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

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In the Matter of the Probate of the Last Will and Testament of

JOHN F. COSTELLO,

Deceased.

DECISION

File No. 2016-390042
Dec. No. 32136

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PRESENT: HON. MARGARET C. REILLY

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

This is an uncontested proceeding to probate, as an ancient document, a copy of the last will and testament of the decedent, John F. Costello. The will is dated February 22, 1985, the original of which cannot be located; the decedent died October 31, 2015. The petitioner is the decedent's son and the listed executor, John L. Costello. At the time of his death in 2015, the decedent's only distributees were his three children, John L. Costello, Juanita Lee Johnson and Debra C. Allen. The propounded instrument leaves the entire estate to his three children in equal shares, the same result as would be achieved by distribution under intestacy. The other distributees have each signed a waiver of process and consent to probate the lost will. There is no self-proving affidavit attached to the will, nor was it supervised by an attorney as far as can be inferred.

There were three witnesses to the will, but only one of the names are legible, Rhonda Ubertini. Petitioner has conducted a search for Rhonda Ubertini by checking telephone listings and asking the decedent's neighbors, but has not been able to find her or anyone who knew who she was. Petitioner was shown the copy of the will prior to death of decedent, but was not aware that it was a copy. He searched through the papers of decedent and has had no success locating the original.

Under the ancient document rule of evidence a will may be admitted to probate if it is more than thirty years old, taken from a natural place of custody and is unsuspicious in nature (*see In re Strickland*, 2010 WL 2797917 [Sur. Ct. Nassau Co. 2010]; Matter of Brittain, 54 Misc. 2d 965 [Sur. Ct. Queens Co. 1967]). While the copy is over thirty years old, the "document sought to be probated and the contents established is the original will of the decedent and not the copy" (*Matter of Pollack*, NYLJ, Dec. 28 1993, at 27, col 1). Meaning, it is the original will whose place of custody that needs to be examined and it is the original will whose nature needs to be determined. Without the original will before the court it cannot be examined in such a way as to authenticate it. As such, a photocopy of a will does not qualify as an ancient document (*Matter of Cafferky*, 38 Misc. 3d 1219(A) (Sur. Ct. Bronx Co. 2013). The portion of the petition to admit the will as an ancient document is therefore **DENIED**.

As to whether the copy can be admitted as a lost will pursuant to SCPA §1407, a lost or destroyed will or codicil may be admitted to probate only upon establishing:

(1) that the will has not been revoked; (2) proper execution; and (3) the provisions of the missing will. As to revocation, the petition is supported by an affidavit of the petitioner stating that his father showed him the copy and told him that it was his will. Petitioner states that the original was likely kept by the attorney who drafted the will.

This court does not know, however, whether the will was actually drafted by an attorney as there was no supervising attorney attestation. The only permissible inference the court can draw is that the decedent had possession of the original. Accordingly, a presumption of revocation must be overcome (*see Matter of Fox*, 9 NY2d 400 [1961]; *Matter of Demetriou*, 48 AD3d 463 [2d Dept 2008]). This is a strong presumption and the lone fact that decedent showed petitioner the copy is not enough to rebut it (*see Matter of Staiger*, 243 NY 468 [1926]; *Matter of Winters*, 84 AD3d 1388 [2d Dept 2011].

It cannot be shown that the execution of the original instrument was supervised by the attorney draftsman so there is no presumption of due execution that arises (*see Matter of Spinello*, 291 AD2d 406 [2002]). Additionally, though the will was signed by three witnesses not one can be found to testify as to due execution. There is an attestation clause, which does "raise a presumption of a will's validity" (*In re Will of Halpern*, 76 AD3d 429 [1st Dept 2010]), but the fact that not one of the witnesses can be found and two of the three names are illegible, this court holds that due execution cannot be proved in this case (SCPA §1407[2]). As to the third requirement, a copy of the will "proved to be true and complete" (SCPA §1407[3]) is enough to satisfy, but there is not one person

who can attest to the validity of the copy.

Accordingly, the copy of the decedent's will, dated February 22, 1985, shall not be admitted to probate.

This constitutes the decision and order of the court.

Dated: December 20, 2016
Mineola, New York

E N T E R:

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

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