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Article 11

Wills--Probate of Destroyed Will--Instrument Destroyed in Bombing Raid Held "Fraudulently Destroyed" (In the Matter of Will of Fox, 9 N.Y.2d 400 (1961))

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a rule of law, one should not be responsible for his conduct unless he could have reasonably foreseen that his conduct created an unreasonable risk of danger to a *normal* person.[24] Therefore, it has been said that persons with pre-existing disorders should not recover in these cases at all, or should only recover for damage due to an aggravation of their disorders.[25] Such a viewpoint would answer the objection that to allow recovery would be too dangerous an extension of actionable negligence. New York may find it necessary to lay down some specific restrictions, such as the above, on the new rule.

WILLS—PROBATE OF DESTROYED WILL—INSTRUMENT DESTROYED IN BOMBING RAID HELD "FRAUDULENTLY DESTROYED."—Testator executed a will in Germany, deposited it with a notary and never regained access to it or possession of it. The will was subsequently destroyed in an allied bombing raid, and the decedent, with knowledge of such destruction, failed to revoke the will. Upon testator's death petitioner sought to have the will probated as one fraudulently destroyed under Section 143 of the Surrogate's Court Act.[1] Testator's son unsuccessfully contested the probate of the will in the Surrogate's Court. Upon appeal, the Appellate Division, in reversing the Surrogate's Court, held that the will had not been fraudulently destroyed because of the testator's knowledge of the destruction.[2] In a 4-3 decision, the Court of Appeals, reversing the Appellate Division, *held* that a will is considered "fraudulently destroyed" if its destruction is effected by another without the testator authorizing or directing the destruction. *In the Matter of Will of Fox*, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961).

In the absence of statute it is generally held that a properly executed will which has not been revoked by the testator, and

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[24] See Smith, *supra* note 23, at 252-77.

[25] McNiece, *supra* note 23, at 76-79; Smith, *supra* note 23, at 302.

[1] N.Y. SURR. CT. ACT § 143 provides: "A lost or destroyed will can be admitted to probate in a Surrogate's Court, but only in case the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness."

[2] In the Matter of Will of Fox, 9 App. Div. 2d 365, 193 N.Y.S.2d 794 (1st Dep't 1959).

is lost or destroyed, is admissible to probate.[3] The fact that the testator has knowledge of the destruction by another has no bearing on its admissibility as mere knowledge or acquiescence does not effect a revocation.[4] This rule has been modified by statute in New York by Section 143 of the Surrogate's Court Act, which provides that a lost or destroyed will may be admitted to probate, "but only in case the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime. . . ." [5] Thus, in New York a lost or destroyed will may be probated if it meets one of these two conditions.

In New York it has been established that "existence" as used in the statute denotes physical existence of the will and not mere existence in contemplation of law.[6] However, the phrase "fraudulently destroyed" has not been amenable to such exactitude. At one time the court was of the opinion that an *actual fraud* must have been perpetrated in the destruction of the will,[7] while later cases have permitted *constructive fraud* to suffice.[8] In *Timon v. Claffy* [9] it was held that the "fraud . . . must consist in some deceitful contrivance, device or practice to defeat the wishes . . . of the testator. . . ." [10] However, in *In the Matter of Will of Dorrity* [11] the court decided that the "destruction of the will *without the knowledge* or consent of the testatrix in

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[3] See ATKINSON, WILLS § 97, at 506 (2d ed. 1953). For an historical development of the subject, see Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646 (1886).

[4] See ATKINSON, *op. cit. supra* note 3, at 507.

[5] N.Y. SURR. CT. ACT § 143.

[6] See In the Matter of Will of Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901). "The fact in issue [in regard to N.Y. CIV. PRAC. ACT § 1865, the predecessor of N.Y. SURR. CT. ACT § 143] was whether the instruments in question were *physically in existence* at the time of the death of the testatrix. . . ." *Id.* at 169, 60 N.E. at 443 (emphasis added). Although the courts in New York have not given much discussion to the matter, it can be inferred from the cases themselves that physical existence is required. If existence in contemplation of law were sufficient then the phrase "fraudulently destroyed" as used in the statute would be mere surplusage. Since the New York courts do not consider "fraudulently destroyed" to be mere surplusage, it logically follows that physical existence, and not existence in contemplation of law is required. For a case where existence in contemplation of law was considered sufficient, see In the Matter of Estate of Havel, 156 Minn. 253, 194 N.W. 633 (1923).

