

STATE OF RHODE ISLAND
PROVIDENCE, SC

PROBATE COURT
CITY OF PROVIDENCE

In Re ESTATE OF ISABELLA SCHIANO
Decedent estate

No. 2001-128

Decision

This case is before the court on the Petition to allow the purported will of Isabella Schiano (“decedent”) dated December 1, 1989. She died on February 7th, 2001. The petition is brought by one of the two named Co-Executors under the will, George DeResta, the testator’s brother-in-law, (“Proponent”). The purported will submitted is a photo copy of the original will.

Mary Scully, Isabella’s niece and one of her statutory heirs at law, filed an Objection to the allowance of the will and a Miscellaneous Petition requesting that a document entitled: “Last Will & Testament Interview Sheet”¹ be admitted as the last will of Isabella Schiano. Richard Ferrazzano, another heir at law of the decedent, was represented by the same counsel to object to the allowance of the 1989 will. The Objectors initially raised an issue as to a deficiency by the Proponent in identifying all the heirs at law of the decedent. No allegations of undue influence, lack of testamentary capacity or fraud were raised by the Objectors nor did they claim that the photo copy of the will should raise the refutable presumption that the original will was destroyed by the decedent.

Travel of the case

The matter was heard in Probate Court on June 21st, 2001 at which time the Proponent offered the testimony of Joseph A. Croce, Esquire² the draftsman of, and witness to the execution of the will submitted herein. Mr. Croce testified that the statutory

¹ This document was admitted as evidence in the Probate Court hearing on the matter on June 21st, 2001 and was marked as a full exhibit as Objector’s 1.

² Mr. Croce is a licensed member of the bar in the Commonwealth of Massachusetts, but not Rhode Island.

formal requirements for execution of a will as set forth in **RIGL 33-5-5** were met at the time the will was signed by the decedent in December, 1989; he also testified that she was competent to make a will and understood the document presented herein and was given the original will, with instructions to keep it in a safe place³. He testified that he had a long standing friendship with Mrs. Schiano and visited often with her. Sometime in September or October of 2000, she called him (more than once) to discuss her will; his recollection was that she remembered the contents of it and did not wish to change it. He testified that he assured her it was still valid.

He met with her at her home during this time frame when she stated to him that she could not find the original will. He testified that he looked through her desk and could not find it; she asked him if this was a problem. He responded, in a *classic understatement*, that it could be and encouraged her to continue searching for the original will. Thereafter, he never spoke with her again. He never mailed her a photo copy of the will which he retained in his file at his office in Taunton. After Mrs. Schiano's death, in February 2001, he provided a copy of his photo copy to the named Co-Executor therein and that is what is now before this court.

George DeResta, the named Co-Executor of Mrs. Schiano's purported will, testified that he searched Mrs. Schiano's home (desk and closet) after she died, but did not find the original will. He testified that he did not find any of her "papers" (bank records and the like) either; he also denied any knowledge of a bank safe deposit box.

Mary Scully, the niece of the decedent testified in opposition to the purported will and in support of the Last Will & Testament Interview Sheet. She stated that she had lived with Mrs. Schiano for 14 years prior to her death and had taken care of her exclusively during her last illness of approximately 6 months; according to her, Mrs. Schiano was practically bed ridden for the 3 months prior to her death and required almost constant care from her.

She further testified that Mrs. Schiano had said if Mary Scully was good she would be left her home. She stated that the household bills were paid equally by the two of them; she also said that Mrs. Schiano had given her gifts over time and had made her a

³ Mr. Croce had the will executed at RI Attorney Charles Ajootian's office; Attorney Croce retained a photo

joint owner with her of a \$62000 bank account. She further stated that sometime prior to her death, Mrs. Schiano had asked Mary to call “Joe” (*Croce*) for the purpose of having him visit her and change her will, which she admitted for whatever reason was not done. She believed that in the month prior to her death, the decedent intended to revoke her will and that the aforementioned Last Will & Testament Interview Sheet is an accurate representation of how the decedent wanted to dispose of her property.

No other witnesses were presented by the Objectors. Neither party submitted a brief in support of their respective positions.

Findings Of Fact and Conclusions of Law

The court finds that the Proponent has complied with the **Notice Requirements** of RIGL 33-22-3,4,6. Further, the matter was duly advertised pursuant to RIGL 33-22-7. Therefore, pursuant to RIGL 33-22-14, the court finds that statutory Notice requirements have been met by the Petitioner herein.

In Rhode Island, the burden of proof in a will contest is a shifting one, with different evidentiary standards for the Proponent and Objectors. Initially, the Proponent for the allowance of a will must establish its validity as to its *statutory compliance*. The testator must be eighteen (18) years old, **appear** to be of sound mind to the two (2) subscribing witnesses RIGL 33-5-5, not be coerced to declare the document as his last will and testament, and appear to understand its contents and be of sound mind and belief. The witnesses testify that the will was executed by the testator or signed at his direction, acknowledged by him as his last will and testament, in their presence and they then subscribe in his/her presence and in the presence of one another that all the formal requisites to a valid will have been met. RIGL 33-7-26 and Hazard v Bliss 43 RI 431. The Proponent has satisfied this requirement as to the document presented through the testimony of Attorney Croce. However, efforts to locate the original will executed by Mrs. Schiano on December 1st, 1989 have not yielded any results and a photo copy of the executed original will has been filed for allowance by this court. The Proponent is relying on RIGL 33-7-24 which provides in part:

copy of the executed will.

...In case the original will is lost, on proof of loss, the copy may be proved in the same manner and shall have the same effect as the original.

At common law, in those cases that the decedent had custody of the original will and after death it cannot be found, there is a rebuttable presumption that the will was revoked by the decedent. 86 ALR 3d- 980. The burden is on the proponent to establish that the decedent did not revoke the will; there are no Rhode Island cases supporting this premise.

In fact, in addition to the above referred statute dealing with allowing a photo copy to be used as the last will and testament of a decedent upon proof of loss of the original, Rhode Island has adopted specific statutes for revoking a will. RIGL 33-5-10 details the usual methods for revoking a will; RIGL 33-5-11 was adopted stating that no will shall be revoked by **presumption of intention** on the grounds of an alteration in circumstances. Likewise, RIGL 33-5-9 provides for the revocation of a will upon the subsequent marriage of a testator unless the will indicates it was made in contemplation therein; RIGL 33-5-9.1 provides a partial revocation of a will leaving property to a subsequently divorced spouse unless it appears from the will that it was the testator's intention to so leave the property to a divorced spouse.

In this case, the testimony submitted by Mr. Croce clearly indicates that the original will was lost. This fact first was discovered by Mrs. Schiano herself as stated to him in their Fall, 2000 meeting and telephone conversations. I find his testimony credible and objective; there never was any mention by Mrs. Schiano to him that the original will had been intentionally destroyed or burned as required by the Rhode Island statute on revocation, *supra*, nor was there any evidence or submission of a Revocation document executed by Mrs. Schiano with the same formalities as a will. Mary Scully did not testify that Mrs. Schiano had destroyed the original will either; she stated that she did not know where it was. The evidence herein is overwhelming to rebut any presumption of revocation because the original will is lost. Therefore, this court finds that the Photo Copy of the original will meets the necessary formal standard for allowance by the Court.

Next, the Court will consider the Objectors Petition for allowance of their Exhibit 1- Last Will & Testament Interview Sheet, along with the testimony of Mary Scully, to

support the allowance of this document as the purported will of the decedent. The document is undated, not witnessed by two disinterested parties and does not contain the signature of the decedent in the normal conclusionary place, among other things. It was allegedly prepared by Mrs. Schiano less than a month before she died when according to Ms Scully she was “really sick” and needed 24 hour care. Ms. Scully testified that the decedent wanted to “take care” of her in her will. She had 14 years to do this with a will and did not.(She may have accomplished it with non-probate assets.) The Court finds as a matter of fact the document submitted by the Objectors does not meet the statutory requirements for a last will and testament in Rhode Island. RIGL 33-5-5 .Therefore, the Objectors petition for allowance of the “Last Will & Testament Interview Sheet” is denied. Further, the Court finds that, based on the evidence submitted, the decedent did not revoke her December 1st,1989 will during her lifetime and the photo copy of the aforesaid will shall be allowed as her last will and testament.

The named fiduciaries in the will, George DeResta and Marie Josephine Kourmpates are appointed Co-Execuors and Co-Appraisers. Bond is set at \$200,000 without surety.

DATE:

ENTER:_____

BY ORDER:_____