COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Estate of Marion B. McCoy, Deceased
O.C. No. 204 AP of 2016
Control No. 165100

OPINION

This is an appeal from the decision of the Register of Wills to probate an unsigned copy of the Last Will and Testament ("Will") of Marion McCoy, deceased ("Decedent" or "Testator"). There are two main issues before the Court: (1) whether there was sufficient evidence to overcome the presumption of revocation by destruction and probate a copy of the Will and (2) whether the Testator lacked testamentary capacity when she executed her Will. After a hearing at which six witnesses testified, the Court finds that (1) the Testator did not revoke her Will by destruction and (2) the Testator did not lack testamentary capacity at the time she executed her Will. Accordingly, the Court affirms the decision of the Register of Wills and denies the appeal.

I. BACKGROUND

The Testator died on August 14, 2015. In a Decree dated February 2, 2016, the Register of Wills of Philadelphia County probated an unsigned copy of the Testator's Will, which she executed on August 7, 2015.

The Decedent's son, Edgar McCoy ("Petitioner"), timely appealed the Register of Wills' decision to probate the Will by filing a Petition for Citation ("Petition") with the Court on February 22, 2016.[1] In his Petition, the Petitioner alleged that the Testator's "physical and mental

[1] The probated Will gave Petitioner the balance of the Testator's tangible personal property not accounted for in a separate memorandum and established a trust for the benefit of the Petitioner with one third of the residual estate. The trustees of the trust were to pay Petitioner the income and, in their discretion, principal as necessary to support him. If the Testator had died intestate, Petitioner would have been entitled to one half of her estate. *See Petition* ¶ 3.

condition … was greatly impaired by sickness and infirmity and that she was not a person of sound mind, capable of disposing by Will of her Estate" because she died of pancreatic cancer seven days after executing the Will. *Petition*, ¶ 6. Furthermore, the Petitioner alleged that that the Testator destroyed the original, signed Will "a few days before her death" after she "revised her thoughts." *Id.*

In a Decree dated March 14, 2016, the Court awarded a Citation, directed to the Will proponents, to show cause why the will appeal should not be sustained. The Executors of the Decedent's Estate, Belinda Gordon-Brown and Olivia Gordon-Michael ("Respondents"), filed an Answer to the Petition on April 26, 2016. The Answer denied that the Testator destroyed her Will and, while they admitted that that the "Decedent was ill at the time she executed her Will," they denied that the effects of her illness were so great that she lacked testamentary capacity when she executed her Will on August 7, 2015.

Based on the factual disputes in the pleadings, the Court scheduled a bench trial, which occurred on June 21, 2016. The Petitioner and his fiancée, Melody Harrison, testified for the Petitioner. The following witnesses testified for the Respondents: Milton Abowitz, Esquire (scrivener of the Will); Erwin Miller, Esquire (Testator's attorney); Christine Benslimen (Testator's friend and witness to the signing of the Will); and Shanna Cobb (second witness to the signing of the Will).

II. DISCUSSION

There are two issues presented in this matter: (1) whether the Respondents have presented sufficient evidence to overcome the presumption of revocation by destruction and probate a copy of the will and (2) whether the Petitioner has presented sufficient evidence to prove that the Testator lacked testamentary capacity at the time she executed her Will. Our

review of the decision of the Register of Wills to probate the Will is *de novo*. *In re Estate of Luongo*, 39, 823 A.2d 942, 960 (Pa. Super. Ct. 2003) (citing 20 Pa.C.S. § 776) (noting that "the hearing on appeal to the Orphan's court from a decision of the Register of Wills is *de novo,* unless the parties appearing in the proceeding have agreed otherwise").

A. The Respondents Presented Sufficient Evidence to Probate a Copy of the Will

"[W]here a testatrix retains the custody and possession of her will and, after her death, the will cannot be found, a presumption arises, in the absence of proof to the contrary, that the will was revoked or destroyed by the testatrix." *In re Murray's Estate*, 171 A.2d 171, 176 (Pa. 1961) (citation omitted). To overcome a presumption of revocation by destruction, "the evidence must be positive, clear[,] and satisfactory." *Id.* To probate a will when the "will is known to have been executed by the decedent and cannot be located after her death and no other will is found," the will proponent must (1) rebut "the presumption that the testator revoked the lost instrument"; and (2) present "proof ... of both the execution and of the contents of the missing document." *In re Estate of Mammana*, 564 A.2d 978, 980 (Pa. Super. Ct. 1989) (citation omitted). Here, the Court finds that (1) a presumption of revocation arose because the Testator retained possession of her Will; (2) the Respondents presented positive, clear, and satisfactory evidence to overcome the presumption of revocation; (3) the Decedent properly executed the original, signed Will; and (4) the contents of the copy of the Will offered for probate are substantially the same as the contents of the original, signed Will.

