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# Lost Wills

**M**any estate practitioners will face the situation where the original Will cannot be located following the death of the testator. There are many variations on the fact patterns surrounding such lost Wills and any number of reasons the original Will cannot be located.

At common law, where a validly executed Will is shown to have last been in the custody of the testator and that Will has not been located despite every effort, then, *in the absence of evidence to the contrary*, a presumption of revocation by the testator arises. In other words, the law presumes the testator has destroyed the Will with the intention of revoking it. This presumption also applies to the copies, i.e., any executed copies are deemed to have been revoked, as well.

In this article, we will examine this presumption of law and review some of the cases where evidence to the contrary has been offered to rebut the presumption. Most of the cases focus on whether or not the presumption has been rebutted on the facts of the particular case.

## The Presumption of Revocation: Leading Cases

1. *Sugden v. Lord St. Leonard* (1876) 1 P.D. 154 (C.A.)

In this leading case, Lord St. Leonard's Will could not be found following his death. His daughter, however, had read the Will so many times, she was able to reproduce almost all of its provisions *verbatim*. In this case, the court was satisfied with the honesty of the witness and her ability to recall. Further, they were convinced the daughter had accurately related the testator's intentions. The court thus admitted into probate the daughter's memorandum of the contents of her father's Will.

In terms of the legal presumption, the court further held it would consider if there were other explanations for inability to locate the Will, i.e., explanations other than the intentional destruction by the testator.

The court further held that a testator's declarations as to the contents of the Will were admissible to prove those contents. The court held the declarations were admissible whether they be made before or after the Will was signed and whether the declarations be oral or written.

As to the strength of the presumption of revocation, the court said this would depend on the character of the custody the testator had over his Will.

In this case, the court found Lord St. Leonard was a person who regarded his Will of the utmost importance. They found that since there was no evidence that he deposited the Will with others for safekeeping, he likely would have kept it in his possession. The court concluded it was "obvious that the Will may have been inadvertently burned when the testator's personal effects were destroyed after his death."

The court opined,

it seems utterly impossible that, under the circumstances, such a man as Lord St. Leonard would voluntarily destroy his Will, whether for the purpose of revoking it or making another, or for any other purpose that could be considered.

2. *Lefebvre v. Major* (1930) S.C.R. 253  
The Supreme Court of Canada followed *Sugden v. St. Leonard* in admitting into probate a copy of a Will. In this case, the deceased's banker had sent him his Will; upon his death, however, it could not be

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located. A few weeks before his death, the deceased had told a close friend that “his papers were fixed up so that everything went to his sister after his death.”

As in the *Sugden* case, the court found that the deceased regarded his Will of the utmost importance. The court held that the testator was a simple man who was affectionate to his sister and that he would not have intentionally destroyed his Will. Again, as in *Sugden*, the court speculated the Will had been “inadvertently burned” with the rest of his personal effects.

3. A different approach was taken in another leading Canadian case, *Sigurdson v. Sigurdson* (1935) 4 D.L.R. 529.

Sigurdson had taken his original Will home from his lawyer’s office. All of his family read the Will and it was put in a small locked metal box that Sigurdson kept. He also kept an unlocked wooden box in which he had other personal papers. From time to time, Sigurdson would move papers from one box to the other. Just prior to his death, he told a son by his first marriage that he did not have a Will because everything would be divided up “according to law.”

In the subsequent litigation, the court found Sigurdson to be a person who knew exactly what papers he had in his metal box. The trial judge concluded that he revoked his Will so as to allow his wife and his children from both marriages to share by operation of law. The Supreme Court of Canada upheld the trial decision, which applied the presumption of revocation and refused to admit into probate a copy of the Will.

In the Supreme Court decision, Davis J. stated,

it needs to be clear and convincing evidence to establish what is alleged to be a lost Will. The person propounding such a Will has a burden of proof that persists throughout the whole trial to satisfy the court at the conclusion that the Will is in fact lost and that it was not destroyed by the testator with the intention of putting it to an end.

