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The Probate of Lost Wills: In re Kleefeld

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The Probate of Lost Wills: *In re Kleefeld*

I. Introduction

It is not uncommon that an original will is lost or destroyed while in the possession of the testator[1] or in the custody of a third party.[2] The will may have been lost or destroyed due to the negligence of the testator himself, without an intention to revoke the will,[3] or through the negligent or fraudulent act of another.[4] It may also have been destroyed by a catastrophe such as fire or flood.[5]

In New York, section 1407 of the Surrogate's Court Procedure Act (SCPA 1407),[6] allows probate of a lost or destroyed will if the proponent[7] proves contents of the will, its due execution,

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1. *See In re* Yanover, 16 Misc. 2d 128, 182, N.Y.S.2d 961 (Sur. Ct. Nassau County 1959); *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939); *In re* Shlevin, 157 Misc. 40, 283 N.Y.S. 377 (Sur. Ct. Richmond County 1935).

2. *See In re* Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961); *In re* Granacher, 174 N.Y. 504, 66 N.E. 1109 (1903); *In re* Juriga, 140 N.Y.S.2d 656 (Sur. Ct. Queens County 1955); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951).

3. If the testator destroys his will because he wishes to revoke it, it ceases to exist as a valid will and cannot be admitted to probate. If the testator failed to make a new will, he will then have died intestate. When a will is destroyed by the testator without an intent to revoke, or is destroyed by a third party without the testator's knowledge or direction, it continues to exist as a valid will. It can then be admitted to probate if it is proved that an original will was executed and it was not destroyed by the testator with the intent to revoke it. 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed. 1982); 2 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK § 1157 (1947); H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939).

4. *See, e.g., In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939) (original will destroyed by testator's maid while cleaning closet).

5. In the following cases, the will was destroyed by fire while in the possession of the attorney-draftsman. *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961).

See In re FOX, 9 N.Y.2d 400, 174 N.E.2d 499, 24 N.Y.S.2d 405 (1961) (original will destroyed during bombing raid in Germany while in possession of custodian).

6. N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1971) which became effective September 1, 1967, replacing SURR. CT. ACT § 143 (McKinney 1921). *See* 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed. 1982). *See infra* text accompanying note 16.

7. The proponent of a will is the party who offers it for probate. BLACK'S LAW DICTIONARY 1097 (rev. 5th ed. 1979).

and absence of revocation by the testator.[8] In *In re Kleefeld*,[9] the New York Court of Appeals disallowed probate of a lost will when the proponent failed to strictly comply with the evidentiary requirements for proof of contents under SCPA 1407.[10] The majority determined that the statute should be strictly construed and not alterable by judicial interpretation[11] in order to effectuate the primary purpose of the statute's evidentiary requirements to prevent the admission of fraudulent wills to probate.[12]

Part II of this note discusses the legislative history of SCPA 1407 and the judicial interpretations given to its provisions. Part III presents the factual background of *Kleefeld* and discusses the opinions of the Surrogate's Court, the appellate division, and the court of appeals. Part IV analyzes the court of appeals holding. Part V concludes that although the *Kleefeld* court's construction of SCPA 1407 places a heavy burden of proof on proponents of lost wills and will make admission to probate a more difficult procedure in the future,[13] it is a correct interpretation of the statute as mandated by public policy considerations.

II. Background

At common law, a lost will was admitted to probate if the proponent proved the contents of the will, its due execution, and the absence of revocation by the testator.[14] In New York, as in most other jurisdictions,[15] the common law has been codified. SCPA 1407 provides that:

> A lost or destroyed will may be admitted to probate only if
> (1) It is established that the will has not been revoked.
> (2) Execution of the will is proved in the manner required for

8. 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed. 1982).

9. 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (1982).

10. *Id.* at 257, 433 N.E.2d at 523, 448 N.Y.S.2d at 458.

11. *Id.* at 259, 433 N.E.2d at 524, 448 N.Y.S.2d at 459.

12. *Id.*

13. Holding that strict statutory construction was necessary, the court denied probate to the lost will when the evidentiary requirements for proof of contents under SCPA 1407 were not precisely adhered to. *See infra* notes 75-79 and accompanying text.

14. A. Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283, 283 (1945); Note, 37 N.Y.U. L. REV. 168, 168 (1962); Note, 36 ST. JOHN'S L. REV. 182, 183 (1961).

15. For a discussion of the probate of lost wills under the various state statutes, see Note, 29 NOTRE DAME L. REV. 444 (1954).

the probate of an existing will, and

(3) All of the provisions of the will are clearly and distinctly proved by each of at least 2 credible witnesses or by 1 witness and a copy or draft of the will proved to be true and complete.[16]

When the foregoing requirements are met, the proponent is in the same position as if he were offering an original will to probate.[17]

Allowing probate of a lost or destroyed will prevents the frustration of testamentary intent that results from requiring intestacy for a missing but otherwise valid will.[18] Admittance of fraudulent wills to probate is equally to be avoided, and, where the original will is missing, the possibility of fraudulent admission increases significantly.[19] Therefore, although New York provides the opportunity to admit lost or destroyed wills to probate, the standard of proof required for admittance is stringent,[20] with the burden of proof falling entirely on the proponent of the will.[21]

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16. *See supra* note 6.

17. *See* 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed. 1982); H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939); *infra* notes 51-56 and accompanying text.

18. *In re* Hughson, 97 Misc. 2d 427, 429, 411 N.Y.S.2d 839, 841 (Sur. Ct. Erie County 1978):

> The apparent alternative to probating the 1968 [lost] will is intestacy, a result obviously not intended by the testatrix . . . [C]ertainly, it is the court's obligation to avoid intestacy if possible, and to carry out, within the realm of possibility, the intent of the deceased. . . .

