

**IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA  
ORPHANS' COURT DIVISION  
IN RE: ESTATE OF FLAVIO FRANCIS FALCONE  
NO. 1504-1548**

Edward N. Flail, Jr., Esquire, Attorney for Linda F. Filipone & John Anthony Yanniell  
James Mannion, Esquire, Attorney for Damian Falcone  
Anthony DiMassa, Esquire, Attorney for William James

**OPINION**

Damian Falcone filed a Petition for Appeal of the May 4, 2005 Order of the Register of Wills admitting to probate a copy of a holographic will dated June 26, 2002, and revoking Letters of Administration granted to Damian Falcone.

**FACTUAL BACKGROUND**

Flavio Falcone was born on March 23, 1947 and died on September 27, 2004. He was 57 when he died.

Flavio was injured during the Vietnam War and was assigned to a desk job as a typist for the remainder of his service. In 1972, Flavio married Angela Green. They had three children: Jules, Tanya and Damian. Jules and Tanya are not parties to this action. Flavio and Angela operated a business called Falcone Graphics (N.T., 10/12/06, at 171). They obtained printing jobs and brokered the jobs to other printers. Angela did all the typing, filing and administrative duties.

Flavio was very active in the local chapter of the American Legion. He was the manager of the local chapter and spent a great deal of time at the local

collection. It is evident that Flavio also had some vices. The Veterans Administration hospital records indicate that he was an alcoholic who continued to drink and smoke cigarettes to the end of his life (Exhibit P-5).

Flavio and Angela separated in 1994 and divorced in 2000 (Id., at 170). Flavio had a strained relationship with his children after the separation. Jules and Damian saw their father from time to time (Id., at 199). In late 1999, Jules lived with his father at Flavio's house. Flavio and Jules later became opponents in litigation after Flavio's mother gave Jules her Power of Attorney. When Damian was in college, he lived for a time in an apartment on top of the American Legion headquarters and saw his father daily during that time. After the separation, Tanya stopped talking to her father and wanted nothing to do with him.

During his life, Flavio had close relationships with many of his cousins. The closest relationship was with his cousin William ("Billy") James. Mr. James was a member of Flavio's wedding party and is the godfather of Damian Falcone. Throughout the years, Flavio and Mr. James loaned each other money for their respective businesses, Falcone Graphics and James Brothers Builders (N.T., 10/12/06, at 79, 87). Before his death, Flavio loaned Mr. James \$48,500. Some of that debt was repaid before Flavio's death (Id. at 80, 86).

On August 30, 1995, during divorce proceedings and before entering the hospital for surgery, Flavio gave Mr. James a blank check from Falcon Graphics made out to "William James". He also gave Mr. James a written list of instructions in the event of his death, written on Falcon Graphics letterhead (P-6). Among other things, the writing instructs Mr. James to "fill out an insurance form with 'Billy

James' as beneficiary, go to the 'House' and strip it of guns jewelry, etc., take money out of account in England, get money from [American] Legion, use money to get Damian and Tanya a college education, keep my guns + \$25,000 and bury me and don't tell anyone where." In 1995, Flavio executed a Power of Attorney in favor of William James (N.T., 10/12/06, at 71, Exhibit W.J. #4). Mr. James testified that at the time Flavio signed the POA he handed him a key to a bank (Wilmington Trust) safe deposit box (Id. at 30, 164).

Sometime in the 1990's during the divorce proceeding, Flavio changed the beneficiary on an Equitable life insurance policy from Angela Falcone to William James (W.J. #4). On June 14, 2000, Flavio changed the beneficiary on a Penn Mutual Life insurance policy to William James (30%), Maria Caputo (30%), Anthony Da Bundo (30%) and Dominique Da Bundo (10%) (W.J. #5). On February 2, 2004, Flavio named William James as beneficiary of an IRA (W.J. #6).