For other decisions where the court has found the presumption was not rebutted, see: *Re Wagenhoffer* 22 E.T.R. 60 (Sask. C.A.); *Re Wellwood* (1982) 19 Alta. L.R. (2d) 268; *Kennedy v. Peikoff* (1966) 56 W.W.R. 381; *Re Singh* (1912) 1 W.W.R. 472; and *Re Perry* (1925), 56 O.L.R. 278.

### **Review of Cases where the Courts find the Presumption to be Rebutted**

A review of the “lost Will” cases could lead one to conclude that the courts are very open to finding the presumption has been rebutted. In spite of the legal presumption, the courts seem to be very reluctant to find that a testator has deliberately revoked a Will by destroying it.

There are many cases where, based on evidence that is relatively weak, the courts permit a copy of a Will or other sufficient evidence of the Will to be admitted into probate.

1. A leading British Columbia case is *Unwin v. Unwin* (1914) 6 W.W.R. 1186.

Mr. Unwin had prepared a Will leaving everything to his wife. He placed the Will in an envelope and gave it to his wife to put in a drawer with his other papers. After his death the Will could not be located.

Mrs. Unwin testified that she and the deceased had a harmonious marriage and that the deceased never expressed any intention to revoke the Will. The court found that Mr. Unwin had no motive to make another Will. The Court believed the testimony of the wife and admitted a copy of the Will into probate.

The court held that it was entitled to consider the relationship between the deceased and his wife, also his words and actions subsequent to the execution of the Will, and any circumstances that may tend to support or rebut the presumption of revocation.

In rebutting the presumption, the court relied on *Sugden v. St. Leonard* where Chief Justice Cockburn stated, "The presumption will be more or less strong according to the character of the custody which the testator kept over the Will."

2. Both *Unwin* and *Unwin* and *Sugden v. St. Leonard* were followed in *Brown v. Woolley* (1959) 29 W.W.R. 425.

In this case, a BC court admitted into probate a carbon copy of the executed Will

after the original was lost. The court based its finding on the uncorroborated evidence of an interested party that the court, nevertheless, found to be a reliable witness.

In all three cases, the court found the presumption of revocation to be rebutted, based on evidence "by trustworthy witnesses" as to the deceased's declarations made shortly before death as to the dispositions made in his Will.

3. *Holst Estate v. Holst* 39 E.T.R. (2d) 218.

This is a recent BC case that typifies the kind of evidence required to rebut the presumption of revocation.

In 1988 the deceased and his son were the owners, as tenants in common, of a parcel of land. The father had given the son's share to him as a gift. Six years later, the father wrote a Will dividing his estate equally among his children. He later realized that, in effect, he had already given the one son an inheritance equal to the shares of the estate left to his other children. The father thus executed a codicil to revoke this one son as a beneficiary under his Will. After his death, this codicil could not be found.

The court found that the presumption had been rebutted because:

- a) eight months before his death, the deceased had told his lawyer that he had executed such a codicil;
- b) evidence showed that the codicil could have been lost;
- c) it was not the deceased's character to have intentionally destroyed his codicil;
- d) evidence did not support the contention that the codicil was intentionally destroyed by the deceased;
- e) the deceased had numerous documents throughout the house that were not organized.

## Other Conditions to Consider

### 1. Dementia

A testator must have sufficient mental capacity to be able to revoke a Will. Doubtless many seniors "squirrel away" their Wills, then forget where they have put them. Thus a Will lost by a testator, who ultimately becomes incapable, creates a legal dilemma. Often it is not clear when the Will was lost in relation to the

deceased's loss of legal capacity. Did the person intend to revoke the Will? Did that person have legal capacity at that time?

In *Re Broome* (1961) 35 W.W.R. 590, the Manitoba Court of Appeal held that the burden of showing that the Will was destroyed *before* the onset of insanity lies on the party asserting revocation.

