

**Matter of Barber**

2017 NY Slip Op 30701(U)

March 28, 2017

Surrogate's Court, Nassau County

Docket Number: 2016-388108

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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**Probate Proceeding, the Will of**

**ROSE BARBER,**

**Deceased.**

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**PRESENT: HON. MARGARET C. REILLY**

**DECISION**

**File No. 2016-388108**

**Dec. No. 32572**

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

Order to Show Cause. ....	1
Affirmation. ....	2
Affidavit in Opposition. ....	3
Affirmation in Opposition.....	4
Affirmation in Reply.....	5

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An order to show cause was filed on behalf of James Barber, asking the court to revoke letters testamentary issued to his sister, Lynn Barber, in the estate of their mother, Rose Barber, and to direct Lynn Barber to account for estate funds that she has withdrawn and deposit them with the court, and to further direct Lynn Barber to pay the counsel fees of James Barber in connection with this proceeding.

**BACKGROUND**

Rose Barber (the decedent) died on February 24, 2015, survived by her two children, James Barber (the petitioner) and Lynn Barber (the respondent). A petition for probate was filed by the respondent on February 22, 2016. The three-page instrument offered for probate is dated September 21, 2007 and is titled “Codicil to Last Will and Testament of Rose Barber” (the September 21, 2007 document). The first paragraph of the September 21, 2007

document states the following:

“I, ROSE BARBER, now residing at 300 Kilburn Road South, Garden City, New York being of sound and disposing mind and memory, but not unmindful of the uncertainties of this life, do hereby make, publish and declare this to be a codicil to my Last Will and Testament executed October 28, 2005, amending my Codicil to my Last Will and Testament executed on January 18, 2007, amending my Codicil to my Last Will and Testament executed on April 23, 2007.”

Article Fifth of the September 21, 2007 document leaves corporate stock to the respondent, and Article Sixth bequeaths the entire residuary estate to the respondent. There are no other bequests. In Article Seventh, the decedent nominates the respondent to serve as her executor.

Citation on the probate petition filed by the respondent was issued on February 19, 2016 and was returnable on March 30, 2016. The court’s records reflect that an affidavit of service was filed with the court, showing that the citation, along with a copy of the September 21, 2007 document, was served by certified mail, return receipt requested, upon the petitioner at a post office box address in Roundup, Montana, which was not returned, and at another address in Roundup, Montana, which was returned on the basis of “no mail receptacle.”

James Barber did not appear, nor did he have counsel appear for him, on the citation return date, and he did not file objections to probate. The September 21, 2007 document was admitted to probate by this court on April 11, 2016 and letters testamentary were issued to the respondent.

On November 7, 2016, seven months after the issuance of letters testamentary to the

respondent, counsel for James Barber filed the instant order to show cause, which was signed by the Surrogate on November 11, 2016. Counsel for the petitioner and counsel for the respondent appeared in court on November 30, 2016. After a brief court conference, counsel for each party agreed that papers responsive to the order to show cause would be filed no later than January 6, 2017. An additional court conference followed on January 10, 2016.

### **RELIEF REQUESTED**

The petitioner seeks the following relief: (a) revoking the letters testamentary issued to Lynn Barber, on the grounds that she has falsified her February 18, 2016 petition to this court; (b) directing Lynn Barber to immediately account for all monies/assets withdrawn from the estate of Rose Barber and to deposit them with the clerk of the Surrogate's Court pending the final determination of the court in this matter; and (c) directing payment by Lynn Barber of fees of counsel for James Barber.

### **ORDER TO SHOW CAUSE AND SUPPORTING AFFIRMATION**

Counsel for James Barber advises the court that subsequent to the decedent's execution of the September 21, 2007 document, counsel prepared and supervised the execution of several later wills for the decedent. In addition, counsel notes that the September 21, 2007 document is not a will but rather, a codicil, which purportedly amended a will dated October 28, 2005 and which also purportedly amended codicils dated January 18, 2007 and April 23, 2007, none of which were filed with the court. As the attorney who prepared and supervised the execution of multiple subsequent wills for the decedent that followed the decedent's execution of the September 21, 2007 document, counsel for the

petitioner affirms that the September 21, 2007 document, as well as the will and the two codicils it modified, were declared null and void by the decedent in later wills.

