

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

IMO THE ESTATE OF )  
CARL H. BARTELT ) C.M. NO. 4335-S  
)

MASTER'S REPORT

Date Submitted: February 16, 2007

Draft Report: March 5, 2007

Final Report: March 26, 2007

Deirdre A. O'Shea, Esquire, of Smith, O'Donnell, Feinberg & Berl, LLP; Attorney  
for the Petitioner

AYVAZIAN, Master

This is a report on a petition to admit to probate a copy of a will. In 1998, Carl H. Bartelt executed a will that left his estate to his wife Lorraine, but in the event that his wife predeceased him, Mr. Bartelt's estate was to be divided between his two children in the following manner: 65% to his daughter Anne L. Raffaele and 35% to his son Paul A. Bartelt. Mr. Bartelt's wife died on December 10, 2002. Mr. Bartelt died on April 23, 2006. After Mr. Bartelt's death, Ms. Raffaele was unable to find the original 1998 will in her father's room at the nursing home where he had been residing at the time of his death. Accordingly, Ms. Raffaele, who had been named the alternative executrix of her father's estate in the 1998 will,<sup>1</sup> has moved for admission of the copy in lieu of the original will.

“A missing will, last in possession of the testator, is presumed to have been discarded or intentionally destroyed with the intent that it be revoked.” *In re: Marilyn S. Wilson Estate*, 1999 WL 504783 (Del. Ch.) (ORDER) (citing *Putney v. Putney*, 487 A.2d 1125, 1127 (Del. 1984)). It is possible, however, to rebut the presumption upon a proper showing of evidence. *See Putney*, 487 A.2d at 1127. To overcome the presumption of revocation, the party seeking to establish the validity of the missing will must show that: (1) a valid will was executed by the decedent; (2) the terms of the missing will; and (3) the will was lost or unintentionally destroyed and that the decedent's testamentary intent was not

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<sup>1</sup> Mr. Bartelt's wife was the named executrix in his 1998 will.

altered prior to his death. *See In Re Ainscow's Will*, 27 A.2d 363, 365 (Del. Super. 1942).

The proponent in this case, Ms. Raffaele, was the only witness to testify at the hearing held on February 16, 2007. In addition to Ms. Raffaele's testimony, the following documents were admitted into evidence: the death certificates of Carl H. Bartelt and Lorraine H. Bartelt, a copy of the 1998 Will of Carl H. Bartelt, a copy of the 2002 Will of Carl H. Bartelt, and a letter from Stephen P. Ellis, Esq., the attorney who had drafted Mr. Bartelt's two wills. Ms. Raffaele's search for the original 1998 will in her father's residence was unsuccessful because, according to Ms. Raffaele, her brother had apparently collected most of the paperwork after their mother's death.<sup>2</sup> Ms. Raffaele possessed a copy of Mr. Bartelt's 1998 will that her mother had given her sometime around the year 2000.<sup>3</sup> Ms. Raffaele testified that she had been under the impression that her brother had the original 1998 will. She had spoken with her brother after their father's death and, according to Ms. Raffaele, Paul Bartelt had told her that his lawyer would file the will. Ms. Raffaele subsequently learned from the Office of the Register of Wills that no will had been filed, and so she hired an attorney.

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<sup>2</sup> In 2002, Charles Bartelt lived in a nursing home in Greenwood, Delaware, and his wife lived in a house on the property of the nursing home. Ms. Raffaele testified that at some point in time her father had possession of the original 1998 will, and she described her father as a precise record keeper who had everything labeled. Ms. Raffaele also testified that her mother took care of everything when she was alive.

<sup>3</sup> Ms. Raffaele recalled receiving the copy of her father's 1998 will before she left Maryland. She currently lives in Minnesota.

Through her attorney, Ms. Raffaele contacted Stephen Ellis, the attorney who had drafted her father's 1998 will. Mr. Ellis did not have the original 1998 will, but he provided Ms. Raffaele with a copy of a will that had been prepared for Mr. Bartelt in August 2002.<sup>4</sup> Under the 2002 will, Mr. Bartelt left his estate to his daughter, son, and daughter-in-law Barbara A. Bartelt in three equal parts in the event that his wife predeceased him.<sup>5</sup> The copy of the 2002 will was not signed, and the letter from the attorney indicated that he had no knowledge whether the original document had ever been signed.<sup>6</sup> Ms. Raffaele testified that she also spoke with Barbara Bartelt, who lived in Wilmington and had a close relationship with her ex-in-laws. According to Ms. Raffaele, Barbara Bartelt did not have the original 1998 will, and did not know whether Mr. Bartelt ever signed the 2002 will.

