To be Argued by:
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(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division - Third Department

In the Matter of

ANGELA J. DISIENA

Deceased.

Brief for Appellants

Saratoga County Surrogate's Court File No.: 2011-50

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PRELIMINARY STATEMENT

Angela J. DiSiena ("decedent") died in October 2010. Her last will has not been found and a copy has been offered for probate by her daughter, Carol. One of Angela's sons, Mario, objects to probate citing the presumption that if an original will cannot be located, it is presumed to be revoked.

Mario moved for summary judgment based on the presumption alone, and without any other facts supporting revocation. Carol and another son, Salvadore, presented opposition with a great deal of evidence. Son, Bernard, responded but took no position.

The Surrogate stated that the presumption is strong and ruled that the presumption alone constitutes an initial barrier that must be overcome in opposing the summary judgment motion and if not overcome therein, by clear and convincing evidence, the probate petition must be denied. On the presumption alone and without any facts evidencing any revocation, the Surrogate did in fact deny the petition for probate.

Appellants Carol and Salvadore contend that the Surrogate erred. The Surrogate relied solely on the presumption, and the record contains no factual evidence of any such revocation. In fact, as explained below, the record contains sufficient evidence to overcome any presumption.

Accordingly, the Surrogate should have granted summary judgment in favor of the appellants or alternatively held a trial.

QUESTIONS PRESENTED

1. Whether the Surrogate erred in granting summary judgment to respondent and in denying probate?

2. Whether the Surrogate erred in failing to grant summary judgment to appellants and in failing to admit the will to probate?

3. Whether the Surrogate, in deciding the respective motions for summary judgment, misapplied the presumption by placing the presumption as an initial barrier to be overcome?

4. Whether the Surrogate erred in failing to hold a jury trial to determine the factual issues herein?

STATEMENT OF FACTS

The decedent, Angela J. DiSiena ("decedent"), maintained an estate plan since at least 1954 [341, 496].[1] That year, the decedent executed a will with her husband [58-59, 341, 496]. Sometime after her husband's death, however, the decedent changed her will and successfully litigated her right to do so against opposition from two of her sons, Objectant Mario DiSiena ("Mario") and Bernard DiSiena ("Bernard") [341, 496] (see Matter of DiSiena, 178 AD2d 720 [3d Dept 1991]).

Thereafter, the decedent executed a new will dated January 1992, which removed Mario as a beneficiary [341, 503-510]. The will provides: "While I love my son Mario J. DiSiena, I purposely make no provision ... for [Mario]" [504]. The decedent advised the attesting witnesses about the reason for Mario's disinheritance as follows:

> "Mario DiSiena left the family business and opened his own business in competition with the family business. After many attempts by [the decedent] to include [Mario] in family activities, she stopped because he refused to go to any of them. [Mario's] business is doing well, and since the other three children have put all of their time into the family business and [Mario] has cut himself off totally from the family and the family business, [the

[1] All page references are to the Record on Appeal.

decedent] feels that the other three children are entitled to the business and the proceeds" [DeBien Aff (dated 1-31-92 and sworn 2-14-92), at 508-509 (emphasis in original); see also 510].

In August 1996, the decedent again decided to revise her estate plan and retained Louis Pierro, Esq., whose law firm prepared various documents for her, including a 1996 will [352-358, 512-513, 515]. In the 1996 Will, the decedent again disinherited Mario, explaining: "While I love my son MARIO ... I purposefully make no provision for him ... because I have adequately provided for him during my lifetime" [515].

Thereafter, in 1999, this Court granted the decedent's motion to dismiss a complaint filed by Mario against the decedent seeking to compel her to transfer a certain interest in the decedent's business to him [341, 499-501] (see DiSiena v DiSiena, 266 AD2d 673 [3d Dept 1999]). The Court held that Mario's claim lacked merit [499-501] (see id.).

After the litigation, in February 2000, the decedent again executed a new will leaving "nothing to MARIO ... for reasons well known to him" ("Will" or "2000 Will") [341, 366]. The will further provides that "no property shall pass to MARIO" even as a taker of last resort and that "MARIO ... and his issue shall not be [considered as] descendants" for purposes of the will [366, 371]. On the same day, the decedent also executed a revocable trust with a similar provision benefiting only three of her children and not Mario [342, 354, 527-549].

Initially, the decedent left her original 2000 Will with Mr. Pierro for safekeeping [355]. However, in April 2004, the decedent took possession of the 2000 Will, with Mr. Pierro retaining a copy of it in his law office safe [355, 551].

On December 11, 2007, the decedent executed a codicil, which named Carol as the sole executrix and Salvadore and Bernard (and not Mario) as successor executors [354-355, 375-376]. In all other respects, the 2007 Codicil further "ratif[ied] and confirm[ed] all of the provisions of

[her] said Last Will and Testament dated February 16, 2000" [375]. After its execution, the decedent kept the original 2007 Codicil at Mr. Pierro's law firm [345, 349, 355, 451].

On the same day she executed the 2007 Codicil, the decedent also signed an amendment to the revocable trust, which changed the trustee provision in a similar manner and declared that "All other terms and conditions of said Declaration of Trust dated February 16, 2000 ... shall remain in full force and effect" [354-355, 553-555].

In 2010, the decedent became ill and spent her last several weeks in the hospital [61, 235, 252-253, 266, 356, 462]. During that time, the decedent sought additional estate planning services from Mr. Pierro [353-357]. In response, Mr. Pierro's law firm prepared important legal documents at the decedent's request [353-357].

On September 27, 2010, the decedent and three of her children (and not Mario) signed a Power of Attorney, which named Carol as the decedent's agent, with Salvadore and Bernard (and not Mario) as successor agents [356, 604-621]. On that same day, at the hospital Mr. Pierro discussed the creation of an irrevocable trust with Carol, Salvadore, Bernard, and the decedent [356]. The purpose of the trust was to reduce the estate taxes upon the decedent's death [356].

Based on his conversations, "[i]t was clear [to Mr. Pierro] that [the decedent] was in control of her decision [to create the irrevocable trust] and that her three children agreed with her that in order to reduce the New York State estate tax burden in her estate, a trust be formed and her remaining interests in the business be gifted in trust to Carol, Salvadore, and Bernard" [356]. At that time, the decedent "once again expressed her firm desire that [Mario] not be a part of her estate plan" [356].

Based on the decedent's wishes, the irrevocable trust was drafted consistently with the decedent's long-term estate plan disinheriting Mario [356, 557-602]. The document was "ready for execution," but the decedent did not survive long enough to execute it [356, 557-602].

After the decedent's death, Carol and others diligently attempted to locate the original 2000 Will [37-45, 349-350, 357]. Despite their efforts, however, the original could not be located [37-45, 349-350, 357].

The Probate Proceeding

In or around January 2011, Carol filed a petition seeking to probate a copy of the 2000 Will and the original 2007 Codicil and to obtain letters testamentary [24-45, 366-376]. In support of the petition, Carol submitted an affidavit from Mr. Pierro and herself [37, 42].

Pursuant to SCPA 1404, Carol and three attorneys, including Mr. Pierro, were examined by Mario's attorney, among others [340, 378-493]. [2] Afterwards, the Surrogate (Seibert, Jr.) provided the parties with 10 days to file objections and to interview one of the 2000 Will's attesting witnesses, Douglas W. Stein, Esq., who resided in Atlanta, Georgia [340, 489-490]. Mario's attorney informally interviewed Mr. Stein over the telephone, but did not further pursue the opportunity to formally examine him [340].

Objections and Evidence Submitted By Mario

In June 2011, Mario filed objections to Carol's petition [46-52]. After some discovery, Mario sought partial summary judgment dismissing the petition [56-57, 334, 340, 724]. Among other things, Mario asserted that the decedent presumably revoked her will because it could not be located upon her death [328-333]. In support, Mario submitted his own affidavit in which he averred that the decedent wanted to reconcile their relationship during the last several years of

[2] A SCPA 1404 exam is similar to a deposition (see e.g. Matter of Wimpfheimer, 8 Misc 3d 538, 539 [Sur Ct, Bronx County 2005]).

her life and that he would occasionally eat dinner at the decedent's residence, with just him and the decedent present [58-62]. Mario also submitted his attorney's affirmation [63-72], an appendix containing various documents [81-326], and a memorandum of law [327-336].

Evidence Submitted In Opposition To Mario's Motion

Carol opposed Mario's motion and cross-moved for summary judgment granting the petition [337]. Carol relied upon the self-proving affidavits from the attesting witnesses [373, 376]. Carol also submitted her affidavit and the affidavits and affirmations of the attesting witnesses to the 2000 Will and 2007 Codicil, including attorneys Pierro and Stein [348-364]. Among other things, Carol and the attesting witnesses explained the circumstances surrounding the decedent's execution of the documents and stated that the decedent did not inform them about any revocation of the 2000 Will [348-364]. Carol further explained that the decedent kept voluminous records at her residence and that Bernard had removed various records [350]. Carol also submitted (1) an attorney affirmation outlining the facts and legal arguments [339-347], (2) various exhibits [365-634], and (3) a memorandum of law [635-652].

Salvadore also opposed Mario's motion and joined in Carol's motion [653]. Salvadore submitted his attorney's affirmation and affidavits from the decedent's nephew, granddaughter, and financial advisor [653-660].

The decedent's nephew averred that the decedent indicated to him on at least six occasions, including at least one time in the spring of 2010, that upon her death all of her assets would go to only three of her children and that Mario would receive nothing [655-666]. The decedent's granddaughter averred that in May 2007, Mario indicated to her that he felt "screwed" by the decedent and that he planned to go after the decedent's business and siblings after the decedent's death [657-658]. After the decedent's granddaughter reiterated this to the

decedent, the decedent informed her that she had "spent a lot of money over the years with Lou Pierro's law firm to make sure Mario won't have anything [from her estate], including any part in the business" [657-658]. The decedent stated that "Mario is out" and that she did "everything in [her] power to make sure he gets nothing" [658].

In addition, the decedent's financial advisor averred that

> "On numerous occasions from 2004 through mid-2010, [the decedent] reiterated to me that she wanted Bernard, Salvadore and Carol to have an equal share of the family business, and that ... she wanted her assets divided equally among the three of them. The last time I met with her in or about March, 2010, [the decedent] expressly stated that she did not want Bernard, Salvadore and Carol fighting over her assets, and accordingly, wanted them divided equally among the three of them. At no time did [the decedent] indicate to me that she wanted to provide her son, Mario DiSiena with a share of her estate" [659-660].

<u>Evidence Submitted By Bernard</u>

Bernard took no position, but submitted two affidavits, one requesting to be a co-administrator if the court granted Mario's motion [661-662] and the other disputing certain factual assertions made by Carol and Mr. Pierro [663-665].

<u>Mario's Reply Papers and Second Motion</u>

As part of his reply papers, Mario submitted another affidavit from himself [666-671], along with another attorney affirmation and memorandum of law [672-675, 676-682]. In addition, Mario filed a second motion seeking to declare the following to be inadmissible for purposes of summary judgment, trial, or otherwise: (1) two decisions of this Court regarding the prior litigation between Mario and his mother, (2) the decedent's wills from 1992 and 1996 disinheriting Mario, (3) an unsigned irrevocable trust,[3] (4) the affidavit and proposed testimony

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[3] Mario's motion to preclude did not pertain to the revocable trust, which was in effect at the decedent's death [12 n 2].

of Mr. Pierro regarding his conversations with the decedent, and (5) pursuant to CPLR 3126, an Order precluding the use of affidavits of the decedent's nephew, granddaughter, and financial planner [683-722]. In support, Mario submitted another affidavit from himself [685-686], along with another attorney affirmation and memorandum of law [691-693, 714-722]. In opposition to Mario's second motion, Carol and Salvadore submitted an attorney affirmation and a memorandum of law [723-724, 725-731].

Decision

Surrogate's Court, Saratoga County (Kupferman, S.), essentially denied Mario's second motion regarding the evidentiary challenges [10-23]. The Court (1) considered the appellate rulings as circumstantial evidence of the decedent's estate plan; (2) denied Mario's request to preclude the prior wills; and (3) considered on summary judgment Mr. Pierro's affidavit and the affidavits of the decedent's nephew, granddaughter, and financial planner, without addressing whether any corresponding testimony would be admissible at trial [10-23].

The Court further granted Mario's partial summary judgment motion, denied Carol's cross motion for summary judgment, and dismissed Carol's probate petition [10-23]. The Court held that the proponents of the 2000 Will have shown nothing more than a long-standing estate plan to disinherit Mario and that the evidence submitted failed to overcome the presumption that the 2000 Will was revoked [10-23]. The Court further held that "[b]ecause the 2000 Will has been considered revoked, the 2007 Codicil has no effect pursuant to EPTL § 3-4.1 (c)" [23].

Carol and Salvadore now appeal from the order granting Mario's motion and denying probate [3, 6].

ANALYSIS

The will proponents sought to admit to probate a copy of the 2000 Will and the original 2007 Codicil [24-45, 339, 366-376]. The Surrogate granted summary judgment dismissing the petition, without conducting a trial [10-23]. This was error.

A. A Lost or Destroyed Will May Be Admitted to Probate

Pursuant to SCPA 1407, a lost or destroyed will may be admitted to probate if

> "1. It is established that the will has not been revoked, and
>
> 2. Execution of the will is proved in the manner required for the probate of an existing will, and
>
> 3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete."[4]

B. The Court's Function On This Motion Is Issue Finding Not Issue Determination

"The court's function on a motion for summary judgment is issue finding not issue determination and, where a genuine issue of fact exists, summary judgment must be denied" (Gadani v Dormitory Auth. of State of N.Y., 43 AD3d 1218, 1219 [3d Dept 2007]). The Court must view the evidence in the light most favorable to the nonmoving party and accord it the

[4] Significantly, SCPA 1407 replaced the prior provisions of the Surrogate's Court Act which permitted the probate of a lost will, but only if "the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime ...." (see Julia Kalmus, *The Probate of Lost Wills: In Re Kleefeld*, 3 Pace L Rev 415, 418 [1983]; see also Matter of Fox, 9 NY2d 400, 408 [1961] [discussing the meaning of the prior language and holding that all the statute required was "proof that the testator himself had not revoked the lost or destroyed will"]; 3-41 Warren's Heaton on Surrogate's Court Practice § 41.12 [LexisNexis 2012] ["SCPA 1407 simply requires the proponent of a lost or destroyed will to prove that the will had not been destroyed by the testator with revocatory intent"]).

benefit of every reasonable inference (see Barrett v Watkins, 82 AD3d 1569, 1571 [3d Dept 2011]).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]). Upon the proponent's showing of entitlement to summary judgment, the burden shifts to the opponent to "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; see Zuckerman, 49 NY2d at 562). Moreover, "in opposing a motion for summary judgment, hearsay evidence may be utilized as long as it is not the only evidence submitted" (Guzman v L.M.P. Realty Corp., 262 AD2d 99, 100 [1st Dept 1999]; see Matter of Ryan, 2005 NY Misc LEXIS 7465, *10-*11, 233 NYLJ 44 [Sur Ct, New York County 2005]; see also Phillips v Kantor & Co., 31 NY2d 307, 307 [1972]).

For the reasons that follow, appellants respectfully request that the Court reverse the order of the Surrogate and grant summary judgment in their favor. Alternatively, appellants request a trial.

