IN THE COURT OF COMMON PLEAS of PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT of PENNSYLVANIA
ORPHANS' COURT DIVISION

Orphans' Court No. 1487 of 1994
Estate of ADELAIDE BRISKMAN, Deceased

OPINION

BONAVITACOLA, J.

BACKGROUND

In the five months preceding her death[1], the Decedent, Adelaide Briskman allegedly transferred substantially all of her assets, both real and personal, to one Mark G. Resop, the manager of a NationsBank branch located near her last residence in Naples, Florida.

The only asset of value not transferred to Mr. Resop is a parcel of commercial real property located at 1632 Walnut Street, Philadelphia (the **"Philadelphia Property"**), which is currently occupied – coincidentally – by a branch of Mellon Bank, N.A.

More specifically, between her first meeting with Mr. Resop, on January 15, 1993, and her death, five months later, on June 15, 1993, the Decedent :

1. Deeded her condominium residence to Mr. Resop, for nominal consideration, subject only to a life estate that she retained. Several months after her death, Resop sold the property for $118,900.00;

2. Authorized the transfer of the entire balance of her investment accounts (approximately $2,700,000.00 in the aggregate) into a newly-opened account titled jointly with Mr. Resop. In the ensuing months, Resop spent freely from this account, and

[1] Ms. Briskman died on June 15, 1993, at age 82. She never married, and had no children.

upon her death, became the sole owner of the balances remaining on deposit; and

3. Allegedly made a new Will (the **"1993 Will**), naming Resop executor and sole beneficiary, to the complete exclusion of the beneficiaries named in a Will executed in 1984 (the **"1984 Will**).

Resop probated the 1993 will in Philadelphia on December 3, 1993, and was granted Letters Testamentary by the Register of Wills. Julie K. Palley, a niece of the Decedent (the **"Objectant"**), filed an appeal from the decision of the Register, in which she alleged that the 1993 Will was procured by fraud, undue influence, duress and constraint on the part of Resop, at a time when the Decedent was not of sound mind and therefore lacking in testamentary capacity.

Though Resop was to inherit the Philadelphia Property under the terms of the 1993 Will, on March 23, 1995, Judge Kathryn Lewis entered an Order enjoining the transfer of the Philadelphia Property pending resolution of the will contest.

The matter was then assigned to Judge Frank X. O'Brien, who held hearings on February 25 and 26, 1998. Judge O'Brien rendered no decision, however, and the matter was thereafter reassigned to me.

At the February, 1998 hearing, the Objectant stipulated that, by introducing the certified record of the Register, Resop had met his initial burden of proof. The Objectant presented live testimony from Tena Warnke (**"Warnke"**), a friend of the Decedent, together with deposition testimony from the two subscribing witnesses, Linda K. John (**"John"**) and Rebecca K. Howard (**"Howard"**), from Annette Tufano (**"Tufano"**), the Notary Public who had notarized the 1993 Will (and, it should be noted, the Deed conveying the Decedent's

residence to Resop) and from Margaret Ritchie (**"Ritchie"**), a neighbor of the Decedent[2].

Tufano also testified live in Resop's portion of the case, giving the Objectant an opportunity to cross-examine her before the Court. In addition, Resop presented testimony from Raymond Emmons (**"Emmons"**), a private detective retained by his attorneys, from Alan Morris (**"Morris"**), the Decedent's stockbroker, and from Ritchie (who answered only one inconsequential question before being excused).

Inexplicably, it does not appear that the Objectant ever pressed for leave to depose Mr. Resop, perhaps the only person who could identify the scrivener of the 1993 Will, or who could explain how that Will – and the other documents mentioned above – allegedly came to be signed by the Decedent.

Further – given the Objectant's pre-trial stipulation – the Objectant evidently never considered the possibility that the 1993 Will was forged; the Decedent's testamentary capacity in January, 1993 is irrelevant if it can be shown that she did not execute the 1993 Will at all.

Still, as a judge of the Orphans' Court, I have an independent duty to the Decedent, to her heirs, and to the administration of justice itself to look beyond the parties' positions if necessary to ensure that justice is properly served, and that equity is done. "[I]t is plain that the Orphans' Court must apply the rules and principles of equity. ***Estate of Pedrick***, 505 Pa. 530; 482 A.2nd 215 (1984). "The familiar maxim that 'he who comes into a court of equity must come with clean hands' applies to matters within the Orphans' Court's jurisdiction." ***Ibid., Cross' Estate***, 319 Pa. 1; 179 A. 38 (1935).