Id. at 429, 411 N.Y.S.2d at 841.

See Schultz v. Schultz, 35 N.Y. 653 (1866) (court develops the concept of constructive fraud to avoid intestacy). *See infra* notes 36-46 and accompanying text for a discussion of constructive fraud.

19. "Such a statute [lost wills statutes] serves as a protection against the ready setting up by oral evidence of an allegedly lost will which is actually spurious." Note, 32 CALIF. L. REV. 221, 221 (1944).

20. *See* Kahn v. Hoes, 14 Misc. 63, 35 N.Y.S. 273 (1895):

> Experience, however, has demonstrated the necessity of providing for the cases where wills which had been duly executed were lost . . . [b]ut in so doing the legislature has also sought in some measure to provide against the dangerous consequences imminent upon this relaxation of the rule [for probate of original existing wills] by prescribing a special quality of proof in such cases.

Id. at 65, 35 N.Y.S. at 274.

21. *See In re* Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961); *In re* Sheldon, 158 A.D. 843, 144 N.Y.S. 94 (3d Dep't 1913); *In re* Pardy, 161 Misc. 77, 291 N.Y.S. 969 (Sur. Ct. Clinton County 1936); *In re* Shlevin, 157 Misc. 40, 283 N.Y.S. 377 (Sur. Ct. Richmond County 1935); *In re* Luby, 144 Misc. 900, 260 N.Y.S. 541 (Sur. Ct. Rensselaer County 1932); 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed.

SCPA 1407[22] replaced the provisions formerly found in section 143 of the Surrogate's Court Act (SCA 143),[23] under which many lost wills cases were decided.[24] The first evidentiary requirement of SCA 143 permitted a lost or destroyed will to be admitted to probate upon proof that "the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime . . . ."[25]

Under common law, when a will was last seen in the possession of the testator and could not be located after his death, a presumption arose that he destroyed the will *animo revocandi*.[26] The presumption arose when the will was in the testator's possession because it was then under his control and its non-existence was presumed to be the result of his intentional destruction. The first evidentiary requirement of SCA 143 allowed the proponent to overcome the presumption of revocation by proving that the will was in existence at the time of the testator's

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1982); H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939).

22. *See supra* note 6 and text accompanying note 16.

23. N.Y. SURR. CT. ACT § 143 (McKinney 1921), was enacted in 1920 and replaced section 1865 of the New York Code of Civil Procedure (CCP), the 1830 codification of the common law. *In re* Dorrity, 118 Misc. 725, 726, 194 N.Y.S. 573, 574 (Sur. Ct. Westchester County 1922). N.Y. SURR. CT. ACT § 143 (McKinney 1921) provides that:

> 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 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.

Id. The language of the SCA 143 was almost identical to CCP 1865. *In re* Granacher 74 A.D. 567, 569, 177 N.Y.S. 748, 750 (4th Dep't 1902).

24. *See In re* Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961); *In re* Staiger, 243 N.Y. 468, 154 N.E. 312 (1926); *In re* Robinson, 257 A.D. 405, 13 N.Y.S.2d 324 (1st Dep't 1939); *In re* Yanover, 16 Misc. 2d 128, 182 N.Y.S.2d 961 (Sur. Ct. Nassau County 1959); *In re* Haefner, 4 Misc. 2d 835, 162 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939); *In re* Musacchio, 146 Misc. 626, 262 N.Y.S. 616 (Sur. Ct. Madison County 1933).

25. N.Y. SURR. CT. ACT § 143 (McKinney 1921).

26. *Animo Revocandi:* with intention to revoke. BLACK'S LAW DICTIONARY 80 (rev. 5th ed. 1979).

See In re Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961); *In re* Staiger, 243 N.Y. 468, 154 N.E. 312 (1927); *In re* Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901); Collyer v. Collyer, 10 N.Y. 481, 18 N.E. 110 (1888); *In re* Millens, 30 N.Y.S.2d 274 (Sur. Ct. Ulster County 1941), *aff'd mem.*, 264 A.D. 936, 36 N.Y.S.2d 27 (3d Dep't 1942), *aff'd mem.*, 291 N.Y. 613, 50 N.E.2d 1014 (1943); *In re* Robinson, 257 A.D. 405, 13 N.Y.S.2d 324 (4th Dep't 1939); Note, 37 N.Y.U. L. REV. 168, 170 (1962).

death[27] or that it was fraudulently destroyed in his lifetime.[28] The presumption of revocation was completely overcome by proof that the will had been in the custody and under the control of a third person rather than in the testator's possession.[29]

The meaning of the phrase "was in existence"[30] was consistently interpreted by the courts as meaning the physical existence of the will until the moment of the testator's death and its subsequent loss or destruction.[31] The courts, however, had difficulty defining the term "fraudulently destroyed."[32] Originally, the courts held that an actual fraud perpetrated against the testator was necessary to admit the will to probate.[33] Requiring actual fraud meant that a will which was destroyed by negligence, accident or unknown agent could not be admitted to probate.[34]

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27. *See In re* Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961); 2A Warren's Heaton on Surrogates' Courts § 179 (6th ed. 1982); H. Harris, Estates Practice Guide § 240 (1939).

As the court noted in Collyer v. Collyer, 110 N.Y. 481 (1888):

> He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested in establishing intestacy had an opportunity to destroy the will.

Id. at 486. *See In re* Fox, 9 N.Y.2d 400 (1961) where the court said 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.*" *Id.* at 409.

28. 2A Warren's Heaton on Surrogates' Courts § 179 (6th ed. 1982); 76 Am. Jur. 2d *Trusts* § 605 (1975).

