

Elder Law/Trust & Estates

All Hope Is Not Lost—Probating a Lost Will Pursuant to SCPA §1407

When confronted with the loss of an original will instrument, estate practitioners have traditionally responded with a briefcase containing affidavits explaining the circumstances behind the document's disappearance. It is therefore not surprising that such a loss can serve as a potential death knell for any probate proceeding. However, hope is not lost. In New York, probating a copy of a lost or destroyed will is, to quote a line from *The Godfather Part II*, "difficult, not impossible."

Pursuant to SCPA § 1407, a copy of a lost or destroyed will may be admitted to probate only upon (1) establishing that the will has not been revoked, (2) proving execution in the manner required for probate of an existing will, and (3) clearly and distinctly proving all of the provisions of the will by at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

This threshold poses a daunting task for estate practitioners, particularly those seeking to probate copies of wills that are several decades old. If the proffered will is more than twenty years old, the drafting attorney and/or witnesses are often impossible to locate. They may well be deceased. Further, as time goes by memories tend to fade and documents tend to disappear.

Practitioners in some cases have resort-

ed to the ancient document rule to successfully probate copies of wills that are several decades old. Most courts require the copy of the will to be a minimum of thirty years old in order for the ancient document rule to apply, however Nassau County Surrogate's Court has adopted the more lenient twenty-year-old federal rule.¹

In these instances, the court will ascertain whether the location from which the copy was obtained constitutes a "natural place of custody" and will also examine the appearance of the document itself to determine whether the drafting language contained therein, or the physical state of the copy are suspicious in nature, before admitting the copy to probate.² If, however, the ancient document rule is inapplicable, the petitioner will be obligated to comply with the requirements of SCPA § 1407.

As a general rule, the second requirement of SCPA §1407, namely proving execution in the manner required for probate of an existing will, is easily surmountable. This is particularly true if there is evidence that the will was executed with attorney supervision, which in and of itself creates a presumption



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of due execution.³ If any or all of the witnesses to the will are deceased, their testimony may be dispensed with pursuant to SCPA § 1405 regarding the due execution of the instrument, provided that the petitioner is able to submit handwriting samples for the testator and one witness.⁴

The first prong of SCPA §1407—establishing that the will has not been revoked, can be a bit more troubling. In most instances, a presumption of revocation arises when

the original testamentary instrument, known to have been in possession of the testator prior to death, cannot be located after death.⁵ When it is alleged that the decedent's will was destroyed during his lifetime, petitioners are required to provide proof that the testator, or someone acting at his direction, had not previously revoked the will.⁶

Accordingly, the practitioner is faced with the formidable task of proving a negative, that the testator did not revoke the will at any time since the date the subject will was executed. While it is entirely possible that proof exists that the testator formed such a bond with his existing estate plan that revocation would be seen as implausible, often such

proof is wanting. Furthermore, witness testimony may be subject to dismissal for being either speculative or mere conjecture.

Some petitioners have managed to successfully probate a copy of the will with the submission of an affidavit from the drafting attorney. The submission may include a copy of the will that was executed. It may also set forth the attorney's personal recollection of the terms which were drafted in the original instrument, in an effort to confirm that they are identical to the terms set forth in the copy of the will now being submitted for probate.⁷

For the attorneys charged with the task of probating a lost or destroyed will, tracking down the drafting attorney is pivotal for a successful probate petition. If the drafting attorney is deceased or cannot be located, petitioners may still seek to probate a copy by submitting evidence establishing that it was the attorney-drafter who retained possession of the original will.

Evidence which has previously been accepted by the courts have included correspondence from the drafting attorney which indicates that the original will remained in their possession, or a "COPY" stamp affixed to the decedent's instrument to indirect-

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Kirk & Kubrick at the Court Martial

Gentlemen of the court, there are times that I am ashamed to be a member of the human race and this is one such occasion. It's impossible for me to summarize the case for the defense, since the Court never allowed me a reasonable opportunity to present my case....

The attack yesterday morning was no stain on the honor of France, and certainly no disgrace to the fighting men of this nation. But this court martial is such a stain and such a disgrace. The case made against these men is a mockery of all human justice.

Gentlemen of the court, to find these men guilty will be a crime to haunt each of you until the day you die. I can't believe the noblest impulse in man, his compassion for another, can be completely dead here. Therefore, I humbly beg you show mercy to these men.

Kirk Douglas as Colonel Dax, in *Paths of Glory*

Violence tragically has been the hallmark of our species and war the most visceral form of man's inhumanity to man. As well, the depiction of martial combat, be it on cave walls or on movie screens, has long captured the human imagination.

