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Alan Rothenberg
University of Michigan Law School

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WILLS — PROBATE — "FRAUDULENT" DESTRUCTION NOTWITHSTANDING TESTATOR'S KNOWLEDGE — Decedent executed a will in which he exercised a general testamentary power of appointment making plaintiff beneficiary of a trust. The will was delivered for safekeeping to a notary in Germany and subsequently destroyed in a bombing raid. Decedent, having learned of the destruction of his will, died ten months later without executing a new will in the interim. The Surrogate admitted the will for probate as one "fraudulently destroyed" under New York law.[1] The Appellate Division reversed.[2] On appeal to the New York Court of Appeals, *held*, reversed, three judges dissenting. The will was "fraudulently destroyed" within the meaning of the statute even though decedent knew of its destruction and failed to execute another testamentary instrument. *In re Fox*, 9 N.Y.2d 400, 174 N.E.2d 499, 214 N.Y.S.2d 405 (1961).

The courts have found it difficult to formulate a workable procedure to establish the status of lost or destroyed wills. The desire to give effect to the testator's intent when his will is not available must be tempered by the realization that without the document itself before the court there is a greater possibility of the establishment of a spurious will which would instead frustrate the testator's wishes. Twelve states, including New York, attempt to reconcile these considerations by granting probate if the will is proved to have been "in existence at the death of the

1 "A lost or destroyed will can be admitted to probate in a surrogate's court, but only in case the will is in existence at the time of 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." N.Y. SURR. CT. ACT § 143.

2 *In re* Fox, 9 App. Div. 2d 365, 193 N.Y.S.2d 794 (1959).

testator or, . . . fraudulently destroyed in his lifetime."[3] This statutory provision, however, creates the additional problem of defining what constitutes a "fraudulent destruction."[4] No dishonest purpose, bad faith, or corrupt intent need be shown to categorize a destruction as "fraudulent."[5] The courts have included within the meaning of the statutory language a concept of constructive fraud,[6] so that "fraudulently destroyed" now encompasses any loss or destruction, accidental or intentional, within the testator's lifetime, so long as it was without his consent, knowledge, or procurement.[7] The fraud upon the testator is his death ". . . intestate, when he intended and meant to have disposed of his estate by will and never evinced any change of that intent."[8] In the principal case the testator's knowledge that his will had been destroyed and his inaction thereafter had the effect of vitiating any "fraud" against him as well as offering circumstantial evidence of a change of testamentary intent.

The dilemma presented to the court in the principal case is illustrative of the problems created by the use of the term "fraudulently destroyed." The will had not been revoked in conformity with the statutory mandate

[3] ARIZ. REV. STAT. ANN. § 14-321 (1956); ARK. STAT. § 60-304 (1947); CAL. PROB. CODE § 350; IDAHO CODE ANN. § 15-231 (1947); MONT. REV. CODES ANN. § 91-1202 (1947); N.Y. SURR. CT. ACT § 143; N.D. CENT. CODE § 30-05-17 (1960); OKLA. STAT. tit. 58, § 82 (1951); S.D. CODE § 35.0211 (Supp. 1960); UTAH CODE ANN. § 75-3-26 (1953); WASH. REV. CODE ANN. § 11.20.070 (1961); WYO. STAT. ANN. § 2-73 (1957).

[4] A further difficulty is encountered when attempting to determine whether "existence" means legal or physical existence. If construed to mean legal existence, a will destroyed during testator's lifetime continues to exist in contemplation of law, rendering surplusage the fraudulent destruction clause of the statute. *In re* Havel, 156 Minn. 253, 194 N.W. 633 (1923), recognized this but interpreted "existence" as legal existence to refrain from limiting the doctrine of dependent relative revocation. See also *In re* Eder, 94 Colo. 173, 29 P.2d 631 (1934); *In re* Nickels, 114 Me. 338, 96 Atl. 238 (1916). If the statute is literally construed and a physical existence at the time of death required, an unrevoked will may be refused probate if it is lost prior to testator's death, or destroyed in other than a fraudulent manner. Since the will cannot be proved, for all practical purposes it is revoked, the revocation statute notwithstanding. *In re* Kerckhof, 13 Wash. 2d 469, 125 P.2d 284 (1942), 41 MICH. L. REV. 358. See generally TURRENTINE, WILLS 228 (1954).