1. There was a Presumption that the Testator Revoked Her Will

The evidence adduced at trial tended to show that the Testator retained custody and possession of the original, signed copy of her Will. The witnesses to the August 7, 2015 signing of the Will, Christine Benslimen ("Ms. Benslimen") and Shanna Cobb ("Ms. Cobb"), testified

that the signing occurred in the Testator's bedroom in the Testator's home. *See Transcript* pp. 90, 102. Although Ms. Cobb did not observe what happened to the Will after the Testator signed it, Ms. Benslimen testified that the Testator put the signed Will "next to her in the bed in a purse." *See Transcript* p. 90. Therefore, the Court finds that the Testator retained custody and possession of the signed Will and, since the signed Will was not found after the Testator's death, a presumption arises that the Testator revoked her Will by destruction. To overcome this presumption, the Respondents need to present positive, clear, and satisfactory evidence.

2. The Respondents Presented Sufficient Evidence to Overcome the Presumption of Revocation

The Court finds that the Respondents presented sufficient evidence to overcome the presumption of revocation by destruction. Erwin Miller, Esquire ("Mr. Miller"), who has no interest in the outcome of these proceedings, testified that he had a conversation with the Petitioner, during which the Petitioner informed him that "he tore up the Will because it wasn't what his mother wanted." *See Transcript* p. 82. Mr. Miller also testified that, to the best of his recollection (he wasn't "100 percent positive"), at the January 19, 2016 hearing before the Register of Wills, Melody Harrison (Ms. Harrison") stated, with respect to the Will, "I tore it up." *See Transcript* p. 86. Furthermore, Milton Abowitz, Esquire (Mr. Abowitz"), who also has no interest in the outcome of these proceedings, testified that, at the hearing Ms. Harrison "testified that she tore it up at Mrs. McCoy's request." *See Transcript* p. 72.[2] At the hearing, the Petitioner and Ms. Harrison denied having made such statements, but the Court does not find that interested testimony to be credible. Rather, the Court finds the disinterested testimony of Mr. Miller and Mr. Abowitz to be credible. The Court finds that both Ms. Harrison and the Petitioner

[2] Unfortunately, there are no transcripts available for the conference or hearing that occurred before the Register of Wills. *See Transcript* p. 49.

admitted to destroying the Will and the Petitioner or Ms. Harrison—or both of them together—destroyed the Testator's Will. Consequently, the presumption of revocation is overcome.[3]

3. The Testator Properly Executed the Original Will and the Copy of the Will Offered for Probate is Substantially the Same as the Original Will

Generally, a will must "be in writing and [must] be signed by the testator at the end thereof" to be valid. 20 Pa.C.S § 2502. "Where a lost will is sought to be established, there must be produced, not only two competent witnesses of its execution, but also two witnesses to show its contents." *In re Harrison's Estate*, 173 A. 407, 408 (Pa. 1934); *see also In re Estate of Wilner*, 92 A.3d 1201, 1207 (Pa. Super. Ct. 2014) (noting that there is a "longstanding requirement of a second witness to prove a lost will"). Here, Ms. Benslimen and Ms. Cobb both testified that they signed the Will as witnesses after they observed the Decedent sign the Will. *See Transcript* pp. 90, 97. Ms. Benslimen testified that the probated document was a true and correct copy the Will she signed and witnessed the Testator sign. *Transcript* pp. 91-92. Ms. Cobb testified that the probated document "looks the same" as the Will she signed and witnessed the Testator sign. *Transcript* p. 101. Mr. Abowitz, the scrivener, testified that the probated document was a true and correct copy of the draft of the Will that he sent to the Testator in July 2015 after making edits to the original draft following his discussion with the Testator. *Transcript* pp. 66-67. The Court finds that the testimony of these three disinterested witnesses is credible and, therefore, finds that the Testator properly executed the original Will and the contents of the probated copy