Flavio was diagnosed with cancer in March 1998. During the last years of his life, Flavio's relationship with Damian became closer. Flavio visited Damian in Florida at least three times. Flavio's cousins testified that Flavio enjoyed the visits to Florida (N.T., 11/13/06, at 72). When Damian came to Pennsylvania he always visited his father. Damian testified that on Flavio's third trip to Florida in 2004, Flavio told him if anything happened to him, "my sister and I were to get everything" and that "Billy James would have a sealed envelop in a safe deposit box for me." (N.T., 10/13/06 at 77- 78). Damian also stated: "My father did not use the word will... He said you and your sister are going to get everything." (Id., at 145).

After Flavio died his body laid unclaimed at Paoli Hospital for over 24 hours. The hospital eventually contacted Flavio's former girlfriend, Louise Bateman, who called Mr. James and asked him to meet her at the hospital. On September 29, 2004, Ms. Bateman and Mr. James identified Flavio's body. Mr. James' wife Rita joined him at the hospital. William and Rita James then left the hospital and went directly to Flavio's house to remove items listed in the 1995 written instructions (P-6). Mr. James had a key to Flavio's house but he did not stop at his own house to retrieve the key. Paula Carroll, a neighbor of Flavio's, let them into Flavio's house (N.T., 10/11/16, at 188-189).

During the search of the house for "valuables", Rita James looked in a magazine rack next to Flavio's favorite reclining chair in the living room. No magazines were in the rack, but Rita James found several papers in the rack and a folder. Inside the folder, Mrs. James found a hand written piece of paper about 5 by 7 inches (the size of steno pad paper) (N.T., 10/11/06, at 100, 104, 11/14/06, at 66-67). There was handwriting on both sides and the color of the paper was off white. William James testified that the paper was "off white to a greenish color." (Id. at 204). The paper was dated June 26, 2002 and titled "Last Will and Testament of Flavio Falcone, 1206 Paoli Pike, West Chester, PA 19380" (P-3).

The document states:

I plan on doing a formal Will but should anything happen; I leave everything I own to be divided between Linda Filipone (cousin) at South Devon Ave, Wayne Pa, Anthony D'Abundo (cousin) Marova NJ and William James (cousin) Skippack PA. with the exception of my guns that will go to Jay Yanella (spelled wrong) (cousin) Linda will verify he lives in Texas. Flavio Falcone

Family jewels in safe deposit Box at Wilmington Trust on 352 to go to my daughter Tanya (Bill James has them) coin collection to my son Damian.

Stocks in upper drawer of file cabinet in living room. 2 insurance policies (Life) Penn Mutual & Equitable Life.

Flavio Falcone

The document is signed twice. Rita also found bank statements and insurance policy statements in the magazine rack. No magazines were in the rack.

Paula Carroll, the neighbor, accompanied William and Rita James during the search of the house. Ms. Carroll did not see the document that Rita James found in the magazine rack, but she remembered Rita James said: "it looks like his will". (Deposition, Paula Carroll, at 14, 45). Ms. Carroll stated that prior to his death Flavio showed her a bank envelope containing cash that he kept behind a filing cabinet in the dining room. When William James searched the house following Flavio's death, he removed the envelope from behind the filing cabinet. "I was standing right next to him with the filing cabinet there... He knew exactly where it was." (Deposition at 58).

William and Rita James removed certain items from the house to "safeguard" them pursuant to Flavio's written instructions (N.T., 10/11/06, at 86-87). They removed the gun collection, bank account records, insurance policy records and several "stacks" of Deutschmark currency.

When the James returned to their house, Mr. James made a copy (using a fax machine) of the holographic will on 8 ½ by 11-inch paper (P-4). Mr. James testified that he did not recall whether he made the copy from his office or home

fax machine (N.T., 10/11/06, at 212-213). He possibly trimmed the perforated edges off the top of the paper to fit into his fax machine (N.T., 10/12/06, at 98). He then faxed the copied document to various cousins (P-3). William James contacted attorney Richard Burns (who had drafted the POA) to inquire whether Flavio had made a formal typed will. The lawyer informed Mr. James that he had not drafted any formal will for Flavio Falcone.

