FOR PUBLICATION

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

IN THE MATTER OF THE ESTATE OF:	)	**Probate No. ST-05-PB-035**
GONZALO CALO CALO a/k/a	)	
GONZALO CALO	)	
	)	
Deceased	)	
	)	

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THOMAS, Judge

MEMORANDUM OPINION

(Filed: May 26, 2009)

This Matter came on for a hearing on Monday, May 22, 2006, on the Declaration of Contest[1] filed by Judith Calo Wheatley (Wheatley), daughter of the decedent Gonzalo Calo Calo (Calo).[2] Wheatley was represented by Kathleen Mackay, Esq., and Herminia Soto (Soto), also a daughter of Calo, was represented by Charles S. Russell, Jr., Esq.

PROCEDURAL HISTORY

On July 20, 2005, Wheatley filed a Petition for Administration on behalf of the Estate of Gonzalo Calo Calo (Estate). The Court appointed Wheatley as Administratrix of the Estate on August 9, 2005. On September 15, 2005, Soto filed a Petition for Probate of a Will and Issuance

[1] Wheatley filed an "Objection to Petition for Letters Testamentary." She should, however, have designated it a "Declaration of Contest" pursuant to Rule 193 of the Rules of the Superior Court—Will [C]ontests.
[2] The decedent was also known as Gonzalo Calo.

of Letters Testamentary. Along with the Petition, Soto filed an onion skin document entitled "Last Will and Testament of Gonzalo Calo" dated August 17, 1971, which she alleged to be a "conformed copy" of Calo's Will. Soto requested that the purported conformed copy be admitted to probate and that the Letters of Administration previously issued to Wheatley be revoked. Wheatley filed an objection to the document offered by Soto as a conformed copy of the "Last Will and Testament of Gonzalo Calo."

FACTS

The onion skin document filed by Soto as a conformed copy of the Last Will and Testament of Gonzalo Calo is two pages in length and contains a notation that the original document is located in a safe at Bailey, Wood & Rosenberg (BWR) (Conformed Copy of Last Will And Testament Of Gonzalo Calo 1), the local law firm from which Calo regularly sought legal advice during the 1960s and 1970s (Soto Aff. ¶ 3). Calo's typewritten name "/S/ Gonzalo Calo" appears at the end of the document. The names of the attesting witnesses, F.D. Rosenberg (Rosenberg), Helga Williams (Williams), and Mary Grigg,[3] and their respective cities of residence are also typewritten on the document. (Conformed Copy of Last Will And Testament Of Gonzalo Calo 2.) The attestation clause located at the end of the conformed copy states that "the foregoing instrument, consisting of two typewritten pages, was on the above date signed by the Testator, Gonzalo Calo, in our presence and he at the same time declared the same to be his Last Will and Testament. . . ." The conformed copy is dated August 17, 1971. (Conformed Copy of Last Will And Testament Of Gonzalo Calo 2.)

According to Mary Shrallow (Shrallow), who was a secretary at BWR in 1971, it was BWR's practice to have the attorney responsible for drafting Wills as well as two secretaries at the firm meet with the testator to ascertain his understanding of the contents of the document as

[3] "Grigg" is the maiden name of Mary Shrallow.

his last Will and Testament, to witness his signature to the document in his presence, and thereafter to attest the Will as witnesses. Shrallow stated that the conformed copy in this case would have been executed in accordance with the aforementioned procedure (Shrallow Aff. ¶ 6.) and is in a format typical of that used by BWR circa 1971. (Shrallow Aff. ¶ 3.) BWR would then "keep [the] original, executed wills in a safe at the firm at the client's request, and . . . provide the client with an onion skin copy, because [the firm] did not have a photocopy machine at that time." (Shrallow Aff. ¶ 4.) Consistent with that practice, the conformed copy of Calo's purported original Will bears the notation "Original located in [s]afe at Bailey, Wood & Rosenberg." According to Shrallow, "it is [her] belief that [the conformed copy] is a true copy of a Will prepared by [BWR]." (Shrallow Aff. ¶ 5.)

