

**Matter of Weisberg**

2023 NY Slip Op 30920(U)

March 22, 2023

Surrogate's Court, Bronx County

Docket Number: File No. 2020-1781

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

March 22, 2023

ESTATE OF LOUIS WEISBERG  
AKA  
LOUIS G. WEISBERG, Deceased  
File No.: 2020-1781

This is an uncontested proceeding to probate a photocopy of a lost will dated May 12, 2016 (hereinafter, the "May 2016 will"). The decedent died on February 21, 2020, at the age of 91, survived by six nephews as his only distributees. He was divorced and never had children. A nephew, Burton F. Boltuch, ("Burton") is the petitioner and the nominated co-executor under the proffered instrument. The nominated co-executor, another nephew, renounced and consents to the application, as do the three other nephews. Citation issued to a sixth nephew and no opposition has been received to date.

Under SCPA 1407, a copy of a lost or destroyed will may be admitted to probate only upon (1) establishing that the will has not been revoked, (2) proving execution in the manner required for probate of an existing will, and (3) clearly and distinctly proving all of the provisions of the will by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete (Matter of Castiglione, 40 AD3d 1227 [2007], lv denied 9 N.Y.3d 806 [2007]).

Supporting the first requirement of SCPA 1407 is a copy of the “May 2016 will” and an affidavit from Burton, the petitioner and decedent’s nephew as well as a California attorney and the attorney draft-person of the May 2016 will. Burton’s affidavit establishes that the decedent provided him with a copy of his prior will (date unknown) which they reviewed together. The prior will left the estate assets equally to four nephews including Burton. The decedent then asked Burton to prepare a new will to divide the estate among three nephews, not four nephews as indicated in the prior will. After some discussion, decedent then asked Burton to draft a new will to include a reduced percentage (4%) to the fourth nephew, Robert, who was in the original will. Burton avers he drafted the will as requested and it was thereafter executed by the decedent. No provisions were made for two other nephews in either instrument.

As requested by the decedent, after execution, Burton retained the May 2016 will along with a power of attorney and living will which he also drafted for the decedent. Original documents cannot now be found after diligent efforts by Burton. According to Burton, he never returned the May 2016 will to the decedent and the prior will was destroyed in Burton’s presence after the May 2016 will was executed.

Generally, a presumption of revocation applies where an executed will cannot be located after a testator's death if such will was in the testator's possession (Matter of Gottlieb, 75 AD3d 99, 105 [1<sup>st</sup> Dept. 2010]). Here, however, the original May 2016 will was not lost while in the decedent’s

possession. Therefore, the presumption of revocation never arose. On the proof presented, the court finds that the decedent did not revoke the propounded original will.

As for the second requirement of SCPA 1407, the evidence establishes that the original May 2016 will was properly executed. The photocopy of the May 2016 will and its self-proving affidavit indicate that the original instrument was attorney-drafted, creating a presumption of due execution (*Matter of Halpern*, 76 AD3d 429 [2010]). Further, the propounded instrument contains an attestation clause which raises a presumption of its validity (see *Matter of Collins*, 60 NY2d 466 (1983)). Two affidavits of attesting witnesses were signed pursuant to SCPA 1406 by the witnesses to the May 2016 will, respectively on September 24, 2021 and October 15, 2021.

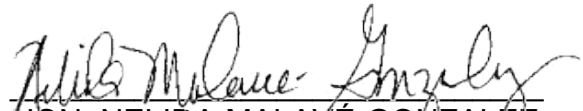
On the record presented, the Court is satisfied not only that the May 2016 will was executed in accordance with EPTL 3-2.1, but that such execution occurred while the decedent was competent to make a will and free from restraint or undue influence.

Finally, the third requirement of SCPA 1407 is met if there is independent corroborative evidence that the alleged photocopy is a true and complete replica of the entire original will (see *Matter of Castiglione*, 40 AD3d at 1229 (2007)). The court finds such corroboration reading the affirmation testimony of Burton and examining the copy of the May 2016 will.

Accordingly, the propounded photocopy of the instrument dated May

12, 2016 is admitted to probate as the decedent's last will and testament, and letters testamentary shall issue to Burton upon his duly qualifying according to law.

Decree signed.

  
HON. NELIDA MALAVÉ-GONZÁLEZ  
SURROGATE