

STATE OF RHODE ISLAND
PROVIDENCE, SC

PROBATE COURT
CITY OF PROVIDENCE

In Re ESTATE OF MARGARET DE FUSCO
Decedent estate

No. 2002-330

Decision

This case is before the court on the Petition(s) to allow **either** the will of Margaret DeFusco (“decedent”) dated January 28th, 1998 or a will dated May 17th, 2000. She died on July 12th, 2002. The **1998 will** is an original document while the **2000 will** submitted is a photo copy, including signatures.¹ The decedent had three (3) children: Margaret M. Provoyeur, Nicole DeFusco and William DeFusco, Jr. and no surviving spouse. For purposes of this decision, the decedent’s children will be referred to by their first name and the wills in contest will be referred to as the “**98 will**” and “**2000 will**” respectively. After unsuccessful attempts to settle the case, a hearing was held in Probate Court on April 22, 2003. Both purported documents were admitted as full Exhibits. No issues as to fraud, testamentary capacity, or undue influence were raised nor are they addressed in this decision.

Travel of the Case

The **2000 will** appoints Margaret and William as Co-Executors and leaves all the decedent’s property, including real estate at 71-73 Freese Street, Providence, RI, to the three (3) children, equally. In the **98 will**, Margaret is named sole Executrix, William is **specifically omitted** from sharing in the estate at all, and the decedent’s property is left to Margaret and Nicole equally².

¹ Both wills were prepared by Attorney Robert A. Gentile, witnessed by him and his secretary and signed by the decedent.

² Except her furniture which she bequests to Niocole .

Attorney Robert A. Gentile, the draftsman of, and witness to the execution of both the wills submitted herein, testified that the statutory formal requirements for execution of a will as set forth in **RIGL 33-5-5** were met at the time both wills were signed by the decedent; he also testified that she was competent to make a will and understood the documents presented herein were her last will and testament. **RIGL 33-7-26**. He testified that he gave Mrs. DeFusco the original document(s) in **1998** and **2000**, as has been his office's long standing practice, with instructions to keep it in a safe place³ and to destroy any prior wills. He opined that Mrs. DeFusco executed the **2000 will** to in his words, keep peace in the family. He had no knowledge of the whereabouts of the original of the **2000 will**. The proponent of the **2000 will** did not testify nor were any other witnesses presented in its support for allowance.

The proponents of the **98 will**, Margaret and Nicole, did not testify in its support either; however Yolanda Archetto, the decedent's first cousin and close confidant, according to her testimony, testified on their behalf. She testified that she witnessed Mrs. DeFusco, sometime in the fall of 2000, tear the **2000 will** and throw it in the garbage. She testified that as she observed her doing this, the decedent stated to her that her son William, Jr. had not been coming around and that she had made a mistake in executing the **2000 will**. On cross examination, she admitted she was nervous testifying and that she made a mistake if she had referred to the will that was destroyed as being the **2002 will** in her direct testimony. She was adamant, however, that Mrs. DeFusco had exclaimed that she was destroying the will that left her property equally to her three (3) children, even though she (Ms Archetto) did not read or personally examine the document that Mrs. DeFusco tore up.

The proponents of both wills also stipulated to the allowance of Attorney Michael Fitzpatrick's deposition as a full exhibit. In summary, his deposition indicates that he had prepared a will for Mrs. DeFusco in February of 2001. Two unsigned copies of this will are attached to his deposition (Exhibit A and B); both copies contain the same devises and powers⁴. This will leaves all property equally to her three (3) children; there is a clause, which allows Nicole and Margaret to reside in the Freese Street real estate for

³ Attorney Gentile retained a photocopy of each of the executed wills.

⁴ The difference is that **A** names James Provoyeur as substitute Executor should Margaret not serve and **B** names Nicole as substitute. **B** is the will that attorney Fitzpatrick recalls being signed.

as long as they desire, provided they pay all expenses and costs of the house. Her executor is not authorized to sell the real estate without consent of her surviving children **or** if said consent is withheld, with Probate Court permission. The will was signed at the decedent's home and given to her for safekeeping⁵; no testimony was presented concerning the status of this will, other than the attorney's deposition⁶. It is not an issue in this proceeding.

No other witnesses were presented. The parties submitted briefs in support of their respective positions.

Findings Of Fact and Conclusions of Law

In order for this court to consider allowance of the copy of the **2000 will** to be admitted as the last will and testament of the decedent, either of the following must be found:

- That the decedent herself lost or misplaced the original will; or
- That someone other than the decedent had the care and custody of the original will and that person has either destroyed or is withholding the original will from probate.⁷

As to the first proposition as stated above, the Proponent is relying on **RIGL 33-7-24** which provides in part:

.... 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 refutable presumption that the will was revoked by the decedent. **86 ALR 3d- 980**. The burden is on the proponent to establish by clear and convincing evidence that the decedent did not revoke the will; there are no Rhode Island cases specifically on point. However, in **Dawley v. Congdon** 42 R.I. 64 the court held that a will which had been left in the possession of the testatrix and found with her possessions after death, the inference arises that the removal of a clause in the

⁵ Attorney Fitzpatrick indicated that because this will was executed at the decedent's home, no copy of the signed document was made.

⁶ Attorney Fitzpatrick testified that Margaret had sent a copy of a previous will to him.