As a genre, war movies run the gamut from action epics to service comedies. Films have portrayed, at various times and in different ways, either valor or cowardice, victory or defeat, noble sacrifice or bitter pathos. Cinema is universal, and armed conflict is a recurring and pervasive theme.

Yet few films possess the power or the poignancy of Stanley Kubrick's 1957 film *Paths of Glory*.¹ Featuring towering performances from Kirk Douglas, Adolphe Menjou, and George Macready, the story is adapted from the novel by Humphrey Cobb.

Set during World War I, the audience is presented with the agonies of the Western front in stark and vivid terms. Incredibly, the memory of Kirk Douglas, who just passed at age 103, still remains very much with us and *Paths of Glory* can well-serve as a testament to his artistry.

It would be a cliché to simply label *Paths of Glory* as "anti-war." The film is a cinematic indictment of twentieth-century militarism. Its devastating portrait of the French Army is, in all actuality, a metaphor for the human condition, particularly its capacity for veniality and folly.

The film affirms the maxim that in war, "truth" is the first causality.² In quick succession, "truth" is followed on the causality list by any notion of justice. The events delineated in *Paths of Glory* dramatically demonstrate the machinations of those in positions of authority, wielding their power with casual regard for human life.

The law plays a prominent role in the story as it unfolds. For as gripping as the combat scenes are, the film's moral center revolves around the court martial of three soldiers wrongly charged with "cowardice in the face



of the enemy." The trial of these unfortunates is on par with the brutalities visited them and their comrades on the battlefield.

French and German forces are mired in a bloody stalemate. As the movie's opening narration informs the audience, "By 1916, after two grisly years of trench warfare, the battle lines had changed very little. Successful attacks were measured in hundreds of yards and paid for by thousands of lives." This situation was untenable, both militarily and politically.

General Broulard (Menjou), of the French General Staff, initiates the film's action by manipulating a vain-glorious martinet, General Mireau (Macready), into attacking an impregnable German position, known fittingly as the "Ant-Hill." Mireau, ever hungry for promotion, in turn orders his field commander Colonel Dax (Douglas) to carry out these orders over Dax's own better judgement.

In spite of the valor of Dax's men, the offensive falters. Taking the Ant-Hill was not only impossible, it was foolish. Mireau, who views the failed assault as a personal affront to his ambitions, takes the extraordinary step of ordering a French artillery battery to fire on his own troops. The battery commander refuses to do so without a written order from the general.

The search for blame, more properly put, for scape-goats, begins almost at once. Ultimately three men,³ one from each company, are selected to be court martialed. One is chosen by lot. Another is chosen because his company commander sees him as a social undesirable. And a third is chosen in order to keep him silent after witnessing his company commander's cowardice and incompetence.

Dax, the foremost criminal lawyer in France before the war, volunteers to represent the soldiers. Moreau, his reputation on the line, sees Dax as disloyal for taking on the case. He threatens to "break him thru the ranks."

accurate copy of an instrument that was duly executed, establishing all of the provisions set forth in the original, also serves to evidence that the copy in the decedent's possession is a complete.⁸ Additionally, whether the decedent had openly held out the copy of the will to be their last will and testament will bolster the application in those cases where the evidence establishing the third prong of SCPA § 1407 is circumstantial.⁹

For estate planning attorneys, it is important to keep the rigid requirements of SCPA § 1407 in mind when executing wills. If the client leaves the ceremony with a copy only in-hand, estate planners should distinctly



Rudy Carmenaty

Dax is given only three hours to prepare his defense.

Moreau's chief-of-staff, Major Saint-Auban, is set to prosecute. During the trial, Mireau hovers on the periphery of the proceedings as an overbearing presence. With Mireau interjecting at will, the trial quickly degenerates into a farce.

No formal charges are filed nor is a written indictment presented in open court. No stenographic transcript is kept. The court's presiding officer adroitly restricts Dax in his every attempt to offer an effective defense. Dax is literally reduced to pleading for mercy on behalf of his clients. To call this a Kangaroo Court is to do a disservice to that noble animal.

The conviction of the soldiers is a foregone conclusion. Preparations for their executions are underway while the court is supposedly still deliberating. The men are sentenced to death by firing squad, the sentence to be carried out at dawn the following morning.

The machinery engendered by the court martial is determined to see the men convicted and executed as quickly as possible. Once set in motion, nothing will be permitted to interfere. When one of the men is severely injured in a jail-house brawl, he is strapped to a stretcher, lined up against the wall, and his checks pinched so that he can attain momentary consciousness before being shot.

