

Wills--Duplicate Wills--Retention of Both by Testator During His Life (Matter of Mittelstaedt, 280 App. Div. 163 (1st Dep't 1952))

St. John's Law Review

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Recommended Citation

St. John's Law Review (1952) "Wills--Duplicate Wills--Retention of Both by Testator During His Life (Matter of Mittelstaedt, 280 App. Div. 163 (1st Dep't 1952))," *St. John's Law Review*: Vol. 27 : No. 1 , Article 20.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol27/iss1/20>

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This is the first authoritative ruling on the definition of "next of kin" since the above mentioned amendment became effective. The result has been to check conflicting interpretations among the various departments of the Appellate Division.¹⁹



WILLS—DUPLICATE WILLS—RETENTION OF BOTH BY TESTATOR DURING HIS LIFE.—Decedent executed her will in duplicate and retained both copies. After her death, the ribbon copy was missing and only the carbon copy offered for probate. The contestant argued that, since all the executed copies were not produced, there arose a presumption of revocation of the will. In reversing a decree denying probate, the Appellate Division *held* that, since both copies were retained by the decedent, the discovery of one of them at her death is sufficient to support a jury's finding of non-revocation. *Matter of Mittelstaedt*, 280 App. Div. 163, 112 N. Y. S. 2d 166 (1st Dep't 1952).

When a *single* will has been executed and it is established that it was not within the testator's possession or control prior to his death, no presumption of revocation arises in the event that the will is missing.¹ Any such presumption would be entirely overcome by the inaccessibility of the instrument to the testator and the consequent improbability of his having destroyed it.² However, when a single will is last traced to the testator and, upon his death, cannot be found, there arises the presumption that he destroyed it *animo revocandi*.³ The disappearance is presumed intentional, in the latter case, because of the ambulatory character of the will, coupled with its availability to the testator.⁴

The presumption of revocation, in such circumstances, may be rebutted by proof that the will was ". . . in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime . . ." ⁵ The burden of such proof is on the proponent.⁶ It

¹⁹ A recent amendment substituted "persons interested in the estate" for "next of kin." Laws of N. Y. 1952, c. 350, § 133 (effective Sept. 1, 1952). By definition, "next of kin" are included among "persons interested in the estate." N. Y. SURR. CT. ACT § 314(10).

¹ *Schultz v. Schultz*, 35 N. Y. 653 (1866).

² See *id.* at 654.

³ *Matter of Staiger*, 243 N. Y. 468, 154 N. E. 312, reversing 217 App. Div. 743, 216 N. Y. Supp. 920 (1st Dep't 1926); *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442 (1901), affirming 53 App. Div. 105, 65 N. Y. Supp. 879 (1st Dep't 1900); *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110 (1888); *accord*, *Matter of Cunnion*, 201 N. Y. 123, 94 N. E. 648 (1911).

⁴ See *Matter of Kennedy*, *supra* note 3 at 168, 60 N. E. at 443; *Betts v. Jackson*, 6 Wend. 173, 181 (N. Y. 1830).

⁵ N. Y. SURR. CT. ACT § 143.

⁶ *Matter of Staiger*, 243 N. Y. 468, 154 N. E. 312, reversing 217 App.

has been held that no malice or dishonesty is necessary to constitute fraud within the meaning of this statutory provision. It is sufficient if the will was destroyed without the knowledge or consent of the testator, contrary to his testamentary intentions,⁷ thus including accidental destruction.⁸ Further, it has been intimated that destruction either by the testator or by another with his knowledge and consent will not revoke the will if it is established that the act was done for some purpose other than revocation.⁹

It is the belief of many lawyers that by executing wills in *duplicate* they are protecting their client against intestacy. If one will is lost or destroyed, it is thought that the other will be admitted to probate; but present New York law actually increases the danger of intestacy under such circumstances.¹⁰ The result has been much confusion and litigation.

When there are *duplicate* wills, one copy remaining with the testator and the other in the possession of a third party, and the one not in the testator's possession is the only one missing, the presumption of revocation is overcome,¹¹ for the same reason as in the case of a single will in another's possession; *i.e.*, non-accessibility.¹² It follows from this rule that, when a third party has possession of both duplicates and one or both are missing, the presumption will likewise be overcome. Accordingly, when the only copy in the testator's possession cannot be found, the presumption arises that he destroyed it intending revocation, and the other copy will not be admitted to probate.¹³ In this instance, a revocation of one copy is a revocation of the entire testament since the testator, having only one copy, could not readily have destroyed both.

A more delicate situation occurs where a will has been executed in duplicate and the testator has retained *both* copies, only one of

Div. 743, 216 N. Y. Supp. 920 (1st Dep't 1926).

⁷ Matter of Dorrity, 118 Misc. 725, 194 N. Y. Supp. 573 (Surr. Ct. 1922).