[5] *E.g.*, *In re* Breckwoldt, 170 Misc. 883, 11 N.Y.S.2d 486 (Surr. Ct. 1939), which held that the statutory fraud was not fraud in the usual sense; *In re* Gethins, 97 Misc. 561, 163 N.Y. Supp. 398 (Surr. Ct. 1916), where a will was in the possession of another and the testatrix wanted to die with a will, it was declared "fraudulently destroyed" when not found after her death. *But see*, Timon v. Claffy, 45 Barb. 438 (Sup. Ct. N.Y. 1865), *aff'd mem. sub nom.* Conroy v. Claffy, 41 N.Y. 619 (1869); *In re* Kidder, 66 Cal. 487, 6 Pac. 326 (1885), where a third person negligently allowed the will to be destroyed, it was held not to constitute a fraudulent destruction.

[6] See Tenny, *Probate of Wills Where Original Is Missing*, 23 N.Y.B. BULL. 47 (1951); *In re* Breckwoldt, *supra* note 5. *But see In re* Arbuckle, 98 Cal. App. 2d 562, 220 P.2d 950 (1950), which limits constructive fraud to fiduciary relationships.

[7] *E.g.*, Rose v. Hunnicut, 166 Ark. 134, 265 S.W. 651 (1924) (will lost following a fire in custodian's vault); Voorhees v. Voorhees, 39 N.Y. 463 (1868) (testator himself destroyed his will while under undue influence). See Tenny, *supra* note 6, at 50-51.

[8] Schultz v. Schultz, 35 N.Y. 653, 656 (1866).

governing revocation,[9] unless ratification of unauthorized acts of destruction could be judicially recognized as a new form of revocation.[10] The majority classified the will as "fraudulently destroyed" to avoid the anomaly of a will validly executed and unrevoked, but inadmissible for probate. Yet any notion of fraud[11] is seemingly inapplicable to a testator, who, knowing of the destruction of his will, failed to execute another dispositive instrument even though there was ample opportunity to do so before his death. The majority's classification rested on its inadequate construction of the purpose of the lost-or-destroyed-wills statute as a means by which proponents of a lost or destroyed will could overcome the common-law presumption of revocation.[12] The fallacy in this reasoning is that when a will is in the possession of a custodian, there is no presumption that the testator destroyed his will *animus revocandi*.[13] The lost-or-destroyed-wills statute governs the probate of *all* lost or destroyed wills, not merely those last seen in the testator's possession. The necessary conclusion is that the statute was intended for a purpose broader than that attributed to it by the majority.[14] Had the majority properly construed the statute, it would have had to resolve the fundamental issue in the case—the conflict between the lost-or-destroyed-wills statute and the revocation statute. The dissent did recognize that knowledge by the testator of the destruction of his will, followed by inaction for a reasonable time thereafter during which he had both the capacity and opportunity to execute a new will, negates any suggestion of actual or constructive fraud.[15] This result, while a more reasonable construction of the lost-or-destroyed-wills statute, similarly fails to resolve the conflict[16] between

9 "No will in writing . . . shall be revoked . . . unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking same, by the testator himself, or by another person in his presence, by his direction and consent . . . ." N.Y. DECED. EST. LAW § 34. See Matter of Tremain, 282 N.Y. 485, 27 N.E.2d 19 (1940), for discussion of legislative history and purpose.

10 There have been instances in which some form of ratification has been recognized, *e.g.*, Campbell v. Smullens, 96 N.J. Eq. 724, 125 Atl. 569 (1924) (knowledge plus inaction for six months); Cutler v. Cutler, 130 N.C. 1, 40 S.E. 689 (1902) (failure to execute new will after being informed of destruction); Deaves Estate, 140 Pa. 242, 21 Atl. 395 (1891) (knowledge plus six months inaction); Parsons v. Balson, 129 Wis. 311, 109 N.W. 136 (1906) (knowledge plus three year lapse and adoption of child). *But cf.* Estate of Murphy, 217 Wis. 472, 259 N.W. 430 (1935). See generally ATKINSON, WILLS § 86 (2d ed. 1953); UNDERHILL, WILLS § 225 (1900).

11 See Schultz v. Schultz, 35 N.Y. 653 (1866); text accompanying note 8 *supra*.

12 *Accord*, Matter of Staiger, 243 N.Y. 468, 154 N.E. 312 (1926); Matter of Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901); Collyer v. Collyer, 110 N.Y. 481, 18 N.E. 110 (1888).