[3] It is possible for a will to be revoked when a person other than the testator destroys the will. However, there is no presumption of revocation and, in order for such an act to revoke the will, the act must be done "in [the testator's] presence and by [the testator's] express direction." 20 Pa.C.S. § 2505(3). Furthermore, "the direction of the testator must be proved by the oaths or affirmations of two competent witnesses." *Id.* Even if Ms. Harrison's testimony before the Register of Wills that she destroyed the Will at the Testator's request is considered an oath or affirmation by a competent witness despite the fact that she denied at trial that she so testified before the Register of Wills, there is not an oath or affirmation from a second competent witness; when the Petitioner claimed "that he tore up the will because it wasn't what his mother wanted," he did so during an informal conversation with Mr. Miller.

are substantially the same as the original Will. *See Mammana*, 564 A.2d at 980 (finding adequate proof that original will was properly executed and the contents were substantially the same as the copy probated where two individuals who witnessed the decedent sign the original will testified that the probated will was a true and correct copy of the original will).

B. The Petitioners Failed to Present Sufficient Credible Evidence that the Testator Lacked Testamentary Capacity When She Executed Her Will

A testator has testamentary capacity if, at the time the will is executed, she knows "the natural objects of [her] bounty, the general composition of [her] estate, and what ... she wants done with it" after her death. *In re Estate of Smaling*, 80 A.3d 485, 494 (Pa. Super. Ct. 2013) (citing *Brantlinger Will,* 210 A.2d 246 (Pa. 1965)). Generally, the will proponent initially has the burden of proving testamentary capacity. *In re Estate of Vanoni,* 798 A.2d 203, 207 (Pa. Super. Ct. 2002) (citation omitted). However, where the execution of a will is proved by two subscribing witnesses, there is a presumption that the decedent had testamentary capacity. *Id.* Where the scrivener is the decedent's attorney, the presumption of testamentary capacity can only be overcome with "clear and compelling evidence." *Id.*

As explained previously, two subscribing witnesses, Ms. Benslimen and Ms. Cobb, testified to the proper execution of the Decedent's Will and the Court finds their testimony to be credible. Since the Will has been proved by two subscribing witnesses and the scrivener, Mr. Abowitz, is an attorney, in order for the Petitioner to prevail, the Petitioner had to present "clear and compelling evidence" showing that the Testator lacked testamentary capacity. *See id.*

The Petitioner fell far short of meeting his burden to prove that the Testator lacked testamentary capacity. There are only two allegations in the Petition to support the Petitioner's assertion that the Testator lacked testamentary capacity: (1) the Decedent died of pancreatic

cancer seven days after executing her Will and (2) "the [D]ecedent was suffering and in great pain and distress" when the Will was prepared. *See Petition* ¶¶ 6-7. However, it is well established that illness or sickness alone is insufficient to establish even weakened intellect, much less lack of testamentary capacity.[4] *See Luongo*, 823 A.2d at 966 (citations omitted) (citing cases and holding that testimony that the Decedent abused drugs and alcohol and had "chronic lung disease" did not alone establish weakened intellect). Likewise, physical pain is insufficient to establish lack of testamentary capacity. *See In re King's Estate*, 87 A.2d 469, 473 (Pa. 1952) (explaining that "[s]o long as the mind, like the captain of a stricken ship, is free to dictate direction and course, its decision will not be questioned in law even though the body be crippled with pain and the spirit awry with torment"); *In re Hoffmann's Estate*, 147 A.2d 633, 634 (Pa. 1959) (holding that testator did not lack testamentary capacity even though there was testimony that she "was ill with a painful abdominal disorder" and received "a pain-relieving narcotic").

The Petitioner testified that the Testator's "mind came and go" and she was "under heavy medication," was "wishy washy," "would beat around the bush on certain things that she was supposed to tell me," and "would go off on a tangent on another subject matter" when she was talking to the Petitioner. *Transcript* pp. 25, 31-32. Even if these statements were sufficient to prove lack of testamentary capacity—which they are not—this Court does not find this interested testimony to be credible. This testimony is also vague, not "clear and compelling," and the idea that it supports finding a lack of testamentary capacity is undermined or contradicted by the

[4] Weakened intellect is an element of the undue influence defense to Wills and it is possible for a testator to have weakened intellect without lacking testamentary capacity. *See In re Clark's Estate*, 334 A.2d 628, 633 (Pa. 1975) (noting that "[w]eakened intellect need not amount to testamentary incapacity"); *Estate of Reichel*, 400 A.2d 1268, 1274 (Pa. 1979) (holding that, while the decedent had weakened intellect when the will was executed, that "did not imply a lack of testamentary capacity when the will was executed" and the Court "would be loath to" find that she lacked testamentary capacity "if it were the precise issue before the Court").

Petitioner's other testimony and Ms. Harrison's testimony. For instance, the Petitioner admitted that he did not know the state of the Testator's mind on August 7, 2015, the day that she signed her Will; when asked whether it was possible that the Testator's "mind came instead of went" on August 7, 2015, the Petitioner said "I don't know about August 7th" and "I'm not going to sit here and play scrabble on what days her mind was good and bad." *Transcript* p. 34. Ms. Harrison testified that, in the two months before the Testator's death, the Testator "was lucid ... all the time" and had stopped taking the medications that were "messing with her." *Transcript* p. 51. The Petitioner also testified that the Testator (his mother) knew of, and communicated with, him and his daughter and the Testator's sister and nieces. *Transcript* p. 25.

Finally, the record is replete with examples of disinterested, credible testimony that demonstrate that the Testator had testamentary capacity at the time she conveyed her wishes to the scrivener and at the time she executed the Will. Mr. Miller testified that he spoke to the Decedent in May 2015 and, at that time, she was lucid and they discussed in detail her testamentary wishes. *Transcript* pp. 78-79. Mr. Abowitz, who spoke to the Testator over the phone numerous times during the process of drafting her Will from May 2015 to July 2015, testified that "[s]he was lucid" and "knew exactly what she wanted and why she wanted it." *Transcript* p. 64. Mr. Abowitz also testified that, after he sent a draft of the Will to the Testator on July 28, 2015, she called him and noted that he had incorrectly numbered the paragraphs, which resulted in Mr. Abowitz sending her a revised draft with correctly numbered paragraphs. *Transcript* p. 67. Mr. Abowitz's disinterested testimony shows that, during the process of drafting the Will and in the days and weeks prior to the execution of the Will, the Testator was alert and well aware of what she owned and who she wanted to receive it upon her death. *See Williams v. McCarroll*, 97 A.2d 14, 19-20 (Pa. 1953) (holding that "where mental capacity is at

issue, the real question is the condition of the testator at the very time [s]he executed the will, although evidence of capacity or incapacity for a reasonable time before and after the making of the will is admissible as indicative of capacity or the lack of it on the particular day").

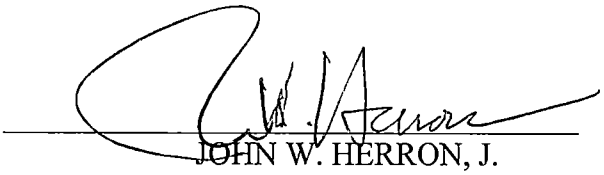
More importantly, there is credible testimony from Ms. Benslimen and Ms. Cobb that severely undermines any speculation that the Testator lacked testamentary capacity at the time she signed her Will. For instance, Ms. Benslimen testified that she knew the Testator "almost 30 years" and did not "notice any deficiency in her cognitive ability" at the time she witnessed her sign the Will or at any time prior to that. *Transcript* pp. 87, 89. Ms. Cobb testified that the Testator appeared "to be in possession of her faculties" and "was her regular, quick-witted self" on the day of the Will signing. *Transcript* pp. 97, 102. This credible testimony shows that the Testator had testamentary capacity on the day she executed her Will.

III. CONCLUSION

Although a presumption arose that the Testator revoked her Will by destruction, the Respondents have offered sufficient evidence to rebut that presumption, namely credible and disinterested testimony from Mr. Abowitz and Mr. Miller that the Petitioner and Ms. Harrison, the Petitioner's fiancée, previously claimed to have torn up the Will. The Respondents have also offered credible and disinterested testimony from Ms. Cobb and Ms. Benslimen, the witnesses to the execution of the Will, that the Will was properly executed and the probated copy of the Will was substantially the same as the Will that the Testator executed. Because two disinterested subscribing witnesses testified to the proper execution of the Will and the scrivener was an attorney, the Testator is presumed to have had testamentary capacity when she executed her Will and this presumption can only be rebutted with "clear and compelling evidence." The Petitioner's testimony, which the Court did not find entirely credible, is, at best, vague and

contradictory while the credible testimony from the Respondents' disinterested witnesses clearly shows that the Testator had capacity when she conveyed her wishes to the scrivener and when she signed the Will. For these reasons, the Register of Wills' decision to probate a copy of the Last Will and Testament of Marian C. McCoy was proper and the appeal therefrom is denied.

BY THE COURT:



JOHN W. HERRON, J.

Murray B. Dolfman, Esquire

Stephen H. Green, Esquire