

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Probate Division

2022
PRO/NPR/000088

IN THE ESTATE of Sharon Young Murphy of the State of Florida, one of the United States of America deceased.

AND IN THE MATTER of the Last Will and Testament of Sharon Young Murphy, deceased, dated the 17th day of June A.D., 2015

AND IN THE MATTER of an Application by William Washer as Executor of the Last Will and Testament of Sharon Young Murphy to have a copy of the Last Will and Testament of Sharon Young Murphy, deceased, dated the 17th day of June A.D., 2015 admitted to Probate.

Before: The Honorable Madam Justice C.V. Hope Strachan
Appearances: Ms. Sharmon Ingraham of Higgs and Johnson, Law Chambers appears for the Applicant on an Ex-Parte Summons
Hearing Date: 29 March 2023

RULING

Introduction

1. By Ex Parte Summons dated the 17th February, 2023 the Applicant sought an order from the Court that a copy of the Last Will and Testament of Sharon Young Murphy, deceased dated the 17th day of June, A.D., 2015 be admitted to proof as contained in the copy thereof exhibited to the Affidavit of William Washer filed, the copy Will is exhibited in aid of the application.

The Evidence Given In Support Of The Application

2. The factual circumstances existing which led to the requirement for the subject application were described in the Affidavits sworn by Jennie L. Barry an attesting witness to the due execution of the said Will, Carlene D. Farquharson an attorney employed at the law firm of Alexiou, Knowles and Co., Marsh Harbour Abaco, where the Will was purportedly executed and one William Lee Washer one of the Executors named in the Last Will and Testament of the deceased.

3. The circumstances are that the deceased Testatrix executed the original copy of the Will at the offices of Alexiou, Knowles and Co. by signing her name at the foot or end thereof as it appears on the copy produced to the Court. Further that the Testatrix executed the said original of the copy produced to the court in the presence of the said Jennie L. Barry and Shirley Mills.
4. The original of the said Will was then left with Alexiou, Knowles and Co. for safe custody. The Testatrix was given a copy of the said Will which Carlene D. Farquharson swore in her affidavit was certified by her. However, the same Will cannot now be found and is believed to have been inadvertently destroyed, along with the offices of Alexiou, Knowles and Co. during the passage of Hurricane Dorian on 1st September 2019.
5. William Lee Washer, one of the Executors named in the copy Will produced to the court, was appointed with one Candace Guittarr. However, exhibited to the Affidavit of William Washer is Form 13, Renunciation of Probate in Supreme Court Action 022/PRO/npr/00 executed by Candace Guittarr signed before a Notary Public of the Commonwealth of Massachusetts on 9th September 2022.
6. According to the copy Will produced at clause 4 thereof, Bahamian Law should govern the terms of the Will.
7. The Testatrix died on 15th April 2021 in Clearwater Pinellas Florida at the age of 74 years.

Matters To Be Considered In Light Of The Application

8. The issues to be determined are:
 - a. Is the Will as it appears in conformity with the provisions of the Wills Act, Chapter 115, Statute Laws of The Bahamas?
 - b. If the answer to the question above is yes, has it been revoked?
 - c. If not, Can the copy of the same be admitted to Probate?

The Law

A. Is the Will in conformity with the Wills Act?

9. **Section 4 and 5 of The Wills Act, Chapter 115 Statute Laws of The Bahamas** provides:

“4. To be valid, a will shall be made by a person who —
(a) is aged eighteen years or over; and
(b) is of sound disposing mind.

5. (1) Subject to section 6, no will is valid unless it is in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction in accordance with subsection (2).

(2) The signature of the testator or other person mentioned in subsection (1) is effective if —

(a) so far as its position is concerned it satisfies subsection (3);

(b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) each witness either —

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary nor is publication of the will necessary.

