June 14, 1991

ESTATE OF ANGELINA BARNABY, Deceased

In this proceeding petitioner seeks to vacate a decree entered on October 24, 1989, admitting to probate a will dated August, 1975, and to then file objections to the will on the ground that it is a forgery. The Internal Revenue Service had seized the interest of decedent's son in real property which decedent had owned on the date of her death for non-payment of taxes. Petitioner purchased this interest at an auction on May 25, 1989. Decedent died on May 13, 1978 survived by her son as her sole distributee. If the 1975 will is valid, petitioner made a worthless purchase because the real property is devised under the will to respondent, who is the decedent's grandson.

Respondent contends that the decree should not be vacated because the court has already determined that decedent's will is valid; that petitioner has failed to "show facts sufficient to

afford a substantial basis for contesting a will as well as establishing a reasonable probability of success in such a contest"; and that petitioner lacks the status to object to the instrument. Respondent requests that the application be dismissed and that sanctions be imposed against petitioner.

Respondent is both the sole beneficiary and nominated executor under the will which had been admitted to probate. This will was purportedly executed on an unspecified day in August, 1975. Although decedent had died in 1978, the petition to probate the will was not filed in this court until October, 1989, more than 11 years after decedent's death. Respondent filed an affidavit in the probate proceeding indicating that the delay in offering the instrument for probate was based upon his being unaware that "any legal action" was necessary and that it had recently been "suggested" to him "that the title to the property in question might be unclear". As a result of this suggesstion, he had consulted with an attorney who had advised him that it would be appropriate to probate the instrument. Based upon this affidavit,

the usual proofs, and the waiver and consent of Roy Barnaby, who is decedent's son and respondent's father, the 1975 will was admitted to probate. At that time it appeared that decedent's son had no objection to the admission of the will to probate and that he was the only person who could be adversely affected thereby inasmuch as he was decedent's sole distributee and the sole beneficiary under decedent's 1957 will which had been filed in this court in 1980, approximately two years after the decedent's death.

Petitioner alleges that respondent's reason for offering the will for probate are not as benign as they appeared from his one sided allegations in the initial probate proceeding. It appears that decedent was the record owner of the real property and that the seizure and sale to petitioner on account of the tax delinquency of decedent's son was based upon the premise that title to the property devolved to the son by operation of law. Petitioner was allowed to have experts examine and test the admitted will as well as the 1957 will which had been filed in this court [Matter of Barnaby, N.Y.L.J., March 8, 1990, p. 25,

col. 4]. Sworn statements of both a handwriting expert and a forensic chemist aver that the 1957 and 1975 wills were not signed by the same person. The parties apparently agree that the earlier will contains a genuine handwriting specimen of the decedent. Although the handwriting expert did not set forth the basis for his conclusion, the forensic chemist stated that the ink used by each person who signed the purported 1975 will was only manufactured between 1980 and 1985 and could not have been used by anyone in 1975. Additionally, "the keeper of records" for the paper company that allegedly manufactured the bond paper used in the 1975 will filed a sworn statement alleging that a review of a template made from the "water mark" appearing upon the paper revealed that a combination of the particular symbol used in the "water mark" and its placement establishes that the paper was not manufactured prior to January 23, 1980.

In addition, petitioner argues that the circumstance surrounding the probate of the purported 1975 instrument make it suspect. The instrument was not presented for probate until more

than 11 years after the decedent's death, by which time decedent's son had already lost whatever interest he might have had in the real property as a result of the tax lien sale. Furthermore, petitioner notes that the two attesting witnesses were beholden to decedent's family, that they were married to each other, and that no attorney witnessed or supervised the execution of the instrument. Lastly, respondent argues that it is suspicious that the purported 1975 will changed the beneficiary of the 1957 will, which had been filed with the court after the death of the decedent, from the decedent's son to her grandson without any explanation as to what event triggered the change.

Respondent's contention that the court should not entertain this application because the court has already determined that the will is authentic has no merit. The instrument was admitted to probate at a time when the court had no reason to suspect the possibility that decedent's son and grandson instead of having interests adverse to each other might have been conspiring to defraud respondent. It would be a contradiction in terms to hold, as respondent appears to contend is

the law, that a court of equity is without any power to reverse the harm caused by a fraud which has been perpetrated before it. The law does not require such a bizarre result. This court has inherent power to right a wrong by vacating a decree which it had entered as a result of a fraud [Matter of Brennan, 251 N.Y. 39; Matter of Regan, 167 N.Y. 338; Matter of Kauffman, 54 AD2d 1067; see also SCPA 209(1) and (10)].

