

IN COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Probate Division

Claim No. 2024/PRO/cpr/00020

IN THE MATTER OF the Estate of Robert William Carlson of Unit D-2 Jolly Roger Drive, Freeport, Grand Bahama, The Bahamas, deceased

AND IN THE MATTER OF the Last Will and Testament of Robert William Carlson, deceased, dated the 18th August 1997, a First Codicil dated the 26th February 2003, a Second Codicil dated the 7th February 2014, a Third Codicil dated June 2014, a Fourth Codicil dated the 19th September 2014, a Fifth Codicil dated the 5th November 2015, a Sixth Codicil dated 26th February 2017, a Seventh Codicil dated 6th October 2017 and an Eighth Codicil dated 26th October 2018

AND IN THE MATTER OF an application by Michael Rosenberg as Executor of the Last Will and Testament of Robert William Carlson together with its Codicils to have draft of the lost Third Codicil dated about June 2014 of Robert William Carlson, deceased, admitted to Probate notwithstanding the loss and/or destruction of the Third Codicil

MICHAEL ROSENBERG

Claimant

Before: The Hon. Madam Justice J. Denise Lewis-Johnson MBE

Appearances: Sharmon Ingraham of Counsel for the Claimant

Hearing Date: 29th August 2024, 27th November 2024, 15th January 2025

The Wills Act- Codicils-Destruction of Codicil- Lost Codicil- Admittance of Draft Codicil into Probate-Intention of Testator-Revocation of Codicil

JUDGMENT

Introduction

1. By Originating Application filed 24th May 2024, the Claimant sought the following:

“An Order pursuant to the Administration of Estates Act and the inherent jurisdiction of this Court that the Last Will and Testament of Robert William Carlson, deceased, dated the 18th August 1997, a First Codicil dated the 26th February 2003, a Second Codicil dated the 7th February 2014, a Fourth Codicil dated the 19th September 2014, a Fifth Codicil dated the 5th November 2015, a Sixth Codicil dated 26th February 2017, a Seventh Codicil dated 6th October 2017 and an Eighth Codicil dated 26th October 2018 together with a draft of the Third Codicil dated about June 2014 be admitted to proof as contained in the Last Will, the Codicil thereto and the draft of the Third Codicil exhibited to the Affidavit of Michael Rosenberg filed herewith; and such further or other relief that this Court deems fit.
2. By Notice of Application filed on 27th May 2024 the Claimant commence this application on the following grounds:
 - a. Michael Rosenberg was named an executor of the Estate of Robert William Carlson in a last will and testament dated 18th August 1997 in respect of such last will and testament, the testator made eight codicils between 26th February 2003 to 26th October 2018.
 - b. In a plane crash, which resulted in the death of the other named executor of the last will and testament of Robert William Carlson dated 18th August 1997, the third codicil to such last will and testament is believed to have been lost and or inadvertently destroyed.
 - c. It is for the purpose of submitting the Last Will and Testament together with its Codicils to the Probate Division and obtaining a Grant of Probate in the Estate of Robert William Carlson in The Bahamas together with such further or other Order

that this application is made for the draft copy of the lost and/or destroyed Third Codicil to be admitted into proof.

The Claimant's Evidence

3. The Claimant averred the following:

- a. That he is the surviving executor named in the Last Will and Testament of Robert W. Carlson "the Testator" dated the 18th August 1997.
- b. That the Testator died on 26th May 2023 in Flagler County, Florida, United States of America.
- c. That in August 1997, the Testator gave instructions for the preparation of his Will which was executed on the 18th August 1997 and gave further instructions for eight Codicils to his Will.
- d. That the Will designated him along with Michael Kennedy as co-personal representatives of the Testator's estate. That Michael Kennedy died on 18th August 2014.
- e. On the 18th August 1997 the Testator executed a Last Will and Testament followed by 8 Codicils. The Codicils bears the following dates:
 - i. First Codicil dated the 26th February 2003;
 - ii. Second Codicil dated the 7th February 2014;
 - iii. Third Codicil dated June 2014;
 - iv. Fourth Codicil dated the 19th September 2014;
 - v. Fifth Codicil dated the 5th November 2015;
 - vi. Sixth Codicil dated 26th February 2017;
 - vii. Seventh Codicil dated 6th October 2017; and
 - viii. Eighth Codicil dated 26th October 2018
- f. That over the years the remaining Codicils were prepared by the Testator's attorneys in Florida and were executed by him either in the presence of attorneys in Florida or The Bahamas.
- g. That the originals of the executed Will and Codicils were conveyed to the offices of Packman, Neuwahl and Rosenberg in Miami, Florida.