Sometime thereafter, William James called Damian in Florida. Damian had already been informed of his father's death.<sup>1</sup> During this first phone call, Mr. James did not tell Damian that he removed items from Flavio's house (N.T., 10/11/06, at 217, 10/13/06, at 84). Damian started driving from Florida to Pennsylvania, and a series of phone calls ensued between Damian and William James. During the fourth phone call, Mr. James informed Damian that he had removed items from Flavio's house and deposited them at his house (10/13/06, at 87). Damian stated that he intended to collect his father's belongings. When he arrived in Pennsylvania, Damian stopped first at his father's house, but did not go in because he left his spare key in Florida (Id. at 89). Damian went across the street and picked up a local friend before driving to the James house (Id. at 125)

William James and Damian Falcone agree that during this first meeting after Flavio's death, Damian requested the return of the items taken from Flavio's house and Mr. James refused to give anything to Damian (N.T. 10/12/06, at 21, 10/13/06, at 95). Billy James testified that he showed Damian a copy of the 2002 will during

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<sup>1</sup> Damian Falcone testified that his mother, Angela Green, phoned him on September 28, 2004 in the afternoon to tell him that his father had died. This was before William James first called Damian. Damian testified that Billy James was angry that he was not the first person to inform Damian of Flavio's death.

this first meeting (N.T. 10/11/06, at 217, 10/12/06, at 18, 21). Damian stated that he left a copy of the 2002 document on Billy James' table (N.T., 10/13/06, at 147).

The following day, William James called Damian and told him he had a change of heart. He asked Damian to come back to the James house to pick up Flavio's belongings (N.T., 10/13/06, at 98). Mr. James testified that he handed Damian the insurance papers and other financial forms found in the house. He stated that he also handed Damian the original 2002 will separate from the other documents (N.T., 10/12/06, at 37). He stated that Rita James and their son William Jr. were present when he handed Damian the original will. Damian testified that he never saw the original will; William James gave him a leather binder that did not contain either the original 2002 nor a copy of the 2002 will (N.T., 10/13/06, at 105-106). His former attorney obtained a copy of the will in 2004 (Id. at 147), after litigation had begun. The whereabouts of the original of the document is now unknown.

William James, Jr. testified that his father (William James) showed him the original will before Damian arrived at the James house. He examined the original will in his father's kitchen (N.T., 11/14/06, at 81-82, 95). When Damian arrived, he helped Damian carry Flavio's guns to Damian's car. William James, Jr. stated that he was sure that his father gave the original will to Damian, but "I don't specifically remember it changing hands" (Id. at 82). Later in his testimony, William, Jr. stated: "I saw my dad hand the will to Damian" (Id. at 100-101). William, Jr. admitted that the document he saw his father give to Damian could have been a copy of the will,

not the original. He stated that he did not remember what Damian did with the document after Billy handed it to him (Id. at 102).

Billy James testified that he gave Damian the coin collection and most of the gun collection. He kept three rifles that had "sentimental value" and two handguns that Flavio had given him "for safekeeping" (N.T., 10/12/06, at 42-44).

Damian has lived in Flavio's house since he returned to Pennsylvania after his father's death. He has made renovations to the house. Angela Green testified that when she separated from Flavio in 1994, she left the house without most of her personal belongings or household items. After Flavio's death, Damian allowed Angela to retrieve her personal items from the house. When Damian prepared the house for renovation, he took down all of the family photos that hung on the walls and put them in boxes (N.T., 10/12/06, at 172-174). In October 2004, Damian gave the boxes of photos to Angela (Id. at 174-175).

Angela described the picture frames as being dirty and smelling of nicotine. She stated that she left the boxes in her kitchen for a few months, and eventually sorted through the photos to clean the frames. When she was cleaning one of the picture frames she noticed that the cardboard backing was sticking out from the frame. Angela testified that she took the backing off and found a bank money envelope (P-11) stuck between the backing and the family photo (Id. at 177-178). Inside the envelope were ten \$100 dollar bills and a folded piece of paper (P-1). The content of the paper was faded and hard to read but she could tell that it was type written with a hand written signature at the bottom. Angela testified that she took the paper to the window and held it up to the light. She recognized the



signature as Flavio's signature (Id. at 180-182). Angela did not want to expose the document to further light damage so she placed the paper back into the envelope and placed the envelope between the backing and the frame. She gave Damian the photo frame with the envelope containing the \$100 bills and the type written document (Id. at 183). Angela testified that she removed the backing from all of the other photos but did not find anything else hidden in the back of the photos (Id. at 191).

