

Matter of Esposito

2017 NY Slip Op 31994(U)

September 6, 2017

Surrogate's Court, Nassau County

Docket Number: 2016-390272

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, Will of

DECISION & ORDER

SALVATORE ESPOSITO,

File No.: 2016-390272

Dec. No.: 33363

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers have been considered in the preparation of this decision:

Verified Petition for Probate, dated March 9, 2016.....	1
Last Will and Testament.	2
Affidavits of Attesting Witnesses [2].	3
Affidavits of Petitioners in Support [2]	4
Affidavit of Petitioner to Amend, dated	5
Affidavit of Heirship.	6
Affidavit of Attorney Draftsman, September 15, 2016.....	7
Notice of Probate.	8
Citation and Proof of Service..	9

Before the court is a petition for Letters Testamentary and to probate a copy of a lost will. The decedent was survived by five distant nieces and nephews. The petitioners, Lucille M. Vetrano and Denise Festa, are the decedent’s long time friends and attorneys in fact who are the nominated executors. The copy offered for probate was obtained from the files of Myron G. Jacobson, the attorney draftsman, and indicates that the will was executed on February 18, 2009. The attorney draftsman’s affidavit states that he reviewed a certified copy of the will, that it is a copy of the will he drafted for decedent that was executed under his supervision and the original was given to the decedent. The two attesting witnesses were employees of his law firm. The original cannot be located. Notice of Probate was duly

served on the charitable beneficiaries under the “lost” will and the New York State Attorney General’s Charities Bureau. Service of a citation was duly made and no one has objected to probate of the “lost” will.

Where a will known to have been in the possession of the testator cannot be located after death, there is a strong presumption in the law that the testator destroyed the will with the intention of revoking it (*Collyer v Collyer*, 110 NY 481, 486 [1888]; *Matter of Fox*, 9 NY2d 400, 411 [1961]; *Matter of Winters*, 84 AD3d 1388 [2d Dept. 2011]). In order to have a copy of the will admitted to probate, petitioner must satisfy the requirements of SCPA § 1407, which provides:

A lost or destroyed will may be admitted to probate only if:

1. It is established that the will has not been revoked, and
2. Execution of the will 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.

As to revocation, the proponents have the burden to overcome the presumption of revocation by proving that the will was not revoked during the testator’s lifetime (*Matter of Fox*, 9 NY2d 400 [1961]). The proponents must demonstrate, by the facts and circumstances, that the will had been destroyed in the testator’s lifetime without his knowledge, consent or procurement, or accidentally lost (*Matter of Fox*, 9 NY2d 400 [1961]).

The evidence offered in support of the petition consists of the attorney/draftsman's affidavit, the affidavit of Lucille M. Vetrano, one of decedent's long time friends and the affidavit of Denise Festa, another long term friend.

The attorney affirmation addresses the authenticity of the copy of the will, and notes that the

“Decedent ... was a long time client of mine....Subsequent to the execution of the Will, I had several occasions to meet with Decedent ... to conduct business with him, including but not limited to the administration of his late sister's estate. Additionally, I prepared Powers of Attorney for decedent in which he appointed Petitioners herein as his attorneys in fact....At no time, between February 18, 2009 and his death on July 6, 2015 did Salvatore Esposito ever indicate to me that he was revoking or intentionally destroying the original instrument....From February 18, 2009 to his death on July 6, 2015 Mr. Salvatore Esposito never contacted me or discussed revoking or revising that Will. I know from my conversations with the Decedent that it was his intention that his entire residuary estate be equally divided between the two churches he had a relationship with.”

Ms. Vetrano's affidavit recites how she and Ms. Festa searched decedent's home for the will, which they could not find it. Ms. Festa's affidavit is virtually identical in substance. They state under oath that they “assisted [decedent] with his personal affairs, including but not limited to his banking, accounting and legal issues and assisted him in obtaining and supervising home health care aids and other medical providers....I know from my personal knowledge that on February 18, 2009 the Decedent executed an original instrument purported to be his Last Will and Testament, a copy of which is herewith being offered for probate.” They indicate that decedent advised them that they were the named executors under the will.

They also had knowledge of the decedent's family. "Between February 18, 2009 and the date of Decedent's death, July 6, 2015, I, on many occasions, drove the Decedent to his attorney's office ... and discussed various legal and business matters with him. The Decedent advised me on more than one occasion that his February 18, 2009 Will was his Last Will and Testament.... The Decedent never indicated to me that he had either revoked or destroyed the instrument dated February 18, 2009."

The court is aware that the terms of the will leave the estate to two charities and all available information indicates that the decedent did not change his mind about excluding his distant relatives from his residual estate. Based on the submissions, and no objections having been filed, the court concludes that the will was accidentally lost and not revoked.

Considering the requirement that the execution of the will be proved in the manner required for probate of an existing will, the court is satisfied that petitioner has established that the will was executed in compliance with EPTL §3-2.1. The execution of the original instrument was supervised by an attorney, permitting the inference that the statutory requirements were met (*Matter of Spinello*, 291 AD 2d 406 [2d Dept 2002]). The will also contains an attestation clause which, in the absence of contrary evidence, itself creates a presumption that the statutory requirements have been satisfied (*Matter of Collins*, 60 NY 2d 466 [1983]; *Matter of Templeton*, 116 AD 3d 781 [2d Dept 2014]). Finally, the court is in receipt of original affidavits from both of the attesting witnesses, executed after death, regarding the execution of the original instrument. Based on all of the foregoing, the court is satisfied that the will was executed in accordance with all statutory formalities.

All of the provisions of the will were clearly and distinctly proved by the copy of the will offered for probate which was satisfactorily proved to be true and complete by the self-proving affidavits, the affidavit of both of the attesting witnesses and the affidavit of the attorney/draftsman.

Oaths and designations have been filed with the court. The will is admitted to probate and Letters shall issue.

This constitutes the decision and order of the court.

Dated: September 6, 2017
Mineola, New York

E N T E R:

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

cc: William G. Wallace, Esq.
Favata & Wallace, LLP
Attorneys for Petitioner
229 Seventh Street, Suite LL02
Garden City, New York 11530