

Matter of Logan

2012 NY Slip Op 33019(U)

December 11, 2012

Sur Ct, Nassau County

Docket Number: 2012-368341

Judge: III., Edward W. McCarty

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

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 Probate Proceeding, Will of

JAMES A. LOGAN a/k/a
 JAMES LOGAN,

Deceased.

File No. 2012-368341

Dec. No. 28237

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Before the court in this probate proceeding is an application by the petitioner to dispense with the testimony of the attesting witnesses and admit the purported will to probate as an ancient document. For the reasons that follow, the application is granted.

The decedent, James A. Logan, died on December 21, 2011, a resident of Nassau County, leaving a purported will dated July 28, 1972. The decedent was survived by his wife, Elizabeth Logan, six children, Barbara Rago, Lynette Brown, Denise Logan-Heuser, James Logan, Maureen Proverdi and Colleen Mills, and three grandchildren, Bridget Hagest, Noreen Herbert and Courtney Herbert, who are children of the decedent's predeceased daughter, Kathleen Herbert.

The purported will bequeaths the decedent's entire estate to his wife, Elizabeth. Elizabeth is also nominated as executor, with the decedent's daughter, Barbara Rago, nominated as the successor. The purported will has been offered for probate by Barbara Rago. The decedent's wife is listed in the petition as a person under a disability. Accordingly, a guardian ad litem was appointed for her benefit. All of the decedent's children and grandchildren have executed a Waiver and Consent consenting to the admission of the purported will to probate and the issuance of letters testamentary to petitioner.

The purported will was witnessed by Robert J. Williams, Esq., the attorney-draftsman, Maureen Williams and Joan Deachman. The petitioner has submitted an affidavit proving the

handwriting of her father, the decedent. Petitioner's counsel also has submitted an affirmation stating that he contacted John Deachman, Jr., who is the son of Joan Deachman. According to Mr. Deachman, Joan Deachman is deceased, having died on December 5, 2005, as confirmed by a copy of her death certificate annexed to counsel's affirmation. In addition, John Deachman, Jr. has submitted an affidavit proving the handwriting of his mother.

Mr. Deachman also advised petitioner's counsel that the draftsman, Robert J. Williams, Esq., was his uncle. Mr. William is deceased, as evidenced by the attorney directory listing report generated by the New York State Unified Court System electronic database, a copy of which is annexed to counsel's affirmation. Mr. Deachman further advised petitioner's counsel that Maureen Williams was the spouse of Robert J. Williams. Mr. Deachman stated that his aunt, Maureen Williams, is deceased; however, he does not recall the date of her death. Since both Maureen Williams and Robert J. Williams lived in Kings County at the time of their deaths, petitioner's counsel searched the records of the Kings County Surrogate's Court for both names. Sixteen listings were yielded for Robert Williams and one listing was yielded for Maureen Williams. None of the listings for Robert Williams reflected that the decedent had a spouse named Maureen Williams. Similarly, the one listing for Maureen Williams did not refer to a spouse by the name of Robert Williams. Petitioner's counsel also searched the Social Security Index for the name Maureen Williams in Kings County and found over one hundred (100) entries. He also searched an online source and found no listing for a Maureen Williams in Kings County.

The ancient document rule is a common law rule of evidence, whereby a will may, under

certain circumstances, be admitted to probate without the testimony of subscribing witnesses insofar as such witnesses are unavailable (*Matter of Hehn*, 6 Misc 2d 801 [Sur Ct, Nassau County 1957]). Pursuant to the ancient document rule, when a writing is old, is shown to be in the presence of the natural custodian, and is unsuspecting in appearance, it may be admitted to probate without the requirement of a hearing (*Matter of Miley*, NYLJ, Oct. 29, 2001, at 42, col 2 [Sur Ct, Suffolk County]). In New York, a document that is twenty or more years old, may be considered an ancient document (*Matter of Hennessy*, NYLJ, Jan. 27, at 32, col 1 [Sur Ct, Nassau County]). In *Matter of Tier* (3 Misc 3d 587 [Sur Ct, New York County 2004]), the decedent executed a will in August of 1974 and died in November 2000. The court noted that to apply the ancient document rule, the will must be more than twenty years old, taken from a natural place of custody and be unsuspecting in nature. Also, the fact that an ancient document contains an attestation clause is entitled to great weight in determining whether the will was duly executed (*Matter of Borome*, 6 Misc 3d 1005 [A] [Sur Ct, New York County 2003]).

The guardian ad litem has submitted a report wherein she states that she has certain questions regarding the purported will, but defers to the court's determination as to whether to admit the purported will to probate as an ancient document. The court notes that the guardian ad litem's ward receives the entire estate.

Here, the purported will was executed approximately forty years ago in the presence of three attesting witnesses, one of whom was the attorney-draftsman. The purported will contains the signatures of the testator and the three attesting witnesses and has an attestation clause. The signature of the testator has been proved by an affidavit of his daughter, the petitioner. The handwriting of one of the witnesses, Joan Deachman, has been confirmed by an affidavit of her

son. Proof of death has been provided for two of the three witnesses, Robert J. Williams and Joan Deachman. The nephew of Maureen Williams confirms that his aunt is deceased. The will is unsuspecting in appearance, although there is a handwritten change made on page one to correct the first name of the decedent's son listed in the will as a contingent remainderman. The original purported will was continuously held by the decedent in his possession from the date of execution through the date of the decedent's death and was located among his personal documents at his residence.

The propounded will meets the requisite criteria to be admitted to probate as an ancient document.

Concerning the guardian ad litem's fee, the guardian ad litem states that she spent 25 hours on this matter and that her usual hourly rate is \$400.00 per hour. The value of the estate is approximately \$350,000.00. Applying the criteria used to determine the reasonableness of attorneys' fees (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County, 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]) and mindful of the relatively small size of the estate (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), the court fixes the fee of the guardian ad litem in the amount of \$2,000.00 to be paid within thirty (30) days of the decree to be settled herein.

Settle decree.

Dated: December 11, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court

