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Wills - Revocation - Loss of a Duplicate Will

John W. Gelder
University of Michigan Law School

WILLS—REVOCATION—LOSS OF A DUPLICATE WILL—Testator, who had executed his will in triplicate, retained two originals in his possession, but only one of them could be found after his death. Plaintiff sought to probate this document, but the lower court held that the plaintiff had not rebutted the presumption of revocation arising from the loss or destruction of one duplicate and refused to grant probate. On appeal, *held,* reversed. The presumption that the testator destroyed one original with an intention to revoke his will is rebutted by the fact the testator had preserved another original in his possession. *Jones v. Mason,* (La. 1958) 99 S. (2d) 46.

As each duplicate is regarded as the testator's will, a destruction of any such original with the requisite intent to revoke is a revocation of all duplicates.[1] When one of the duplicates is missing after the testator's death, it has long been held that there is a presumption the testator destroyed the instrument with an intent to revoke.[2] An early English decision stated that the strength of the presumption depended on whether the testator retained both duplicates or gave one to a third person.[3] Following this precedent, some American courts have held that where the testator retains only one of the two existing originals and subsequently destroys it, the presumption of revocation is strong,[4] but when the testator retains both

1 ATKINSON, WILLS, 2d ed., 442 (1953); 1 PAGE, WILLS, 3d ed., §437 (1941); Crossman v. Crossman, 30 Hun (N.Y.) 385 (1884).

2 E.g., Onions v. Tyrer, 2 Vern. 741, 24 Eng. Rep. 418 (1716); In re Bates Estate, 286 Pa. 583, 134 A. 513 (1926); In re Walsh's Estate, 196 Mich. 42, 163 N.W. 70 (1917); In re Rinder's Estate, 196 Misc. 657, 92 N.Y.S. (2d) 320 (1949).

3 Pemberton v. Pemberton, 13 Ves. Jr. 291, 33 Eng. Rep. 303 at 310 (1805), ". . . If a testator cancels that part, which is with him, the legal presumption is, that the duplicate in the possession of another, is not to prevail . . . that if the testator himself has possession of both, the presumption holds, though weaker; and farther, that, even if having both in his possession, he alters one, then destroys that, which he has altered, there is also the presumption; but still weaker."

4 In re Field's Will, 109 Misc. 409, 178 N.Y.S. 778 (1919); In re Bates Estate, note 2 supra; In re Drake's Estate, 150 Neb. 568, 35 N.W. (2d) 417 (1948); Menzi v. White, 360 Mo. 319, 228 S.W. (2d) 700 (1950).

duplicates and only one is destroyed, the presumption is weaker.[5] In some cases, however, courts have agreed with the writers[6] and applied the presumption of revocation as vigorously when the testator retains both copies as when he retains only one;[7] yet in others it has been held that testator's mere possession of the other duplicate at his death rebuts the presumption.[8] When a duplicate not in the testator's possession is lost or destroyed, one court held that no presumption of revocation arises,[9] while others have held that continued retention of the duplicate by the testator is sufficient to rebut the presumption.[10] As in the principal case, courts apparently apply to the three original situations the same rule that they would apply if only duplicates were involved.[11] Although there was some question in early decisions whether the presumption of revocation was one of fact or of law, the courts now seem to agree that it is one of fact.[12] The presumption is always rebuttable and evidence may be admitted to show that the testator did not destroy the duplicate with intent to revoke.[13]

This area is one of conflict because persuasive arguments exist both for and against a strong presumption of revocation when one of several retained duplicates is not produced. Courts favoring the presumption argue that as each duplicate contains the will of the testator, a revocation of either is a revocation of both.[14] On the other hand an early English case,[15] which dealt with the mutilation of one of the two originals retained by the testa-

[5] In re Shields, 117 Misc. 96, 190 N.Y.S. 562 (1921); Phinizee v. Alexander, 210 Miss. 196, 49 S. (2d) 250 (1950); In re Mittelstaedt's Will, 280 App. Div. 163, 112 N.Y.S. (2d) 166 (1952).

[6] ATKINSON, WILLS, 2d ed., 442 (1953); 1 PAGE, WILLS, 3d ed., §437 (1941); 17 A.L.R. (2d) 805 at 813 (1951); 9 WIGMORE, EVIDENCE, 3d ed., §2523 (1940).

[7] In re Blackstone's Estate, 172 Misc. 479, 15 N.Y.S. (2d) 597 (1939); In re Hedin's Will, 181 Misc. 730, 48 N.Y.S. (2d) 870 (1944); In re Rinder's Estate, note 2 supra.

[8] In re Shields, note 5 supra; In re Mittelstaedt's Will, note 5 supra.

[9] Snider v. Burks, 84 Ala. 53, 4 S. 225 (1887).

[10] In re Cucci's Estate, 192 Misc. 555, 81 N.Y.S. (2d) 202 (1948); In re Sand's Will, 194 Misc. 662, 89 N.Y.S. (2d) 541 (1949).

[11] In re Moore's Estate, 137 Misc. 522, 244 N.Y.S. 612 (1930); In re Hedin's Will, note 7 supra. But see Roberts v. Fisher, (Ind. App. 1951) 98 N.E. (2d) 215.

[12] Managle v. Parker, 75 N.H. 139, 71 A. 637 (1908); In re Wall's Will, 223 N.C. 591, 27 S.E. (2d) 728 (1943); In re Sand's Will, note 10 supra.

[13] Combs v. Howard, (Tex. Civ. App. 1939) 131 S.W. (2d) 206; In re Flynn's Estate, 174 Misc. 565, 21 N.Y.S. (2d) 496 (1940); In re Martin's Will, 180 Misc. 113, 40 N.Y.S. (2d) 685 (1943). There may also be ample evidence of testator's intent to revoke his will by destroying one of the duplicates, in which case there is no need for any presumption. In re Holmberg's Estate, 400 Ill. 366, 81 N.E. (2d) 188 (1948).

[14] Pemberton v. Pemberton, note 3 supra; Crossman v. Crossman, note 1 supra; In re Rinder's Estate, note 2 supra. It has also been argued that both duplicates must be examined to see if they are exactly alike. In re Robinson's Will, 257 App. Div. 405, 13 N.Y.S. (2d) 324 (1939); In re Blackstone's Estate, note 7 supra.

[15] Roberts v. Round, 3 Hagg. Ecc. 548, 162 Eng. Rep. 1258 (1830). The court held the mere retention of the other duplicate intact was enough to rebut the presumption of revocation and seems to have been the basis for American decisions adopting the view of the principal case.

tor, argued that the presumption, if followed at all,[16] should be very weak because if the testator had intended to revoke his will it would be easy enough for him to destroy all the duplicates. This latter position has been adopted by some American courts,[17] further arguing that a layman would not consider loss of one duplicate as revocation of the other duplicate.[18] Another argument is that, since one original may be put in a relatively safe place, the others may be treated casually with the real possibility that they will be lost or mislaid,[19] rather than destroyed *animo revocandi.* Finally, in the triplicate will situation, the fact that all but one of the three originals are produced, as was true in the principal case,[20] may have significance. In essence the court in the principal case holds that there is no presumption of revocation in saying that it is rebutted by the mere retention of another original, although the court did not specifically reject the presumption as has one other court on similar facts.[21] The lesson of the above discussion for the careful testator is, of course, to avoid the problem by having extra *copies* of his will made rather than extra *originals.*

John W. Gelder

16 Though the argument has never been exposed by courts, it is arguable that the "lost wills" statute, which forms the basis for the presumption of revocation, was never meant to apply to duplicate wills. It has been suggested that since the testator must not only destroy a will to revoke it, but must do so with the requisite *animo revocandi,* that in the case of duplicate wills, the burden should be put on the testator to seek out and destroy all copies if he intends to revoke his will. 17 A.L.R. (2d) 805 (1951).

17 In re Shields, note 5 supra; In re Mittelstaedt's Will, note 5 supra; Roberts v. Fisher, note 11 supra.

18 In re Mittelstaedt's Will, note 5 supra.

19 See In re Robinson's Will, note 14 supra, at 326, ". . . [O]ne who makes a will in duplicate subjects it to a double hazard of loss or accidental destruction which cannot be accounted for; and this may result in the defeat of testator's intention by mere accident, or by the carelessness of a custodian of one of the duplicates, or even by the deliberate fraud of one having an interest in defeating the will."

20 The court, however, did not seem to attach much significance to the fact that the original not retained was also produced. Compare the cases cited in note 11 supra.

21 Roberts v. Fisher, note 11 supra.