⁷ **RIGL 33-7-5, 7** prohibits this type of activity and makes it a crime to do so.

instrument was the act of the decedent with intent to revoke the clause, subject to proof to the contrary that was clear and satisfactory, either direct or circumstantial.

William did not introduce any evidence in support of the premise that the will was in fact lost or misplaced by the testatrix. To the contrary, Yolanda Archetto an apparently objective and disinterested party testified that she witnessed the decedent tearing and ripping a document which was identified by the decedent to her as the **2000 will**. William as the proponent of this will argues in his memo that he had an excellent relationship with the decedent but offered no concrete evidence to support this premise. The testimony of Attorney Gentile suggests otherwise, as do the apparent numerous testamentary schemes contemplated or executed by the decedent over the last four (4) years of her life. There is sufficient evidence to find that the decedent had destroyed the original of the **2000 will**.

William next argues in his memo that his sister had custody of the **2000 will**, although no evidence of this has been provided, save the testimony of Attorney Fitzpatrick that Margaret faxed a copy of one of the decedent's wills to him prior to the preparation of a new will for her in February 2001. It is also suggested that because Margaret lived on the second floor of decedent's home and/or that Nicole lived with her mother, and that both had much to gain if the **2000 will** was not found, they were responsible for its unavailability. In order to find that this occurred, I would have to presume that they have committed a crime. (See footnote 7, *supra*). No credible evidence was provided in support of these allegations. They remain presumptions and suppositions, without substantiation and speculative at best. Therefore, I find that based on the evidence provided there has been no withholding or destruction of the **2000 will** by someone other than the decedent.

He further alleges in his memo that somehow the rules of evidence⁸ should be applied by the court in allowing the copy of the will to be probated by applying the best evidence rule, i.e. a photocopy of the **2000 will** is sufficient if the original is not available; rather than application of the appropriate R.I. statute(s) and case law for proof of a will. No case law, precedent or legal theory is provided to buttress this position. I find as matter of fact that these rules standing alone are used for purposes of allowing

⁸ R.I Rules of Evidence, 1003, 1004.

certain types of evidence in R.I. court proceedings and are not to supplant the RIGL statutes in the proof of testamentary documents.

Since neither of the findings necessary to support the allowance of the **2000 will copy** have been satisfied and supported with credible evidence, I find as a matter of fact that the **2000 will** has been revoked by the decedent in a manner set forth by Yolanda Archetto and that the copy of this will is **not** allowed as the last will and testament of the decedent.

Rhode Island has adopted specific statutes for revoking a will. RIGL 33-5-10 details the usual methods for revoking a will (exclusive of RIGL 33-5-9, 33-5-11 which are not relative to this case): a new will or codicil executed pursuant to § 33-5-5; some writing declaring an intention to revoke the will and executed in the manner in which a will is required to be executed; burning, tearing or otherwise destroying the will by the testator or at his or her direction and in his or her presence with intent. (Tearing and otherwise destruction of the **2000 will** was used by the decedent herein).

The proponent of the **2000 will** argues that if the copy of the will is not allowed as the last will and testament of the decedent, it meets the statutory requirements as a writing set forth in § 33-5-10 for revocation of a will. As case authority for this position, two (2) Rhode Island Supreme Court cases are cited: In Re Estate of Eglee 119 R.I. 786 (1978) and Reese v. Court of Probate of Newport 9 R.I. 434. The former case stands for the premise that the R.I. revocation statute is to be interpreted narrowly and holds that a mere writing on part or all of a will “canceled” or red-lining it out will not revoke a will; the later case involved a will that was executed but not witnessed by the correct number of witnesses which made it invalid. It would have, if witnessed properly revoked prior wills even without a specific clause of revocation in it. Neither case is applicable to the case at hand.

§ 33-5-10 provides two (2) distinct methods of revoking a will by a writing: a new will which speaks to the future (effective if not revoked earlier at the death of the testator/trix) or a separate writing which is a present acting document revoking an existing will, signed and witnessed as a will would be. A document that does not pass muster, as being the decedent’s last will and testament cannot then serve alone as a revocation document. A will is ambulatory by its very nature and is only irrevocable and

effective upon the death of the testator/trix. The R.I. Supreme court has carefully set out a detailed explanation of this premise in **Bates v. Hacking** 29 R.I. 1; the distinctness of the writings referred to in the revocation statute (will and separate writing) are delineated and explained in **Bates v. Hacking** 28 R.I. 523. I find that the **2000 will** copy is not a revocation of the **1998 will** under the **RIGL** revocation statute or applicable case law.

Since I have found that the **2000 will** is revoked, the court must now determine if the **98 will** has been revived, since it was not physically destroyed by the decedent as a method of revocation, but was revoked by the execution of the **2000 will**.

Rhode Island has maintained the common law position that will revoked by another will or writing pursuant to the appropriate revocation statute and has not been destroyed is revived and exists as if never revoked once the document that revoked it is itself revoked in any way allowed, except the execution of another will. **Bates v. Hacking** 29 R.I. 1, supra. I find that the **98 will** has in fact been revived by the destruction of the **2000 will**. Attorney Gentile witnessed and prepared this will and testified to its authenticity and proper execution, I conclude that this is the last will of the decedent and allow its probate. Margaret Provoyeur is appointed Executrix and Appraiser, bond is set at \$500,000.00 no surety; the petition for allowance of the **2000 will** is denied and dismissed.

DATE:

ENTER: _____

BY ORDER: _____