In 1986 the law firm of De Vos & Co. succeeded to the law practice of BWR. (De Vos Aff. ¶ 3.) According to Lloyd De Vos, who was the managing partner of De Vos & Co., his firm contacted those individuals whose Wills or trusts had been entrusted to BWR for safekeeping to see whether they wanted to retrieve these instruments or to leave them with De Vos & Co. (De Vos Aff. ¶ 4.) De Vos & Co. closed its St. Thomas offices in 1997 and, at that time, the firm attempted to contact all of the individuals whose Wills, trusts, or other documents had been entrusted to them. (De Vos Aff. ¶ 5.) All of the documents that remained in the custody of the De Vos & Co. St. Thomas offices were moved to New York, where they were placed in a safe deposit box at the Chase Manhattan Bank in the World Trade Center. (De Vos Aff. ¶ 6.) The documents remained in that safe deposit box until September 11, 2001, when they were lost in the terrorist attack on the World Trade Center. (De Vos Aff. ¶ 10.) De Vos averred that the office files, which indicated whether the clients had chosen to retrieve their legal documents when contacted, were also lost that day. (De Vos Aff. ¶ 10.) De Vos has "no knowledge or recollection," however, of the contents of the Chase Manhattan Bank safe deposit box. (De Vos

Aff. ¶ 11.)

Calo died on March 21, 2005, and his purported original Will was never found. Soto avers that in 1989, Calo gave her an envelope bearing the BWR letterhead and the handwritten word "Testamento"[4] and instructed her to put the envelope in a secure location and to open it if "something happened to him." (Soto Aff. ¶ 7.) The conformed copy that is now before the Court was found in that envelope. (Soto Aff. ¶ 11.)

SUMMARY OF ARGUMENTS

Wheatley argues that Soto has failed to prove that the purported original Will ever existed. Wheatley further alleges that even if the original Will did exist, Soto has failed to prove that it was in the possession of someone other than Calo at the time of his death, such that the presumption that he revoked the Will arises. Additionally, Wheatley argues that the purported conformed copy fails to satisfy the requirements of section 13 of Title 15 of the Virgin Islands Code in that it (1) does not bear Calo's signature; (2) does not bear the signatures of any witnesses; and (3) does not contain the respective addresses of the witnesses opposite their signatures.[5] Wheatley also states that no affidavits of the witnesses have been included as required by section 22 of Title 15 of the Virgin Islands Code[6] and Superior Court Rule 194(a).

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[4] The Court takes judicial notice of the fact that the English translation of "Testamento" is "Will."

[5] The omission of the attesting witnesses' addresses opposite their names on a Will does not affect the validity of that Will. Section 14 of Title 15 of the Virgin Islands Code provides:

> **§ 14. Witnesses to a Will to Write Names and Addresses**
>
> The witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction shall write his own name as a witness to the will. **Omission to comply with either of these provisions shall not affect the validity of any will**; nor shall any person be excused or incapacitated on account of such an omission from testifying respecting the execution of such will. (emphasis added)

V.I. CODE ANN. tit. 15, § 14.

[6] The Court notes that section 22 of Title 15 of the Virgin Islands Code states in pertinent part that "[a] subscribing witness to any last will or testament **may** make and sign an affidavit before any officer authorized to administer oaths setting forth such facts as he would be required to testify to in order to prove such will." V.I. CODE ANN. tit. 15, § 22 (1996) (emphasis added).

Soto counters that the original Will was last known to be in the custody of a third party, as shown by the customary practice of BWR and the affidavit of Attorney De Vos. Soto argues, therefore, that a presumption of loss, rather than a presumption of revocation, arises in this case. Soto also argues that the attestation clause within the conformed copy, as well as the routine practice of BWR, demonstrates that the original Will was executed in accordance with section 13 of Title 15 of the Virgin Islands Code. She further argues that Superior Court Rule 194(a) is not mandatory, but permissive. Finally, Soto submits that if the Court determines that the conformed copy of the purported original Will is genuine, then the conformed copy should be admitted to probate.

ISSUES

The Court must now determine (1) whether the original Will was in Calo's custody or in the custody of a third party at the time of Calo's death and (2) whether the conformed copy of Calo's Will substantially complies with the execution requirements of acknowledgment and attestation set forth in section 13 of Title 15 of the Virgin Islands Code such that it can be admitted to probate.

ANALYSIS

I. Custody of the Original Will

This Court must first determine whether the original Will was in Calo's custody or in the custody of a third party at the time of Calo's death. If the Court finds that the original Will was in Calo's custody at the time of his death, then the presumption of revocation arises. *See Duvergee v. Sprauve*, 413 F.2d 120 (3d Cir. 1969). The presumption of revocation is a well settled principle that has been articulated in *Duvergee*:

> [I]f a will or codicil known to have been in existence during the testator's lifetime, and in his custody, or in a place where he had ready access to it, cannot be found at his death, a presumption arises that the will was destroyed by the testator in his lifetime with the intention of revoking it, and in the absence of

> rebutting evidence, this presumption is sufficient to justify a finding that the will was revoked.

Id. at 123. If the presumption of revocation does in fact arise, the proponent of the Will then bears the burden of proving by clear, satisfactory and convincing evidence that there was no possibility that the Will was destroyed by the decedent. *Id.* Proof that a Will was not revoked or destroyed can be presented through circumstantial or direct evidence. *See In re Estate of Richards*, 45 V.I. 287, 289 (Super. Ct. 2003). Furthermore, the absence of any statement by a testator reflecting intent to revoke his Will is "a significant factor" in determining whether the Will was revoked. *Id.* at 290, (citing *Matter of Modde's Estate*, 323 N.W.2d 895 (S.D. 1982)).

The presumption of revocation does not arise, however, in every case where an original Will cannot be found. According to the *Duvergee* Court:

> [I]n a proceeding for the probate of a lost will, when the will has been placed in the custody and control of a third person and it cannot be found among the effects of that person, no presumption of revocation by the testator arises from the failure to find it.

Duvergee, 413 F.2d at 123. Where a court finds "no proof tracing the will into the hands of the testat[or]," no presumption of revocation arises. *White v. Brennan's Administrator*, 212 S.W.2d 299, 302 (Ky. App. 1948) (*cited in Duvergee*, 413 F.2d 120) (presumption of revocation did not arise where an original Will had been mailed to the named executor at the testatrix' request and was not traced back into the hands of the testatrix).

In the case at bar, the presumption of revocation does not arise as Wheatley has offered no proof tracing the original Will back into the hands of Calo. Consistent with the practice of BWR circa 1971, the conformed copy of Calo's purported original Will bears the notation "Original located in [s]afe at Bailey, Wood & Rosenberg." No evidence has been submitted to show that Calo retrieved the original Will from BWR or that he even elected to obtain it from De Vos & Co. in 1986 or in 1997. Moreover, the record is devoid of any statements by Calo

evidencing an intent to revoke his Will. His delivery of the conformed copy to Soto for safekeeping in 1989 suggests to the contrary.

In sum, Wheatley has failed to offer any evidence that Calo had custody of his original Will at the time of his death such that a presumption of revocation would arise. Instead, she has offered mere speculation as to what Calo or De Vos & Co. "may very well have" done.[7] A finding of revocation on such theories, however, "could be reached only at the top of a pyramid of inferences." *In re Estate of Yost*, 117 So. 2d 753 (Fla. Dist. Ct. App. 1960). In the absence of proof to the contrary, this court can reasonably infer that Calo's Will remained in the custody of De Vos & Co. and, as such, was destroyed in the World Trade Center.