POINT I THE SURROGATE ERRONEOUSLY DETERMINED, AS A MATTER OF LAW, THAT THE DECEDENT REVOKED HER WILL

The Surrogate erroneously determined, as a matter of law, that the decedent revoked her will. The holding of the Surrogate rests on pure speculation that the decedent suddenly and secretly destroyed her will. The Surrogate relied solely on a presumption, and the record contains no factual evidence of any such revocation. In fact, the record contains sufficient evidence to overcome the presumption of revocation. Among other things, the decedent

- felt that her other three children were entitled to her business after she died because they dedicated their lives to the business [508-509]
- "provided for [Mario] during [her] lifetime" and recognized that Mario "contributed nothing" to her business and owned a successful competing business from which he profited [515, 508-510]
- maintained a valid will since 1954 and executed three wills and a revocable trust disinheriting Mario [341-345, 366-376, 496, 503-549]
- twice fought Mario in court, once to preserve her rights to remove him from her will and another time to prevent him from obtaining an interest in her business [341, 495-501]
- executed a related subsequent codicil confirming Mario's disinheritance [355, 375]
- did not revoke her trust or codicil disinheriting Mario [12 n 2, 56-682]
- discussed her estate plan with her attorney and financial advisor shortly prior to her death and did not mention any revocation to anyone [257, 352-358, 362, 364, 655-665]

A. Evidence of Non-Revocation Is Established By the Totality of the Circumstances

"If a will, shown once to have existed and to have been in the [decedent's] possession, cannot be found after [his or her] death, the legal presumption is that the [decedent] destroyed the will with the intention of revoking it" (Matter of Demetriou, 48 AD3d 463, 464 [2d Dept 2008]; see Matter of Fox, 9 NY2d 400, 407 [1961]; 3-14 New York Civil Practice: SCPA P 1407.01 [LexisNexis 2012]). The presumption, however, is not conclusive (see Matter of Fox, 9 NY2d at 400; Matter of Vogelsang, 227 AD 739, 739 [2d Dept 1929]). It can be overcome by either direct or circumstantial evidence of non-revocation, and in such cases the lost will may be admitted to probate (see SCPA 1407 [1]; Matter of Demetriou, 48 AD3d at 464; Matter of Mittelstaedt, 278 AD 231, 233 [1st Dept 1951] ["A presumption of intentional revocation may be

overcome by circumstantial evidence"]; Matter of Vogelsang, 227 AD at 739; Matter of Herbert, 89 Misc 2d 340, 340 [Sur Ct, Nassau County 1977]; see also Schultz v Schultz, 35 NY 653, 655 [1866] ["proof that the will ... was fraudulently destroyed in testator's lifetime ... may be established ... by circumstantial ... evidence"]).

"Evidence of non-revocation is established by the totality of the circumstances" (1-8 NY Practice Guide: Probate & Estate Admin § 8.08 [LexisNexis 2012]; see e.g. Annotation, *Sufficiency of Evidence of Nonrevocation of Lost Will Not Shown to Have Been Inaccessible to Testator — Modern Cases*, 70 ALR4th 323). Non-revocation, for example, may be established by evidence that the decedent engaged in conduct inconsistent with revocation (see 3-14 New York Civil Practice: SCPA P 1407.01 [4] [LexisNexis 2012]). For instance, this includes evidence that the decedent (1) searched for his or her will, (2) maintained an estate plan inconsistent with intestacy, (3) subsequently executed a Codicil, or (4) retained a copy of the will and/or the original codicil (see Matter of Stein, 2006 NY Misc LEXIS 5239, 236 NYLJ 69 [Sur Ct, New York County 2006]; Matter of Suidt, 2006 NY Misc LEXIS 4648, 236 NYLJ 103 [Sur Ct, New York County 2006]; Matter of Mulder, 2005 NY Misc LEXIS 4954, 234 NYLJ 58 [Sur Ct, Kings County 2005]; Matter of Edmondson, NYLJ, Apr. 21, 2000, at 29 [Sur Ct, Kings County] [attached]; Matter of Zeines, NYLJ, Mar. 2, 1999, at 32 [Sur Ct, Nassau County] [attached]; Matter of Herbert, 89 Misc 2d at 340; Matter of Rush, 38 Misc 2d 45 [Sur Ct, New York County 1962]; Matter of Pardy, 161 Misc 77 [Sur Ct, Clinton County 1936]; see also Matter of Kelly, 2007 WL 3000330 [Sur Ct, Nassau County 2007] [Record on Appeal, at 623-625]; Matter of Dawson, NYLJ, Nov. 28, 1983, at 15 [Sur Ct, Kings County] [attached]).[5]

[5] Although some of these cases involved uncontested probate proceedings, this factor is irrelevant. It is the duty of the Surrogate, even in an uncontested matter, "to be satisfied that all

Similarly, evidence of non-revocation includes (1) a decedent's long-term efforts aimed at avoiding intestacy and maintenance of a long-term relationship with an estate attorney for that purpose, (2) the non-revocation of a trust consistent with the will, (3) a prior alternative non-testamentary disposition for the disinherited family member, (4) a decedent's retention of voluminous records, (5) the ability of others to access the decedent's residence and/or records, and (6) a decedent's sudden departure to the hospital and away from his or her records and residence prior to his or her death (see Matter of Hirchler, 2011 NY Misc LEXIS 2841, 2011 NY Slip Op 31585U [Sur Ct, Nassau County 2011]; Matter of Lagin, 2008 NY Misc LEXIS 7721, 2008 NY Slip Op 30010U [Sup Ct, Nassau County 2008]; Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]; Matter of Sayers, 2008 NY Misc Lexis 1488, 239 NYLJ 45 [Sur Ct, New York County 2008]; Matter of Chitty, 2003 NY Misc LEXIS 2004, 229 NYLJ 41 [Sur Ct, Westchester County 2003]; see also Matter of Stein, 2006 NY Misc LEXIS 5239, 236 NYLJ 69 [Sur Ct, New York County 2006]; 11-187 Warren's Heaton on Surrogate's Court Practice § 187.04 [4] ["Preference Against Intestacy in Will Construction"] [LexisNexis 2012]).

In addition, another important factor that should be considered is the relationship between the decedent and those persons named as beneficiaries or disinherited by the will (see e.g. 70 ALR4th 323, §§ 17-20; Annotation, *Proof of Nonrevocation in Proceeding to Establish Lost Will*, 3 ALR2d 949, § 11 ["Friendly or unfriendly relations with others"]).

B. Generally, Whether the Presumption is Rebutted Should Be Left to the Jury

Whether a "presumption is rebutted [even a very strong one] will ordinarily be for the jury, since there will ordinarily be some credibility issue ..." (PJI 1:63 [3d ed], at 85 [citing

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legal requirements have been met before a propounded paper can be admitted to probate" (Matter of Ericson, 200 Misc 1005, 1009 [Sur Ct, Suffolk County 1951]; see SCPA 1408 [1]).

cases]; see Country Wide Ins. Co. v Nat'l R. R. Passenger Corp., 6 NY3d 172, 179 [2006] [noting that summary judgment should be denied where doubts exist]). "Where the evidence leaves open two possible findings, it is 'the [fact finder's] business to resolve the doubt[,]'" and the fact finder may decide to accept a finding contrary to the presumption (Green v William Penn Life Ins. Co. of N.Y., 12 NY3d 342, 346-347 [2009] [presumption against suicide] [citation omitted]; see Chaika v Vandenberg, 252 NY 101, 105 [1929] ["No fiction can deprive [a party] of his right to a trial upon a decisive question of fact which the record shows was never decided"]).

"Even where there is substantial evidence to the contrary, there is generally an issue for the jury" (PJI 1:63, at 85, citing Aetna Casualty & Surety Co. v Brice, 72 AD2d 927 [4th Dept 1979]). "Unless the facts are undisputed and not susceptible of conflicting inferences, the jury is to determine whether the presumption arises" (PJI 1:63, at 90 [discussing the presumption of death after three years' absence], citing Butler v Mutual Life Ins. Co., 225 NY 197 [1919]).

In the lost will context, summary judgment should not be granted as a matter of course based solely on the presumption arising from the lost will (see Matter of Demetriou, 48 AD3d 463, 464 [2d Dept 2008]). Rather, assuming a will opponent meets his or her initial burden, summary judgment may be granted only if a will proponent fails to raise a triable issue of fact or relies on pure speculation (see Matter of Winters, 84 AD3d 1388, 1388 [2d Dept 2011]; Matter of Passuello, 169 AD2d 1007, 1007 [3d Dept 1991]; see also Matter of Demetriou, 48 AD3d at 463-464).

C. The Decedent Maintained a Long-Term Estate Plan

The decedent maintained an estate plan throughout most of her life. Since 1954, the decedent executed five wills and a revocable trust [341-345]. The decedent also retained an

estate planning attorney, Mr. Pierro, Esq., to assist her with her estate plan [353-357]. As explained in Mr. Pierro's affidavit, the decedent utilized his law firms' services on numerous occasions from 1996 until just days prior to her death [353-357 (listing numerous services and explaining that the decedent made telephone calls to Mr. Pierro to ask legal questions)]. In addition, the decedent also utilized the court system and litigation attorneys to formulate her plan, including one aimed at disinheriting Mario [495-501].

