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Wills--Multiple Execution--Presumption of Revocation--Burden of Proof (In re Rinder's Estate, 196 Misc. 657 (Surr. Ct. 1950))

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latter case are just as patently burdensome and oppressive as those of the former.[26]

Despite these moving considerations it is felt that the law of New York is too well settled to be changed except by legislation. California is the only state found wherein such a statute has been enacted. The highest court of that state has construed [27] the statute [28] as changing the common law rule and allowed a recovery for prenatal injuries. There the case hinged on the interpretation of the word interests, as found in the statute. The court held that the right to immunity from harm was one of the interests protected.

A. T. L.

WILLS—MULTIPLE EXECUTION—PRESUMPTION OF REVOCATION —BURDEN OF PROOF.—Respondents objected to the issuance of letters of administration, alleging that the decedent left a will. To succeed they must produce the will of the decedent.[1] Respondents propounded two copies of a will executed by the decedent in triplicate and offered no explanation concerning the third copy which the decedent possessed prior to his death. *Held,* issuance of letters of administration granted. Where the will is executed in multiple, all copies must be produced or their absence accounted for or a presumption will arise that the decedent destroyed the will *animo revocandi* particularly when the instrument was in the decedent's possession prior to his death. In re *Rinder's Estate,* 196 Misc. 657, 92 N. Y. S. 2d 320 (Surr. Ct. 1950).

Each executed copy of the will constitutes a part of the whole [2] and a destruction *animo revocandi* of a part revokes the whole will.[3] Such a presumption arises when a will or any part thereof was possessed by the decedent and a diligent search of the decedent's effects

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[26] Stemmer v. Kline, *supra* note 3, wherein the mother's pregnancy was diagnosed as a tumor and she was treated with X-rays. Child born deaf, dumb, blind and paralyzed. No recovery allowed.

[27] Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939).

[28] CAL. CIV. CODE § 29: "A child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the event of subsequent birth."

[1] N. Y. SURR. CT. ACT § 144.

[2] Crossman v. Crossman, 95 N. Y. 145 (1884). One copy is probated as the entire will and the other admitted as evidence, unless each has different provisions in which case both will be admitted to probate. Matter of Froman's Will, 54 Barb. 274 (N. Y. Sup. Ct. 1869). The codicil and will are considered one for the purpose of construction, but when the codicil is destroyed the will may stand if enough of it was unrevoked by the codicil to allow it to stand alone. Osborn v. Rochester Trust and Safe Deposit Box Company, 152 App. Div. 235, 136 N. Y. Supp. 859 (4th Dep't 1912).

[3] Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442 (1901); Crossman v. Crossman, 95 N. Y. 145 (1884).

fails to reveal it.[4] Proof that a person adverse to the will had access to it and could have destroyed it will not suffice to rebut this presumption.[5] A failure to explain the absence of one copy of a will executed in multiple will result in a presumption that it was revoked [6] even when both copies were in the testator's possession.[7]

The presumption was overcome, however, where the duplicate was proved to have been destroyed with no revocation intended,[8] where the carbon copy was alone executed, the ribbon copy being blotted with ink,[9] on a showing by the proponent of the carbon duplicate that the testator's attorney had retained and lost the ribbon copy, [10] and where two carbon copies of a triplicate are produced and competent evidence indicates the third was lost or stolen from the testator.[11]

In *Matter of Shields,* the court held that the testator displayed such concern by keeping one executed copy in the safe deposit box that the presumption of revocation arising from the absence of the duplicate was overcome.[12] This holding is criticized in subsequent cases as being contrary to the authorities.[13]

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[4] *In re* Maguire's Estate, 161 Misc. 219, 291 N. Y. Supp. 753 (Surr. Ct. 1936); Matter of Moore, 137 Misc. 522, 244 N. Y. Supp. 612 (Surr. Ct. 1930); Matter of Field, 109 Misc. 409, 178 N. Y. Supp. 778 (Surr. Ct. 1919).

[5] Collyer v. Collyer, 110 N. Y. 481, 18 N. E. 110 (1880); Knapp v. Knapp, 10 N. Y. 276 (1851); Matter of Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1929).

[6] *In re* Cucci's Estate, 192 Misc. 555, 81 N. Y. S. 2d 202 (Surr. Ct. 1948); *In re* Leaven's Will, 47 N. Y. S. 2d 668 (Surr. Ct. 1944). In cases not involving duplicate copies the presumption is one which arises when the decedent possessed the will prior to his death. However, with duplicate wills the presumption arises when no explanation is offered concerning the unproduced copy.

[7] *In re* Blackstone's Estate, 172 Misc. 479, 15 N. Y. S. 2d 597 (Surr. Ct. 1936).

[8] *In re* Watson, 58 Hun 608, 12 N. Y. Supp. 115 (Sup. Ct. 1890); *In re* Flynn's Estate, 174 Misc. 565, 21 N. Y. S. 2d 496 (Surr. Ct. 1940).

[9] *In re* Martin's Will, 180 Misc. 113, 40 N. Y. S. 2d 685 (Surr. Ct. 1943).

[10] *In re* Cucci's Estate, 192 Misc. 555, 81 N. Y. S. 2d 202 (Surr. Ct. 1948).

[11] *In re* Flynn's Estate, 174 Misc. 565, 21 N. Y. S. 2d 496 (Surr. Ct. 1940). Competent evidence is more than just testimony establishing the declarations of the decedent concerning the non-revocation of the will. The decedent's declarations to be admissible must be part of the *res gestae* as they were in In re *Flynn's Estate* in which the decedent, declaring her copy to be lost or stolen, took from the office of her attorney the second copy and transferred it to the other witness with the declared intent of making sure it would be safe.