[7] Timon v. Claffy, 45 Barb. 438 (Sup. Ct. 1865), *aff'd mem. sub nom.* Conroy v. Claffy, 41 N.Y. 619 (1869); In the Matter of Will of De Groot, 18 N.Y. Civ. Proc. 102, 9 N.Y. Supp. 471 (Surr. Ct. 1890).

[8] Schultz v. Schultz, 35 N.Y. 653 (1866); St. John v. Putnam, 128 Misc. 714, 220 N.Y. Supp. 141 (Sup. Ct. 1927); In the Matter of Will of Dorrity, 118 Misc. 725, 194 N.Y. Supp. 573 (Surr. Ct. 1922).

[9] 45 Barb. 438 (Sup. Ct. 1865), *aff'd mem. sub nom.* Conroy v. Claffy, 41 N.Y. 619 (1869).

[10] *Id.* at 446.

[11] 118 Misc. 725, 194 N.Y. Supp. 573 (Surr. Ct. 1922).

disregard of her intention . . . constitutes constructive fraud and becomes a fraudulent destruction within the meaning of section 143. . . ." [12] It is evident that the cases are in harmony in requiring some type of fraud although in discord as to what type.

In the instant case the Court was again required to interpret the phrase "fraudulently destroyed." In so doing Judge Fuld utilized the reasoning employed in *Schultz v. Schultz*.[13] In that landmark case, the testator executed a will, deposited it with a custodian and never regained possession of it. Upon his death the instrument could not be discovered. The court held "that either this will was in existence at the time of the death of the testator, or . . . had been destroyed in his lifetime, *without his knowledge,* consent or procurement, or accidentally lost. If so destroyed, it was done fraudulently as to him. . . ." [14] It is worthy to note that one of the ostensible characteristics of "constructive fraud" is the testator's ignorance of the destruction of the will in his lifetime.

The majority in the instant case felt that an analysis of section 143 taken in conjunction with the *Schultz* case lead to the conclusion that "the design of the section is solely to require proof that the lost or destroyed will offered for probate was not destroyed by the testator *animo revocandi*." [15] The reasoning employed in the principal case and the *Schultz* case is similar but the facts to which it was applied are different in one very important aspect. In the instant case, the testator gained knowledge of the will's destruction before his death, whereas in *Schultz* the testator was unaware of such destruction. Since constructive fraud requires the testator's ignorance of such destruction it is apparent that the instant case is distinguishable from the *Schultz* case.[16]

Timon v. Claffy [17] was somewhat of an obstacle for the majority in the principal case. In the *Timon* case the testator executed a will which was subsequently destroyed by another in his presence and by his procurement. However, a valid revocation

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[12] *Id.* at 728, 194 N.Y. Supp. at 575-76 (emphasis added). *But see* In the Matter of Will of Reifield, 36 Misc. 472, 73 N.Y. Supp. 808 (Surr. Ct. 1901). "As I construe the statute and construe the term 'fraudulently' as applicable thereto, it appears to me that, in order to come within the lines thereof, there must be some intervening *human agency* in motion . . . to have brought about its destruction." *Id.* at 474, 73 N.Y. Supp. at 810 (emphasis added). The *Reifield* decision is a much narrower interpretation of constructive fraud than is the *Dorrity* decision.

[13] 35 N.Y. 653 (1866).

[14] *Id.* at 656 (emphasis added).

[15] In the Matter of Will of Fox, 9 N.Y.2d 400, 409, 174 N.E.2d 499, 505, 214 N.Y.S.2d 405, 413 (1961).

[16] Schultz v. Schultz, 35 N.Y. 653 (1866).

