

Matter of Lagin

2008 NY Slip Op 30010(U)

January 7, 2008

Surrogate's Court, Nassau County

Docket Number: 0343178/2007

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 Probate Proceeding, Lost Will of

File No. 343178

EDNA LAGIN,

Dec. No. 813

Deceased.

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In this proceeding, the petitioner, Ivor R. Moskowitz, seeks to admit to probate a copy of the last will and testament dated April 9, 1991 of Edna Lagin, the original not being found after the decedent's death on July 16, 2006. Ivor is the decedent's nephew and the nominated executor of the will.

In order to have the copy of the will probated, the petitioner relies upon SCPA 1407, which provides:

"A lost or destroyed will may be admitted to probate only if

1. It is established that the will has not been revoked, and
2. Execution of the will is proved in the manner required for the probate of an existing will, and
3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete."

It is well established that where a will cannot be found after the death of the testator, there is a strong presumption that it was destroyed with the intent to revoke it (*Matter of Evans*, 264 AD2d 482 [2d Dept 1993]; *Matter of Passuello*, 169 AD2d 1007, 1007 [3d Dept 1991]). However, this presumption can be rebutted by facts and circumstances showing that the will was accidentally lost or destroyed (*Matter of Fox*, 9 NY2d 400 [1961]; *Matter of Philbrook*, 185 AD2d 550, 552 [3d Dept 1992]).

The propounded will leaves the decedent's estate to a revocable trust established by the decedent on April 9, 1991, the same date she executed the will. Although the decedent had two children, a son, Alan Lagin, and a daughter, Stacey Lagin, the decedent's estate plan provides only for Stacey. Alan has filed with the court a waiver of process and consent to probate.

Michael D. Angiulo, the attorney who prepared the will and trust and who now represents the petitioner in this proceeding, has submitted an affidavit in support of the petition to probate a copy of the will. In the affidavit, Mr. Angiulo states that (1) his firm represented the decedent in all her legal matters for more than twenty years; (2) the original will was delivered to the decedent at or about the time she executed it; (3) his firm handled all of the decedent's legal matters in the years after she executed the will and prior to her death on July 16, 2006; (4) at no time did the decedent ever indicate that she had destroyed, revoked or otherwise changed the will, even when Mr. Angiulo met with the decedent on June 16, 2006, several days prior to her entering the hospital for what was expected to be minor heart surgery; (5) during their June 16, 2006 meeting, the decedent repeatedly asked Mr. Angiulo about the sufficiency of her estate-planning documents, reaffirming her desire that Stacey would be provided for in the event of the decedent's death; and (6) the original will was not found in the decedent's safety deposit box after her death.

According to Mr. Angiulo, Stacey has lived with the decedent since the early 1980s. The decedent advised Mr. Angiulo that Stacey suffers from psychological problems for which she takes medication. Mr. Angiulo states that he believes the original will is in the control of or has been destroyed by Stacey, "due to her miscomprehension of this matter." Mr. Angiulo further states that he has corresponded and spoken to Stacey several times in an attempt to locate the will, but that Stacey maintains that she cannot locate it. She has refused to allow Mr. Angiulo or

members of her family access to the apartment to search for the original will. The petitioner previously petitioned the court for an order to compel the production of the will and for an order for substituted service. A copy of the order to compel production of the will was served on Stacey by certified and regular mail, but Stacey did not appear on the return date. Mr. Angiulo avers that he does not conclude that Stacey lacks legal capacity in light of the fact that she maintains a bank account, operates a motor vehicle, corresponds with his office and is aware of the existence of the trust, which she told him she is happy with, and that she does not want to upset matters.

Under the circumstances, the evidence is sufficient to show that it is unlikely the decedent intentionally revoked her will dated April 9, 1991. The court is satisfied that the original instrument was either lost or destroyed by someone other than the decedent and was not revoked by the decedent during her lifetime (SCPA 1407 [1]).

The court also is satisfied that the petitioner has established that the will was executed in compliance with the statutory formalities found in EPTL 3-2.1. The execution of the original instrument was supervised by an attorney, permitting the inference that the statutory requirements were met (*Matter of Spinello*, 291 AD2d 406, 407 [2d Dept 2002]). Additionally, the court has in its file the affidavits of the two attesting witness (SCPA 1406), executed after the decedent's death, stating that they were shown a court-certified reproduction of the original instrument and attesting to the compliance with the statutory formalities necessary for probate.

All of the provisions of the will are clearly and distinctly proved by the copy of the will offered for probate, which was satisfactorily proven to be true and complete by the affidavit of the attorney-draftsman.

Accordingly, the petition is granted.

Decree.

Dated: January 7, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court

