

Matter of Ciavatella
2018 NY Slip Op 31275(U)
May 29, 2018
Surrogate's Court, Nassau County
Docket Number: 2016-391250
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Will of

DECISION AND ORDER

**NICHOLAS CIAVATELLA, JR.
a/k/a NICHOLAS A. CIAVATELLA,
and NICHOLAS CIAVATELLA,**

**File No. 2016-391250
Dec. No.: 34600**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition for Letters Testamentary.	1
Waivers and Consents [2]	2
Attorney Affidavit	3
Affidavits of Attesting Witnesses [2].	4
Affidavits of Petitioner and decedent’s partner [2].	5
Copy of Will.	6
Death Certificate.	7
Petition for Temporary Administration.	8
Kinship Affidavit.	9
Agreement and Stipulation of Settlement	10

In this proceeding to probate a copy of a lost will, Nicholas Ciavattela, Jr., (“decedent”) the decedent was survived by two sisters, two adult nieces and one adult nephew. Decedent died on February 12, 2016 and was 73 years old at the time of his death. Tina Marie Martin, his niece, who was named as primary executor under the will is the petitioner herein. Mary Minutillo, the sister of the decedent, post-deceased him and the petitioner is the executor of her estate. The instant probate petition was filed with this court on October 18, 2016. On January 25, 2017, by stipulation the respondents, Camille Ciavatella

and Anthony Ciavatella, a niece and nephew of the decedent, requested SCPA §1404 examinations. By letter dated February 27, 2017, the request for SCPA § 1404 examinations was withdrawn by letter from counsel for the respondents. Petitioner was issued temporary letters of administration by order of this court dated July 12, 2017.

The copy of the will offered for probate indicates that the will was executed on January 19, 1998, but the original cannot be located. The petition is supported by waivers and consents from the petitioner as executor of the estate of Mary Minutillo, the decedent's post-deceased sister and Christine Grassi, the decedent's other surviving sister, affidavits from two of the three attesting witnesses, an affidavit of comparison, a kinship affidavit, an attorney affidavit of due diligence describing the efforts to locate the original will, two affidavits from the decedent's partner, an affidavit from the petitioner, and an affidavit from the attorney draftsman. The attorney draftsman affirms that he drafted the decedent's will, but another attorney from his office was asked to supervise the execution in his absence. The attorney draftsman acknowledged that his firm routinely keeps original wills for clients, but that since he was not at the execution, he could not say for certain that the original was maintained at his office. He further stated that he did a thorough search for the original will but was unable to locate it. Counsel offered the instant affirmation to the petitioner, after he observed a handwritten note attached to a copy of the decedent's will, presented to him by the petitioner, that indicated that his firm had the original will. Counsel also stated that he has no reason to believe the will was not maintained by his firm, and may have been lost when the firm moved or misplaced over the last sixteen (16) years.

In order to have a copy of the will admitted to probate, petitioner must satisfy the requirements of 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.”

Considering the requirement that the execution of the will be proved in the manner required for probate of an existing will, the court is satisfied that petitioner has established that the will was executed in compliance with EPTL §3-2.1. The execution of the original instrument was supervised by an attorney¹, permitting the inference that the statutory requirements were met (*Matter of Spinello*, 291 AD2d 406 [2d Dept 2002]). The will also contains an attestation clause which, in the absence of contrary evidence, itself creates a presumption that the statutory requirements have been satisfied (*Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Templeton*, 116 AD3d 781 [2d Dept 2014]). Finally, the court is in receipt of original affidavits of two of the three attesting witnesses, executed after death, regarding the execution of the original instrument. Based on all of the foregoing, the court is satisfied that the will was executed in accordance with all statutory formalities.

All of the provisions of the will were clearly and distinctly proved by the copy of the will offered for probate, which was satisfactorily proved to be true and complete by the self-proving affidavits of the attesting witnesses (SCPA §1407[3]). Finally, there have been no

¹ The attorney draftsman affirmed that the attorney from his firm that supervised the execution of decedent’s will was duly admitted to practice law in the State of New York.

objections nor has any party refuted the due execution of the will.

As to revocation, the proponent has the burden to overcome the presumption of revocation by proving that the will was not revoked during the testator's lifetime (*Matter of Fox*, 9 NY2d 400 [1961]). The proponent must demonstrate, by the facts and circumstances, that the will had been destroyed in the testator's lifetime without his knowledge, consent or procurement, or accidentally lost (*Id.*). No presumption of revocation arises if the attorney has custody of the will (*Matter of Castiglione*, 40 AD3d 1227 [3d Dept 20017]). Both the affidavit of the petitioner and the affidavits from the decedent's partner² state that the petitioner was to be directed to contact the firm of the attorney draftsman upon the death of the decedent to obtain his original will. The petitioner also explained that when she was going through her mother's (post-deceased sister of the decedent) belongings, as the executor of her mother's estate, she came across a handwritten note attached to a copy of the decedent's will, similar to the note that was given to her, explaining that the original was at the firm of the attorney draftsman. The attorney draftsman stated that the decedent never contacted him to revoke his will. And finally, the decedent's partner stated that the decedent had reiterated the contents of his will from time to time following the execution and until his death. The court concludes that decedent's original will was not revoked.

An agreement and stipulation of settlement (the Stipulation) dated April 16, 2018, has been submitted to the court and the respondents have agreed to the submission of the copy of the will to probate. The Stipulation provides, among other things, that in consideration for the respondents waiver of rights and forbearance of the respondents filing objections, the

² The decedents's partner is not named in the will.

petitioner has agreed to pay counsel for the respondents \$20,000.00. The respondents have agreed to waive citation to attend any and all proceedings for the judicial settlement of the account and waive the right to compel an accounting, judicial or otherwise, from the petitioner or her successors, provided the aforementioned settlement sum has been paid.

Accordingly, the petition to admit to probate the copy of the decedent's will dated January 19, 1998, is **GRANTED**, subject to the terms of the Stipulation.

Settle decree.

Dated: May 29, 2018
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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