All this effort and preparation evidences the decedent's common plan and scheme to create certainty in her estate and to avoid it from passing in intestacy (see Matter of Lagin, 2008 NY Misc LEXIS 7721, 2008 NY Slip Op 30010U [Sup Ct, Nassau County 2008]; Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]; Matter of Chitty, 2003 NY Misc LEXIS 2004, 229 NYLJ 41 [Sur Ct, Westchester County 2003]).

D. The Decedent's Estate Plan Provided For Only Three of Her Children

Since at least 1992, the decedent intended to leave her estate to only three of her children and spent a significant amount of time and effort in support of her intention [341-345]. The decedent, for example, twice fought Mario in court, once to protect her estate plan and another time to prevent him from obtaining an interest in her business [341, 495-501]. The decedent further executed three wills disinheriting Mario [341-342]. In December 2007, less than three years prior to her death, the decedent also executed a Codicil confirming the 2000 Will [343] (see Matter of Herbert, 89 Misc 2d at 340; Matter of Pardy, 161 Misc at 77; Matter of Mulder, 2005 NY Misc LEXIS 4954, 234 NYLJ 58 [Sur Ct, Kings County 2005]).

In addition, the sworn statements of the decedent's attorney and others regarding the decedent's stated desire not to benefit Mario also clearly establishes the decedent's intention to

avoid intestacy and to maintain her estate plan [355-357, 655-660] (Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23).[6]

Based on these circumstances, it is highly unlikely and purely speculative to assume that after litigating two lawsuits against Mario (and taking two successful appeals) and disinheriting him on numerous occasions with consistent reasons that the decedent suddenly changed her mind and decided to provide him (via intestacy) with an equal share with his siblings of the very business that she fought so hard to prevent him from obtaining. In fact, no evidence exists that the decedent had any intention of changing her long-term estate plan disinheriting Mario. It defies reason to assume that suddenly the decedent sought to thrust Mario, a long-time competitor, into the family furniture business co-owned and operated by the other three siblings.

E. The Decedent Did Not Intend to Deviate From Her Estate Plan

Based on the long-term desire of the decedent to disinherit Mario, it is highly unlikely and purely speculative to assume that the decedent intentionally suddenly destroyed her entire estate plan at the very end of her life without discussing the matter with anyone, including her financial advisor and long-time estate attorney [257, 349, 355-357, 362, 364, 655-665; see also 58-62]. If the decedent intended to undo her entire estate plan, she would have presumably informed at least Mr. Pierro of her intentions, and she could have done so in confidence [512-

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[6] The decedent's statements reflect her state of mind and surrounding circumstances. In addition, some of the decedent's statements were made to her financial advisor and attorney or during the decedent's execution of various estate planning documents [356-357, 655-660]. As such, such statements are part of the res gestae and admissible at trial [729-730] (see Matter of Engelken, 103 Misc 2d 772, 775 [Sur Ct, Nassau County 1980] [purporting to limit the admissibility of declarations of a deceased concerning revocation to only those which are part of the res gestae]; see also Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]; DiLorenzo v Ciancio, 80 Misc 2d 193, 201-202 [Sup Ct, Queens County 1974]). Further, even if hearsay, such statements may be relied upon to defeat summary judgment (see Matter of Ryan, 2005 NY Misc LEXIS 7465, *10-*11, 233 NYLJ 44 [Sur Ct, New York County 2005]; see also Guzman v L.M.P. Realty Corp., 262 AD2d 99, 100 [1st Dept 1999]).

513]. The decedent maintained a long-term relationship with her attorney, Mr. Pierro, since 1996 and had discussed the creation of a consistent irrevocable trust just days prior to her death [353-357]. The decedent's only motivation to execute the irrevocable trust was to avoid tax consequences associated with her then existing plan and not a radical departure [353-357].

The decedent would have undoubtedly notified her estate attorney and executed written documents if she intended to change her entire estate plan. Such an approach would have (1) been consistent with her past conduct and then existing documents, including the revocable trust, and (2) prevented her estate and children from incurring unnecessary legal expenses. As evidenced by the record, the decedent was never intestate from the date of the joint will until the decision below and valued certainty in her affairs [341-345].

Contrary to the holding of the Surrogate, no evidence exists that the decedent intended to create any new estate plan [10-23]. In fact, there is an utter lack of evidence to support any finding that the decedent executed any written documents inconsistent with her estate plan or discussed any such radical change.

The record evidences the complete contrary and fully supports a finding of non-revocation. The decedent, for example, did not mention or take any action evidencing any revocation [257, 342, 349, 355-357, 362, 364, 455, 655-665; <u>see also</u> 58-62]. The decedent further continued to make statements to others that she intended to disinherit Mario [355-357, 655-665] and executed documents reflective of her intent to disinherit him, including a codicil and trust amendment in December 2007 and a Power of Attorney in September 2010 [375, 553, 604]. In addition, the decedent further attempted to execute an irrevocable trust providing for only three of her children and not Mario [356, 557]. The document was discussed with the

decedent and prepared for her signature [356-357, 557]. However, the decedent did not live long enough to execute it [356].

The decedent also did not revoke or destroy the 2007 Codicil, her revocable trust, or the trust amendment, which all reveal the decedent's desire to distribute her assets to only three of her children and not Mario [12 n 2, 339-364, 375-376, 527-549, 553-555]. These actions are entirely inconsistent with any intention to revoke the 2000 Will and further demonstrate that the decedent intended to document and maintain her estate plan rather than leave it to speculation or radically alter it (see Matter of Herbert, 89 Misc 2d at 340; Matter of Pardy, 161 Misc at 77; Matter of Mulder, 2005 NY Misc LEXIS 4954, 234 NYLJ 58 [Sur Ct, Kings County 2005]). The validity and existence of these documents completely eliminates the possibility that somehow decedent sought to die intestate.

Contrary to the holding of the Surrogate, the decedent's estate plan did not anticipate intestacy. Such a plan would provide Mario with a means to obtain estate assets that the decedent fought so hard to prevent [341-345]. Such a result is not only inconsistent with the entire actions taken by the decedent for over fifty years prior to her death, but also creates a grave injustice that contradicts the decedent's long-time demonstrated intentions [508-510].

F. Mario's Continued Unwillingness to Contribute to the Decedent's Business Resulted in His Disinheritance

The factors causing Mario's disinheritance also did not change during the decedent's lifetime, which further supports the inference that the decedent did not change her estate plan [366, 508-510, 515]. The decedent explained in her prior wills that she had adequately provided for Mario during his lifetime; that Mario could support himself; and that she decided to leave everything, especially her business, to only three of her children because they dedicated their lives to her business [508-510, 515; see also 275-276, 297] (see Matter of Hirchler, 2011

NY Misc LEXIS 2841, 2011 NY Slip Op 31585U [Sur Ct, Nassau County 2011]; Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]; see also Matter of Chitty, 2003 NY Misc LEXIS 2004, 229 NYLJ 41 [Sur Ct, Westchester County 2003]).

In contrast to his siblings, Mario reaped the financial benefits of opening up his own business rather than working for the decedent [60, 297] (see Matter of Hirchler, 2011 NY Misc LEXIS 2841, 2011 NY Slip Op 31585U [Sur Ct, Nassau County 2011]; Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]). Mario also alienated himself from the rest of the family, sued his mother, and did not participate in family outings, which also caused his disinheritance [350-351, 495-501, 508-510]. At the time of the decedent's death, the record indicates that Mario continued to have issues with his family members and continued to profit from his own self-owned furniture business rather than assist in the family business [60, 297, 483].

Further, Mario's vague allegations regarding his alleged attempts to rekindle his relationship with the decedent are belied by the codicil, trust amendment, and Power of Attorney, as well as the decedent's non-revocation of the trust, her statements regarding her intent to disinherit Mario, and her plans to create an irrevocable trust for tax purposes [12 n 2, 58-62, 341-345, 355-357, 655-665]. In addition, although the decedent arguably could have decided to revoke her will for some other reason (e.g., to decrease the inheritance of her other three children), the record lacks any evidence to support the likelihood of a possible alternative basis for any such change. The decedent continued to maintain friendly relations with her three children named in the 2000 Will and, in fact, appointed them as agents in her Power of Attorney

just prior to her death [604-621]. In contrast, the decedent clearly continued to desire to prohibit Mario from sharing in her estate.