[17] 45 Barb. 438 (Sup. Ct. 1865), *aff'd mem. sub nom.* Conroy v. Claffy, 41 N.Y. 619 (1869).

was not effected as two witnesses were not present.[18] The court held that though the will remained unrevoked it could not be admitted to probate as one "fraudulently destroyed" because there was no fraud perpetrated on the testator. Essentially, the facts are the same as in the instant case except that in *Timon* the testator had attempted a revocation according to statute. However, the fact stands that in both cases the wills remained unrevoked while the testators had knowledge of their destruction. The obstacle presented by *Timon* was overcome in the present case by the majority's dismissing *Timon* as merely standing for the proposition that a will which is destroyed in the testator's presence and by his procurement will not be deemed "fraudulently destroyed." [19] However, the court in *Timon* based its decision on the fact that a fraud had not been committed on the testator.[20]

It is obvious from what has been said that the majority in the case at hand did not require fraud, actual or constructive, as a prerequisite to declaring a will "fraudulently destroyed." Rather, the Court stated that the term "fraudulently destroyed" has nothing to do with the motive for destruction, but solely with the agency of the destruction.[21] If the will is destroyed by someone other than the testator "without his authorizing or directing it," [22] then upon the testator's death it should be admitted to probate. Thus we now have a much more expansive interpretation of the phrase "fraudulently destroyed."

The dissent, however, was quite explicit in declaring that some type of fraud is necessary before a will can be declared "fraudulently destroyed." As did the majority, Chief Judge Desmond relied on the *Schultz* case. It was cited by the dissent to emphasize that the fraud referred to in section 143 "is a *fraud* upon the testator," [23] thus stressing that the court in that case required fraud. After relegating the *Schultz* case to this position, the dissent stated that the *Timon* case has settled the question as to whether or not an unrevoked will destroyed in the testator's lifetime would be admitted to probate if he had knowledge of such destruction.

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[18] See N.Y. DECED. EST. LAW § 34.

[19] In the Matter of Will of Fox, *supra* note 15, at 410, 174 N.E.2d at 505, 214 N.Y.S.2d at 413.

[20] Timon v. Claffy, 45 Barb. 438 (Sup. Ct. 1865), *aff'd mem. sub nom.* Conroy v. Claffy, 41 N.Y. 619 (1869). It is interesting to note that the majority in the instant case felt that *Timon* had been affirmed on other grounds. This appears to be an assumption, as the Court of Appeals' determination of the case was without opinion. The majority in the principal case distinguished *Timon* only after assuming *arguendo* that it had been affirmed on the question of fraud.

[21] In the Matter of Will of Fox, *supra* note 15, at 409, 174 N.E.2d at 504, 214 N.Y.S.2d at 413.

[22] *Ibid.*

[23] Schultz v. Schultz, *supra* note 16, at 655 (emphasis added).

"A testator who knows that his testament has been annihilated and accepts the fact and does nothing about it despite a reasonable opportunity to make a new will has not been the victim of a fraud, actual or constructive." [24] Thus, the dissent is of the opinion that some type of fraud is necessary to satisfy the phrase "fraudulently destroyed," and that the testator's knowledge of destruction, either at the time thereof or subsequent thereto, will refute the contention of fraud.

The Court of Appeals' construction of the phrase "fraudulently destroyed" in the principal case has rounded out the judicial definition of that phrase. The indefinite nature of the phrase has concerned both the bar and the bench. The instant case has to a great degree eliminated this indefiniteness and given the phrase a meaning capable of practical application. Almost every will destroyed in the testator's lifetime which remains unrevoked will now be admitted to probate; it is no longer necessary for the court to adopt a somewhat strained definition of constructive fraud.

However, cases which present facts similar to *Timon* will not come within the purview of the definition. It would appear then that if an ineffective attempt is made by the testator to revoke his will and such attempt causes the destruction of the instrument, then it is not "fraudulently destroyed."

The Court in the instant case, for all practical purposes, has rendered the word "fraudulently" mere surplusage. Perhaps, in view of the fact that the courts have found the phrase to be unworkable, it is timely for the legislature to amend section 143. "Fraudulently destroyed" should be replaced by a phrase more in consonance with court construction of that section.

[24] In the Matter of Will of Fox, *supra* note 15, at 413, 174 N.E.2d at 507, 214 N.Y.S.2d at 416 (dissenting opinion).