

Matter of Wells

2023 NY Slip Op 32395(U)

July 17, 2023

Surrogate's Court, New York County

Docket Number: File No. 2023-1801

Judge: Hilary Gingold

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This opinion is uncorrected and not selected for official publication.

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

July 17th 2023

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Probate Proceeding, Estate of

BEVERLY ANN WELLS,
a/k/a Beverly A. Wells,

DECISION

File No.: 2023-1801

Deceased.

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G I N G O L D, S.

This is an uncontested proceeding in the estate of Beverly Ann Wells seeking to probate a conformed copy of an allegedly destroyed will, dated June 6, 2007, pursuant to SCPA 1407. Petitioner also requests, pursuant to SCPA 1405, that the court dispense with the testimony of one of the two witnesses to the propounded instrument's execution.

Under SCPA 1407, "[a] lost or destroyed will may be admitted to probate only if (1) It is established that the will has not been revoked, and (2) Execution of the will is proved in the manner required for the probate of an existing will, and (3) All of the provisions of the will are clearly and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."

Petitioner, decedent's brother, asserts that, after decedent executed the propounded instrument on June 6, 2007, the attorney-draftsman retained the original and mailed a conformed copy of it to decedent. In that regard, Petitioner's application includes as an exhibit a copy of a letter, dated June 8, 2007, from the

attorney-draftsman to decedent, which states, "enclosed please find a conformed copy of your will which was executed on June 6, 2007. The original is being kept in our will vault for safekeeping."

In an affidavit, petitioner states that, in 2007, decedent provided him with a copy of the June 8, 2007 letter and advised him that he should contact the attorney-draftsman to obtain the original instrument upon her death. Petitioner avers that, "[s]ince 2007 Beverly Wells never had custody of the original Will. Therefore, she never destroyed the original Will nor did she have any intent to destroy the original." However, petitioner offers absolutely no basis for his self-serving statements, which are of little probative value (see *e.g. Ramathunga v Mazzota*, 2010 NY Slip Op 33867(U) [Sup Ct, NY County 2010] [citations omitted] [noting "self-serving statements are entitled to little weight"]; see also *Matter of Bergman*, NYLJ 1202576305790 [Sur Ct, NY County 2012] [finding self-serving statements insufficient to defeat summary judgment]).

The attorney-draftsman of the propounded instrument, who represents petitioner in this proceeding, submitted an affirmation in which he attests that his firm maintained the original instrument, but that it was destroyed in or about October 2016. According to him, in an "unfortunate series of events," a newly-purchased will vault was returned to the vendor containing original

documents for hundreds of clients, including the original of the propounded instrument. Petitioner's attorney further asserts, with no proof to support his claims, that the returned will vault containing the original documents, was immediately destroyed by the vendor. Petitioner's attorney concludes his affirmation stating that the decedent was never advised of this incident.

Significantly, petitioner has presented no evidence to support a specific finding that the propounded instrument was in the firm's possession in October 2016 or, that it was in the allegedly destroyed will vault. The application is devoid of any evidence that decedent did not revoke the propounded instrument (SCPA 1407[1]).

Additionally, petitioner has failed to provide any evidence of the due diligence required to dispense with the testimony of the second witness. Petitioner alleges that the witness could not be located, but does not identify any efforts to locate her. SCPA 1405[1] requires a showing that the "witness cannot with due diligence be found within the state. . . ." The statute does not define "due diligence." However, courts require more than what is proffered here, namely, only a bald statement that "[e]fforts to contact [the witness] have proved unsuccessful" [*compare Matter of Keene*, NYLJ 1202725323608, at *2 [Sur Ct, Queens County 2015] [court denied application to dispense with testimony where proponent did not describe efforts made to locate the witnesses]

with *Matter of Gristina*, 2002 NY Misc. LEXIS 2101, *2 [Sur. Ct., Bronx County 2002] [proponent demonstrated sufficient due diligence in attempting to locate missing witnesses by mailing letters to the addresses they had provided when the will was executed and by the employment of two separate investigative agencies to try to locate them]).

Finally, the propounded instrument contains a monetary bequest to decedent's cousin, which bequest, by the terms of the propounded instrument, lapses if she predeceased decedent. Petitioner asserts the cousin predeceased decedent, but has not provided any proof that she is, in fact, deceased.

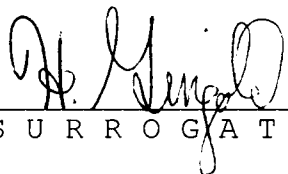
Accordingly, it is

ORDERED, that this proceeding is denied without prejudice.

This decision constitutes the order of the court.

The clerk of the court is directed to email a copy of this decision and order to petitioner's attorney at the email address at the foot herein.

Dated: July 11th, 2023


S U R R O G A T E

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