IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

In re: LEONARD W. LEHMAN, Deceased : OC-41-22-0050
:
: ORPHANS' COURT DIVISION

DECREE

AND NOW, following an evidentiary hearing held on February 18, 2022 on Petitioner Kimberly L. Martin's Petition for Probate of Copy of Will, the Court hereby issues the following DECREE.

BACKGROUND

Decedent Leonard W. Lehman died on June 13, 2021; Petitioner Kimberly L. Martin is Decedent's adult daughter. Petitioner avers that on September 28, 2017, Decedent executed a Will naming her as Executrix of Decedent's Estate. On January 21, 2022, Petitioner filed a Petition for Probate of Copy of Will, averring that "[t]he original Will was last believed to be in the possession of the decedent. However, that original Will was misplaced by decedent." Petitioner avers that she "requested production of the original Will from decedent's surviving spouse… Patricia C. Lehman, a/k/a Patricia Hoffman," who advised through counsel that she "conducted [an] exhaustive search but was unable to locate the original Will… [and] advised that the original Will was misplaced and is currently lost." Petitioner was able to obtain a copy of the original Will from the scrivener, the Mathers Law Firm, who affirmed that the September 28, 2017 Will was the most recent version of which they were aware. The Petition avers that from September 28, 2017 until his death Decedent never expressed in any manner an intent to revoke the Will, and "[d]uring

the last weeks of decedent's life… he was suffering from dementia and… would have been physically unable to leave his bed and locate and destroy the original Will." Based on these facts, as well as "discussions with other family members," Petitioner avers in the Petition that Decedent did not revoke or change the Will, and therefore asks this Court to admit to probate the photocopy of the will obtained from the Mathers Law Firm.

APPLICABLE LAW

In situations where the testator retains possession of his will and after his death the original will cannot be found, a presumption arises that the testator revoked or destroyed the will.[1] This presumption may be overcome with positive, clear, and satisfactory evidence: "(1) that the testator duly and properly executed the original will; (2) that the contents of the executed will were substantially the same as on the copy of the will presented for probate; and (3) that the testator had not destroyed or revoked her will prior to her death."[2] The "two-witness rule" requires that the execution of the lost will be proven by the oaths or affirmations of two competent witnesses.[3] The two-witness rule was long held to also apply to proof of the contents of the lost will. However, in 2016 the Supreme Court of Pennsylvania held in *In re Estate of Wilner* that any clear and convincing evidence may prove the contents of a lost will.[4] As to the third factor, that the testator had not destroyed or revoked their will prior to their death, "[d]eclarations of intent, condition, and circumstances of

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[1] *In re Wasco's Est.*, 281 A.2d 877, 879 (Pa. 1971) (citing *In re Bates' Est.*, 134 A. 513 (Pa. 1926)).
[2] *In re Est. of Keiser*, 560 A.2d 148, 150 (Pa. Super. 1989) (citing *Michell v. Low et al.*, 63 A. 246 (Pa. 1906)).
[3] *In re Est. of Wilner*, 142 A.3d 796, 801 (Pa. 2016) (quoting 20 Pa. C.S. § 3132).
[4] *See id.* at 805-06.

family are insufficient to establish whether a will remains undestroyed or unrevoked by a decedent" and therefore such statements fail to rebut the existent legal presumption.[5] "Accordingly, a court will not weigh the probability of the decedent's wishes or otherwise speculate as to the motives which may or may not have influenced the testator in the direction of intestacy."[6]

TESTIMONY AND EVIDENCE

The Court held an evidentiary hearing in this matter on February 18, 2022. Prior to presenting testimony and evidence, Petitioner suggested that this case is quite similar to *Estate of Wilner*, and that the primary purpose of the requirements surrounding lost wills is to avoid fraud, of which there is no allegation here.

Petitioner testified that she is Decedent's daughter, and that she was present along with Decedent when the Will was drafted in 2017. Also present at that time was Decedent's wife, Patricia Hoffman ("Hoffman"), who is not the mother of Petitioner or any of Petitioner's siblings. Petitioner indicated she was familiar with the contents of the Will.

