COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Ainello Joseph Leone,
Appeal from the Register
O.C. No. 1488 AP of 2010
Control No. 102728

OPINION

Petitioner Jason Buck, an intestate heir and grandson of decedent, Ainello Joseph Leone ("Leone"), appeals from the Register of Wills decree probating a photocopy of his deceased grandfather's will dated February 15, 2006. The respondent is the Leone Estate, as represented by Elizabeth Majors, the Executrix named in Leone's will. An evidentiary hearing was held and the key facts are not in dispute. For reasons explained hereinafter, it was improper and an error of law to probate the photocopy of the will based on the facts of record.

Background

The hearing on petitioner's appeal of the probate of a photocopy of his grandfather's will began with a stipulation by the parties; attorney Joseph Mirarchi drafted the original will dated February 15, 2006 for Mr. Leone and upon its execution gave that original to Mr. Leone.[1] As the proponent of the photocopied will, the estate called only two witnesses: attorney Joseph Mirarchi and Roy Peffer, a friend of Mr. Leone. Both witnesses testified that neither of them saw the original will after it was given to Mr. Leone, who died on July 2, 2009.

Mirarchi testified that after he drafted the February 15, 2006 will, he gave the original and a copy to Leone "in one envelope."[2] Although he saw Mr. Leone thereafter from time to time, on April 21, 2009 he was contacted by Mr. Leone's friend, Roy Peffer, because Mr. Leone wished to draft a power of attorney and perhaps a new will.[3] Mirarchi then testified that on "April 29th, 2009, I visited with Mr. Leone to discuss a durable power of attorney, as well as possible will changes."[4] He met again with Mr. Leone on May 19, 2009 to prepare—or have Mr. Leone review—the revised will he had requested. When asked if he had inquired as to the whereabouts of the original will, Mirarchi responded:

1 6/6/11 N.T. at 3-6 (Jerner and Williams).
2 6/6/11 N.T. at 17 (Mirarchi).
3 6/6/11 N.T. at 13-14 (Mirarchi).
4 6/6/11 N.T. at 14 (Mirarchi).

I was advised that the will was given to Mr. Peffer and I recorded it in my notes on a yellow sheet of paper.[5]

Mirarchi's notes were admitted as Ex. R-1. In relevant part, the notes bear the date "4/21/09" and state "Neil said he gave original will to Roy Peffer." The notes also state that "is 100 + 5 months D.O.B.--10/12/55." Ex. R-1. Mirarchi testified that he gave the original will to Mr. Leone after drafting it in 2006, and that Mr. Leone subsequently told him in 2009 that he "gave everything to Roy Peffer."[6] When asked if he had ever had a conversation with Roy Peffer about the original will, Mirarchi testified that "I did." According to Mirarchi, "Mr. Peffer basically said I have the will."[7] This statement, however, was subsequently undermined by Mr. Peffer's testimony at the hearing. In fact, throughout his testimony, Mirarchi's credibility was considerably diminished by his insistence on acting as an advocate[8] concerning the fate of the original will after he gave it to Mr. Leone even though he lacked firsthand knowledge of key facts. This willingness to assert facts without firsthand knowledge was compounded by an adversarial stance. When asked, for instance, whether Mr. Peffer actually stated that he had the original will, Mirarchi responded:

A. It's been sometime. My understanding is that Mr. Peffer believed whatever document he had was the controlling will.
Q: Was it?
A: That's the document that I admitted to probate, Counsel, that's the document you are challenging. That's the document that the Register of Wills approved in a detailed hearing, yes.[9]

In any event, Mirarchi confirmed that after Mr. Leone's death on July 2, 2009, he never found the original will even after searching the decedent's residence together with Mr. Peffer. 6/6/11 N.T. at 25-26 (Mirarchi).