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[2] Interestingly, both subscribing witnesses and the Notary worked at the NationsBank branch that Resop managed at the time that the 1993 Will was executed; presumably, all three individuals were considered his subordinates, and took work-related direction from him.

Further, once a party's unclean hands are established, public policy makes it obligatory for the court to deny relief, and – in view of the public policy interest involved – the Court may raise the issue of "unclean hands" *sua sponte*. ***Gaudiosi v. Mellon***, 269 F.2nd 873, at 881 (3rd Cir., Pa., 1959), *cert. denied*, 361 U.S. 902; 80 S. Ct. 211; 4 L. Ed. 2nd 157 (1959).

Accordingly, I am not necessarily bound by the parties' pleadings, nor by a stipulation of facts that is demonstrably and palpably false.

After an extensive review of the record, including a number of documents filed with the Clerk, but not formally introduced at trial[3], I find the malodorous aroma of this case overpowering.

Notwithstanding the parties' stipulation to the contrary, after reviewing the testimony of the witnesses, I find that the Proponent, Mr. Resop, did not establish the authenticity of the 1993 Will by a fair preponderance of the evidence.

Further, though the Objectant did not directly raise the issue in her pleadings, even a cursory comparison of the purported signature of the Decedent on the 1993 will with her (presumably genuine) signature on the 1984 Will leads me to the conclusion that the Decedent's signature on the 1993 Will is quite probably a forgery; counsel's inexplicable failure to explore this line of inquiry does not preclude the Court from considering it, if necessary to prevent injustice and to protect the integrity of the system.

DISCUSSION

According to 20 Pa.C.S. § 3132 (entitled "Manner of probate"), all wills probated in

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[3] A court can take judicial notice of documents contained in its own files.

Pennsylvania must be proved by the oath or affirmation of two competent witnesses. Further, in the case of a will signed by the testator, the statute prefers proof by the testimony of the subscribing witnesses, if readily available, and direct proof of the authenticity of the testator's signature is preferred over proof of the signature of the subscribing witness. 20 P.S. §3132, formerly 20 P.S. §1840.302; *see also*, ***Estate of Brantlinger***, 418 Pa. 236, at 240; 210 A.2nd 246, at 248 (1965).

Classically, proof of a will required the Register to take sworn testimony regarding the circumstances of its execution, preferably from the subscribing witnesses, but in their absence from anyone with knowledge of the relevant events.

Most wills, of course, are probated without objection, and the testimony of the witnesses is both uncontroversial and uncontradicted. Probably in recognition of this fact, a statutory procedure has been established by which Wills may be made "self-proved".

In the absence of a contest, the Register is authorized to enter such a "self-proved" Will into probate without taking testimony from witnesses; 20 Pa.C.S. §3132.1 provides – in pertinent part – as follows :

"20 Pa.C.S. §3132.1. Self-Proved Wills.

> "(A) PROOF. -- Unless there is a contest with respect to the validity of the will...an affidavit of [a] witness made in conformity with this section shall be accepted by the register as proof of the facts stated as if it had been made under oath before the register at the time of probate.
>
> "(B) ACKNOWLEDGMENT AND AFFIDAVITS. --An attested will may at the time of its execution or at any subsequent date be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this Commonwealth or under the laws of

the state where execution occurs...."

20 Pa. C.S. §3132.1 (Emphasis added)

In substance, a self-proved Will must be acknowledged by the testator and by at least two subscribing witnesses, all before a Notary Public[4]. All three acknowledgments must state that the testator was of "sound mind" and "under no constraint or undue influence" at the time the Will was signed, and that the Will was his "free and voluntary" act. The witnesses' acknowledgments must also state that the witness subscribed the Will in the testator's presence, that the testator saw the witness do so, and that the witness saw the testator execute the Will as well. ***Ibid.***

Obviously, the statements in the acknowledgments must actually be true.

In the event of a contest, however, a self-proved Will may no longer be presumed authentic, and evidence must be adduced to establish the proper execution of the Will. ***Standard Pennsylvania Practice***, §151:34; 20 Pa. C.S. §3132.1[5]. *See also,* ***Last Will and Testament of Viola L. Melson***, 711 A.2nd 783 (Delaware Supreme Court, 1998, interpreting substantially similar Delaware statute).

The 1993 Will was subscribed by two witnesses, Rebecca K. Howard and Linda K. John. The acknowledgments of the testatrix and the witnesses were all notarized by Annette C. Tufano, a Notary Public of the State of Florida.