29. *See* Schultz v. Schultz, 35 N.Y. 653 (1866); *In re* Bly, 281 A.D. 769, 118 N.Y.S.2d 340 (2d Dep't 1953); *In re* Levinsohn, 5 Misc. 2d 605, 160 N.Y.S.2d 479 (Sur. Ct. Kings County 1957); *In re* Haefner, 4 Misc. 2d 835, 162 N.Y.S.2d 596 (Sur. Ct. Queens County 1956).

See A. Evans, *The Probate of Lost Wills*, 24 Neb. L. Rev. 283 (1945): "The same presumption arises when it is shown that the testator had ready access to the will [not in his possession] and it cannot be found after his death." *Id.* at 284.

30. N.Y. Surr. Ct. Act § 143 (McKinney 1921).

31. *See In re* Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901): "The fact in issue 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. *See also In re* Millens, 291 N.Y. 613, 50 N.E.2d 1014, 36 N.Y.S.2d 27 (1943); 2 Jessup-Redfield, Law and Practice in the Surrogates' Courts in the State of New York § 1157 (1947); Note, 32 Colum. L. Rev. 221, 223 (1944); Tenney, *The Probate of Wills Where Original is Missing*, 23 N.Y. St. Bar Bull. 47, 50 (1951).

32. N.Y. Surr. Ct. Proc. Act § 143 (McKinney 1921); J. Goldman, *Practice Commentary*, N.Y. Surr. Ct. Proc. Act § 1407 (McKinney 1971).

33. *See, e.g.*, Timon v. Claffy, 45 Barb. 438 (N.Y. Sup. Ct. 1865), *aff'd mem. sub nom.* Conray v. Claffy, 41 N.Y. 619 (1869). "Fraud . . . must consist of some deceitful contrivance, device or practice to defeat the wishes . . . of the testator." *Id.* at 446.

34. *See In re* De Groot, 2 Con. 210, 9 N.Y.S. 471 (Sur. Ct. Kings County 1890);

To overcome this inequity, the courts developed the concept of "constructive fraud,"[35] which was in harmony with the common law test that the destruction only be without the testator's intent to revoke.[36] Thus, any loss or destruction of the will without the knowledge or consent of the testator was held to be a fraud upon the testator and thus a fraudulent destruction within the meaning of the statute.[37] Actual dishonesty was not necessary to show constructive fraud, the issue being the agency of destruction, rather than the motive for destruction.[38]

The definition of constructive fraud was further developed by the New York Court of Appeals in the landmark case of *In re Fox*.[39] There, the will, left with a custodian in Germany, was destroyed during a bombing raid. The testator, after learning of the will's destruction, expressed his intention to execute a new will, but was unable to do so before he died. In a proceeding to admit the destroyed will to probate under SCA 143, the contestants claimed that the testator's knowledge of the will's prior destruction was the same as an intentional revocation, thereby foreclosing the will from being admitted to probate as fraudulently destroyed. The court of appeals disallowed testimony on the issue of subsequent oral adoption,[40] holding that the proof of

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Timon v. Claffy, 45 Barb. 438 (1865) *aff'd mem. sub nom.* Conray v. Claffy, 41 N.Y. 619 (1869).

35. *See* Schultz v. Schultz, 35 N.Y. 653 (1866).

36. *See* Note, 36 ST. JOHN'S L. REV. 182, 186 (1962); Note, 37 N.Y.U. L. REV. 168, 170 (1962); J. Goldman, *Practice Commentary,* N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1971).

37. *See* Schultz v. Schultz, 35 N.Y. 653 (1866) where the court said: "If so destroyed it was done fraudulently as to him, and, in judgment of law, the legal results are the same precisely as if it had continued in existence up to the time of [the testator's] death." *Id.* at 656. *See In re* Dorrity, 118 Misc. 725, 194 N.Y.S. 573 (Sur. Ct. Westchester County 1922). The *Dorrity* decision contemplated destruction of the will by any means which was out of the control of the testator. This was an expansion of an earlier interpretation given constructive fraud in *In re* Reiffield, 36 Misc. 472, 73 N.Y.S. 808 (Sur. Ct. Albany County 1901), which required that "some intervening human agency" have caused the loss to find it was fraudulently destroyed. *Id.* at 474, 73 N.Y.S. at 810.

38. *See* Schultz v. Schultz, 35 N.Y. 653 (1866); St. John v. Putnam, 128 Misc. 714, 220 N.Y.S. 141 (Sur. Ct. Saratoga County 1927).

39. 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961).

40. "[T]he son's testimony as to the father's 'oral adoption' of the prior destruction was inadmissible as hearsay or on general principles developed in the law of wills." *Id.* at 405, 174 N.E.2d at 502, 214 N.Y.S.2d at 409.

See 2 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATE'S COURTS IN THE STATE OF NEW YORK § 1157 (1947): "The declarations of the testator are held not competent

fraudulent destruction required by SCA 143 went only to the question of the testator's intention to revoke.[41] As long as the testator never intended to revoke his will, the statutory requirements were satisfied, regardless of how the will was destroyed.[42]

The holding in *Fox* was codified when SCA 143 was amended by SCPA 1407.[43] Because the term "fraudulently destroyed"[44] had been rendered unnecessary by the *Fox* decision, the revised provision of the statute only requires that the court decide whether the testator did, or did not, intend to revoke his will.[45]

The second evidentiary requirement of SCA 143 was that the will's provisions be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.[46] The requirements to prove contents have been retained by SCPA 1407 with only a slight change in language.[47]

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evidence of the existence, loss or destruction of the will, nor execution. Nor are declarations of the testators equivalent to a correct copy of the will." *Id.* at 456.