The document Angela found was on thermal paper. Angela testified that when she worked for Falcone Graphics, the business fax machine used thermal fax paper (Id. at 184). Photographer David Campli photographed the document and enhanced it in his studio. The digitally enhanced version of the document (P-2) shows that it is titled "Last Will and Testament, Flavio Falcone, West Chester, PA, Chester County, dated August 28, 2004". The document provides:

I am a single man survived by three children: Jules, Damian and Tanya.

The Family jewelry to my daughter Tanya, located in a Safety deposit box at Citizens bank. 1522 McDaniel Drive, West Chester, PA. Billy James has a key.

Coin collection to my son Damian.

Gun collection to Fred Nudy, longtime friend.

I leave the remainder of my possessions to be divided between Damian and Tanya. Included are: Life insurance policies (Penn Mutual and Equitable Life); Retirement plan with RBC Dam Rauscher; and stock certificate all located in filing cabinet.

I leave my son Damian to be executor of my estate.

I would like to be buried and direct my remains to be buried

at Saint Agnes cemetery – Alleva's Funeral Home. – The money for those arrangements is with coin collection – balance to be divided between Damian and Tanya.

The only money presently owed is a loan with a balance of \$32,000 to Billy James. The present repayment schedule is \$400 per month.

Flavio Falcone

The document is signed twice beside the typed words "Flavio Falcone". Damian and Angela Green testified that the picture had always hung on the wall at the bottom of the stairs (10/12/06, at 175, 10/13/06, at 35, 111). William James testified that he never saw the 2004 document during his search of Flavio's house. He stated that if he had found the 2004 document he would have given it to Flavio's son Jules or to Damian (N.T., 10/12/06, at 133).

On October 4, 2004, Damian filed a Petition for Letters of Administration. On October 5, 2004, a Decree of Letters of Administration was issued. On October 20, 2004, Linda F. Filipone and Jay Yanniell filed a Petition to show cause why the June 26, 2002 holographic will should not be admitted to Probate. On March 8, 2005, the Register of Wills held a hearing. On May 4, 2005, a Decree was issued admitting a copy of the June 26, 2002 will to Probate, and revoking Letters of Administration granted to Damian Falcone. On May 16, 2005, Damian Falcone appealed the Decree of the Register of Wills. On December 14, 2005, Damian filed an Amended Petition alleging the existence of the 2004 will. On February 28, 2006, Stacey Willits McConnell was appointed Administrator Pendente Lite. This court held trial on October 11, 12 and 13, 2006 and November 13, 14 and 16, 2006.

At trial Damian Falcone contended that the copy of the 2002 will should not have been admitted to probate. He also claimed that the existence of the 2004 will revoked all prior wills. On May 29, 2007, attorney for Damian Falcone filed proposed findings of fact, conclusions of law and memorandum of law wherein he withdrew the claim with respect to the 2004 document.

#### DISCUSSION

In a will contest proceeding on appeal from the Register of Will's order probating the will, it is sufficient for the proponents to offer the Register of Will's record of probate to establish a *prima facie* case of the will's validity. When the proponent establishes a *prima facie* case by proof of the record of probate, the burden is upon the contestant to come forward with evidence to destroy the will. If the contestant produces evidence which, if not contradicted by the proponent, would support a verdict against the will, the proponent's *prima facie* case has been overcome and the burden of going forward shifts back to the proponent. Burns v. Kabboul, 595 A.2d 1153, 1164 (Pa. Super. 1991) (citations omitted). The purpose of allowing the probate of the will to be placed in evidence is merely to establish *prima facie* status, and affects only the order of proof. The acceptance in evidence of the probate merely temporarily shifts to contestants the duty to come forward with evidence, but the proceeding remains at all times *de novo*. In re Estate of Luongo, 823 A.2d 942, 960 (Pa. Super. 2003).