Roy Peffer, the only other witness called by the estate, was forthright as to his limited knowledge as to the fate of Mr. Leone's original will. Mr. Peffer testified that he had accompanied Mr. Leone to Mirarchi's office when the original will as executed and, in fact, had

5 6/6/11 N.T. at 15 (Mirarchi). These notes were admitted into evidence as Ex. R-1. 6/6/11 N.T. at 28.
6 6/6/11 N.T. at 17 (Mirarchi). See also 6/6/11 N.T. at 18 (Mirarchi).
7 6/6/11 N.T. at 21 (Mirarchi).
8 See e.g., 6/6/11 N.T. at 5 & 21 (Mirarchi).
9 6/6/11 N.T. at 21 (Mirarchi).

witnessed the signing of the original will.[10] About a year and a half before Mr. Leone died,[11] Peffer recalled that Mr. Leone crawled into Peffer's car and handed him an envelope, stating "I want you to keep this for me. I don't want it to be found in my apartment after I die."[12] Peffer stated that he never opened the envelope that Mr. Leone handed him until after his friend's death. 6/6/11 N.T. at 35 (Peffer). When he did open the envelope at that point, the only document inside the envelope was a copy of the will. Peffer testified that the original was not in the envelope, he never had possession of the original will, and he had no idea what may have happened to the original.[13] When asked point blank by counsel for the estate, "[d]id he (Leone) say that he was giving you the original, sir," Peffer replied: "No. Did not."[14] Peffer conceded, moreover, his understanding that if the will was upheld he would receive $5,000 under its terms, but if the will was invalid he would receive nothing.[15]

Legal Analysis

1. The Proponent of the Photocopied Will Failed to Rebut the Presumption that Mr. Leone Destroyed the Original of his February 15, 2006 Will

Under long-standing Pennsylvania law, there is a presumption that a "lost" or "missing" original will in the possession of the decedent at the time of his death was destroyed by him. Fallon's Estate, 214 Pa. 584, 585, 63 A. 889 (1906)(where the will was last seen in the possession of the testator, the "presumption therefore arises that it was destroyed by him, animo reovcandi"). See also Murray Will, 404 Pa. 120, 130, 171 A.2d 171,176 (1961), *superseded by statute as to jury trial issue,* In re Estate of Hunter, 416 Pa. 127, 205 A.2d 97 (1965)(where the original will was in testator's possession prior to her death, and it could not be found, the presumption arises that the will was revoked or destroyed by the testator). In Estate of Janosky, 2003 Pa. Super. 230, 827 A.2d 512 (2003), for instance, the Pennsylvania Superior court concluded that where an original will could not be located, a photocopy of the will was properly

10 6/6/11 N.T. at 34 (Peffer).
11 6/6/11 N.T. at 42-43 (Peffer).
12 6/6/11 N.T. at 35 (Peffer).
13 6/6/11 N.T. at 36-37 (Peffer).
14 6/6/11 N.T. at 39-40 (Peffer).
15 6/6/11 N.T. at 37-38 (Peffer).

not admitted to probate where the decedent had kept the original after its execution. The will's proponent has the burden of overcoming the presumption that a testator destroyed a "lost" will last seen in his possession. Weber's Estate, 268 Pa. 7, 14, 110 A. 785, 787 (1920).

To overcome this presumption that a missing or lost original will was destroyed by the deceased testator, a proponent or party seeking to probate a photocopy must present "positive clear and satisfactory" evidence:

> (1) that the testatrix 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;
> (3) that the testatrix had not destroyed or revoked her will prior to her death.
> Estate of Keiser, 385 Pa. Super. 24, 28, 560 A.2d 148, 150 (1989).

In the present case, there was no dispute raised as to whether the Leone will was duly and properly executed or whether the contents of the executed will were substantially the same as the copy proffered by the estate. Instead, the sole focus of the evidence presented at the hearing was whether Mr. Leone had destroyed or revoked his will prior to his death.