[12] Matter of Shields, 117 Misc. 96, 190 N. Y. Supp. 905 (Surr. Ct. 1921). The testator left the copy with the attorney but called for it soon after its execution with the avowed intent of placing it in the safe deposit box. The court construed this along with the continued storage of the copy in the safe deposit box by the testator as sufficient evidence to overcome the presumption.

[13] Matter of Robinson, 168 Misc. 545, 5 N. Y. S. 2d 801 (Surr. Ct. 1938); Matter of O'Keeffe, 172 Misc. 486, 15 N. Y. S. 2d 201 (Surr. Ct. 1936). It is to be noted that there is no real evidence to take the case out of the presumption for it cannot be found from the mere keeping of the copy in the safe deposit box that the testator did not destroy the other *animo revocandi.*

In *Matter of Vogelsang,*[14] the proponent explained the absence of the triplicate to the satisfaction of the court. One of the triplicates was delivered to the decedent in the presence of his brother, who later placed the decedent in an infirmary while attempting to induce him to make another will. The brother admitted trying to secure possession of the copy but denied he succeeded. The will was admitted to probate, the Appellate Division holding there was no intent to revoke and the presumption of revocation was overcome.[15] However, in *Cooley v. Cooley* [16] the court held, in consonance with the well established rule that the proponent must show the actual fact of destruction by the suspected person by evidence direct or circumstantial,[17] that the presumption was not overcome by proving that the plaintiff had ample opportunity to destroy the will. In *Matter of Barnes* [18] the presumption of revocation did not fall even though the decedent's daughter, who was adverse to the will, was with the decedent during his last illness and other suspicious circumstances existed,[19] for these did not in fact prove the daughter destroyed the will. These decisions are in accord with the established New York Rule.[20] In *Matter of Vogelsang* the court would seem to introduce a subtlety into the rule. The showing of an opportunity to destroy the will for a person, who has ample reason to wish the will destroyed, is not sufficient to obviate the presumption of revocation arising when an executed copy is not found; but if the person who has the adverse interest has also adopted other measures, though abortive, to effect a change or revocation of the will, the court may conclude that this person, if the opportunity be given, would take advantage of it and so the presumption may fall in such a situation.[21]

It has been suggested that the burden of proof when an executed copy of a will is absent is not unlike the burden in a proceeding to

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[14] Matter of Vogelsang, 133 Misc. 395, 232 N. Y. Supp. 654 (Surr. Ct. 1929).

[15] The Surrogate had denied probate but the Appellate Division reversed, 227 App. Div. 739, 236 N. Y. Supp. 917 (2d Dep't 1929), *rev'd without opinion,* 253 N. Y. 533, 171 N. E. 770 (1930).

[16] Cooley v. Cooley, 116 Misc. 157, 189 N. Y. Supp. 577 (Sup. Ct. 1921).

[17] Matter of Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1929); *see* Collyer v. Collyer, 110 N. Y. 481, 18 N. E. 110 (1880); Knapp v. Knapp, 10 N. Y. 276 (1851).

[18] Matter of Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1929).

[19] The will was known to be in the decedent's bureau and when the decedent's son tried to open the bureau drawer to search it the daughter prevented it.

[20] Knapp v. Knapp, 10 N. Y. 276 (1851); Cooley v. Cooley, 116 Misc. 157, 189 N. Y. Supp. 577 (Sup. Ct. 1921); Matter of Ascheim, 74 Misc. 434, 135 N. Y. Supp. 515 (Surr. Ct. 1912).

[21] Matter of Vogelsang, 227 App. Div. 739, 236 N. Y. Supp. 917 (2d Dep't 1929). That reasoning is not set forth in the opinion but is implicit in the decision. The courts cite the decision for the proposition that there was no intent to revoke the will but the decision would still seem to be in conflict with Matter of Barnes, 70 App. Div. 523, 75 N. Y. Supp. 373 (4th Dep't 1929), in which it is said that a fraudulent act will not be presumed.

probate a lost will.[22] In view of the legion of decisions holding the presumption of revocation controverted and granting probate without even adverting to the requisites of a lost will proceeding, the statement should not be literally interpreted. The burden is to overcome the presumption that the will was destroyed.[23]

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[22] Matter of Andriola, 160 Misc. 775, 290 N. Y. Supp. 671 (Surr. Ct. 1936); SURR. CT. ACT § 143. This Act requires the proponent to prove the existence of the will at the testator's death or a fraudulent destruction during his lifetime among other elements. The statute is not rigid on the requirement of fraud for under certain conditions constructive fraud suffices. Schulz v. Schulz, 35 N. Y. 653 (1866).

[23] *In re* Cucci's Estate, 192 Misc. 555, 81 N. Y. S. 2d 202 (Surr. Ct. 1948); *In re* Martin's Will, 180 Misc. 113, 40 N. Y. S. 2d 685 (Surr. Ct. 1943); *In re* Flynn's Estate, 174 Misc. 565, 21 N. Y. S. 2d 496 (Surr. Ct. 1940); *In re* Watson, 58 Hun 608 (N. Y.), 12 N. Y. Supp. 115 (Sup. Ct. 1890). The proponent must satisfy the Surrogate that the propounded instrument is the last will of the testator. Where the will is proper on its face considered in the light of the surrounding testimony, an inference that the propounded will is authentic arises; but when it appears that the duplicate is missing no inference arises and the proponent bears the strict burden of proof to overcome the presumption of revocation. Matter of Andriola, 160 Misc. 775, 290 N. