

**Estate of Hordines**

2024 NY Slip Op 31796(U)

April 22, 2024

Surrogate's Court, Bronx County

Docket Number: File No. 2023-1898

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

April 22, 2024

ESTATE OF MARYJANE HORDINES, also known  
as MARY JANE HORDINES, Deceased  
File No.: 2023-1898

This is an uncontested SCPA 1407 proceeding to probate as a lost will, an original conformed copy of a will dated June 11, 2007, by decedent's daughter and nominated executor under the instrument. The decedent died on March 7, 2020, at the age of 74. A consent was filed by the decedent's son and the fiduciary of the estate of a post-deceased son. All three children are equal beneficiaries under the instrument. The propounded instrument is signed by the decedent, contains an attestation clause, was witnessed by two witnesses and annexes a self-proving affidavit.

In support of the application, petitioner filed an affidavit stating that the decedent, who lived in the same home for 30 years, gave petitioner a copy of her will and kept the original will in her possession. However, the petition was unable to find the original will in the decedent's apartment or in the possession of other family members. The affidavit also states that the decedent never indicated an intent to revoke the will and always reiterated that she wanted her estate split equally among the children.

In further support, counsel for the petitioner provides a memorandum of law urging that the presumption that a will was destroyed by the testator may be rebutted by facts and circumstances showing that the will was accidentally lost or destroyed (see *Matter of Lagin*, 2008 NY Misc LEXIS 7721, 2 (Sup Ct, Nassau County [2008]; see also *Matter of DeFrisco*, 2003 NY Misc LEXIS 2097, 6 (Sur Ct, Suffolk County [2003])). He reiterates petitioner's efforts to locate the original will and concludes that if the decedent intended to revoke her will or make a new will she would have notified the petitioner who is the named executor and has a copy of the will. He notes that the attorney draftsman also supervised the execution of the will. Counsel could not ascertain whether the drafting attorney had retained the original instrument, as he was informed that that attorney is now deceased and the original instrument was not in the office of the attorney who maintained the deceased attorney's client files. Counsel also provides affidavits of the attesting witnesses indicating that the copy of the will is an accurate copy of the will signed by the testator dated June 11, 2007.

A strong presumption of revocation applies where an original copy of an executed instrument cannot be located after a testator's death if that original was in the testator's possession (see SCPA 1407 [1]; see also *Matter of Fox*, 9 NY2d 400, 407 [1961], quoting *Collyer v Collyer*, 110 NY 481, 486 [1888]; *Matter of Gottlieb*, 75 AD3d 99, 105 [1<sup>st</sup> Dept 2010], lv denied 16

NY3d 706 [2011]; see also *Matter of Marotta*, 137 AD3d 787 [2d Dept 2016]; *Matter of Demetriou*, 48 AD3d 463, 464 [2d Dept 2008]).

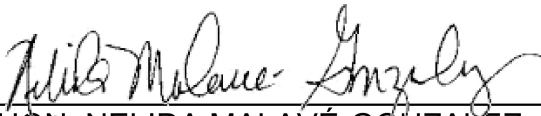
The presumption can be rebutted by clear and convincing evidence (see *Matter of Millens' Will*, 30 NYS2d 274 [Sur Ct, Ulster County [1941], *affd* 264 App Div 936 [3d Dept 1942], *affd* 291 NY 613 [1943]), but where the presumption is not overcome, the lost will may not be admitted to probate (see *Matter of Passuello*, 169 AD2d 1007, 1008 [3d Dept 1991]). A copy of a lost or destroyed will may be admitted to probate only where: (1) it is established that the will has not been revoked; (2) execution of the instrument 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 (see SCPA 1407; *Matter of Morton*, NYLJ, Sept. 26, 2017 at 26, col 1 [Sur Ct, Kings County 2017]).

Based on the proof submitted, including that the decedent gave petitioner a copy of the will, never informed her that she revoked it and confirmed to petitioner her wishes that the estate be divided equally among the children, and the fact that the distribution under the will is the same as intestacy, the court is satisfied that the will dated June 11, 2007 was not revoked by the decedent during her lifetime (see SCPA 1407 [1]).

The court is further satisfied that the original of the instrument offered for probate was validly executed and, at the time of its execution, the

testator was competent to make a will and not under restraint (see EPTL 3-2.1; SCPA 1408, 1407 [2]). In addition, the provisions of the lost will have been proven by the original conformed copy which was established as a true and complete copy of the executed will (see SCPA 1407 [3]). Accordingly, the original conformed copy of the will dated June 11, 2007 is entitled to be admitted to probate.

Decree signed

  
HON. NELIDA MALAVÉ-GONZÁLEZ  
SURROGATE