13 ATKINSON, WILLS 554-55 (2d ed. 1953).

14 *In re* Bristol, 23 Cal. 2d 221, 234, 143 P.2d 689 (1943) (Justice Traynor dissenting).

15 Principal case at 413, 174 N.E.2d at 507, 214 N.Y.S.2d at 416.

16 One case has held that no conflict exists between the lost wills and revocation statutes. The former being procedural must be complied with prior to consideration of the latter which is substantive. *In re* Kerckhof, 13 Wash. 2d 469, 480, 125 P.2d 284 (1942).

that statute and the revocation statute. It is this conflict which induced the majority to distort the term "fraudulently destroyed" so that it becomes, in effect, equivalent to "unrevoked." The distortion of the fraudulent destruction provision to subserve the formalities required by the revocation statute, however, undermines the effect of the lost-or-destroyed-wills statute. If this statute was intended to be co-extensive with the revocation statute it would be superfluous, since the general probate provisions dealing with proper execution, lack of revocation, and proof of the contents of a will, when applied to lost or destroyed wills would accomplish the same result.[17] The legislative intent clearly was to allow the probate of a lost or destroyed will only upon proof of an additional factor—its existence or its fraudulent destruction.

The requirements of fraudulent destruction statutes similar to that in the principal case have been criticized as too restrictive, resulting in the denial of probate for many lost or destroyed wills which it may readily be assumed represent the testator's desires and remain unrevoked at his death.[18] The technical requirements of the statute make compliance difficult, tending to frustrate the testator's intent and encourage fraud, the antithesis of the intended result—for example, disappointed heirs, knowing that the statute imposes severe restrictions on the proponents of a will, might suppress the adverse will and evidence of its existence at the testator's death, casting decedent's estate into intestacy where their fraud would be rewarded.[19] The development of a liberal construction of fraud was a commendable judicial alleviation of the rigidity of a literal construction of the statute, allowing the probate of many of these unrevoked, destroyed wills.[20] The principal case, however, extends this liberalization too far, thus permitting the probate of a will in all probability inconsistent with the testator's intent.

Since the judiciary has not been successful in arriving at a sound and functional definition for "fraudulently destroyed," legislative action is necessary. It has been suggested that the desired solution is to repeal the lost-or-destroyed-wills statute.[21] This would eliminate the present conflict between the lost-or-destroyed-wills and the revocation statutes, but would offer no protection against the danger of fraud. Restrictions

17 In the United States approximately one-half the states allow the probate of lost or destroyed wills under their general probate laws while the remaining states regulate these situations through specific statutory treatment. 3 PAGE, WILLS § 27.2 (Bowe-Parker rev. ed. 1961).

18 Evans, *Probate of Lost Wills*, 24 NEB. L. REV. 283, 296 (1945).

19 See MODEL PROBATE CODE 20 (Simes 1946); 3 PAGE, *op. cit. supra* note 17, § 27.2; 32 CALIF. L. REV. 221 (1944); 39 CALIF. L. REV. 156 (1951).

20 39 CALIF. L. REV. 156 (1951).

21 MODEL PROBATE CODE (Simes 1946), introductory comment at 20. Sections 64(a) and 65(c) are suggested as ideal treatment of the problem by the drafters of the model code.

beyond those imposed upon the probate of physically existent wills are necessary as a protection against the establishment of spurious wills. Two additional alternatives exist: first, a proviso could be added to the lost-or-destroyed-wills statute that a will is not to be deemed "fraudulently destroyed" when the testator has knowledge of the destruction of his will and thereafter fails to execute a new testamentary instrument. However, even with such a proviso the conflict between the lost-or-destroyed-wills statute and the revocation statute would not terminate. The anomaly of a validly executed, unrevoked will being inadmissible for probate would still cause courts to hesitate to deny probate.[22] Second, the revocation statute could be amended to include ratification of any unauthorized act of destruction as a new form of revocation. This solution would answer those who feel that the statutory formalities attending the revocation of a testamentary instrument are inviolable. Moreover, it would be a desired broadening of the revocation statute, resulting in increasing the number of cases in which the obvious intent of the testator could be given legal effect.

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22 With this proviso the court would have much leeway in determining whether or not testator had adequate knowledge and whether under the circumstances his inaction was for an unreasonable time.