Annexed to counsel's affirmation as Ex. B is a photocopy of a will executed by the decedent on April 3, 2012 (the April 3, 2012 will). This will explicitly revokes all prior wills and codicils made by the testator at any time. Under the terms of the April 3, 2012 will, certain corporate stocks are left to each of the decedent's two children, and the residue is bequeathed to the respondent.

Annexed as Ex. C to the affirmation is a photocopy of a will dated November 7, 2011 (the November 7, 2011 will), which was marked by the decedent "VOID - 4/3/12" (the date of the April 3, 2012 will) and initialed by her. This will also explicitly revokes all earlier wills and codicils. Under the terms of the November 7, 2011 will, the decedent again gave specified corporate stocks to each of her children. She gave the petitioner a chair and ottoman, and bequeathed her residuary estate to the respondent. According to counsel, the decedent executed yet another will on May 28, 2013 (the May 28, 2013 will), in which she bequeathed her entire estate to the petitioner and intentionally made no provision for the respondent. A photocopy of this will, which also revokes all earlier wills and codicils, was filed with the order to show cause.

Counsel for the petitioner also annexed a photocopy of a letter that she sent to the respondent on March 17, 2017, enclosing a copy of her client's petition in which he sought probate of the May 28, 2013 will and the issuance to him of letters testamentary.<sup>1</sup> Along

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<sup>1</sup>The petition was not filed with the court.

with the petition, counsel sent to the respondent a copy of the May 28, 2013 will and a waiver for her signature if she consented to the petitioner serving as the executor of the decedent's estate. According to counsel, service of this letter upon the respondent conclusively demonstrates that the respondent was aware of the May 28, 2013 will when she filed the September 21, 2007 document for probate with this court. Despite this, the respondent submitted a petition for probate in which she stated that the September 21, 2007 document was in full force and effect.

On that basis, counsel for the petitioner asks the court to revoke letters issued to the respondent and require her to account for and deposit with the clerk of the court all estate funds in her hands, pending a determination in this proceeding.

#### **OPPOSITION TO THE ORDER TO SHOW CAUSE**

The respondent filed an affidavit in opposition to the order to show cause, in which she states that the decedent executed the September 21, 2007 document that the respondent offered for probate on February 18, 2016. She acknowledges receiving mailings from counsel for the petitioner, which she characterizes as attempts to offer photocopies of later writings of the decedent for probate, and states that she did not respond to these attempts. The respondent further states that she believes that several attempts were made by the petitioner to locate original documents in several banks, where he mistakenly believed that the decedent maintained safe deposit boxes, and that the petitioner also had access to the decedent's residence immediately after her death. Despite the petitioner's access to the decedent's home and efforts to locate the decedent's will, no original documents later in date

than September 21, 2007 were located. The respondent then states that she sought advice from an attorney who represented her in filing the September 21, 2007 document for probate. Following her receipt of letters testamentary from this court, the respondent states that she collected the decedent's assets and carried out the terms of the September 21, 2007 document.

According to the respondent, she believed that the petitioner and his counsel had exhausted all avenues to search for any original documents subsequent to the September 21, 2007 document for which they had photocopies, and that having not heard from them again after not responding to mailings from the petitioner's counsel, the respondent felt that she was under no obligation to search further. She claims that the September 21, 2007 document is a will, not a codicil to a will, and that it is labeled a codicil solely as the result of the sloppiness of the attorney-draftsperson. The respondent notes that her probate petition was filed on notice to the petitioner and his counsel, and yet there were no appearances or objections filed. Having been issued letters testamentary, the respondent relied on the court's determination in carrying out her duties as the executor.