Petitioner testified that she had a close relationship with Decedent, speaking to him at least weekly but attempting to see him more often than that. She testified that from the date the Will was drafted until Decedent's death, he never expressed to Petitioner any desire to destroy or alter the Will, and no other person indicated to Petitioner that Decedent had expressed such a desire.

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[5] *In re Est. of Janosky*, 827 A.2d 512, 521 (Pa. Super. 2003) (quoting *In re Est. of Keiser*, 560 A.2d at 150); *see also In re Est. of Maddi*, 167 A.3d 818, 822 (Pa. Super. 2017).
[6] *Id*.

Petitioner testified that Decedent told her that he stored the Will in a lockbox at Hoffman's house; Petitioner was familiar with this lockbox as a location where Decedent kept important papers. When Decedent died, Petitioner was made the primary executrix of Decedent's Estate, but she did not ask Hoffman for access to the house or the lockbox. Rather, her attorney communicated with Hoffman's counsel, Attorney John Smay, about obtaining the original Will. Petitioner testified that Attorney Smay told her attorney that Hoffman looked for the Will but was unable to locate it. Petitioner reemphasized that Decedent never said anything that suggested he had in fact changed or destroyed the Will, and testified that the scrivener, Attorney Dan Mathers, never reported that Decedent had returned to him to make any changes to the Will. Petitioner believed that Decedent had no desire to revoke or destroy the Will.

Upon questioning by the Court, Petitioner elaborated that prior to accompanying Decedent to the drafting of the Will, she had not discussed his testamentary intentions with him. Petitioner explained that she had offered to accompany Decedent to Attorney Mathers's office for the drafting of the Will, but once there Decedent insisted that Petitioner remain in the room while discussing the contents of the Will. Petitioner testified that the Will was actually signed and executed approximately eleven days after the meeting at Attorney Mathers's to draft the Will, and that Petitioner did not know who witnessed the Will's execution. She confirmed that Attorney Mathers only possessed a copy of the Will and not an original. Petitioner did note that at one point prior to Decedent's death, Hoffman told her Hoffman possessed the Will but Petitioner was not allowed to see it. Petitioner

testified that she assumed the contents of the Will would not have changed in the eleven days between its drafting and its execution, and that the copy provided by Attorney Mathers, which Petitioner seeks to admit to probate, is consistent with Decedent's intentions as expressed in Petitioner's presence at Attorney Mathers's office.

Specifically, Petitioner acknowledged that Hoffman – although nominated as a alternate executrix – is not a beneficiary of the Will. She testified that on the day the Will was drafted Attorney Mathers specifically asked Decedent about this, and Decedent indicated that he and Hoffman were each planning to keep their estates separate for the benefit of their respective children from prior to their marriage. Petitioner did not know if Hoffman at any time waived her interest in Decedent's Estate. Petitioner testified that among Decedent's children, she had the best relationship with Hoffman, though it was not a particularly close one.

Petitioner clarified that she was familiar with the lockbox because Decedent, approximately two or three years before his death, had pointed out its location on a closet shelf in his house, showing her where the keys were (taped to the lockbox itself) and indicating that it contained titles to vehicles, deeds, the Will, and other important papers. Petitioner testified that at some point Decedent took the lockbox to Hoffman's house, after which Petitioner did not see the lockbox. Petitioner reiterated that she never asked Hoffman for a copy of the Will directly, explaining that after Decedent's death she had not spoken to Hoffman. Petitioner did note that approximately a month before the February 2022 hearing, Hoffman informed her that

Decedent had an IRA that Petitioner did not know about, but Petitioner could not recall how this came up.

On redirect, Petitioner explained that after Decedent married Hoffman, he moved to her residence, which is held in trust for Hoffman's children. Petitioner testified that Decedent had a significant amount of property prior to his marriage to Hoffman, and that he kept this property separate from marital property.

Two of Petitioner's three siblings were present and prepared to testify, and the Court accepted counsel's proffer that their testimony would be consistent with Petitioner's with regard to 1) the contents of the photocopy Will being consistent with their understanding of Decedent's testamentary intent; 2) the lack of any evidence or suggestion that Decedent had prepared a new will or amended his Will; 3) their lack of personal knowledge of where the original Will is; 4) their understanding that the original Will was most recently at Hoffman's house; and 5) Decedent never expressing a desire to destroy, revoke, or otherwise change his Will.