Contestant Damian Falcone has the burden of going forward with evidence establishing the invalidity of the 2002 document. However, Proponents William James, Linda Filipone and John A. ("Jay") Yanniell must establish clear and

convincing evidence that the original will was lost and that a copy should be admitted to probate. Proponents claim that the original holographic will was given to Damian and was subsequently lost or destroyed.

"Lost" original 2002 Will

In order to establish the existence of a lost will which was in the custody of the testator prior to his death, the proponent of the will must overcome the presumption that the testator destroyed or revoked the will. In order to probate a copy of a "lost" will, the proponent of a copy must prove (1) The testator duly and properly executed the original will; (2) The contents of the will were substantially the same as appears on the instrument presented for probate; and (3) The testator had not destroyed or revoked the will prior to death. In re Estate of Murray, 171 A.2d 171, 175 (Pa. 1961); Burns v. Kabboul, 595 A.2d 1153 (Pa. Super. 1991); In re Estate of Keiser, 560 A.2d 148 (Pa. Super. 1989). "Where a lost will is sought to be established, there must be produced, not only two competent witnesses of its execution, but also two witnesses to show its contents." In re Harrison's Estate, 173 A. 407, 408 (Pa. 1934).

In the instant case, no witness saw the 2002 document during Flavio's lifetime, and no one witnessed his signature on the document. William James, Rita James and Linda Filipone all stated that they were very close to Flavio during his lifetime, yet none of them recalled him ever discussing the 2002 will. Linda Fillipone testified: "He never told me anything about a will. We never discussed anything like that." (N.T., 11/13/06, at 119). Prior to his death, she was not aware that he had written a will (Id. at 130).

Jay Yanniell testified that he was not aware of a will. In 2001, Flavio told Jay that he wanted to leave his gun collection to Jay (N.T., 11/16/06, at 68-69). "[H]e didn't tell me that he had drawn up a will or that he was going to draw up a will. He just said that when he passed away he wanted to leave me his gun collection." (Id. at 77).

William James was not aware of the 2002 will before Flavio's death.

Q. Now, Mr. Falcone never told you anything about a will; isn't that correct?

MR. JAMES: No, he did not.

Q. And so when you went to the house that night, you weren't going there to search for a will, fair statement?

MR. JAMES: No, I was not.

Q. And so there were no other instructions that Mr. Falcone gave you, other than what you say he told you orally and this 1995 letter?

MR. JAMES: His instructions to me were, if anything should happen to him I was to remove all the valuables in the house.

(N.T., 10/11/06, at 194).

Paula Carroll, Flavio's neighbor, was "very good friends" with Flavio from 1995 until his death. (Paula Carroll Deposition, at 17-18). She dated Flavio for a time and had a key to his house until his death (Id. at 37). Shortly before his death, Flavio felt very ill and called Ms. Carroll to come to his house. Ms. Carroll went to his house and called an ambulance. Flavio wanted her to ride with him in the ambulance to the hospital. Ms. Carroll followed in her own car and stayed in the emergency room with Flavio for a few hours (Id. at 7-9). Ms. Carroll was

possibly the last person other than hospital staff to see Flavio alive. He died sometime after she left. Ms. Carroll testified that Falvio never spoke to her about a will and she never saw any document intended as Flavio's will (Id. at 45).

At times, Flavio had showed Ms. Carroll an envelope with cash that he hid behind a filing cabinet in his dining room (Id. at 55). "And he said if anything ever happens to me, just take the money and just let – you know, just go." (Id. at 13).

Only one witness testified to having a conversation with Flavio about the 2002 will. Anthony D'Abundo, another cousin of Flavio's, testified that in 2001 or 2002 Flavio "called my house and told me he was going to write a will ... he told me he was going to put me in the will, and I asked him for what. And he told me that he was going to leave some to Bill, and he mentioned this woman Linda, which I don't know who she is, and myself. And I asked him for what reason, and he told me that, you know, he was mad at his children and he wasn't really getting along with them well." (N.T., 11/13/06, at 64-65).<sup>2</sup> Mr. D'Abundo stated that he told Flavio to "give it a little thought" before making the will. "And he said to me that if things change, he would consider doing another will, or something... we discussed the will periodically through the time he wrote the will to the time he died" (Id. at 66). Mr. D'Abundo testified that Flavio never sent him a copy of the will.