(3) So far as regards the position of the signature of the testator, or of the person signing for him —

(a) a will is valid if the signature is so placed at, after, following, under, beside or opposite the end of the will that it is apparent on the face of the will that the testator intended to give effect, by the signature, to the writing signed as his will;

(b) no will is affected by the circumstances that —

(i) the signature does not follow, or is not immediately after, the foot or end of the will;

(ii) a blank space intervenes between the concluding word of the will and the signature;

(iii) the signature is placed among the words of the testimonium clause or of the clause of attestation or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, under or beside the names or one of the names of the subscribing witnesses;

Formalities for execution of wills.

(iv) the signature is on a side page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or

(v) there appears to be sufficient space to contain the signature on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written,

and the enumeration of the circumstances in paragraph (b) does not restrict the generality of this subsection, but no signature under this section operates to give effect to any disposition or direction which is underneath or follows it, nor does

it give effect to any disposition or direction inserted after the signature is made.
(4) No person is a competent witness to the execution of a will if he attests the will in any man.”

B. Has the Will been revoked?

10. Section 16 of The Wills Act, Chapter 115, Statute Laws of The Bahamas provides:-

“16. No will, or any part thereof, is revocable otherwise than —

(a) in accordance with section 13;

(b) by another will; Revocation by marriage. Effect of dissolution of marriage. Alteration in circumstances. Revocation generally.

(c) by some writing, declaring an intention to revoke the will, executed in the manner in which a will is required to be executed; or

(d) by the testator, or some person in his presence and by his direction, burning, tearing or otherwise destroying the will, with the intention of revoking it.”

11. Holloways Probate Handbook by R.R. D’Costa, Oxford District Probate Registry at page 51 directs that:

“The evidence must establish if appropriate that it (the will) sic, was whole and unrevoked and in existence after the death of the testator; if this cannot be proved “the evidence must rebut the presumption that the testator revoked the will by destruction. (See Re Davies decd. 1978) 128 NLJ 235”

12. The cases Re Barber (1866) LR 1 P & D 267 and Re Carter (1908) 52 Sol Jo 600 provides that the claim should allege that the will was never revoked or destroyed by the testator, nor by any person in his presence and by his direction, with the intention of revocation, and that it was valid and subsisting at the time of his death but cannot be found and set out the substance of the contents: See Sugden v Lord St. Leonard (1876) 1 PD 154 at 154-156. CA.

C. Can the copy of the subject Will be admitted to Probate?

13. According to Tristram’s & Cootes Probate Practice, Twenty-fifth Edition, 561-562

“Where a Will is known to have been in the possession of the testator and there is no evidence of its having subsequently left his custody but cannot be found on his death, there is a prima facie presumption that the Will has been destroyed *in animo revocandi*. This presumption may be displaced by evidence (e.g. of declaration of the testator’s unchanged intentions or evidence as to his state of mind, etc.) and when it is sought to obtain an order admitting to proof a copy or other evidence of the contents of a will

in the above circumstances, affidavit evidence of the facts relied on as rebutting the presumption of destruction animo revocandi should be lodged.”

Examination Of The Evidence In Light Of The Law And Answering Each Question In Turn