Counsel provided Hoffman with notice of the hearing, but she did not appear and had not communicated with counsel regarding whether she intended to appear.

In closing, Petitioner argued that a ruling in her favor would not constitute a potentially inequitable *de facto* disinheritance of Hoffman, as she could still make a spousal election under 20 Pa. C.S. § 2203,[7] and would be able to file objections to the Will once probated.

[7] 20 Pa. C.S. § 2203(a)(1) states that "when a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of… [p]roperty passing from the decedent by will or intestacy." By contrast, if a decedent dies intestate with "surviving issue… one or more of whom are not issue of the surviving spouse," the surviving spouse is entitled to "one-half of the intestate estate." 20 Pa. C.S. § 2102(4).

ANALYSIS

The evidence presented established that Decedent "retain[ed] custody and possession of his will," and therefore the rebuttable presumption arises that the Will is absent because Decedent revoked or destroyed it.[8] Thus, the Court must determine whether Petitioner has presented "positive, clear and satisfactory evidence… that 1) the testator duly and properly executed the original will; 2) the contents of the will were substantially as appears on the copy of the will presented for probate; and 3) when the testator died, the will remained undestroyed or revoked by him."[9]

In *Janosky*, the decedent's brother wished to probate a copy of a will naming him sole beneficiary to the exclusion of the decedent's other siblings.[10] The proponent "testified to his close relationship with the decedent and a lack of a relationship between the decedent and [their siblings]," and that the "decedent had lived with him for a period of nine years," with the decedent moving out only three months before his death.[11] Towards the beginning of this nine-year period, the decedent executed a will naming the proponent as his sole beneficiary, and "asked [the proponent] to execute a reciprocal will, which he did."[12] The decedent executed a power-of-attorney naming the proponent his attorney-in-fact, and the proponent testified that due to the decedent's alcoholism the proponent of the will was essentially the only person consistently in the decedent's day-to-day life.[13] He further testified that the decedent had named the proponent as the sole beneficiary on

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[8] *See Janosky*, 827 A.2d at 520.
[9] *Id*. at 519-20.
[10] *Id*. at 517.
[11] *Id*.
[12] *Id*.
[13] *Id*.

multiple life insurance policies and retirement accounts.[14] No evidence was presented that the decedent ever expressed an intent or desire to revoke or destroy his will; however, "[w]hen questioned whether he had any evidence other than the relationships of the parties to substantiate his claim regarding whether the will had been lost or destroyed by someone other than the decedent, [the proponent] responded that he had none."[15]

The Superior Court concluded that, "[w]hile the record is replete with testimony regarding the decedent's close relationship with the [proponent] and the lack of any relationship with [their other siblings], we are constrained to find that this evidence in and of itself is insufficient to rebut the presumption of destruction."[16] This is because "[d]eclarations of intent, condition, and circumstances of family are insufficient to establish [whether a will remains undestroyed or unrevoked by a decedent] and thus rebut the existent legal presumption. 'Accordingly, a court will not weigh the probability of the decedent's wishes or otherwise speculate as to the motives which may or may not have influenced the [testator] in the direction of intestacy.'"[17] Thus, in *Janosky*, the Superior Court affirmed the decision of the trial court "that the evidence did not clearly and satisfactorily rebut the presumption needed for the will to have been admitted to probate or that the court applied a conclusive presumption that could not be rebutted."[18]

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[14] *Id*. at 518.
[15] *Id*. at 521.
[16] *Id*.
[17] *Id*. (internal citations omitted).
[18] *Id*.