In Throckmorton v. Holt, 180 U.S. 552 (1901), the United States Supreme Court spoke of the rule of evidence which disallows statements made by the testator as hearsay:

> If declarations of the deceased were admissible to attack, they would then of course be admissible to sustain the will, and there would be apt to arise a contest in regard to the number and character of conflicting declarations of the deceased which he could neither deny or explain, and in the course of which contest great opportunities for fraud and perjury would exist. The statutes as to wills were passed, as we believe, for the very purpose of shutting out all contests of such a character.

Id. at 581. For a further discussion of disallowance of the testimony of the testator's statements, *see In re* Staiger, 243 N.Y. 468, 154 N.E. 312 (1926); *In re* Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901); A. Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283, 288 (1945).

41. *See In re* Fox, 9 N.Y.2d 400, 409, 174 N.E.2d 499, 505, 214 N.Y.S.2d 405, 413 (1961). For a discussion of the *Fox* decision, *see* Note, 13 SYRACUSE L. REV. 182 (1961).

42. *See In re* Fox, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961): "Proof that the testator subsequently learned of the destruction of his will shows, if anything, that he himself did not destroy it and, therefore, such proof, far from implying that the will was not fraudulently destroyed, actually established that it was." *Id.* at 409, 174 N.E.2d at 505, 214 N.Y.S.2d at 413.

43. 2A WARREN'S HEATON ON SURROGATES' COURTS § 179 (6th ed. 1982).

44. N.Y. SURR. CT. ACT § 143 (McKinney 1921).

45. *Fifth Report of the Temporary State Commission on the Law of Estates*, No. 8.2. 5A, Leg. Doc. 19, at 795 (1966); J. Goldman, *Practice Commentary*, N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1971).

46. N.Y. SURR. CT. ACT § 143 (McKinney 1921).

47. *See supra* note 23 and accompanying text. SCA 143 required "its provisions" to

Although the witnesses need not remember the exact language used by the testator,[48] they "must be able to testify to the substance of the whole will, so that it can be incorporated in the decree, should the will be admitted to probate."[49] Each witness must know the will's entire contents and each must agree on its dispositive provisions.[50]

A third evidentiary requirement, explicit proof of the will's due execution, was added to SCPA 1407.[51] Although SCA 143 did not contain this provision, it was part of the proof required at common law for probate of lost wills,[52] and as such, the courts had always read it into the statute by implication.[53] Due execution is usually proved by the testimony of the attesting witnesses

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be proved while SCPA 1407 requires "all of the provisions" to be proved. *See supra* text accompanying note 16.

48. H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939).

> After existence of the will and its destruction have been established, the contents must be proved. The statute provides that all of the provisions of the will must be clearly and distinctly proved by each of at least two credible witnesses or by one witness and a copy or draft of the will proved to be true and correct. In this respect the present statute does not differ from the prior one. Knowledge of the execution of the will is not knowledge of its contents. And while the witnesses need not give the exact language of the will, but merely the substance, *each* of the witness must testify to all the principal parts of the will. A copy of the will takes the place of the second witness but the witness's supporting letter does not.

Id. at 534.

49. *In re* Musacchio, 146 Misc. 626, 627, 262 N.Y.S. 616, 618 (Sur. Ct. Madison County 1933); *See* 2 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK § 1157 (1947); 2A WARREN'S HEATON, ON SURROGATES' COURTS § 179 (6th ed. 1982); H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939).

50. *See In re* Purdy, 46 A.D. 33, 61 N.Y.S. 430 (1st Dep't 1899); *In re* Yanover, 16 Misc. 2d 128, 182 N.Y.S.2d 961 (Sur. Ct. Nassau County 1959); *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939).

51. N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1971) requires that the execution of a lost or destroyed will must be: "Proved in the manner required for the probate of an existing will. . . ." *Id.* § 1407(2). Accordingly, proof must be adduced that all the will formalities have been met. These include:

1. Signature at the end thereof by the testator;
2. Signature by the testator either in the presence of each of the attesting witnesses [or alternate procedure for acknowledging his signature to each of them];
3. Declaration by testator to each attesting witness that document is his will;
4. Presence of and signature by at least two attesting witnesses.

EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1981).

52. *See supra* note 14 and accompanying text.

53. J. Goldman, *Practice Commentary*, N.Y. SURR. CT. PROC. ACT § 1407 (McKinney 1971).

to the original will.[54] Where it is shown that a will was executed under an attorney's supervision, the proponent is entitled to a presumption of due execution.[55] Testimony as to the statements made by a deceased person, however, are not competent proof of either the existence or due execution of a will.[56]

III. *In re Kleefeld*

A. *The Facts*

In *Kleefeld*,[57] the testator executed a will prepared by his attorney. The original will was retained in the attorney's files and the testator was given a copy. The attorney predeceased the testator and after the testator's death, the original will could not be located. The proponent commenced a proceeding to admit the testator's copy of the lost will to probate under SCPA 1407.

At trial, the proponent was able to establish the testator's lack of intent to revoke the will by proving that the will had been lost while in the possession of the attorney-draftsman.[58] The proponent was able to establish due execution[59] through the testimony of two witnesses who had attested to the original will. Neither of these witnesses could testify to the original will's contents[60] as they had not read it.

The testator's copy of the will and the testimony of the secretary who had typed the original will were offered as proof of contents.[61] The secretary was able to identify the cover of the will, her initials on the first page of the copy, and the type as

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54. *See* 2 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK § 1157 (1947): "The factum of the lost or destroyed will is established as in the case of any other will by two subscribing witnesses." *Id.* at 452.

See H. HARRIS, ESTATES PRACTICE GUIDE § 240 (1939): "The proponent must establish the due execution of the will and the testamentary capacity of the testator as well as the absence of undue influence or fraud." *Id.* at 249.