The only clearly stipulated fact is that the original will executed by Mr. Leone on February 15, 2006 had been in his possession after its execution and could not be found after his death on July 2, 2009. Petitioner argues therefore that the testator is presumed to have destroyed the original and thus he died intestate.[16] In an effort to overcome this presumption at law, respondent argues that the evidence shows that Leone did not have custody of his will as far back as one and one half years prior to his death. The main precedent respondent cites to support this argument is Estate of Mammana, 388 Pa. Super. 12, 564 A.2d 978 (1989), *app.denied,*525 Pa. 634, 578 A.2d 929 (1990).[17] The facts of Estate of Mammana, however, are clearly distinguishable from this case. In Estate of Mammana, the testator never had possession of the original because her lawyer kept it in his firm's safe until it was inadvertently destroyed by firm employees. Under these facts, the Mammana court concluded that a photocopy of the original will could be probated. This contrasts markedly with the stipulated facts in this case that Mr.

16 7/1/11 Petitioner's Memorandum of Law at 9.
17 See, e.g., 9/28/11 Respondent's Memorandum of Law at 2.

Leone had been given the original will by his attorney.

The respondent's efforts to establish that Mr. Leone relinquished possession of the original by delivering a photocopy to his best friend are unconvincing. First, and most importantly, the highly credible testimony of that best friend, Roy Peffer, established only that around a year and a half before his death, Mr. Leone had handed Peffer an envelope stating: "I want you to keep this for me. I don't want it to be found in my apartment when I die."[18] In this brief exchange, there were no words referencing a will or describing the contents of the envelope. In fact, Peffer explicitly testified that he never opened the envelope prior to Mr. Leone's death, Mr. Leone had never told him that the envelope contained his original will, and Peffer had no idea what might have happened to the original.[19]

Respondent also offered the testimony of the scrivener attorney, Joseph Mirarchi, more advocate than witness, who testified without objection that he delivered the original will and a copy to testator in February 2006 and that the testator believed either the original or the copy were valid instruments.[20] This testimony based on firsthand knowledge was credible. Beyond that, Mirarchi's testimony as to the fate of the original will in the intervening period from its date of execution to Mr. Leone's death was both speculative and aggressively adversarial. Mirarchi attempted to show that Mr. Leone had relinquished possession of the original by mischaracterizing Peffer's statements on that issue and by relying on statements he recalled by Mr. Leone at an April 29, 2009 meeting. According to Mirarchi's testimony, at his meeting with Mr. Leone on either April 29, 2009 or May 19, 2009, he asked Mr. Leone where the original will was and he "was advised that the will was given to Mr. Peffer and I recorded it in my notes on a yellow sheet of paper."[21] That "yellow sheet of paper," which was placed into evidence as Ex. R-1, however, undermines rather than buttresses this testimony. First, although Mirarchi testified the relevant discussion took place at an April 29th or May 19th meeting, the notes are dated "4/21/09." Second, the notes contain discordant facts which cast doubt as to the accuracy of statements by Mr. Leone that they record. The notes state, for instance, that he "is 100+5

18 6/6/11 N.T. at 35 & 42-43 (Peffer).
19 6/6/11 N.T. at 36-37 & 39-40(Peffer)
20 6/6/11 N.T. at 19-20 (Mirarchi stating that he had informed Mr. Leone that a photocopy of a will could be admitted for probate purposes).
21 6/6/11 N.T. at 14-15 (Mirarchi).

months" followed by a "D.O.B. 10/12/55." Someone who is 100 + 5 months has a birthday considerably earlier than 1955. Ex. R-1. This illustrates that merely because Mirarchi's notes record certain "facts," the accuracy of those "facts" is not thereby established. Based on the record presented, not only Mirarchi's testimony but his evidence failed to establish that Mr. Leone had relinquished possession of the original will. Consequently, the Court gives little weight to this testimony other than for the actual transmittal of the original will and photocopy.

It is clear from the record that the original will remained in testator's physical possession after he gave the sealed envelope to Peffer. One can only speculate as to which of many possibilities occurred and, of course, one of these is the possibility that testator revoked the will by destroying the original. The presumption of revocation would be eviscerated and rendered meaningless if it could be set aside merely by producing a copy of a will. A testator's right to revoke a will by destroying the original would be compromised by the existence of a copy. The advice by the scrivener-attorney to the testator that the copy had the same effect as the original was plainly wrong as it conflicts with the testator's right to revoke his will by destroying the original one in his possession. Application of the presumption in this case produces a harsh result especially if, as Respondent argues, the testator actually misplaced his original will and thought it was in the envelope he gave to Peffer. Worse yet, as a practical matter, those he chose to receive his estate will not do so. Nevertheless, as a matter of law we are compelled to reach this result for to do otherwise ignores well settled Pennsylvania decisional law and, importantly, a contrary decision would nullify the right of every testator to revoke a will by destroying the original in his possession prior to death.[22]

2. Petitioner's Motion for Sanctions Is Superfluous and Without Merit

After the hearing and the filing of the parties' memoranda of law, petitioner Jason Buck filed a prolix motion for sanctions against the respondent for violating Pa.R.C.P. 1023.1 by presenting factual allegations in her post-hearing memoranda of law that "improperly cites facts

22 If a client consents, the problems outlined in this case could be avoided if the scrivener retained the original will to protect it from loss by the client, destruction by self-interested heirs, or neglect by inept executors. For an excellent, comprehensive analysis of the ethical implications of retaining a client's original will, see Formal Opinion 2001-300, "The Retention by an Attorney of a Client's Executed Original Estate Planning Documents," the Pa. Bar Association Committee on Legal Ethics and Professional Responsibility (June 8, 2001).

not in evidence."[23] This motion for sanctions incited a plethora of charges and countercharges, memoranda and counter-memoranda. Upon review, petitioner's allegations are unpersuasive and, in essence, seek to usurp the role of the court in evaluating whether arguments—by either party—are supported by credible evidence on the record.

An example of the prolix, meritless claims in this petition for sanctions is the following assertion by the petitioner:

> In the First Memorandum of Law, Respondent asserts that 'Testator informed his Attorney that he gave the original Will and the Will Envelope to Mr. Peffer." See First Memorandum of Law, page 7, third full paragraph. There is no citation to the record for this assertion and this assertion is not supported by the facts in evidence. Respondent repeats this allegation in the Amended Memorandum of Law. See Amended Memorandum of Law, page 6, third full paragraph. Again, there is no citation to the record for this assertion.
> 10/13/11 Jason Buck Petition for Sanctions, ¶10.

Ironically, in claiming that respondent distorted the record in the Memorandum of Law by stating "Testator informed his Attorney that he gave the original Will and the Will envelope to Mr. Peffer," petitioner distorts the record. According to the hearing transcript, when Mr. Mirarchi was asked what he had been told by the testator as to the fate of the original will, he testified as follows:

> Q: No. I'm only asking about the conversation with respect to what happened to this will that apparently went to Mr. Peffer?
> A: Okay.
> Q: Do you remember the exact question that you gave and the answer that was given?
> A: Yes. And I recorded the answer. I asked him where is the original will at, as well as the copy that I gave him, because when he executed the will, Mr. Leone in 2006 asked me for a copy of his will. So I gave him a copy as well as the original in one envelope, and you are asking for his response. He said to me I gave everything to Roy Peffer.
> Q: So, again—
> A: That's in my notes, which you are more than welcome to submit to the Court.
> 6/6/11 N.T. at 17 (Mirarchi)

Based on this testimony, therefore, respondent's statement in the memorandum of law that Mr. Leone, as testator, had informed his attorney that he gave the original will to Mr. Peffer has a basis in the somewhat garbled record. It is based on Mirarchi's testimony in response to

23 10/13/11 Jason Buck Petition, ¶ 6 & Ex. B.