A. Is The Will In Conformity With The Provisions Of The Wills Act?

14. Jenny L. Barry stated in her Affidavit that she along with Shirley Mills witnessed the Testator execute the said Will.
15. To determine whether the original Will is in conformity with the Wills Act based on the copy provided the appearance it is imperative that the copy be scrutinized for any irregularities on the face of the will.
16. It is established that while under the Wills Act execution of the Will require that two (2) or more witnesses be present at the making of the will there is a proviso contained in S. 5 (2) (c) (i) and (ii) of The Wills Act which provides that no form of attestation is necessary nor is publication of the will necessary. In this instance there were two (2) witnesses to the making of the Will one of whom made a formal written attestation thereby fulfilling the requirement under the Act.
17. In this case, at first glance the Will may call into question the placement of the testator's signature, in that it is on a separate page from the disposing clauses. Notwithstanding that this might raise questions, unless there is some obvious flaw in the appearance of the Will S. 5 (3) (iv) of The Wills Act provides that the signature placement being on a separate page from the dispositions in the will does not invalidate the Will.
18. Where the signature of the testator and/or those of the attesting witnesses appear on some part of the document upon which no part of the Will is written (as in this instance) and there is a proper attestation clause, no evidence is usually called for. In **Re Denning, Harnatt v Elliott [1958] 2 All ER 1** the dispositive part of a will and the testator's signature occupied one side of a small sheet of paper and on the other side were the signatures of Two (2) other persons who could not be found, but there was no attestation clause. It was held that the only practical explanation of the two (2) signatures was that they had been made for the purpose of the attesting the will.
19. In the case **In the Goods of Horsford (1874) LR 3 P & D 2112 and Re Little decd [1960] 1 All ER 387** where the will was comprised of loose sheets fastened together, it was established that once the sheets of the will are physically connected a valid will is created.

20. By all appearances the copy of the original Will displays conformity with the legislation and the authorities.

B. Has The Will Been Revoked?

21. Having executed the Will Carlene Farquharson provided that she then certified the Will, and the Testatrix was given a copy of the said Will (not the original). The original remained at Alexiou, Knowles and Co. She speaks of Hurricane Dorian occurring, the law offices being destroyed and the contents which again presumably included the Original Will being lost or destroyed.

22. William Washer, an Attorney in the US (where the Testatrix lived), was named as Executor of the Will. He sought and obtained sworn statements from Alexiou, Knowles and Co. in particular Jennie L. Barry and Carlene Farquharson that the copy will is a copy of the genuine original Last Will and Testament of the Testatrix.

23. In her Affidavit Jenny L. Barry stated that she did not believe the destruction of the said Will was intended by the Testatrix. Indeed, the Court takes judicial notice of the occurrence and the destructive impact of Hurricane Dorian on the Island of Abaco on 1st September 2019.

24. Similarly, Charlene D. Farquharson states in her Affidavit that her belief is that the original Will was inadvertently lost or stolen during the landfall of Hurricane Dorian. By these statements the presumption that the Will was voluntarily revoked by the Testator can be rebutted and I accept that the standard is met by the statements as described above.

C. Can The Copy Of This Will Be Admitted To Probate?

25. Counsel for the Applicant submitted to the Court inter alia the following excerpt from **Tristram & Cootes Probate Practice:**

“Cases in which copies have been admitted

25.71 After a testator’s death a will was in possession of his solicitors, whose offices were destroyed, no trace of the will being found. A copy of the will, sworn by the solicitor to be a correct copy was exhibited to his affidavit or witness statement. An order was made for admission of the will as contained in the copy exhibited (Re Linttott’s Estate (1941) 191 LT Jo 115.

...

Probate granted of a Lost Will

33.48 Where a will has been destroyed in the testator’s lifetime. Either by himself unintentionally, or by any other person without his directions, or

with his directions but not in his presence, or where a will has been destroyed after the testator's death or cannot be found, or where its disappearance is presumably attributable to accident, a copy or a draft of the contents or the substance of the will may be propounded, and the will may be admitted to proof as contained in such copy, draft, or substance until the original will or a more authentic copy thereof be brought into and left in the registry."

26. In all the circumstances of the case and in light of the evidence as presented in the Supporting Affidavits of the three Affiants together with the submissions of Counsel, the Court is satisfied that the criteria has been met for the Applicant to be granted the relief sought in the Summons, and hereby orders that the copy of the Last Will and Testament of Sharon Young Murphy, deceased dated the 17th day of June, A.D., 2015 be admitted to proof as contained in the copy thereof exhibited to the Affidavit of William Washer filed in this Court until a more authentic copy of the will is proved.

Dated the 31st day of March, A.D., 2023



Justice C.V. Hope Strachan