At a deposition taken on August 21, 1997, however, Ms. John testified that she did not actually see Adelaide Briskman sign the 1993 Will[6], and that the purported signature

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[4] Wills may also be acknowledged before an attorney-at-law under certain circumstances.

[5] This statute conforms to §2-504 of the Uniform Probate Code.

[6] Ms. John also testified that – her affidavit to the contrary notwithstanding – she also did not actually see the other witness, Ms. Howard, sign the Will.

of Adelaide Briskman and the signature and stamp of the Notary Public were already on the document when it appeared on her desk one morning, together with a note in Resop's handwriting asking her to witness it. This testimony renders Ms. John incompetent to testify as an authenticating witness.

Ms. Howard was deposed on August 29, 1997; she testified that -- though her signature on it was genuine -- she had no memory of any circumstances related to the execution of the 1993 Will, and could not say for certain whether she had actually seen Adelaide Briskman sign it. Though Ms. Howard said that she "would not have" signed it as a witness otherwise, she also admitted that there had been "a few" instances where she witnessed a document that had not actually been signed in front of her.

Ms. Tufano, the Notary Public, was also deposed on August 29, 1997, and testified that she didn't remember specifically how she came to notarize the 1993 Will, or whether Ms. Briskman had signed it in her office or in Resop's :

> "I don't, really, as a notary, pay attention to what the document says because that's not my job. My job is to notarize the signature. I don't really remember in detail, you know, exactly what happened. I do know that I would not notarize something unless she was there." (N.T. 8/29/1997, P. 14)

By the time of the February, 1998 hearing, however, Ms. Tufano's memory had improved considerably :

> "She came into my office and asked if I would notarize a document for her. And when I noticed that it was a will, because I have to keep a log of every notary that I do, I had to or at least *[sic]* what kind of document it was, when I noticed it was a will and I asked for a couple of witnesses, because it is a law there [in Florida] if it is a will or deed of trust, et cetera, you have two witnesses besides the notary, so I called upon a couple of witnesses...."
> (N.T. 2/26/1998, Pp. 107-08).

When asked if the will was signed in her presence, Ms. Tufano stated :

> "Absolutely, yes....She signed in front of all of us first and then they [Ms. John and Ms. Howard] signed and then I notarized it...."
> (***Ibid.***)

It is remarkable indeed that Ms. Tufano – who professed to have little or no memory of notarizing the 1993 Will four years after the fact – was nonetheless able to testify about those events six months later with such certainty. Since no explanation was offered for such a marked improvement in her memory, I find her trial testimony neither credible nor worthy of belief, and will disregard it.

Even if viewed in the light most favorable to Resop, the proponent, it is nonetheless clear that the evidence presented is insufficient as a matter of law to establish the authenticity of the purported 1993 Will. Ms. John admitted that she did not see the testatrix sign the document, and that it had already been notarized before she signed it.

Further, the already-signed document materialized on Ms. John's desk with a note from the proponent – who was not only the sole beneficiary under the purported Will but also Ms. John's direct superior – asking her to witness it. It is not difficult to imagine why the purported Will would have passed through Resop's hands on its way to the witnesses, or to surmise that Ms. John felt that she was obliged to sign it.

Unfortunately, no one deposed Mr. Resop, and we can only speculate on what his testimony might have been. Still, because the burden of proof rests with the proponent of a purported Will, and because it is abundantly clear that one of the only two purported witnesses to the execution of the 1993 Will did not actually see the document signed, the proponent has failed to carry his burden of proof, a conclusion that does not require further analysis of the equivocal testimony of the other witness, Ms. Howard, or the contradictory

testimony of the Notary, Ms. Tufano.

CONCLUSION

For the reasons set forth above, it is clear to me that the purported 1993 Will cannot be admitted into probate. At best, the Will lacks sufficient authentication, and at worst, it is an outright forgery.

IT IS, therefore ORDERED THAT :

1. The decision of the Register admitting the 1993 Will to Probate is hereby REVERSED;

2. The Letters Testamentary issued to Mark G. Resop are hereby VACATED; and.

3. The Record is remanded to the Register of Wills.

AND NOW, this 7th day of May, 2001 , the account is confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An Appeal from this Adjudication may be taken, to the appropriate Appellate Court, within thirty (30) days from the date of the issuance of the Adjudication. See Phila. O.C. Rule 7.1A and Pa.O.C.Rule 7.1, as amended, and, Pa.R.A.P. 902 and 903.

BY THE COURT:

Alex Bonavitacola, J.

DATE	NOTIFIED	BY
5/9/01	Daniel B Evans	US
5/8/01	Bernice Kaplan	US