SURROGATE'S COURT, BRONX COUNTY

June 18 , 2024

ESTATE OF RUBEN RIOS, Deceased
File No.: 2019-1950/A

This is an uncontested SCPA 1407 proceeding by a daughter of the decedent to probate, as a lost will, a photocopy of an instrument dated August 4, 2018. The decedent died on May 22, 2019 at the age of 83. In addition to the petitioner, Madeline Brillon ("Madeline") his distributees are another daughter, Hilda Iris Rios ("Hilda") who was appointed administrator on September 10, 2019 with the consent of Madeline prior to the discovery of a copy of the will. The propounded instrument is attorney drafted, signed by the decedent and two attesting witnesses and contains a self-proving affidavit. The copy of the will names Madeline as the nominated executor and directs that decedent's home in the Bronx be sold with net proceeds to be paid 10% each to a sister, a brother, two grandsons and a granddaughter and 40% to the proponent along with the residuary estate. The will specifically disinherits Hilda. The petition was amended to reflect that the decedent's sister named in the will post-deceased on March 5, 2021, leaving a spouse as her sole distributee.

In support of the application, the attorney for the proponent annexes an affirmation from the attorney draftsperson, Jose Rodriguez, Esq. who states that he met the testator, and they discussed the terms of the will including his intention to disinherit Hilda. The testator returned to him on August 4, 2018, at which time the instrument was

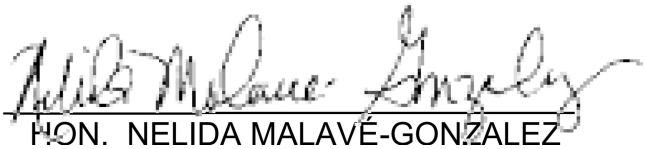
drafted pursuant to the terms originally discussed and thereafter executed along with a power of attorney and a living will document. He states that the testator left his office that day with the executed documents in his possession and never contacted him again. The attorney further affirms "[t]he testator relayed his understanding and expressed his satisfaction that the instrument executed that day would be his Last Will and Testament. The finality of his decision, as expressed to me by him, was supported by his age and rapidly deteriorating health." He further opines "[b]ased upon my meeting and interactions with the testator, his age and his failing health, it is highly probable that the testator never amended, revoked or executed another [w]ill before his passing."

Also annexed is an affidavit from a friend of the decedent for over 30 years. He states that due to their close relationship, he was privy to the circumstances of the decedent's relationship with his immediate family and that decedent confided in him regularly expressing constant frustration with his daughter, Hilda. He recommended an attorney to draft the decedent's will and personally drove him to see the attorney but did not partake in the meeting and did not see the will, but states that he was aware that the decedent returned to his home with his last will and testament in hand. He further states that on or about September/October 2018, the decedent's health took a turn for the worse and he began making trips to the hospital. He further states that he and others noted the decedent's propensity to misplace his documents. He states that the decedent told him he wanted to move to Florida and began packing personal possessions and important documents into boxes and that the decedent told him that he would not allow his daughter [Hilda] who occupied second floor unit of the two family home to access his living space and told him he had changed the locks to his portion of the home.

Here, there is no evidence that any person other than the decedent was in possession of the original will. As the original cannot be found, a presumption arises that the decedent destroyed the will with an intention to revoke it (see SCPA 1407 [1]; Matter of Fox, 9 NY2d 400, 411 [1961], Matter of Lewis, 25 NY3d 456, 462 The presumption can be rebutted by clear and convincing evidence (see Matter of Millens, 30 NYS2d 274 [Sur Ct, Ulster County 1941], aff'd 264 App Div 936 [3d Dept 1942], affd 291 NY 613 [1943]), but where the presumption is not overcome, the lost will may not be admitted to probate (see Matter of Passuello, 169 AD2d 1007, 1008 [3d Dept 1991]). The presumption may be overcome, and the lost will admitted to probate, if the proponent establishes that the will was not revoked by the testator during his or her lifetime (see Matter of Marotta, 137 A.D. 3d 787, 788 [2d Dept 2016]). "The burden of proof is on the will proponent to show, by facts and circumstances, that the testator did not destroy the will with the intent to revoke it; mere speculation or suspicion is insufficient" (see Matter of DiSiena 103 A.D. 3d 1077, 1078-1079 (3d Dept. 2013). Here, the purported instrument was properly executed, and the terms thereof were established by a copy of the instrument. As such, the sole issue is whether the proponent can overcome the presumption of revocation by the testator as the original will appears to have been in the testator's possession. The proponent has not provided proof that the original instrument was inadvertently destroyed by any event such as during a move or by fire.

Accordingly, on this state of the record, this matter is set down for a hearing pursuant to SCPA 1407 and1408 scheduled for August 7, 2024.

The Chief Clerk is directed to mail a copy of this decision, which constitutes the order of the court, to petitioner's counsel, the pro se Hilda Iris Rios, and all parties served with notice of probate.



HON. NELIDA MALAVÉ-GONZALEZ
SURROGATE