Once it has been established that Calo's Will was destroyed in the World Trade Center, Soto may then proceed as if proving a lost Will. *See White v. Brennan's Administrator*, 212 S.W.2d 299, 300 (Ky. App. 1948) (the proponent of a lost Will must prove the contents of that Will). The proponent of a lost Will may prove its contents by presenting a copy of the Will. *See Richards*, 45 V.I. 287 (admitting a copy of a lost Will to probate where the proponent had overcome the presumption of revocation). A carbon copy of a Will, if accepted as the true Will of the testator in question, is sufficient to prove the provisions of the original Will. *Brennan's Administrator*, 212 S.W.2d at 302. In other words, if "[the] decedent's intentions are accurately expressed in the copy of the Will offered for probate," the copy may be used to prove the contents of the original Will. *Richards*, 45 V.I. at 289–90. Accordingly, the conformed copy in the case at bar is admissible to prove the contents of Calo's original Will.

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[7] Wheatley reasons, for example, that because De Vos & Co. continued to provide legal services for Calo until approximately 2002, the law firm would have had the opportunity to return the purported original Will to Calo. (Adm'x' Mem. in Opp. to Pet'r's Supp. Points and Authorities 4.) Alternatively, Wheatley argues that even if the original Will was still in the possession of DeVos and Co. on September 11, 2001, Calo would have had the opportunity to arrange for the preparation of another Will. *Id.* The question, however, is not what *could have* happened to the original Will, especially where, as here, Wheatley is unable to provide any evidence to suggest that the original Will was retrieved and/or revoked.

II. Substantial Compliance with the Formalities of Execution

The Court must now look to the conformed copy to determine whether the original Will was validly executed. The standard by which Wills must satisfy the formalities of execution is "substantial compliance." *Rabsatt v. Schack*, 72 F.3d 123 (3d Cir. 1995) (Nos. 95-7136 and 95-7174). If a testator has substantially complied with section 13 of Title 15 of the Virgin Islands Code, then a court can find that a Will has been validly executed. *In re Estate of Savain*, 39 V.I. 91, 99 (Terr. Ct. 1998)[8] (citations omitted).

Section 13 of Title 15 of the Virgin Islands Code provides the requirements for the execution and attestation of a Will:

> **§ 13. Manner of execution of will**
>
> Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:
> (1) It shall be subscribed by the testator at the end of the will.
> (2) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.
> (3) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.
> (4) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

V.I. CODE ANN. tit. 15, § 13 (1996).

In the instant case, Soto has produced the conformed copy of Calo's Will which bears the typewritten names of Calo and the three attesting witnesses, such that it can reasonably be inferred that Calo and the witnesses signed their names at the end of his original Will. Additionally, the attestation clause contains the language required by section 13. Moreover, the procedure, practice and customs of BWR in the drafting, executing and securing of Wills as

[8] The Superior Court was previously known as the Territorial Court, which was established by the Legislature by Act 3876. Effective January 1, 2005, however, the name of the Territorial Court changed to the Superior Court of the Virgin Islands pursuant to Act of Oct. 29, 2004, No. 6687, sec. 6, § 2, 2004 Sess. L. 179 (2004).

explained by Shrallow, support Soto's contention that the onion skin document is the conformed copy of Calo's original Will. Ergo, the Court finds that the conformed copy is evidence that the original Will was validly executed in accordance with section 13.[9]

CONCLUSION

In sum, Wheatley has failed to trace the original Will back into the hands of Calo. The presumption of revocation is therefore inapplicable to the case *sub judice*. Because no evidence has been produced to demonstrate that the original Will was returned to Calo, the Court finds that the Will remained in the hands of BWR and must therefore be declared lost. The onion skin document, having been found to be a conformed copy of Calo's original Will and having been duly executed, shall be admitted to Probate as the Last Will and Testament of Calo. An Order of even date follows.

DATED: May 26, 2009

Audrey L. Thomas

AUDREY L. THOMAS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

By: _____
JEWEL A. SPRAUVE
Court Clerk Supervisor
5/27/2009

[9] It has been held that evidence of an attorney's customary and usual office practice and procedure is admissible on the issue of due execution and may be sufficient to establish that fact even where the attorney who drew the Will has no independent recollection of the transaction. *See In re Estate of Mammana*, 388 Pa. Super. Ct. 12, 18 (1989).