Just prior to the executions, Dax obtains a sworn statement from the artillery officer charging that Mireau had given the order to fire on his own trenches. Dax takes the affidavits to Broulard in an eleventh-hour appeal for clemency. Broulard does nothing to stop the executions.

The following day however, Broulard cleverly uses the affidavits against Mireau, forcing his hand with talk of a public inquiry. Broulard, acknowledging that France cannot afford to have fools guiding her military destiny, then offers Dax Mireau's command.

Dax is taken aback. More in revulsion than

in anger, he lashes out at Broulard calling him "a degenerate, sadistic old man." Broulard, for his part, assumed that Dax was solely interested in succeeding Mireau. He is surprised to realize that Dax genuinely sought to spare the soldiers' lives.

Their ensuing confrontation reverberates long after the film is over. For his part, Broulard, ever the Machiavellian, compares Dax to the village idiot, pitying him for his idealism: "We're fighting a war, a war we've got to win. Those men didn't fight, so they were shot. You bring charges against General Mireau, so I insist that he answer them. Where have I gone wrong?"

The film concludes with Dax and his men being ordered to the front once more. This was the First World War in microcosm. It was a war of attrition carried out by the European powers or, if you will, a mutual suicide pact on the installment plan. The price being paid by the common foot soldier. A price the officers, it seems, never have to pay.

There is, however, one final denouement of pathos. In a crowded beer hall, a young German girl⁴ is brought out to entertain the weary, battle-scarred men. To the initial wail of catcalls and wolf whistles, the room falls silent as the young woman's song, sung in German, touches their battered souls providing a brief moment of solace.

Paths of Glory is a remarkable film. Upon its initial release, it was not commercially successful. The movie ran afoul of many of the strictures of the 1950's, when the Cold War was at its height. The film was so controversial in fact, that it was not shown in France until 1974.⁵

This was Stanley Kubrick's first major film and a harbinger of things to come. It can rightfully be said that *Dr. Strangelove* (1964), *A Clockwork Orange* (1971), and *Full Metal Jacket* (1987) can trace their lineage within the director's oeuvre to *Paths of Glory*. For film aficionados, it was an auspicious beginning.

For the legal profession, *Paths of Glory* merits repeated viewing.⁶ It is a film which captures the law at its most debased. It shows that under such circumstances the law becomes not a search for truth, but instead a twisted incarnation of deceit and violence. The rigged court martial, Dax's ham-strung defense, and the merciless carrying out of the executions, all illustrate how the law can be manipulated to perverse ends.

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1. The film was produced by James B. Harris and released thru United Artists. The script is by Calder Willingham, Jim Thompson, and Kubrick.
2. This maxim was first attributed to Hiram Johnson (1866 - 1945).
3. Tim Carey, Ralph Meeker, and Joe Turkel render evocative performances as the doomed soldiers.
4. Played by Susanne Christian, she would subsequently become the wife of Stanley Kubrick.
5. Vincent LoBrutto, *Stanley Kubrick*, 155 (1st Ed. 1997).
6. The film's running time is 87 minutes.

LOST WILL ...

Continued From Page 3

ly establish that the original was retained by the drafting attorney. Also accepted are handwritten notations by the decedent which indicate that the original will is in the possession of the drafting attorney.

This sort of circumstantial evidence is helpful in establishing that the will was not revoked by the decedent, as the original remained with the attorney-draftsman, and that it was not destroyed by the decedent. An

mark the client's document as a "copy" and provide a cover letter to the client which confirms their retention of the original. Maintaining a paper trail or paperless trail via email is vital. These small steps may serve to alleviate potential problems in the future, if the original will cannot be located at the time of the testator's death.

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1. *Matter of Cafferky*, 38 Misc.3d 1219(A) (Surr. Ct., Bronx Co. 2013).
2. *Matter of Brittain*, 54 Misc.2d 965 (Surr. Ct., Queens Co. 1967).
3. *Matter of Halpern*, 76 A.D.3d 429 (1st Dept. 2010).
4. *Matter of Derrick*, 88 A.D.3d 877 (2d Dept. 2011).
5. See, e.g., *Collyer v. Collyer*, 110 N.Y. 481 (1888).
6. *Matter of Fox*, 9 N.Y.2d 400 (1961).
7. *Matter of Castiglione*, 40 A.D.3d 1227 (3d Dept. 2007).
8. *Cafferky*, supra n.1; *Matter of Quinlan*, NYLJ (Oct. 13, 1993) at 24.
9. *Cafferky*, supra n.1; *Matter of Keane*, 65 Misc.3d 1229(A) (Surr. Ct., Kings Co. 2019).