- h. As it relates to the Third Codicil, preparation of same began about February 2014. The Testator made request for revisions to the drafts of the Third Codicil which were made, with a final draft being delivered to Michael Kennedy about June 2014.
- i. That I am advised by Todd Rosenberg that Michael Kennedy communicated that he was flying to Canada to oversee the execution of the Third Codicil.
- j. That he believed the Third Codicil was executed at that time and Michael Kennedy retained the executed Third Codicil in his possession pending its safe deposit for safekeeping with the Last Will and testament and other Codicils.
- k. That while still in the possession of the executed Third Codicil, Michael Kennedy died in a plane crash in route to Freeport, Grand Bahama in August 2014.
- l. That the Testator was aware of the loss and presumed destruction of the Third Codicil. In the Fourth Codicil the Testator references the Third Codicil and its accidental destruction and other subsequent Codicils.
- m. That there is no intention in the remaining Codicils to revoke the Third Codicil by the Testator.
- n. That he is advised that the Testator's attorney in Florida diligently searched the offices to of Packman, Neuwal and Rosenberg to confirm whether a signed copy of the Third Codicil was there, which was unsuccessful.
- o. That the widow of the Testator prior to this application undertook another search of the Testator's documents, files and personal effects but did not locate the Third Codicil or a copy of it.
- p. That the remaining codicils are the only testamentary documents in existence for the Testator concerning his estate in The Bahamas and he had no intention of revoking the Third Codicil.
- q. That the Third Codicil is not opposed by any person entitled to an interest in the Testator estate.

Issue

- 4. Whether a draft of the Third Codicil should be admitted to proof for probate.

Decision

5. After the execution of the Third Codicil it is alleged that the co-personal representative of the Testator, Michael Kennedy was in a plane crash, it is believed he had the executed Third Codicil in his possession. The Court is now tasked with making a determination on whether a draft of the Third Codicil ought to be admitted into Probate for the purpose of distributing the assets of the Testator.

Power to Declare a Will Revoked

6. The Court derives its power to declare a Will revoked by the **Wills Act** “the Act” pursuant to Section 16 (d) which provides:

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

(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.”

7. There is great uncertainty as to what happened with the Third Codicil. We know after an exhaustive search by the Testator’s attorneys, and his widow the Codicil could not be found. It is believed it was destroyed in the plane crash.
8. In the case of **Sugden and Others v St. Leonards and others** [1874-80] All ER Rep 21 *Lord Cockburn CJ* stated:

“Where the will is in the custody of a testator, and is not found, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course, the presumption may be rebutted by the facts...”

9. The Court accepts that it is more likely than not that Mr. Kennedy was in possession of the Third Codicil at the time of the plane crash, and it was destroyed. In those circumstances there would not have been the intention of the Testator to revoke the Third Codicil.
10. The Wills Act Section 16 is clear on how a Will is revoked. In this case there is no evidence of the Testator’s intention to revoke the Codicil.

11. It is of concern that the Testator with the knowledge that the Third Codicil was destroyed, proceeded to execute five subsequent Codicils to his Last Will, over the following four year period. As such there was nothing preventing him from executing the Third Codicil, he proceeded to execute a 4th Codicil.
12. In the recitals of the subsequent Codicil (4th Codicil) the Testator states:

“I ROBERT W. CARLSON, of Jolly Rodger Drive, Unit D-2, situated in the City of Freeport in the Island of Grand Bahama, one of the Islands in the Commonwealth of The Bahamas, hereby declare this to be my Fourth Codicil to my Last Will and Testament hereto executed by me on the 18th day of August in the Year of Our Lord One Thousand Nine Hundred and Ninety-Seven and amended thereto by the First Codicil to my Last Will and Testament hereto executed by me on the 26th day of February in the Year of Our Lord Two Thousand and Three, by the Second Codicil to my Last Will and Testament hereto executed by me on the 7th day of February in the Year of Our Lord Two Thousand and Fourteen and by the Third Codicil to my Last Will and Testament hereto executed by me during June or July in the Year of Our Lord Two Thousand and Fourteen (the exact date of which is unknown at this time as the said Third Codicil is believed to have been destroyed in an accident), the purpose of disposing of my real and personal estate situated in the Commonwealth of The Bahamas, and situated anywhere else in the world, with the exception of my tangible, intangible, personal property and real property having situs in the State of Florida, United States [hereinafter collectively referred to as the “Will”], for which I have independently executed a Florida non-domiciliary Will on June 16, 1997 pursuant to Florida Statutes 731.106 (2) [or successor statutory provisions] and any Codicils thereto [hereinafter referred to as the “Florida Will”], and to the intent that the same shall take effect concurrently with and independently of such Florida Will.”

13. The Testator in the 4th Codicil acknowledged the Third Codicil to have been “destroyed, in an accident.” He took no steps to replace the Third Codicil. His intentions are unclear and unknown.

14. The Court notes the formalities which makes a Will valid apply to the Codicil. The Wills Act section 5 outlines the formality of a will. It provides:

“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;”

15. The Claimant seeks to enter a draft of the Third Codicil, which would not have the formal requirements but this is not a deterrent to its admission. **Tristram & Coote’s Probate Practice** at 33.37 found as follows:-

“Probate granted of a lost will

33.48 Where a will which 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.”

16. In **Sugden**, Cockburn J stated:

“No doubt the absence of the will is a serious fact, and one which may place the court that has to decide whether the parole evidence of the contents is right or wrong in a position of considerable difficulty; but with that difficulty it is the business of the court to grapple, in order that effect may be given to the will of the man who

has made his will according to the requirements of the statute, and the will after his death ought to be carried into effect.”

He further states, “...The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone. I am, therefore, decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of the will are admissible as evidence of its contents – which lets in the memoranda made by the testator as preparation for his will....(at page 27)”

17. The evidence is that the Third Codicil was properly executed and in the possession of the Testator’s attorney. It was then destroyed en route to the Testator. This is a clear indication that the Testator did not form an intention to revoke the Will. In **Blythe v. Sykes [2019] EWHC 54** the Court found as follows:-

“[31] ...the concepts which govern the question of how a court approaches the issue of determining whether, as a fact, a will has actually been destroyed with the intention that is revoked where the question of its actual destruction is in issue.

[32] If a will was last traced to the possession of the testator and is not forthcoming at his death, there is, prima facie, a presumption, in the absence of circumstances tending to a contrary conclusion, that the testator destroyed it with the intention to revoke it.

[33] The presumption however may be rebutted by evidence which must be ‘clear and satisfactory’. If the presumption arises it is up to the propounder of the will, in this case Mr. Sykes, to establish, on balance, that the presumption has been rebutted. The strength of the presumption depends on the level or degree of security with which the testator had custody of the will during his lifetime.

[34] The presumption does not arise in circumstances where it is more likely than not that the will was not in the possession of the testator before his death but rather was in the possession of a third party such as a solicitor. In such a case then, where the proper execution of the will is not in doubt, the onus of proof is on the party asserting revocation to prove that, on balance, revocation occurred...”

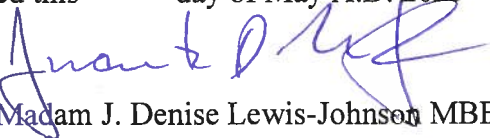
18. The Court is satisfied that the Will was destroyed in the plane crash and it was not the Testator’s intention to revoke it. No evidence was led to rebut the presumption. The issue

here is admissibility of secondary evidence that is the contents of a draft codicil. The sworn evidence of the attorney as to the contents of the Third Codicil is accepted and should be admitted to proof for probate.

19. Having regard to the evidence and law I find:-

- i. That the Claimant's application for admittance of the draft Third Codicil to proof for probate be admitted.

Dated this 15 day of May A.D. 2025


Hon. Madam J. Denise Lewis-Johnson MBE