G. The Decedent's Records Were Voluminous and Accessible To Others

In addition, the record evidences that the decedent previously maintained voluminous records [350]. The decedent's children, including Mario and Bernard, had access to the decedent and her residence where she kept important and valuable papers, among other things [58-62, 267, 317-318, 323, 350, 484, 664]. In addition, the decedent was placed in the hospital and away from her records during the last weeks of her life [61, 235, 252-253, 266, 356, 462]. During her last days, the decedent allegedly had problems communicating and did not recognize anyone [61, 256, 261-263, 266-267]. After her death, Bernard, who previously disagreed with his mother's desire to change her first will, removed papers from the decedent's residence [323, 350, 495-497, 663-664]. When these facts are considered with the other evidence, it is not speculative to assume that someone other than the decedent may have accidentally or intentionally lost or destroyed the original 2000 Will or that the decedent herself may have accidently done so (see Matter of Miraglia, 2008 NY Misc LEXIS 5115, 240 NYLJ 23 [Sur Ct, Kings County 2008]; Matter of Sayers, 2008 NY Misc Lexis 1488, 239 NYLJ 45 [Sur Ct, New York County 2008]; Matter of Stein, 2006 NY Misc LEXIS 5239, 236 NYLJ 69 [Sur Ct, New York County 2006]; Matter of Chitty, 2003 NY Misc LEXIS 2004, 229 NYLJ 41 [Sur Ct, Westchester County 2003]; see also Matter of Shlevin, 157 Misc 40, 40 [Sur Ct, Richmond County 1935]).

In short, the Surrogate erroneously placed too little weight on the record evidence supporting non-revocation and did not consider that there is no factual evidence of revocation. As a result, the decedent's long-time estate plan has been completely destroyed based on the

naked application of a presumption that clearly should not apply in this case to determine the outcome.

POINT II THE DECEDENT'S EXECUTION OF THE 2007 CODICIL AT LEAST RAISES AN ISSUE OF FACT

The Surrogate erroneously disregarded the importance of the 2007 Codicil. It is well settled that the execution of a codicil can republish a prior will, as of the date of the codicil (see Matter of Campbell, 170 NY 84, 86-87 [1902]; Matter of Theaman, 65 Misc 2d 750, 750-751 [Sur Ct, Westchester County 1971]; Matter of Cable, 123 Misc 894, 899 [Sur Ct, Delaware County 1924] ["The principle is well established that a codicil executed with the formalities required by the statute operates as a republication of a will in so far as it is not altered by such instrument"]). Further, under EPTL § 3-4.6 (b), a prior will or one or more of its provisions may be revived by one or more of the following ways:

> "(1) The execution of a codicil which in terms incorporates by reference such prior will or one or more of its provisions.
>
> (2) A writing declaring the revival of such prior will or of one or more of its provisions, which is executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.
>
> (3) A republication of such prior will, whether to the original witnesses or to new witnesses, which shall require a re-execution and re-attestation of the prior will in accordance with the formalities prescribed by 3-2.1."

(see Matter of Theaman, 65 Misc 2d at 750-751; Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 3-4.6, at 555-557).

In this case, the presumption of revocation based on the missing will is of no moment. It is just as likely that the decedent "revoked" her 2000 Will, if at all, only shortly after obtaining the original from her attorneys four years after its execution [355]. Under such circumstances,

any alleged revocation would have been canceled by the decedent's revival of the 2000 Will based upon her execution of the 2007 Codicil, which confirmed, ratified, and incorporated the provisions of the 2000 Will (see Matter of Campbell, 170 NY 84, 86 [1902]; Matter of Theaman, 65 Misc 2d at 750 [incorporation by reference of a prior will pursuant to EPTL § 3-4.6]; see also 2-3 New York Civil Practice: EPTL P 3-4.6 [6] [LexisNexis 2012] ["Revival of Previously Mutilated or Destroyed Will"] ["Where the earlier will has been destroyed, it is still technically possible to revive it by means of a codicil or writing which complies with EPTL 3-4.6(b)(1) or (b)(2), assuming that other satisfactory proof of its contents is available" (citation omitted)] [attached]).[7]

Although the Surrogate deemed the revocation to have occurred only after the decedent executed the 2007 Codicil, the Surrogate's finding is based on pure speculation and lacks any evidentiary support [21]. In fact, the Surrogate's finding disregards the codicil, trust amendment, and Power of Attorney, as well as the decedent's non-revocation of the trust, her statements regarding her intent to disinherit Mario, and her plans to create an irrevocable trust for tax purposes [12 n 2, 341-345, 355-357, 655-665].

Thus, at a minimum, a material issue of fact exists regarding whether the decedent revoked her will before or after she executed the 2007 Codicil (see Matter of Kuszmaul, 491

[7] Some outdated authority seems to suggest that a codicil cannot revive a will revoked by mutilation or destruction (see Matter of Poorman, 27 Misc 2d 375, 375 [Sur Ct, New York County 1960]; Matter of Rosenberg, 205 Misc 528 [Sur Ct, King's County 1953]). However, EPTL § 3-4.6 does not impose this restriction and no evidence exists that decedent actually mutilated or otherwise destroyed her will (see 2-3 New York Civil Practice: EPTL P 3-4.6 [6] [LexisNexis 2012] [noting that "the underlying study of the Commission indicated that such a [mutilated or destroyed] will may be revived pursuant to this section" (citing Fifth Rep., Temp. Comm'n on Estates 420-425, 430-431 [1966])]). In addition, a copy of the will serves as a basis to reliably establish the provisions of the will (see SCPA 1407; compare Matter of Cable, 213 AD 512, 516 [3d Dept 1925], affd without opn 242 NY 510 [1926] ["Had the testator intended to revive the burned codicil he would certainly have rewritten it and would not have left its provision to the uncertainty of memory"]).

So2d 287 [Fl Ct of Appeal 1986] [relying on similar statutes and holding that the presumption was overcome]).

POINT III THE AFFIDAVITS AND SCPA 1404 TESTIMONY SATISFY THE REMAINING TWO PRONGS OF SCPA 1407

In addition, although not raised by the Surrogate, the record evidence also readily satisfies the remaining two prongs of SCPA 1407. Mario cannot cite to any evidence supporting otherwise and, in fact, cannot deny that the affidavits and SCPA 1404 testimony preclude any finding in favor of Mario as a matter of law.

A. <u>The Will Was Duly Executed</u>

The record reveals that the 2000 Will was duly executed. For example, the record contains a self-proving affidavit of the two witnesses, as well as an affidavit and affirmation from the attorneys who drafted, supervised, and witnessed the will's execution [352-358, 359-360, 373, 385-394]. Such evidence raises a presumption of due execution (<u>see</u> EPTL § 3-2.1; SCPA 1405 & 1408; <u>Matter of Walker</u>, 80 AD3d 865, 866 [3d Dept 2011] ["The execution was supervised by the attorney who drafted the will, and the will was accompanied by a self-executing affidavit signed by the attesting witnesses. [This creates] a presumption of due execution"]; <u>Matter of Leach</u>, 3 AD3d 763, 764-765 [3d Dept 2004]).

In addition, Mario has essentially admitted to the validity of the 2000 Will's execution by asserting that the 2000 Will revoked the prior wills [69]. Mario should not be permitted to take an inconsistent position challenging its due execution (<u>see</u> Fisch, NY Evidence § 803, at 475 [2d ed] ["An informal judicial admission is a declaration made by a party in the course of any judicial proceeding ... inconsistent with the position ... now assume[d]"]).

Accordingly, under these circumstances, no reason exists to deny probate on this ground.