In *Maddi*, the decedent contacted an attorney "to prepare a new will," and when he met with the attorney "he brought his sister, [the proponent of the photocopy], with him."[19] When the attorney asked the decedent if he wanted to meet with her privately, the decedent "insisted that he have his sister with him while he discussed his plans" with the attorney.[20] The decedent "explained to [the attorney] that he wanted his sister to be named Executrix… that he had a list of named charities that he would like to leave certain amounts of money to, that he had other specific bequests for relatives, and finally, that he intended to leave any residuary estate to his sister."[21] The decedent mentioned to the attorney that he had two daughters but "he was not going to include them in any bequest in his will because he felt his daughters were well taken care of by him during his lifetime."[22] After decedent's death, a duplicate copy of the will was found in his house, but the original was not; the testimony established that the decedent "had an unusual way of filing and storing papers, bills, and other documents which was essentially known to him," and "within hours after [his] passing… relatives… [began] cleaning out the home… [removing] 'bags of paperwork [and] folders.'"[23] The proponent of the will testified that she "had an extremely close relationship with" decedent, possessed keys to his house, and spoke to the decedent "every evening, and… he never expressed to her any desire to revoke or destroy the will…."[24] The decedent's daughter testified that she thought that immediately before his death the decedent may have "been looking

[19] *Maddi*, 167 A.3d at 820.
[20] *Id*. at 823.
[21] *Id*. at 820.
[22] *Id*.
[23] *Id*. at 821.
[24] *Id*.

for another lawyer to make a new will for him," and that she provided him with an attorney's business card, but that attorney testified that the decedent never contacted him.[25]

The trial court concluded that the proponent of the will had overcome the presumption that the decedent destroyed or revoked his will, and had established by positive, clear and satisfactory evidence that the will had been lost. The trial court found notable that the decedent "stated in his will that he had financially provided for his daughters in his lifetime, and consistent with this, he had transferred approximately twelve different properties to his daughter in exchange for one dollar prior to executing his will."[26] The trial court further noted that "[n]o one who testified was aware of [the decedent] contacting any other attorney to prepare a new will," and only one witness – who stood to benefit if the photocopy was not admitted to probate – "recalled [the decedent] expressing dissatisfaction with his will. Despite this alleged discontent… the [d]ecedent never, to anyone's knowledge, changed his will."[27] The trial court highlighted the decedent's "document filing system known only to him," and concluded that "though the will was not seen among his possessions after his passing, all of the evidence, other than the testimony of [decedent's daughter concerning his seeking a lawyer] points to the [d]ecedent's will… being the embodiment of his wishes for his testamentary estate, and being overlooked or unseen in the process of [the decedent's] relatives cleaning out his home after his death."[28] The trial court ultimately held that "[n]o fact in this case points to [the

[25] *Id*.
[26] *Id*. at 824.
[27] *Id*.
[28] *Id*.

decedent] second-guessing his careful estate planning, let alone destroying his written wishes' every fact… [which] suggests that he… created a thorough and considered scheme of intended distribution… which… was unfound by relatives, as opposed to revoked or destroyed by the testator."[29]

The Superior Court affirmed the trial court's determination, resting its conclusion on:

> "the facts (1) that [the decedent] told [the attorney], and stated in his Will, that he believed he had adequately provided for [his daughters] during his lifetime, (2) that, consistent with his statement to [the attorney], [the decedent] transferred numerous properties to [his daughter] prior to the execution of his… Will, (3) that the attorney referred to [the decedent] by his daughter testified he was never contacted by [the decedent] for a new will, and (4) that no one else who testified was aware that [the decedent] contacted any other attorney to prepare a new will."[30]

The instant case is difficult, as it is somewhere between *Janosky* and *Maddi*. Like in *Maddi*, Decedent 1) had a close relationship with the proponent of the photocopy, 2) never expressed any desire to revoke, destroy, or otherwise change his Will, and 3) included explicit language in his Will indicating that because he had given his child property during his lifetime he had made a conscious decision not to leave a portion of his Estate to that child, which cuts against the notion that he would wish for that child to take through intestacy.[31] Conversely, as in *Janosky* and contrary to *Maddi*, Petitioner has not proposed some physical mechanism or presented any evidence to explain how the original Will may have been lost or

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[29] *Id*.
[30] *Id*. at 826.
[31] Additionally, as in *Maddi*, Decedent insisted on Petitioner being present for his conversation with Attorney Mathers concerning the contents of his Will. Neither the trial court nor the Superior Court in *Maddi*, however, cited this detail in support of the ultimate conclusion, and the Court does not believe it is particularly relevant here.

misplaced, as opposed to intentionally destroyed. The testimony and evidence presented is certainly not *inconsistent* with Hoffman intentionally hiding, destroying, or withholding the Will (either prior to or following Decedent's death), or inadvertently misplacing it herself, but there was no evidence presented one way or the other in this regard – save for a passing reference to Hoffman refusing to permit Petitioner to see the Will prior to Decedent's death – and thus the mechanism by which the Will may have been lost or destroyed is speculative. There is no testimony regarding any other contents of the lockbox – for instance, whether everything is present except the Will, or whether multiple items are missing or moved.