55. *See In re* Utegg, 91 Misc. 2d 21, 22, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Flasza, 57 Misc. 2d 347, 348-49, 292 N.Y.S.2d 815, 816-17 (Sur. Ct. Erie County 1968).

56. *In re* Yanover, 16 Misc. 2d 128, 131, 182 N.Y.S.2d 961, 965 (Sur. Ct. Nassau County 1959). *See supra* note 41 and accompanying text.

57. 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (1982).

58. *See supra* note 29 and accompanying text.

59. *See supra* note 51 and accompanying text.

60. *See supra* notes 46-50 and accompanying text.

61. *Id.*

that used by her typewriter. She could not, however, testify to the contents of the will's substantive provisions as she had not read it after it was typed.

The Surrogate's Court[62] held that the requirements of SCPA 1407 had been met and admitted the lost will to probate.[63] The Surrogate's Court interpreted the proof of contents provision of SCPA 1407[64] as only requiring proof that the submitted copy was a true and complete duplicate of the original, and requiring no further proof of contents once the copy was established.[65] It found that the secretary's testimony had sufficiently identified the copy as a true and complete duplicate, thereby proving the contents.[66]

B. *Appellate Division*

The appellate division affirmed without opinion the decree of the Surrogate's Court.[67] The dissent, however, written by Judge Murphy, argued that the evidence offered to prove contents was insufficient to allow probate under SCPA 1407.[68] Judge Murphy reasoned that since no testimony had been offered to establish the contents of the original will, the proponent had not proved that the copy offered for probate was in fact a true copy of the original.[69] In such a case, according to the dissent, the Surrogate should not have used the copy in lieu of one witness.[70] Moreover, even if the copy was shown to be a duplicate of the original, the dissent, relying solely on the wording of the statute, argued that SCPA 1407 still required that the contents be corroborated by at least one witness whose testimony

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62. A decree of the Surrogate's Court of New York County (Midonick, J.), admitting to probate the Last Will and Testament of George Kleefeld, was entered on March 3, 1980. The opinion of the Surrogate's Court is unofficially reported in 183 N.Y.L.J., March 19, 1980, at 14, cols. 1-2.

A discussion of the Surrogate's decision is included in the court of appeals decision. *In re* Kleefeld, 55 N.Y.2d at 257, 433 N.E.2d at 523, 448 N.Y.S.2d at 458.

63. *Id.*

64. *See supra* notes 46-50 and accompanying text.

65. *In re* Kleefeld, 55 N.Y.2d at 257, 433 N.E.2d at 523, 448 N.Y.S.2d at 458.

66. *Id.*

67. *In re* Kleefeld, 79 A.D. 2d 567, 434 N.Y.S.2d 232 (1st Dep't 1980).

68. *Id.* at 567-68, 434 N.Y.S.2d at 232-33 (Murphy, J., dissenting).

69. *Id.* (Murphy, J., dissenting).

70. *Id.* (Murphy, J., dissenting).

could independently prove the substantive provisions of the will.[71] According to Judge Murphy, since none of the witnesses could offer such testimony, this part of the required proof was also missing[72]

The dissent viewed prevention of admission of fraudulent wills to probate as the main objective of SCPA 1407.[73] Thus, it found that in a case like *Kleefeld,* where a fraudulent document could easily have been substituted without detection by witnesses who were ignorant of the original will's contents, the statute required that probate be denied.[74]

C. *Court of Appeals*

i. *Majority*

The court of appeals, completely agreeing with the reasoning of the dissent, reversed the appellate division and disallowed probate.[75] In an opinion written by Judge Wachtler, the court held that the express wording of SCPA 1407 was clear on its face and thus left no room for judicial interpretation.[76] According to the majority, the statute clearly mandates that probate be denied without the testimony of a witness who could establish the actual contents of the will, independently of the submitted copy.[77]

The majority focused entirely on its view that, under SCPA 1407, the courts' primary responsibility was the prevention of admission of fraudulent wills to probate and offered no opinion on the consequences of requiring intestacy. Speaking of its inability to relax the evidentiary requirements of the statute, the

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71. *Id.* (Murphy, J., dissenting).

72. *Id.* (Murphy, J., dissenting).

73. *Id.* (Murphy, J., dissenting).

74. *Id.* (Murphy, J., dissenting).

75. *In re* Kleefeld, 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (1982). Judge Wachtler wrote the majority opinion in which Chief Judge Cooke and Judges Gabrielli and Jones concurred. Judge Meyers wrote the dissenting opinion in which Judge Jasen concurred. Judge Fuchsberg took no part in the opinion.

76. *Id.* at 259, 433 N.Y.2d at 524, 448 N.Y.S.2d at 459 (citing 1 STATUTES, N.Y. LAW § 76 (McKinney 1971) which provides: "Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intents, resort may not be had to other means of interpretation").

77. *In re* Kleefeld, 55 N.Y.2d at 259, 433 N.E.2d at 524, 448 N.Y.S.2d at 459.

court said:

> The legislative policy embodied in SCPA 1407 is designed to prevent the probate of fraudulent wills. The policy will be subverted if a will, such as the one at issue here, may be established and admitted to probate merely on the basis of testimony regarding the events surrounding the execution of the will rather than the contents of the will itself. A strict construction of the statute in question is therefore essential in order to insure that the legislative policy is properly effectuated. Moreover, SCPA 1407 is a limited statutory exception to the common-law Statute of Wills and should be strictly construed for that reason alone.[78]

In construing SCPA 1407, the majority relied primarily on the wording of the statute and made no reference to prior case law. Requiring that the provisions of SCPA 1407 be strictly construed, probate was disallowed when the standard of proof required by the statute was not met.[79]

ii. *Dissent*

In an opinion by Judge Meyers, the dissent found that prevention of the inequities of requiring intestacy to be the primary purpose of SCPA 1407 and the prevention of fraud of only secondary importance.[80] Thus he said, "the issue for determination is whether the copy presented bespeaks the testamentary plan of the testator, not whether under the circumstances there could have been fraud."[81] To this end, he found that SCPA 1407 called for a liberal construction, requiring only that the "conscience of the court" be satisfied as to the sufficiency of the evidence.[82] Un-

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78. *Id.* at 260, 433 N.E.2d at 524, 448 N.Y.S.2d at 459, (citing 1 STATUTES, N.Y. LAW, § 301(a) (McKinney 1971)), which requires that "statutes in derogation of the common law receive a strict construction."

