

Matter of Eisner

2017 NY Slip Op 31599(U)

July 28, 2017

Surrogate's Court, New York County

Docket Number: 2014-1437

Judge: Nora S. Anderson

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

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In the Matter of an Application
to Probate the Lost Will of

New York County Surrogate's Court

Date: July 28, 2017

MORRIS N. EISNER,

a/k/a NORMAN EISNER,

File No. 2014-1437

Deceased.
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A N D E R S O N , S .

In this uncontested probate proceeding brought pursuant to SCPA § 1407, petitioner seeks probate of a conformed copy of a lost will, dated July 19, 2000, and an original Fourth Codicil, dated February 6, 2012, to be probated together as decedent's last will. Petitioner is the surviving co-executor under the Fourth Codicil, which, inter alia, revokes three prior codicils.

Decedent died on August 25, 2013, survived by his two daughters. Decedent's lost 2000 will was drafted by an attorney, Robert Braunschweig. In support of the current petition, Mr. Braunschweig stated in an affirmation that decedent left Mr Braunschweig's office with the original and a conformed copy of the 2000 will in his possession. Mr. Braunschweig did not keep a copy of the will, but confirmed that he had a final draft saved on his office computer and that the contents of the saved document are identical to the conformed copy.

According to an affirmation of estate-planning attorney Frederic Weiss, who had known decedent for approximately 20 years, decedent had an appointment to consult with him in or

about late spring of 2013. Although the appointment was rescheduled, decedent had then told Mr. Weiss that he currently had a will, that it had codicils and that he wanted to consolidate those instruments into one instrument. Shortly thereafter, they discussed decedent's estate plan over the telephone. In or about late June or early July 2013, decedent met with Mr. Weiss in decedent's apartment to discuss the work Mr. Weiss was to perform. Between May and as late as August of 2013, they had several conversations and meetings in relation to updating decedent's estate plan. Decedent died before any work was done.

After decedent's death, upon a careful search through his papers and effects, petitioner and one of decedent's daughters found a conformed copy of his will and the original Fourth Codicil in the study in decedent's apartment. They were unable to find the original will.

Where evidence shows that the original will was last in the testator's possession and cannot be found after his or her death, a presumption of revocation arises (*Matter of Kennedy*, 167 NY 163, 168). The presumption may be overcome, however, by facts and circumstances that show that the testator did not destroy the will with the intent to revoke it (*Matter of DiSiena*, 103 AD3d 1077, 1078; *Matter of Herbert*, 89 Misc 2d 340 [Sur Ct, Nassau County 1977]; *Matter of DeFrisco*, NYLJ, Apr. 24, 2003 at 26, col

6 [Sur Ct, Suffolk County 2003]). A codicil that implies the existence of the will, at least until the date of the codicil (*Herbert*, 89 Misc 2d at 342; *Matter of Pardy*, 161 Misc 77 [Sur Ct, Clinton County 1936]).

Courts have found that where the evidence is "inconsistent with any intention by the decedent to revoke the will," the will may be admitted to probate (*Matter of DeFrisco*, NYLJ, Apr. 24, 2003 at 26, col 6) (finding, among other things, the "fact that copies of the will and codicil were found among decedent's papers after death *with no evidence of revocation . . .* was clearly sufficient to overcome any presumption that the will had been revoked") (Emphasis added).

Based on the facts and circumstance, the court is satisfied that the testator did not revoke his will. The court is further satisfied that the will was validly executed and that, at the time of its execution, decedent was competent in all respects to make a will and was not under any restraint (EPTL § 3-2.1; SCPA § 1407[2]; SCPA § 1408). Moreover, the provisions of the lost will have been established by a photocopy that has been proved to be a true and complete copy of the instrument as executed (SCPA 1407[3]). The genuineness of the will and codicil having been

established, probate is granted.

Letters testamentary shall issue to petitioner.

Decree signed.

Dated: *July 28th 2017*

A handwritten signature in black ink, appearing to be 'JN', written over a horizontal line.

S U R R O G A T E