The Court finds that Petitioner has presented sufficient evidence to overcome the presumption that Decedent destroyed or revoked his Will. First, the testimony established that Decedent never reached out to Attorney Mathers to draft a new will. Second, similar to *Maddi*, Decedent's Will expressed a desire to distribute his Estate unevenly among his children to account for the fact that his son Elias Joseph Lehman received real property during Decedent's lifetime. This shows that Decedent designed his plans for the distribution of his Estate to address circumstances unique to Decedent and his family, and undermines a presumption that Decedent would have taken actions to return the distribution of his Estate to the generic dictates of intestacy. Third, the Will also appoints Hoffman as an Alternate Executrix, which suggests that the lack of a bequest to Hoffman in the Will was intentional. Had the Will not mentioned Hoffman at all, an argument could be made that Decedent destroyed his Will to correct this oversight if it was unintentional; Hoffman's inclusion establishes that Decedent's choice not to direct any distribution to her from his Estate

was a conscious one. This is consistent with the testimony that Decedent and Hoffman planned to keep their estates separate, and further demonstrates that Decedent carefully tailored his testamentary scheme to his life circumstances.

With regard to the circumstances of the missing original Will, it is relevant that after Decedent's death, Hoffman was the sole person with access to the lockbox where the original Will was previously kept. Although there is certainly no proof positive that Hoffman intentionally destroyed, retained, or otherwise interfered with Petitioner's attainment of the original Will, Hoffman's terse indication through counsel that she was unable to locate it, in light of her previous indication to Petitioner that she possessed the Will but Petitioner was not permitted to see it, is relevant to the question of whether there is alternative explanation for the inability to locate the original Will. This is especially so in light of the fact that Hoffman's spousal share of Decedent's Estate would increase from one-third to one-half should the Will not be admitted to probate.[32] Ultimately, Petitioner indicates that Hoffman told her the original Will "was misplaced and is currently lost," which is not suggestive of intentional destruction by Decedent.

The Court also finds that Petitioner has established that the contents of the photocopy are identical to those of the original Will. Petitioner testified that she was present when Decedent spoke to Attorney Mathers about the Will, and that the contents of the photocopy are consistent with Decedent's intentions as expressed during that conversation. The stipulated testimony of Petitioner's siblings similarly established that the contents of the photocopy were consisted with Decedent's

[32] See note 7, *supra*.

testamentary intent. Finally, Petitioner obtained the photocopy from Attorney Mathers, the original scrivener of the Will.

Petitioner did not present evidence establishing that "the testator duly and properly executed the original will" in accordance with the two-witness rule. This rule is enshrined in 20 Pa. C.S. § 3132, and requires that "[a]ll wills shall be proved by the oaths or affirmations of two competent witnesses and… [i]n the case of a will to which the testator signed his name, proof by subscribing witnesses, if there are such, shall be preferred to the extent that they are readily available, and proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness."[33] The Court does not believe that Petitioner's failure to present this evidence at the hearing on this matter is fatal, however; as long as Petitioner complies with § 3132 when the Will is probated before the Lycoming County Register of Wills, the two-witness rule will be satisfied.

DECREE

For the foregoing reasons, Petitioner may submit the photocopy of the Will to the Lycoming County Register of Wills for probate. Provided that Petitioner is able to satisfy the two-witness rule of 20 Pa. C.S. § 3132, the photocopy of the Will may be probated as though it is the original.

IT IS SO DECREED this 13th day of June 2022.

By the Court,

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Eric R. Linhardt, Judge

[33] 20 Pa. C.S. § 3132(1).

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