⁸ Matter of Breckwoldt, 170 Misc. 883, 11 N. Y. S. 2d 486 (Surr. Ct. 1939).

⁹ Matter of Thompson, 191 Misc. 109, 76 N. Y. S. 2d 742 (Surr. Ct. 1948).

¹⁰ See Matter of Robinson, 257 App. Div. 405, 13 N. Y. S. 2d 324 (4th Dep't 1939). "But, under the decisions of the courts of this State, one who makes a will in duplicate subjects it to a double hazard of loss or accidental destruction which cannot be accounted for. . . ." *Id.* at 406, 13 N. Y. S. 2d at 326.

¹¹ Matter of Sands, 194 Misc. 662, 89 N. Y. S. 2d 541 (Surr. Ct. 1949); Matter of Cucci, 192 Misc. 554, 81 N. Y. S. 2d 202 (Surr. Ct. 1948).

¹² See note 2 *supra*.

¹³ Matter of Robinson, 257 App. Div. 405, 13 N. Y. S. 2d 324 (4th Dep't 1939); Matter of Betts, 200 Misc. 633, 107 N. Y. S. 2d 626 (Surr. Ct. 1951); Matter of Breeding, 161 Misc. 322, 291 N. Y. Supp. 750 (Surr. Ct. 1936), *aff'd*, 251 App. Div. 737, 297 N. Y. Supp. 681 (2d Dep't 1937); Matter of McChesney, 118 Misc. 545, 194 N. Y. Supp. 893 (Surr. Ct. 1922); see Note, 48 A. L. R. 297 (1927).

which can be found upon his death. In *Pemberton v. Pemberton*,¹⁴ where the testator had possession of duplicate wills at death, one of which had been altered and cancelled rather than lost, the court held that the unaltered copy could be probated. In *Matter of Shields*,¹⁵ wherein one of the two copies retained by the testator was lost, the New York Surrogate's Court, in admitting the available copy to probate, followed the reasoning of the *Pemberton* case to the effect that the presumption of revocation was of the weakest character and decided that it was overcome by the preservation of the duplicate copy. Later, however, the same court, in *Matter of Blackstone*,¹⁶ refused to follow the *Shields* case, believing it to be against the weight of controlling authority.¹⁷ Instead, it applied the presumption in all its rigor, denying probate of the copy found in possession of the deceased.

The primary effect of the instant case, *Matter of Mittelstaedt*, is to remove such situations as the latter from a strict application of the presumption of revocation. The court emphasizes that the presumption arising from the mere failure to produce an original counterpart is only an inference of fact which may be rebutted by circumstantial evidence.¹⁸

Since the testator had possession of both copies, it seems improbable that, had he intended revocation, he would have destroyed only one of them leaving the other to be discovered after his death. The instant decision, therefore, is logical, in accord with the factual probabilities of the situation, and not, as was thought in *Matter of Blackstone*, opposed to the weight of authority.¹⁹ The court agreed with the *Shields* case, though not mentioning it, that the basis for the presumption upon such facts is, at best, a weak one²⁰—so weak, indeed, as to be rebuttable by a single fact: the testator's possession of one copy at his death.

¹⁴ 13 Ves. 290, 33 Eng. Rep. 303 (Ch. 1807).

¹⁵ 117 Misc. 96, 190 N. Y. Supp. 562 (Surr. Ct. 1921).

¹⁶ 172 Misc. 479, 15 N. Y. S. 2d 597 (Surr. Ct. 1939).

¹⁷ *Ibid.* Of the cases there cited as forming that authority, however, none contained facts identical to the case at bar. Instead, they were cases in which the missing copy was the only one traced to the testator's possession. The presumption was therefore properly applied.

¹⁸ "Under the circumstances disclosed by this record, we think that any presumption of destruction of the decedent's will *animo revocandi* arising from mere failure to produce an original counterpart was a mere inference of fact. . . . A presumption of intentional revocation may be overcome by circumstantial evidence." *Matter of Mittelstaedt*, 278 App. Div. 231, 232, 104 N. Y. S. 2d 378, 379 (1st Dep't 1951) (principal case on first appeal quoted by court in instant case).

¹⁹ See note 17 *supra*.

²⁰ See *Pemberton v. Pemberton*, 13 Ves. 290, 33 Eng. Rep. 303, 310 (Ch. 1807); *Matter of Shields*, 117 Misc. 96, 97, 190 N. Y. Supp. 562, 563 (Surr. Ct. 1921); *Matter of Schofield*, 72 Misc. 281, 285, 129 N. Y. Supp. 190, 193 (Surr. Ct. 1911): "The presumption of revocation in such a case is, of course, a weak one, for the testator, when possessed of both examples, is at liberty to destroy them, and yet he does not do so." (Situation referred to here was similar to the facts of instant case).