79. *In re* Kleefeld, 55 N.Y.2d at 259, 433 N.E.2d at 524, 448 N.Y.S.2d at 459.

80. *Id.* at 261, 433 N.E.2d at 525, 448 N.Y.S.2d at 460 (Meyers, J., dissenting).

81. *Id.* at 270, 433 N.E.2d at 442, 448 N.Y.S.2d at 465 (Meyers, J., dissenting).

82. *Id.* (Meyers, J., dissenting). The dissent cited to a passage in *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939) which in its entirety states:

> [Proof of the lost will's contents] involves merely a clear and satisfactory demonstration that the devolutionary plan which is promulgated is in fact that which the testator himself intended. It is the conscience of the court which must be satisfied upon this point. As the court reads them, the provisions of the statute in this connection provide merely a rule of caution against too ready a conviction on this issue and inhibit an expression of such conviction merely upon the unsup-

like the majority, Judge Meyers relied primarily on prior case law to support his opinion.[83]

The dissent found that the copy of the will and the secretary's testimony were sufficient to prove contents of the will.[84] Moreover, he found that the reciprocal will of the testator's wife, evidence not referred to by the majority, should have been sufficient to prove that the copy was authentic.[85] The dissent, like the Surrogate,[86] interpreted SCPA 1407 as requiring no additional proof of contents, once the authenticity of the copy was established.[87]

Judge Meyers also saw error in the court of appeals' taking the case at all.[88] In deference to the competence of the Surrogate he noted that "here, the conscience of an experienced and conscientious Surrogate has been satisfied . . . [He] found as a fact that the contents of the copy were the same as the original will and that the finding, having been affirmed by the Appellate Division, . . . is now beyond our review."[89]

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ported recollection of a single witness. This must be fortified either by corroborative testimony or by documentary demonstration of a satisfactory nature. Whether either will be sufficient for the purpose must, in the nature of things, be remitted to the decision of the trier of the facts. If, on the composite demonstration of the record, he is convinced that the documentary proof adduced is, in fact, a correct draft or copy of the lost will, the statute requires only one witness in addition.

Id. at 888, 11 N.Y.S.2d at 491. *In re* Breckwoldt was decided under N.Y. SURR. CT. ACT § 143 (McKinney 1921).

83. *In re* Kleefeld, 55 N.Y.2d at 261-63, 433 N.E.2d at 525-26, 448 N.Y.S.2d at 460-61 (Meyers, J., dissenting). The dissent refers to the following cases in support of its opinion. They will be discussed *infra* in Part IV of this note. *In re* Grenacher, 174 N.Y. 504, 66 N.E. 1109 (1903); *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 162 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951); *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939).

84. *In re* Kleefeld, 55 N.Y.2d at 262, 433 N.E.2d at 526, 448 N.Y.S.2d at 461 (Meyers, J., dissenting).

85. *Id.* at 267-69, 433 N.E.2d at 529-30, 448 N.Y.S.2d at 464-65 (Meyers, J., dissenting).

86. *See supra* notes 62-66 and accompanying text.

87. *In re* Kleefeld, 55 N.Y.2d at 262-63, 433 N.E.2d at 426-27, 488 N.Y.S.2d at 461-62 (Meyers, J., dissenting).

88. *Id.* at 265, 433 N.E.2d at 527-28, 448 N.Y.S.2d at 462-63 (Meyers, J., dissenting).

89. *Id.* (Meyers, J., dissenting).

IV. Analysis

In *Kleefeld,* the New York Court of Appeals retreated from the liberal position towards the probate of lost wills that it had taken in *In re Fox.*[90] In that case the language of SCA 143 was stretched to its logical limit to allow a lost will to be admitted to probate, rather than require intestacy.[91] Both cases reflect a significant difference in attitude between the courts towards the probate of lost wills. While the court in *Fox* was willing to expand the meaning of the statute to include the unique circumstances of a particular case,[92] the court in *Kleefeld* was unwilling to allow any interpretation on a case-by-case basis.

The cases may be substantively distinguished aside from any differences in the makeup of the court. The issue in *Fox* was the requirements to have a will admitted to probate as "fraudently destroyed"[93] after it was established that the will was destroyed without the testator's intent to revoke it.[94] Neither the contents of the *Fox* will nor the possibility that it was a fraudulent document was in question. In *Kleefeld,* however, proof of lack of revocation was accepted[95] and proof of contents was the issue.[96] The *Kleefeld* court had to decide the quantity and quality of evidence that would be acceptable to prove contents in order to prevent fraudulent wills from being probated.[97]

Although both courts were required to construe a statute, the *Kleefeld* court had the advantage of making its decision dealing with SCPA 1407 which had been amended to remove the ambiguities found in SCA 143, the relevant statute in *Fox.*[98] In SCA 143 the meaning of the term "fraudulently destroyed" was not at all clear and the courts had struggled to find a workable definition until the term was finally dropped when the statute

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90. 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961). *See supra* notes 39-45 and accompanying text.