Under the 1998 will, Ms. Raffaele stands to inherit a larger share of Mr. Bartelt's estate than her brother. Ms. Raffaele testified that the reason her father gave her the larger share was because he knew that she, unlike her brother Paul Bartelt, would give some of the inheritance to Paul's ex-wife, Barbara Bartelt, which would benefit Mr. Bartelt's grandchildren. Ms. Raffaele testified that the 1998 will reflected her father's wishes. She also expressed her belief that her

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<sup>4</sup> Although the scrivener's testimony would have been helpful to the Court in deciding this matter, Mr. Ellis was not called as a witness, nor did he provide an affidavit in support of the petition.

<sup>5</sup> Ms. Raffaele testified that Barbara and Paul Bartelt divorced some time prior to 1998.

<sup>6</sup> According to Mr. Ellis's letter, his law office had also prepared an identical will for Lorraine Bartelt, which she signed, but Mr. Bartelt had not been present in the office and Mrs. Bartelt had been given the original will to take to her husband.

father never intended to revoke his 1998 will, and that the original 1998 will was lost in a box somewhere.

The copy of the will submitted is dated January 12, 1998. It is signed by Carl H. Bartelt,<sup>7</sup> witnessed by three people, and notarized in a manner which would make it valid and self-proving. *See* 12 Del. C. §§ 202, 1305. It appears clear from the evidence that in 1998 Mr. Bartelt executed a valid will, the terms of which are set forth in the copy which Ms. Raffaele seeks to admit to probate.

There remains the final factor set forth in *In Re Ainscow's Will*: was sufficient evidence presented at the hearing to overcome the presumption that Mr. Bartelt intended to revoke his will? Weighing the evidence, I find that there was not sufficient evidence presented to overcome the presumption that Mr. Bartelt intended to revoke his 1998 will. In the first place, the only testimony was provided by the petitioner, who was not a disinterested witness. Ms. Raffaele stands to inherit a greater share of her father's estate if the copy of the 1998 will is admitted to probate than by intestate succession. More significant, however, is the 2002 will, evidence strongly implying that Mr. Bartelt had changed his testamentary intent before his death. The 2002 will added a new beneficiary, Mr. Bartelt's daughter-in-law, who was to receive one-third of Mr. Bartelt's estate equally with his daughter and son. Moreover, the proposed scheme of distribution

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<sup>7</sup> Ms. Raffaele testified that the signature on the copy is her father's signature.

in Mr. Bartelt's 2002 will is consistent with Ms. Raffaele's own testimony that her father had wanted some of his estate to go to Barbara Bartelt in order to provide for his grandchildren.

There is no evidence, however, that the 2002 will was ever executed. "It is presumed that someone who had a will intended to die testate." *In the Matter of Purported Last Will and Testament of Joseph L. Kuklinski*, 1995 WL 106504 (Del. Ch.) (ORDER) (citing *Bank of Delaware v. Harris*, 158 A.2d 924 (Del. Ch. 1960)). This presumption appears to conflict in the present case with the presumption that a missing will was destroyed *animo revocandi*. Nevertheless, the evidence in this case that the 1998 will was lost, and not revoked, is minimal. It consists primarily of Ms. Raffaele's belief that her father never intended to revoke his 1998 will, and her belief that the 1998 will was lost in a box somewhere. The fact that a new will was prepared for Mr. Bartelt in 2002, on the other hand, supports the presumption that Mr. Bartelt intended to revoke his 1998 will. At the time the new will was drafted, however Mr. Bartelt was in a nursing home and his wife, who apparently took care of everything for Mr. Bartelt when she was alive, died approximately four months later. In all likelihood, these circumstances prevented Mr. Bartelt from executing the 2002 will and dying testate. Accordingly, I recommend that the copy of the 1998 will of Carl H. Bartelt produced by Ms. Raffaele not be admitted to probate.