questioning that is less than clear and direct as well as the notes Mirarchi proffered. As previously stated, this court concludes that Mirarchi's testimony is not persuasive because not based on first hand evidence. Yet while respondent's arguments in her post-hearing memorandum of law may not have been ultimately unpersuasive, this does not mean that it was without basis in the record. The issue of credibility of evidence or testimony is obviously distinct from the issue of whether there are facts of record to support arguments made in a post hearing memorandum of law. Because there is a basis in the record for respondent's argument, plaintiff's motion for sanctions is without merit. It is for the court—and not the opposing party--to decide whether testimony of record is credible. Petitioner's motion for sanctions based on this record is without merit.

Similarly, another example asserted by petitioner of respondent's lack of evidentiary support is the following claim:

> In the First Memorandum of Law, Respondent asserts that 'Testator provided [Mr. Peffer] with the envelope that was to contain Testator's Will and the copy. See First Memorandum of Law, page 8, fourth full paragraph. While Respondent cites to pages 34 and 35 of the hearing transcript, neither the testimony cited nor any facts in evidence support the allegation that the envelope given to Mr. Peffer by Testator contained or "was to contain" anything other than a photocopy of Testator's will N.T. at 34-35. There is absolutely no record evidence that said envelope contained or "was to contain" Testator's original will. In the Amended Memorandum of Law, Respondent repeats this allegation, almost verbatim, when she states: "Testator provided [Mr. Peffer] with the envelope that was to contain Testator's Will. See Amended Memorandum of Law, page 7, fourth full paragraph. Once again, Respondent cites to pages 34 and 35 even though the testimony cited failed to support the allegation. N.T. at 34-35.
> 10/13/11 Jason Buck Petition for Sanctions, ¶ 11.

A review of the record reveals, however, that there was some basis for respondent's argument in the following testimony by Mr. Peffer though admittedly it was a stretch:

> Q: Now was there a time when Mr. Leone gave you an envelope?
> A: Yes. He had come across the street. I had taken him on many excursions, doctors' appointments, everything that he needed to have done, prescriptions and what have you, groceries. He crawled in the car one afternoon—one morning and he said here, I want you to keep this for me. I don't want it to be found in my apartment after I die. So he gave it to me. I put it up on the ledge of the car. When I got home, I took it in and put it in a safe place.

Q: And did there come a time when you opened that envelope?
A: I didn't need to open it until Mr. Mirarchi asked me, that he wanted to have a copy of it because I knew what was in the will. I witnessed it being signed. I was the person that encouraged him, prompted him, asked him what he wanted in his will, what he didn't want in his will. So I had no need to open it until Mr. Mirarchi asked for a copy of it. Then I took it out. I opened it and went and made a copy of it and gave it to Mr. Mirarchi

….

Q: There was a will in the envelope, correct?
A: Yes, a copy.
Q: A copy of the will and there was just one copy in the envelope, correct?
A: It was the copy that Mr. Mirarchi gave to him originally unopened.

….

Q: Was the original will in that envelope?
A: No, it was not.
6/6/11 N.T. at 34-36 (Peffer)

This rambling, diffuse testimony by Roy Peffer supports respondent's general assertion that the testator gave his friend an envelope that he assumed contained a will. Respondent's suggestion that the envelope "was to contain Testator's will and the copy"clearly stretched the testimony to the point that it lacked credibility. Once again, that credibility determination is for the court. This court had the benefit not only of personally witnessing the hearing but of reviewing the transcript of that hearing. It is fully capable of analyzing the arguments of both parties in terms of the record. For all these reasons, the petition for sanctions was prolix, redundant, unnecessary and without merit. It is denied by a contemporaneously issued order.

Date: February 8, 2012

BY THE COURT:

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John W. Herron, J.

Benjamin L. Jerner, Esquire
Joseph Q. Mirarchi, Esquire
Ronald V. Cole, Esquire
William Roca, Esquire
Karen Deanna Williams, Esquire