In further opposition to the instant order to show cause, counsel for the respondent filed an affirmation, noting that when the September 21, 2007 document was filed with the court, no other original wills or writings existed or were on file with the court, as confirmed by the respondent in her petition. There were numerous photocopies of wills and writings earlier in date and later in date than September 21, 2007, but no original documents had been located. Since the original documents were in the possession of the decedent, they were

presumed to have been destroyed and, therefore, revoked. Accordingly, the respondent's petition for probate was not falsified.

Counsel argues that the September 21, 2007 document, although titled a codicil, was a complete testamentary instrument, and is referred to as a will in the attestation clause and in the annexed affidavit of subscribing witnesses. She cites *Matter of Smith* for the proposition that if “there be no such existent and validly executed will, and if the codicil be so complete in itself as to be capable of execution, then it must necessarily stand and be given the force of valid testamentary disposition” (*Matter of Smith*, 165 Misc 36, 40 [Sur Ct, Westchester County 1937]).

Counsel then asserts that a probate decree will only be vacated under extraordinary circumstances, such as fraud, misrepresentation, or overreaching. She argues that the petitioner has offered nothing in support of vacatur apart from unsupported allegations of falsified filings by the respondent. Counsel claims that “the idea that the Probate Petition was falsified in not including the unnecessary and irrelevant information to the Court that there were later writings of the Decedent that could not be found after two years of searching cannot be construed and twisted to amount to fraud or misrepresentation.” She emphasizes the petitioner's failure to appear on the citation return date in connection with the respondent's petition for probate, as well as his failure to file objections. Finally, she notes the seven month delay between the issuance of letters testamentary to her client and the filing of the petitioner's order to show cause.



## AFFIRMATION IN REPLY TO OPPOSITION

Counsel for the petitioner argues that the respondent, by filing for probate a codicil to a will which she knew had been revoked, deliberately deceived the court so that she could claim all of the decedent's assets, even though she knew that the decedent had subsequently bequeathed all of her assets to the petitioner. These facts constitute the extraordinary circumstances required to grant the relief sought by the petitioner and vacate a decree of probate.

## ANALYSIS

Pursuant to SCPA § 209 (10), the Surrogate has the power to vacate a probate decree. However, “[b]ecause vacatur disrupts the orderly process of administration and creates a continual aura of uncertainty and non-finality, it is not readily granted and a substantial basis for contesting the will and a reasonable probability of success must be shown” (*Matter of Stern*, NYLJ, Jul. 20, 1994, at 25, col 5 [Sur Ct, New York County 1994] [citations omitted]). “An application to vacate a decree is addressed to the discretion of the court. The decree will only be vacated in extraordinary cases” (*Matter of Bell*, 1996 NYLJ LEXIS 1312 (Sur Ct, Westchester County 1996) [citations omitted]). While “the court has broad discretion to vacate and modify its decree if such relief is necessary to achieve an equitable result . . . a decree will not be opened in the absence of fraud, newly discovered evidence or some other cause substantial enough to outweigh the interests of finality” (*Matter of Fales*, NYLJ, Jul. 18, 2001 [Sur Ct, New York County] [citations omitted]).

The statutory grounds for relief from a judgment or order are found in CPLR 5015.

These are: (1) excusable default; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct; (4) lack of jurisdiction; and (5) reversal, modification or vacatur of a prior judgment on which it is based. Moreover, a party seeking to overturn a decree of probate must demonstrate: (a) the party has standing to challenge the will; (b) the factual basis for challenging the will; and (c) a reasonable likelihood of success (1 Harris, N.Y. Estates: Probate Admin. and Litigation § 8:134 [6th ed.]).

A party who had standing to object to probate but failed to do so may subsequently seek another opportunity to challenge a will (Peter C. Valente and Joann T. Palumbo, *Waivers, Defaults and Decrees*, NYLJ, May 24, 1995, at 1, col 3). This can occur before a decree of probate has issued, after a party's default but before a decree is signed, or only after the decree has been signed and letters testamentary have been issued. In the third scenario, which is presently before the court, "in the absence of fraud, the movant seeking to object to the will must not only have a reasonable excuse that would convince the court to disrupt the estate administration but also have facts available that would show a reasonable probability of success in the will contest" (*id.*).