It is well settled that the party who alleges that a fraud has been committed has the burden of establishing its existence [Matter of Kauffman, supra, citing Matter of Griffin, 210 App. Div. 564; Matter of Sandow, 25 Misc 2d 356, 358-359, affd. 13 AD2d 451]. Moreover, there are innumerable cases in which expert testimony has been diametrically opposed or where the trier of the facts has given more credence to the testimony of those persons involved in the pertinent events than to the testimony of expert witnesses. Nevertheless, petitioner has presented sufficiently detailed allegations to warrant vacating the decree so that the court may re-examine, pursuant to its obligation under SCPA 1408(1), whether it is

satisfied as to the genuineness of the 1975 will. At this juncture of the proceedings, these allegations include but are not limited to the expert proof, which was not contradicted by any other expert proof, that the instrument admitted to probate could not have been executed prior to decedent's death and the fact that respondent and his father had a motive to manufacture a will 11 years after decedent's death because, without the presence of this will, the real property which had belonged to decedent would go to petitioner instead of a member of decedent's family.

Inasmuch as it has been concluded that the court is exercising its inherent power to vacate the probate decree, the only remaining question is whether petitioner has the right to file objections to probate as a party to the proceeding. At the outset it is noted that, if this matter were to proceed solely as an inquiry by the court to satisfy itself as to the genuineness of the 1975 will, the court would nevertheless request that petitioner present any proof that it has which would bear on the genuineness of the instrument. Furthermore, as a general rule, it is

clearly preferable that the court be the arbiter of a contest, where all interested parties present evidence, instead of placing the court in the awkward position of having to be both the inquisitor and the final arbiter of its own inquisition. Lastly, it simply makes no sense to conclude that the party who is the victim of an alleged fraud has no right to participate in the proceeding in which the question to be determined is whether a fraud was perpetrated.

Although petitioner is not listed in SCPA 1403 as a party who must be served with process in a proceeding to probate a will, under the facts of this case, the court cannot agree with respondent's contention that this necessarily supports the conclusion that petitioner may not be made a permissible party to the probate proceeding. "A person's right to process under SCPA 1403 should not be correlated with the right to object under SCPA 1410" [Goldman, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 58A, SCPA 1410, p. 317]. Objections to probate may be filed by "(a)ny person whose interest in property or in the estate of the testator would be adversely affected

by the admission of the will to probate" [SCPA 1410]. The word "estate" is defined in SCPA 103 (19) as "(a)ll of the property of a decedent,...as originally constituted, and as it from time to time exists during administration." Here, the real property at issue must be considered as part of the "estate" of decedent as that word is used in SCPA 1410 and that petitioner's interest in the real property "would be adversely affected by the admission of the will to probate" as those words are used in SCPA 1410. The ownership of the real property hinges solely upon the validity of the purported will and it does not appear that any other property of the decedent is at stake in the probate proceeding. Moreover, the initial probate proceeding was not filed until after petitioner had obtained the interest of decedent's son, her sole distributee, in the real property.

Under the unusual fact pattern presented, it is concluded that petitioner, in effect, stands in the shoes of decedent's son, her sole distributee, and may file objections to the 1975 instrument so that its interest in the real property may not be adversely affected by the

admission of the instrument to probate. These unusual circumstances include, inter alia, that the admission of the 1975 instrument to probate has no practical effect upon anyone other than petitioner or respondent and that petitioner has presented proof which raises the distinct possibility that respondent presented a fraudulent will to this court in the initial probate porceeding and that the petitioner was the victim of the fraud. Of course, respondent may be able to establish the genuineness of the will at the trial.

Accordingly, the application to revoke the probate decree entered on October 24, 1989 is granted and the letters testamentary issued thereunder to respondent are revoked. Petitioner may serve and file the proposed objections within 10 days of the entry of the order to be settled herein. Respondent's request to dismiss petitioner's application is denied. His request for the imposition of sanctions against petitioner as well as any similar application that petitioner might make against respondent shall be considered

by the court after it has been established who, if anyone, frivolously or fraudulently presented claims before the court.

Settle order.

Lee L. Holzman

SURROGATE