Mr. D'Abundo testified that he observed Flavio's signature in the 1990's and in 2000 when he ordered brochures from Falcone Graphics. Mr. D'Abundo stated

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<sup>2</sup> Almost every witness testified that Flavio's relationship with Damian improved in the last years of Flavio's life, and every witness testified that Flavio enjoyed his visits with Damian in Florida.

that the signature on the copy of the 2002 will (P-3) "looks a little distorted" (N.T., 11/13/06, at 74).

The people who testified to witnessing the original will *after* Flavio's death were William James, Rita James, William James, Jr., Thomas James (William (Sr.)'s brother) and Reynold "Renny" Todd. Although Paula Carroll was with William and Rita when the 2002 document was discovered at Flavio's house after his death, they did not show her the document (Paula Carroll Deposition, at 45). "His [William James'] wife found what she said was a will. He was right – standing next to me and Rita said it looks like his will... I didn't see whether it was hand written, typed, signed, notarized. I didn't look. I figured this was a family matter and, you know, but he took that." (*Id.* at 14). Ms. Carroll stated that she did not know whether the document was an original or a copy (*Id.* at 45).

Renny Todd testified that William James showed him the original 2002 holographic will before Mr. James made copies of it. Mr. Todd stated that when Damian arrived at the James' house for his first visit, William James showed Damian a copy of the 2002 document (N.T. 11/16/06, at 35-37, 42). Mr. Todd was not familiar with Flavio's handwriting, thus he could not verify Flavio's signature.

Thomas James testified that he saw the original will at William James' house before Damian arrived (N.T., 11/14/06, at 143-145). He stated it was on 8 by 12 paper and greenish in color (*Id.* at 146). He could not say whether the original will was shown to Damian the night of that first meeting (*Id.* at 149). Thomas James was not familiar with Flavio's handwriting (*Id.* at 147).

William James, Jr. testified that he saw the original 2002 document at his father's house. He could not recall whether it was dated and did not remember the color of the paper (N.T., 11/14/06, at 90-91). William, Jr. testified that when his father handed Damian the original will, the people present were William James, Rita James, himself, and Damian (Id., at 86). He stated that neither his uncle Thomas nor Renny Todd were present when his father gave the will to Damian (Id. at 86). William, Jr. also was not familiar with Flavio's handwriting (Id. at 91).

Rita James testified that she was not familiar with Flavio's handwriting and could not verify Flavio's signature on the document she found in the magazine rack (N.T., 10/11/06, at 105). William James testified in his deposition that the original document was on "regular loose leaf type paper." (N.T., 10/12/06, at 21). At trial he testified that the original document was on a stenographer's pad (N.T., 10/11/06, at 203).

William James made multiple copies of the 2002 document (P-3, P-4, F-1). Some of the copies have fax phone numbers and fax dates and some contain no fax lines. Damian notes that the May 4, 2005 probate decree does not indicate which version of the 2002 document the Register of Wills admitted to probate.

To overcome the presumption that the testator revoked or destroyed a missing will that he possessed, the evidence must be positive, clear and satisfactory. In re Estate of Janosky, 827 A.2d 512, 519 (Pa. Super. 2003). Two competent witnesses must separately depose to all the facts necessary to complete the chain of evidence of the content and execution of the will, so that no



link in it may depend on the credibility of but one. In re Harrison's Estate, 173 A. 407, 409 (Pa. 1934).

I do not find positive, clear and satisfactory evidence that Flavio duly and properly executed the original will or that the contents of the will were substantially as appears on the copies faxed to the various relatives. Although some witnesses testified that the signature on the copies of the 2002 document was similar to the way Flavio wrote the letter "F" in his name, no one saw Flavio write the 2002 will, no one witnessed his signature on the will and no one saw the will while Flavio was alive. Cf Glockner v. Glockner, 106 A. 731 (Pa. 1919) (testator showed holographic will to two people shortly before his death. Both witnesses credibly testified to the execution and content of the lost will).