The petitioner has standing to bring this order to show cause for vacatur. Petitioner's basis for asking the court to vacate the probate decree is that the decree was obtained through fraud. Specifically, the petitioner argues that the respondent's filing of the September 21, 2007 document for probate, without advising the court that the decedent had revoked this document in the April 3, 2012 will, the November 7, 2011 will and the May 28, 2013 will, constituted a fraudulent filing by the respondent.

The respondent does not dispute the existence of the later wills that revoked the September 21, 2007 document. In the respondent's affirmation she admits that she received a copy of the May 28, 2013 will from counsel to the petitioner, prior to the respondent's filing of the September 21, 2007 document with the court for probate. However, the respondent justifies her actions by advising the courts that the later wills could not be found and were presumed to have been revoked by the decedent.

The respondent correctly cites the New York presumption of revocation that arises where a will that was in the possession of the testator cannot be located after death (*see, e.g., Matter of Fox*, 9 NY2d 400 [1961]; *Matter of Evans*, 264 AD2d 482 [2d Dept 1999]). However, the presumption is only germane where a proceeding is brought to probate a copy of the missing will. Even if the later will is never admitted to probate, it is nevertheless effective to revoke prior testamentary instruments because "it is the later will's execution and not its probate which revokes an earlier will" (*Matter of DeLutri*, 12 Misc3d 1159[A][Sur Ct, Nassau County 2006][additional citations omitted]). Furthermore, that presumption does not imply that the previously revoked documents were revived by the presumed revocation of the later wills.

EPTL § 3-4.6 provides:

§ 3-4.6. Revocation or alteration of later will not to revive prior will or any provisions thereof

(a) If after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof.

(b) A revival of a prior will or one or more of its provisions may be effected by:

- (1) The execution of a codicil which in terms incorporates by reference such prior will or one or more of its provisions.
- (2) A writing declaring the revival of such prior will or of one or more of its provisions, which is executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.
- (3) A republication of such prior will, whether to the original witnesses or to new witnesses, which shall require a re-execution and re-attestation of the prior will in accordance with the formalities prescribed by 3-2.1.

Thus, if a testator executes a later will that revokes an earlier will, the revocation of the later will, or a presumption of revocation, does not revive the earlier will unless one or more of the terms contained in EPTL § 3-4.6 (b) are met. These terms are met if: (1) the testator executes a codicil that incorporates the prior will or its terms by reference; (2) the testator executes a writing, in accordance with the formalities of a will execution, stating the testator's intention to revive the previously revoked will; or (3) the previously revoked will is re-executed, re-attested and republished in accordance with the formalities of a will execution.

For the respondent's argument to withstand the petitioner's challenge, she would have had to show that the revoked September 21, 2007 document was revived by an act of the decedent that caused the document to become effective again under EPTL § 3-4.6 (b), despite having been repeatedly revoked. No such facts have been shown.

Furthermore, if a later will that served to revoke a prior will is subsequently revoked, and the testator never acted to revive the prior will, intestacy results (*see e.g. Petition of Cleary*, 277 App Div 893 [2d Dept 1950]).

## CONCLUSION

The petition for vacatur is **GRANTED**. The court finds that the petition filed by the respondent was fraudulent in that the respondent was aware that the September 21, 2007 document which she filed for probate had been revoked by the decedent's execution of a later will. The court revokes the letters testamentary issued to the respondent, and directs the respondent to return all estate assets to the estate within 30 days of this decision.

It is unclear why the petitioner failed to file a petition for probate or a petition for the probate of a lost will under SCPA §1407 in connection with the May 28, 2013 will, or a petition for letters of administration in the decedent's estate. If the petitioner does not commence a proceeding within 45 days of the date of this decision, the estate administration will be referred to the Public Administrator's office.

The fees of the petitioner's counsel with respect to this proceeding will be paid out of the estate.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: March 28, 2017  
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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