B. The Provisions of the Will Are Evidenced by a Copy of the Will

The record also reveals that the provisions of the will are proved by a copy of the will (see SCPA 1407 [3]). The record contains, for example, an affidavit from the decedent's attorney, Mr. Pierro, who averred that he retained a true and correct copy of the 2000 Will upon providing the original to the decedent in April 2004 [38, 355]. Thereafter, the copy was offered for probate [24, 38]. Under these circumstances, no reason exists to deny probate on this ground (see SCPA 1407 [3]).

Accordingly, this Court should admit the 2000 Will to probate and/or remit the matter for a trial.

POINT IV THE CODICIL SHOULD BE ADMITTED TO PROBATE

Further, even if the will proponents had not overcome the presumption, the Surrogate erroneously precluded probate of the 2007 Codicil. In this regard, the court erroneously relied upon EPTL § 3-4.1.

EPTL § 3-4.1 (c) provides that the "revocation of a will, as provided in this section, revokes all codicils thereto" (emphasis added). That section of the EPTL, however, limits the acts capable of revoking a will by providing for revocation by another will or an "act of burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction performed by ... [the testator or another] person, in the presence and by the direction of the testator" (EPTL § 3-4.1).

Here, there is no evidence that the decedent revoked her will "as provided" in EPTL § 3-4.1. Not one "witness" mentioned anything about any subsequent will or any act of burning or tearing, etc. Rather, the only purported "evidence" of revocation of the 2000 Will cited by the Surrogate involved the application of a common law presumption. It is axiomatic that application of a presumption is not evidence (see Werking v Amity Estates, Inc., 2 NY2d 43, 48

[1956] [discussing presumption of regularity of proceeding conducted by sworn tax officers]). The Legislature did not include the presumption as part of the circumstances permitting a party to rely upon EPTL § 3-4.1 (c).

In addition, the evidence in this case also indicates that the decedent had no intention of revoking the executor provision of the codicil. The decedent, for example, created an amendment to the revocable trust with a similar provision and did not revoke it during her lifetime [553]. The decedent also executed a Power of Attorney just shortly before her death, in which the decedent outlined the same order of preference as in the 2007 Codicil for her children to serve as her agents [604].

Under these circumstances, the 2007 Codicil should be admitted to probate regarding the executor provision (see Matter Emmons, 110 AD 701, 705 [1st Dept 1906]; Matter of Lundequist, 183 Misc 803, 804 [Sur Ct, Kings County 1944] [permitting probate of codicil by itself without lost will]). In addition, given that the 2007 Codicil ratifies and confirms the provisions of the 2000 Will, the 2007 Codicil, together with a copy of the 2000 Will (incorporated by reference) should be fully probated together as a whole, with all the provisions incorporated therein as valid and effective (see EPTL § 3-4.6; Matter of Smith, 253 AD 731, 731 [2d Dept 1937]; Matter Emmons, 110 AD at 705; Matter of Theaman, 65 Misc 2d 750, 750-751 [Sur Ct, Westchester County 1971] [incorporation by reference of a prior will pursuant to EPTL § 3-4.6]; Matter of Brown, 6 Misc 2d 803, 803 [Sur Ct, Nassau County 1957] [admitting codicil to probate]; Matter of Lundequist, 183 Misc at 804; Matter of Pardy, 161 Misc 77, 83-84 [Sur Ct, Clinton County 1936]; see also Matter of Cable, 213 AD at 512).

In short, on the law and the facts, any presumption arising from the original 2000 Will being missing is insufficient to preclude the 2007 Codicil from being admitted to probate.

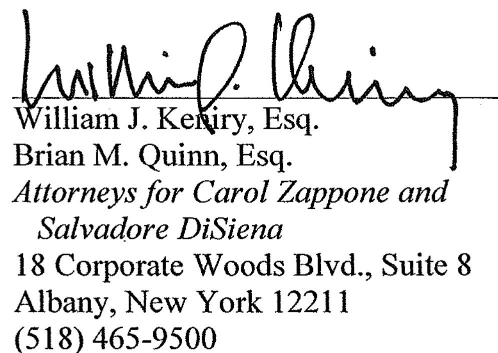
Accordingly, the 2007 Codicil should be admitted to probate based on the record evidence supporting its due execution and genuineness [38-39, 43, 349, 352-364, 375-376, 414-420, 435-439, 454-456] (see EPTL § 3-2.1; SCPA 1408; Matter of Walker, 80 AD3d at 866; Matter of Leach, 3 AD3d at 764-765).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Court should reverse the order of the Surrogate by (1) denying the will objectant's motion seeking partial summary judgment dismissing the petition and (2) granting the will proponents' cross motion seeking summary judgment granting the petition or, alternatively, directing a trial, together with such other relief as the Court deems just and proper.

Date: August 22, 2012
Albany, New York

TABNER, RYAN and KENIRY, LLP



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Attachments:

1. Matter of Edmondson, NYLJ, Apr. 21, 2000, at 29 (Sur Ct, Kings County)
2. Matter of Zeines, NYLJ, Mar. 2, 1999, at 32 (Sur Ct, Nassau County)
3. Matter of Dawson, NYLJ, Nov. 28, 1983, at 15 (Sur Ct, Kings County)
4. 2-3 New York Civil Practice: EPTL P 3-4.6 (6)

GULZAR v. New York Edge Taxi Corp.; IKECHUKW v. NYCTA — Order signed.

Justice Spodek

TAITZ v. MOISEENKO — Order signed.

SURROGATE'S COURT

Surrogate Feinberg

MATTER OF CLIFFORD A. EDMONDSON, dec'd QDS:44255169—In this contested proceeding for letters of administration, the temporary administratrix moves for summary judgment dismissing the answer and objections of respondents which seek the probate of a purported lost will.

Background

Decedent Clifford Edmondson died on December 27, 1998, survived by his sister, Frances Edmondson Baines (hereafter "petitioner"). Prior to his death, decedent visited attorney Jeffrey Hap ("Hap") for the purpose of having a will drawn. The record reveals that decedent executed an instrument on September 26, 1995 under the supervision of Hap, who was nominated therein as executor and trustee of the estate. The propounded instrument disinherits the petitioner, decedent's sole surviving distributee, and leaves the entire estate instead to nine charities.

Shortly after decedent's death, Lee Roy Everette ("Lee Roy"), the decedent's upstairs tenant and petitioner's cousin, searched the decedent's premises for important papers. Bank documents belonging to decedent were found in a desk drawer; a photostatic copy of the September 26, 1995 instrument was found on a closet shelf. Although the decedent had received the original will from the attorney draftsman, it could not be located after his death.

The petitioner thereafter filed with this court for letters of administration. The charities and nominated executor filed an answer objecting to letters being issued to petitioner on the basis, inter alia, that the purported will dated September 26, 1995 was not revoked by the decedent but, instead, was lost or fraudulently destroyed (SCPA 1407). On July 1, 1999, temporary letters of administration were granted to the petitioner.

Discussion and Analysis

The petitioner now moves for summary judgment dismissing the answer and objections and granting her full letters of administration.

The task of a court when disposing of a motion for summary judgment is issue identification rather than issue determination (see, Sternbach v. Cornell Univ., 162 AD2d 922, 923; Moskowitz v. Garlock, 23 AD2d 943-1 Ferrante v. American Lung Association, 90 NY2d 623). Furthermore, a party moving for summary judgment has the burden of establishing a prima facie case by admissible evidence (see, Bush v. St. Clare Hosp., 82 NY2d 738, Friends of Animals Inc v. Associated Fur Manufactures Inc., 46 NY2d 1065).

In the case at bar, the petitioner relies upon the common law presumption, which arises when a will previously executed and in the testator's possession cannot be found after the testator's death, that such will was revoked by the testator animo revocandi (see, 39 NY Jur 2d §663; Collyer v. Collyer, 110 NY 481; In re Kennedys Will, 167 NY 163; In re Staiger's Will, 243 NY 468).

In furtherance of the position that summary judgment should be awarded dismissing the lost will claim, petitioner submits her own affidavit and the affidavit of her cousin Lee Roy. The court notes that the petitioner's affidavit is totally barred by the Dead Man's Statute (CPLR 4519), as she will inherit his entire estate as sole distributee if the purported lost will is not admitted to probate. While evidence that runs afoul of the Dead Man's Statute is admissible to oppose a motion for summary judgment, it is not admissible to support the granting of summary judgment in one's favor (see, Philjps v. Kantor, 31 NY2d 307; Raybin v. Raybin, 15 AD 2d 679).