This case was followed in the British Columbia of *Eaton v. Heyman* (1946) 63 B.C. R. 62

## 2. Suspicious Circumstances

The presumption of revocation may be rebutted if it can be shown that a person who stands to benefit from the loss of the Will has fraudulently destroyed it.

In *Re Weeks*, (1972) 3 O.R. 422, the court refused to make an inference of fraudulent destruction in spite of what the judge characterized as "very suspicious circumstances." Instead the judge applied the presumption of revocation and declared an intestacy.

In this case, the evidence showed that the deceased's wife had been badgering him to amend his Will and leave a larger share to her. She alone had access to the locked drawer where the Will was kept. She stood to inherit much more if the Will were not found and he died intestate. Nevertheless the court applied the presumption of revocation and found the Will was presumed to have been destroyed by the deceased and thus revoked.

In *Re Perry* [1925] 1 D.L.R. 930 (C.A.), the court refused to allow a copy of a lost Will into probate and declared an intestacy.

Justice Middleton stated,

...when a testator has possession of his testamentary instrument, and it is not forthcoming at the time of his death, the presumption is that he destroyed it. The presumption is against fraudulent abstraction either before or after death, but circumstances which render the abstraction possible must be taken into account in weighing the evidence.

## 3. Accidental Loss or Destruction

In *Allan v. Morrison*, [1900] A.C. 604, the Privy Council upheld the decision of the New Zealand Court of Appeal who, in rendering their appeal judgment, had said as follows:

The hypothesis of accidental loss or

destruction is unreasonable. There is a presumption against the hypothesis of fraudulent abstraction. There is a reasonable possibility that the deceased destroyed the Will himself. In order to find for the Will, we must be morally satisfied that it was not destroyed by the testator *animo revocandi*. (With an intention to revoke)

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## Requirement for Proof of the Contents and the Will's Execution

Even once the presumption of revocation is rebutted, probate will still only be granted if there is sufficient proof of both the contents of the lost Will *and* its due execution.

The contents of the Will may be established on secondary evidence such as the solicitor's notes or a copy or any other such written evidence. For example, in *Re Dreger*, 13 E.T.R. 212, a carbon copy of the Will was admitted into probate.

Secondary evidence of the contents of a Will may include:

- 1) the solicitor's notes or a typed copy or carbon copy;
- 2) oral testimony of someone having direct knowledge of the contents, such as the solicitor who prepared the Will;
- 3) pre-testamentary or post-testamentary statements of the testator, whether written or oral.

In weighing such evidence, the court will carefully scrutinize the evidence of anyone who stands to benefit from the contents proposed.

## The Presumption applies only if the Will was in the Possession of the Testator.

In *Re Flaman Estate*, (1997) 18 E.T.R. 305, the court confirmed that the presumption to intentionally revoke a Will is only established when the Will is last traced to

the possession of the testator. In this case the deceased was in a nursing home and thus the Will's possession could *not* be last traced to him.

## Conclusion

In summary, the case law currently provides that where a missing Will was last known to be in the possession of the testator before his death, the presumption is that the testator destroyed the Will with the intention of revoking it.

This presumption may be rebutted by the following evidence:

- 1) words or actions of the testator, either before or after the execution of the Will; or
- 2) a codicil that refers to the Will; or
- 3) evidence of the character of the testator and his treatment toward the beneficiaries during his life; or
- 4) statements made by the testator about the provisions made to beneficiaries.

Even if the existence of a Will is proven and the presumption rebutted, two further matters must still be established—the contents of the Will *and* its proper execution. Only once these elements are proven will the court admit a copy of the Will or other sufficient evidence in place of the original Will.

Like many other areas of estate law, the law purports to be clear; its application, however, is at times apparently inconsistent. It seems the courts are reluctant to declare an intestacy and will often go to some lengths to find sufficient evidence to rebut the presumption of revocation. ▲

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