91. *Id.*

92. *See supra* notes 39-42 and accompanying text.

93. *See supra* notes 75-78 and accompanying text.

94. *See supra* notes 40-42 and accompanying text.

95. N.Y. SURR. CT. ACT § 143 (McKinney 1921).

96. *See supra* notes 39-42 and accompanying text.

97. *See supra* notes 75-79 and accompanying text.

98. *See supra* notes 22-24 and accompanying text.

was amended by SCPA 1407.[99] SCPA 1407 is written in unambiguous terms that clearly require the testimony of two witnesses or a true copy of the will and the testimony of one witness to prove contents of a lost will.[100] It is therefore not surprising that this is exactly what the court required in order to admit a lost will to probate.

The court in *Kleefeld* clearly stated that its primary concern[101] was prevention of admitting fraudulent wills to probate and only when it has been assured that a fraud is not being perpetrated will it concern itself with preventing the inequity of requiring intestacy when a valid will was in fact executed.[102] Thus the majority held that when the standard of proof explicitly required by the statute is not met, probate will be denied.[103]

In many prior cases, wills had been lost under similar circumstances as those found in *Kleefeld*. The denial of probate in *Kleefeld* is in accordance with the decisions in those cases.[104] In

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99. *See supra* notes 25-38 and accompanying text.

100. N.Y. SURR. CT. PROC. ACT. § 1407(3) (McKinney 1971) provides that: "(3) all of the provisions of the will are clearly and distinctly proved by each of at least 2 credible witnesses or by 1 witness and a copy or draft of the will proved to be true and complete."

101. Notwithstanding the mandate of strict statutory construction required by SCPA 1407, the court analyzed what it deemed to be the legislative policy without reference to any legislative statement of intent. *See* supra text accompanying note 81.

102. *See supra* notes 75-79 and accompanying text.

103. *See supra* notes 76-77 and accompanying text.

104. In the following cases the original will was lost while in the possession of the attorney-draftsman. The testimony of the attorney as to the authenticity of a copy allowed the lost will to be admitted to probate. *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Graeber, 53 Misc. 2d 640, 279 N.Y.S.2d 429 (Sur. Ct. Erie County 1969); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 165 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Juriga, 140 N.Y.S.2d 656 (Sur. Ct. Queens County 1955); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951).

In the following cases the original will was lost while in the possession of the attorney-draftsman and was admitted to probate on the testimony of the attesting witnesses who had read the will and were aware of its contents. *See In re* Granacher, 174 N.Y. 504, 66 N.E. 1109 (1903); *In re* Hughson, 97 Misc. 2d 427 (Sur. Ct. Erie County 1978).

In the following cases the original will was destroyed in the possession of the testator. The copy retained by the attorney and the attorney's testimony as to its validity allowed the will to be admitted to probate. *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Sur. Ct. Kings County 1939); *In re* Shlevin, 157 Misc. 40, 283 N.Y.S. 377 (Sur. Ct. Erie County 1935).

See also In re Musacchio, 146 Misc. 625, 262 N.Y.S. 616 (Sur. Ct. Madison County 1933). *Cf. In re* Yanover, 16 Misc. 2d 128, 182 N.Y.S.2d 961 (Sur. Ct. Nassau County 1959) (testimony of attesting witnesses who had not read the will but only "glanced

Kleefeld, as in these prior cases, lack of revocation was established by proof that the will was lost while in the custody of a third party,[105] and due execution was proved by the testimony of the attesting witnesses.[106] Unlike *Kleefeld*, however, in the cases where the court found the proof of contents offered acceptable, the witnesses had read the will and could testify to the will's substantive provisions, or could corroborate a copy as being a true and complete duplicate of the original.[107] This was, of course, the determinative issue in *Kleefeld*, where no such testimony was available to either establish the copy as authentic or to corroborate its provisions.

In many of the cases cited by the dissent, the wills were lost while in the possession of the attorney-draftsman.[108] In those cases the testimony of the attorney that the copy was an identical version of the original will, without a recital of the provisions, was accepted by the courts as proof of contents.[109] Since the attorneys had drafted the original wills, such testimony was considered appropriate.[110] Although the dissent regards those

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through it" not clear and distinct enough to allow probate).

105. *See supra* notes 26-29 and accompanying text.

106. *See In re* Granacher, 174 N.Y. 504, 66 N.E. 1109 (1903); *In re* Hughson, 97 Misc. 2d 427 (Sur. Ct. Erie County 1978).

107. *See In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Graeber, 53 Misc. 2d 640, 279 N.Y.S.2d 429 (Sur. Ct. Erie County 1967); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 165 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Juriga, 140 N.Y.S.2d 656 (Sur. Ct. Queens County 1955); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951).

108. *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 165 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951).

109. *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 165 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951).

110. *In re* Utegg, 91 Misc. 2d 21, 396 N.Y.S.2d 992 (Sur. Ct. Erie County 1977); *In re* Eisele, 31 Misc. 2d 173, 219 N.Y.S.2d 849 (Sur. Ct. Dutchess County 1961); *In re* Haefner, 4 Misc. 2d 835, 165 N.Y.S.2d 596 (Sur. Ct. Queens County 1956); *In re* Bohnson, 203 Misc. 116, 115 N.Y.S.2d 147 (Sur. Ct. Kings County 1951). *See, e.g., In re* Granacher, 174 N.Y. 504, 66 N.E. 1109 (1903) where the court stated: "It is true that instead of reciting its provisions the witness stated they were the same as those contained in a paper which was shown him, to wit, the copy. But, this manner of proving the contents of the original will was in no manner objected to." *Id.* at 507, 66 N.E. at 1111. In *Granacher*, unlike *Kleefeld*, the witness who testified that the copy was the same as

cases as supporting its position that a corroborating witness in addition to the copy is not required,[111] they are distinguishable from *Kleefeld,* where the only witness available to testify to the contents had typed, but never read, the original will. Therefore, there was no testimony offered to prove that the copy was authentic, in which case it could not be used in lieu of one witness. In a case where no authentic copy of the original will has been established, SCPA 1407 requires the testimony of at least two credible witnesses to clearly and distinctly prove the contents.[112] Since the proponent in *Kleefeld* could not produce even one witness who knew the will's contents, the proof offered clearly fell short of that required by the statute. Unfortunately, the only person who could have offered the proper testimony, the attorney-draftsman, predeceased the testator.[113]