Lee Roy's affidavit, while not barred by CPLR 4519, is barred to the extent that it seeks to introduce statements made by decedent wherein he expressed dissatisfaction with the September 26, 1995 instrument and also expressed his intention to revoke the same It is well settled that testators' statements concerning the validity or lack validity of their wills are not admissible, unless they form part of the res gestae (see, Richardson, Evidence §8-602 [Farrell 11th ed] citing Waterman v. Whitney, 11 NY 157).

The petitioner's sole remaining ground for summary judgment is the presumption of revocation as set forth in Collyer (supra) and its progeny. This court is also mindful of the recent decision of the Appellate Division, Second Department, wherein the Dutchess County Surrogate's Court was reversed for failing to grant summary judgment when the original will had been in the testator's possession but could not be found after her death (Matter of Ann Evans 264 AD2d 482). In Evans, the Appellate Court reversed the trial court because the petitioner failed to raise a triable issue as to whether the presumption of destruction with intent to revoke could be overcome (see also, Matter of Philbrook, 185 AD2d 550, supra, Matter of Passuello, 169 AD2d 1007). The record before us is clearly distinguishable from the facts in Evans. Here, the fact that decedent kept a photostatic copy of the will among his possessions could possibly rebut the presumption of revocation.

In Matter of Mittelstaedt (278 AD 231) the Appellate Division held that the failure to produce an original executed ribbon copy of a will gives rise to a presumption of destruction animo revocandi that could be overcome by circumstantial evidence, inter alia, that the decedent retained an executed carbon counterpart of the will. The Mittelstaedt Court emphasized that where an executed carbon counterpart of the will was retained by the decedent, the issue of whether the missing ribbon copy established revocation was an issue to be resolved by the trier of fact. That was so because evidence was available which tended against the conclusion of revocation, to wit that decedent had ready access to the executed carbon copy of the will up until her last illness and that she made statements to a neighbor that she considered her will to be extant and effective. The court notes that the Mittelstaedt, holding is rather troubling. In deciding the case, the First Department apparently credited statements of decedent to third parties concerning the validity of her will. However, such statements are not admissible for that purpose unless they form part of res gestae (see, Waterman v. Whitney, cited supra).

In applying Mittelstaedt other courts have reached contrary results. In Matter of Herbert, (89 Misc2d 340), for instance, the Nassau County Surrogate admitted a photostatic copy of a will to probate where the original was last in the possession of the testator but could not be located after his death. The Court found that decedent's retention of the photostatic copy of the executed will, along with the original executed codicil, overcame the presumption of revocation. In Matter of Engelken (103 Misc2d 772), the same Surrogate denied probate to a will where the original was in testator's possession, could not be found after her death and an unexecuted carbon copy marked "copy" was found among her possessions. The court reasoned that because the carbon was not signed by the witnesses and also because the instrument bore the notation "original in safe deposit box in Jam. Savings Bank", probate could be denied as the presumption of revocation was not overcome.

In attempting to apply the relevant case law in deciding the instant motion, this court notes that the Mittelstaedt, Herbert and Engelken, courts reached a decision on the issue of the presumption of revocation only after a hearing when the decedent retained merely an executed carbon, an unexecuted carbon, or a photostatic copy of an instrument. Accordingly, this court finds that the issue of whether or not our decedent's retention among his possessions of a photostatic copy of the will tends to rebut the presumption of revocation is an issue to be resolved at trial.

Conclusion

Therefore, the motion for summary judgment is denied.

This constitutes the decision and order of the court.

MATTER OF DOROTHY KAPLAN, dec'd QDS:44255570—After conference with the court, the objections to the accounting were settled pursuant to a stipulation placed on the record, except for the question of the legal fees to be awarded to the law firm of Janvey, Gordon, Herlands, Randolph, Rosenberg & Cox, counsel to the executrices, which was submitted to the court for decision.

The attorney has submitted his affidavit of services. In addition, he has been deposed and his deposition submitted to the court. Counsel is seeking legal fees of

ESTATE OF EDWARD ZEINES, deceased *QDS:74503122* — Offered for probate is a last will and testament dated August 1, 1991 and another last will and testament dated June 4, 1992 identified as a codicil. The latter instrument reads more like a confirmation and clarification of the 1991 instrument then anything else. The 1991 instrument was attorney drawn and supervised while the 1992 instrument was prepared by the testator alone on his computer and he arranged for its execution.

At the time of the execution of the 1992 instrument, the decedent was physically unable to speak or write without the aid of a computer. He was suffering with Lou Gehrig's Disease. which rendered him virtually completely disabled. The witnesses called before the court confirmed his testamentary capacity at the time the propounded instruments were signed as well as his ability to communicate clearly and concisely through his computer typing skills.

The original of the 1991 instrument could not be found despite a diligent search. The original of the 1992 instrument was found among decedent's effects. Any inference or presumption that the last 1991 instrument was destroyed by the decedent intending to revoke it is rebutted by two important findings.

(1) The proof showed that the decedent was physically incapable of destroying the original 1991 instrument by himself, due to his disability. He would have had to have someone do it for him and there is no suggestion that anyone at the hospital where he was confined rendered such aid.

(2) A revocation of the 1991 instrument is totally inconsistent with the 1992 instrument, the original of which was in decedent's possession. The 1992 instrument incorporates the 1991 instrument by reference and basically repeats all of the terms. In fact, the 1991, instrument can probably stand on its own without the 1991 instrument and the estate would be distributed in the same manner.

Accordingly, the court finds that the decedent did not revoke his August 1, 1991 will and a copy of such instrument shown to be true and complete along with the June 4, 1992, instrument shall be admitted to probate.

Settle decree.

SURROGATE'S COURT

Surrogate Bloom

ESTATE OF THOMAS W. DAWSON, deceaaed—Decedent died on April 2, 1982 at the age of eighty-three possessed of a substantial estate. The propounded instrument consists of an alleged unrevoked will executed on March 29, 1978, the executed copy of which has been lost, and a codicil thereto dated Oct. 8, 1980 the original of which is extant and now offered. No one has appeared in opposition to probate.

Proof of a lost or destroyed will is governed by SCPA 1407 which, as recently amended, provides, in substance, that it may be admitted to probate only if it is established that it was duly executed and was not revoked and if all of its provisions are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete (L. 1983, c. 672 [eff. July 25, 1983 except where a decree of probate or administration had become final prior thereto]). Despite its non-incorporation into the statute, the strong, but rebuttable, common law presumption that a will last known to have been in the testator's possession which cannot be found after his death was destroyed by him animo revocandi continues to obtain (see, e.g., Matter of Danziger, 57 Misc. 2d 1014, 293 N.Y.S. 2d 979 [Surr. Ct. Nassau Co., 1968]). Proof on each of these elements was taken before a senior law assistant-referee.

Due execution of the codicil was established principally by the testimony of the attorney who had prepared it in accordance with decedent's practice instructions and who, along with his wife, acted as an attesting witness thereto. The wife of the attorney-draftsman was not examined before the court, but her deposition setting forth the usual averments as to testamentary capacity and as to the observance of the required formalities of execution is on file. Additionally, the codicil contains a signed attestation clause. The attorney-draftsman was never shown the instrument dated March 29, 1978 to which the codicil referred and he had no personal knowledge which would establish with certainty the fact of its execution on that date or otherwise. Considerable testimony tending to establish the propounded will's execution was, however, adduced from several sources.

sources.

Edmund J. Kane, Esq., whose wife is an aunt of one of the proponents, testified that he had known the decedent for forty years and had represented him in a professional capacity in connection with the probate of his wife's will and also of another in which he had been named executor. During the Christmas season of 1977, decedent approached him about changing his then current will and indicated he would send a note which he did, in fact, do as promised a few days into the new year of 1978 accompanied by a copy of his April 23, 1977 will and instructions for modifying it. His cover note mentioned that he would have witnesses sign it and would return the original to the attorney for safekeeping and these intentions were reiterated in a subsequent note to Mr. Kane after decedent had approved the draft that Mr. Kane had mailed to him incorporating the desired changes. Mr. Kane mailed a typed original to decedent for execution on Jan. 17 or Jan. 18. No instructions were included regarding its proper execution because, in Mr. Kane's words, "Mr. Dawson was not the kind of person you gave instructions to; he instructed you as to what he wanted done."