Only one witness testified that Flavio discussed his intention to leave his estate to the three cousins. This witness did not state that Flavio intended to leave the "family jewels" in a safe deposit box to Tanya and the coin collection to Damian. Indeed, the cousins all testified that Flavio had no relationship with Tanya.

The evidence regarding the disappearance of the original will is speculative. As stated above, Mr. James testified that when Damian made his first visit to Mr. James' house, he showed Damian a copy of the will. "I did not show Damian the original of the document. It was a copy." (N.T. 10/11/06, at 217-218). He testified that on Damian's second visit to his house after Flavio's death, he gave the original will to Damian. Damian testified that on his first visit to the James' house, William James showed him a photocopy of the 2002 will. "It was definitely two

pieces of paper." (N.T., 10/13/06, at 95). He never saw the original will and never received any document (original or copy) on his second visit (Id., at 106).

The mere fact that hostile heirs had access to the will and a motive to destroy the will after the testator's death is insufficient to create a presumption that the will was destroyed by someone other than the testator without the testator's knowledge. In re Estate of Keiser, 560 A.2d 148 (Pa. Super. 1989). It is well settled that if a will, duly executed, is destroyed after the death of the testator, or without his authority in his lifetime, it may be established upon satisfactory proof of its having been so destroyed and of its contents: but the proof upon both points must be of the clearest, most satisfactory character. A lost will not traced out of the possession of the testator is presumed to have been revoked by him by destruction; and it is not enough to show that some one other than he had the opportunity to destroy it, even though there may have been a motive on the part of the person suspected. In re Buchle's Estate, 14 Pa. C.C. 99, 3 Pa. D 16 (Pa. Orph. 1893).

The testimony revealed years of animosity and hostility between the Falcone children and Flavio's cousins caused by Flavio and Angela's divorce and other matters. Both William James and Damian may have had access to the original will, however, they both lacked credibility at times. When William James turned over Flavio's items to Damian he told Damian that he gave him everything that was removed from the house (N.T., 10/12/06, at 43, 10/13/06, at 104). Mr. James admitted that that was a lie (N.T., 10/12/06, at 43). Jay Yanniell testified that William James told him that he gave all of Flavio's guns to Damian. Mr. James did

not tell Jay that he kept a few guns for himself (N.T., 11/16/06, at 79). At trial Damian claimed that a month before his father's death, Flavio typed a new will and hid the thermo fax paper copy of the typed will in the back of a picture frame with ten \$100 bills (N.T. 10/13/06, at 113-116, 168-169). No witness could recall Flavio ever typing any document. Angela admitted that she did all of the typing when she worked for Falcone Graphics.

Based on the foregoing, I find that Proponents failed to provide clear and convincing (satisfactory proof) evidence by two credible witnesses establishing the execution and contents of the original 2002 holographic will. Thus, the Petition for Appeal from Probate is Granted. The 2002 Will is stricken

IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

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NO. 1504-1548

Edward N. Flail, Jr., Esquire, Attorney for Linda F. Filipone & John Anthony  
Yanniell

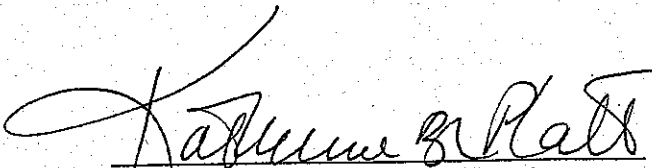
James Mannion, Esquire, Attorney for Damian Falcone

Anthony DiMassa, Esquire, Attorney for William James

ORDER

AND NOW, this 21<sup>st</sup> day of September, 2007, upon consideration of the  
Petition for Appeal of the May 4, 2005 Order of the Register of Wills and after trial,  
it is hereby Ordered that the Petition is Granted. The document purporting to be  
the decedent's June 26, 2002 Will is stricken from probate

BY THE COURT:

  
Katherine B. L. Platt, J.

CLERK OF ORPHANS' COURT  
CHESTER COUNTY, PA

2007 SEP 21 PM 2:45

FILED