The dissent further argued that the reciprocal will of the testator's wife should have been sufficient to prove contents.[114] Yet, even if the majority had accepted the reciprocal will to prove the copy authentic, the statutory requirement of a corroborating witness would not have been satisfied and probate would still have been denied.[115] Although it may seem unnecessarily stringent to require corroboration after a copy is proven authentic, the legislature deemed such a requirement essential by retaining it in the revision from SCA 143 to SCPA 1407.[116] If the results of the *Kleefeld* holding prove to be unduly harsh, the legislature may find it necessary to consider a further amendment of SCPA 1407. For the present, the statutory language is explicit[117] and mandates that probate be denied in cases like *Kleefeld.*

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the original had read the original will. *Id.*

111. *In re* Kleefeld, 44 N.Y.2d at 263, 433 N.E.2d at 526, 488 N.Y.S.2d at 461 (Meyers, J., dissenting).

112. *See supra* notes 46-47 and accompanying text.

113. *In re* Kleefeld, 55 N.Y.2d at 253, 433 N.E.2d at 522, 488 N.Y.S.2d at 457. *In re* Hughson, 97 Misc. 2d 427 (Sur. Ct. Erie County 1978) probate was allowed where the original will was lost while in the possession of the attorney-draftsman who predeceased the testator. *Hughson* can be distinguished from *Kleefeld* as the attesting witnesses had heard the will read and were able to testify to the authenticity of the copy.

114. *In re* Kleefeld, 55 N.Y.2d at 267-69, 433 N.E.2d at 529-30, 488 N.Y.S.2d at 464-65 (Meyers, J., dissenting).

115. *See supra* notes 46-50 and accompanying text.

116. *See supra* notes 22-24 and accompanying text.

117. *See supra* note 16 and accompanying text.

Furthermore, in New York, original wills may be filed with the Surrogate's Court for safekeeping.[118] The holding in *Kleefeld* may have been motivated in part by the court's cognizance of this service. If all original wills were filed with the Surrogate instead of being retained by the attorney or the testator, the difficulties inherent in probating a lost or destroyed will could be entirely avoided.

V. Conclusion

In the probate of wills, a high degree of certainty and strict adherence to statutory requirements has always been demanded.[119] "This extreme caution obviously arises from the essential privacy of the act itself, which does not become the subject of proof until the mouth of the chief actor is closed by death and the consequent ease and safety with which fraudulent wills might be concocted and maintained."[120] Where the original will is missing and the certainty of its validity thereby diminished, it is reasonable to require the same high standard of proof for admittance to probate as where the original is available.

The court in *Kleefeld* was not asked to determine whether or not the possibility of fraud existed in this particular case. Rather, it was asked to interpret SCPA 1407, a rule of evidence which provides clear statutory requirements for admitting a lost will to probate. As such, it is not a guideline for judicial interpretation on a case-by-case basis.[121] Were a court to relax the

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118. *See In re* Hughson, 97 Misc. 2d 427 (Sur. Ct. Erie County 1978), where the court said: "By reason of this constant reminder to attorneys that original wills should be filed in this court as the logical place for the safekeeping thereof, we have, as of December 1, 1978, 91,472 original wills in our safekeeping files." *Id.* at 431.

119. *See supra* notes 51-56 and accompanying text.

120. Kahn v. Hoes, 14 Misc. 63, 64-65 (Sup. Ct. Term 1895).

121. *See* Throckmorten v. Hold, 80 U.S. 552 (1901) where the Supreme Court, in speaking about the rule of evidence which disallows, as hearsay, testimony of statements made by the testator, has said:

> The difficulty in regard to a rule of evidence is that it cannot be the subject of enforcement or non-enforcement according to the exigencies of the particular case. The rule must be general in its application. The rule must either permit or refuse to permit the evidence . . . the statutes of all the States have very careful and stringent provisions in relation to the making of wills, and the due proof of their execution . . . to permit evidence of the nature given in the case tends . . . to break down the efficiency of the statutory provisions, and to render proof of the execution of wills much less certain than was contemplated by the statutes.

evidentiary requirements in one case to avoid the harsh results of requiring intestacy, it could provide an opportunity for fraudulent wills to be more easily admitted to probate and thereby erode the legislative intent of SCPA 1407.[122]

Moreover, because original wills may be filed with the Surrogate's Court for safekeeping, a procedure which would prevent wills from being lost or destroyed, the policy of requiring strict adherence to the evidentiary requirements for admitting a lost or destroyed will to probate is completely justifiable.

Julia Kalmus

Id. at 580-81.

122. *See In re* Booth, 127 N.Y. 109 (1891), where the court said:

> It has been the object of the statutes of the various states prescribing the mode in which wills must be executed, to throw such safeguards around the transactions as will prevent fraud and imposition, and it is wiser to construe the statutes closely, rather than loosely, and so open a door for the perpretration of the mischiefs which the statutes were designed to prevent.

Id. at 116.