Eugene Tully, decedent's eldest grandson and one of the proponents, testified that decedent had shown him his will in 1978, explaining as he did so that he was to "take charge" and to "take care of everybody." Mr. Tully did not recall the date of the will that he was shown but remembered that he and his aunt, the other proponent, were named as co-executors, that each of them was slated to receive two "shares" and that all of his grandfather's descendants in any degree then living were named therein, all of which is consistent with the contents of the March 929, 1978 propounded will but also with the April 23, 1977 will as well.

Edward Mitchell, whose full name appears on a witness line on the conformed copy of the purported lost will, and Marie Mitchell, his wife, whose first name likewise appears thereon, testified that they had indeed acted as subscribing witnesses to a will of Thomas W. Dawson at his home which was opposite their own on East 40th Street. Though neither could remember the date of execution, they each had a memory that the weather or season was such that they did not need heavy overcoats and that it was perhaps six to eight years ago. No other testamentary instrument was ever witnessed by the couple for Mr. Dawson. Neither of the Mitchells read the will, knew its provisions or laid eyes on it after the execution ceremony but Edward Mitchell had a recollection that it had consisted of several pages, as does the conformed copy.

recollection that it had consisted of several pages, as does the conformed copy.

The conformed copy is the final link in the evidentiary chain tending to establish due execution of the will. It is a photocopy evidently made from the same original as the copy retained by Mr. Kane for his files which is likewise in evidence. The writing conforming the copy includes the crossing out of the word "February" preceding the typed words "in the year One Thousand Nine Hundred and Seventy-Eight," the substitution therefor of "March" and the supply of the day of the month as the "29th." The remainder consists of the initials "TWD" in the line used for the testator's signature, the listing of the witnesses' names as above described and the notation of each witness's address as "836 E. 40." Edward Mitchell, who had received signed communications from decedent, testified that he believed this material to be in his handwriting, though he could not say so with absolute conviction. Proponent Eugene Tully, who impressed the hearing officer as a credible witness, averred that it was undoubtedly in his grandfather's hand. In any case, the court is satisfied after its own comparison of known samples of Mr. Dawson's handwriting supplied by Edmund J. Kane (see CPLR 4536) that the copy was conformed by him.

While decedent had made known his intention to Mr. Kane to forward the will to him for safekeeping once he had had it witnessed by neighbors, he never did so. Mr. Kane subsequently acquired the impression (he recalls not how) that the will had been executed and also had a vague recollection that decedent had told him he had placed it in his vault. The testimony of Eugene Tully was likewise that decedent had told him that the original will was in his safe deposit box and had done so on more than one occasion, the last being possibly in 1980. Finally, there is a notation in decedent's handwriting on the will envelope in which Mr. Tully testified that he had found the conformed copy of the March 29, 1978 will at decedent's home that the original was in a certain safe deposit box identified by bank and box number. Thus, all evidence points to the fact that the will was last known to have been in the custody of and under the control of the decedent and its nonproduction after a diligent search gives rise to the presumption that the will was destroyed by the testator with the intent to revoke it.

Upon all of the evidence, however, the court finds that the presumption of [illegible] The execution of the codicil on Oct. 8, 1980 attests

(Decisions continued on next page)

to the fact that at least upon that date, which was one and one-half years prior to his death, the testator had not revoked the March 29, 1978 will but rather ratified and confirmed it as expressive of his ongoing testamentary plan except insofar as then modified by adding a second devisee of his bungalow property and by adding the names of three great-grandchildren who had been vorn subsequent to the will to share in the residuary estate (see Matter of Herbert, 89 Misc. 2d 340, 391 N. Y. S. 2d 351 [Surr. Ct., Nassau Co., 1977]; Matter of Pardy, 161 Misc. 77, 291 N. Y. S. 969 [Surr. Ct., Clinton Co., 1936]). Furthermore, the fact that found among decedent's effects at his home was a will envelope containing the conformed copy of the March 29, 1978 instrument and which noted that the original was in box 3394 at the Greater New York Savings Bank at 1550 Flatbush Avenue, the same box in which the original codicil was found after his death, strengthens the case for drawing a confident conclusion that the disappearance of the original will was inadvertent (cf. Matter of Herbert, supra [presumption of revocation overcome where a reproduced copy of the original will was found in decedent's bedroom drawer with a codicil executed fifteen months previously]). This result is most compatible with the abundant testimony that decedent was not only in frull possession of his mental faculties, but a methodical person of business acumen who relished his independence and was accustomed to exercising it. In particular, he was more than marginally familiar with estate matters as he had several times acted as executor and/or trustee of the estates of various former partners in the engineering consulting firm of which he had been the secretary-treasurer. In fact, he had seemed so knowledgeable that the attorney-draftsman of the codicil departed from his usual practice by preparing the codicil for him without asking for the original will. The fact that attorney Edmund J. Kane had sent him a typed original will without including instructions for its execution was adverted to earlier. That a person of such character would abandon his painstakingly conceived and frequently revised testamentary plan under such errant circumstances appears highly unlikely. It appears especially so when one takes into account that the dispositions under his plan, aside from a bequest for Masses for the repose of his [illegible]

benefited exclusively his surviving daughter and all of his grandchildren and great-grandchildren, all of whom are natural objects of his bounty but many of whom would receive nothing in intestacy.

The court is satisfied that the propounded instrument, consisting of a lost will executed March 29, 1978, all of the provisions of which have been clearly and distinctly proved by a copy of the will proved to be true and complete (SCPA sec. 1407 [3]) and which was not revoked (SCPA sec. 1407 [1]) and of a codicil thereto dated Oct. 8, 1980, is genuine, was validly executed in its respective segments and that at the times of the respective ecutions, decedent was competent to make a will and not under restraint (EPTL sec. 3-2.1; SCPA sec. 1408).

Probate of the instrument as thus constituted is decreed.

Settle decree setting forth the entire instrument.

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2-3 New York Civil Practice: EPTL P 3-4.6[6]

New York Civil Practice: EPTL

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ARTICLE 3 SUBSTANTIVE LAW OF WILLS
PART 4 REVOCATION OF WILLS AND RELATED SUBJECTS
§ 3-4.6 Revocation or alteration of later will not to revive prior will or any provisions thereof

2-3 New York Civil Practice: EPTL P 3-4.6[6]

P 3-4.6[6] Revival of Previously Mutilated or Destroyed Will

Issues of proof may arise where an earlier will is mutilated or destroyed and a subsequent attempt is made to revive it. Nevertheless, the underlying study of the Commission indicated that such a will may be revived pursuant to this section. [1] If the document is still in existence, although crossed out or otherwise defaced, it may nevertheless be republished pursuant to EPTL 3-4.6(b)(3).

Where the earlier will has been destroyed, it is still technically possible to revive it by means of a codicil or writing which complies with EPTL 3-4.6(b)(1) or (b)(2), assuming that other satisfactory proof of its contents is available. [2] However, such a revival may be subject to suspicion and should not be employed unless absolutely necessary. As in most situations, execution of a new will would be the preferred method to resolve any doubts.

The taping of a torn will does not revive the will. *In re Bostick* [3] involved the attempted probate of a will that had been found in the decedent's briefcase in his bedroom, which had been torn up and then taped back together. The will was deemed to have been revoked by the tearing. The act of taping the will did not serve to revive it as it was not in accordance with the formalities of EPTL 3-4.6.

FOOTNOTES:
Footnote 1. *See* Fifth Rep., Temp. Comm'n on Estates 420-425, 430-431 (1966).

Footnote 2. *See In re* Cable, 123 Misc. 894, 206 N.Y.S. 501 (Sur. Ct. Delaware County 1924) , *aff'd*, 213 A.D. 512, 210 N.Y.S. 187 (3d Dep't 1925) , *aff'd*, 242 N.Y. 510, 152 N.E. 405 (1926) .

Footnote 3. *In re* Bostick, N.Y.L.J., Oct. 1, 2009, at 39 (Sur. Ct. Kings County) .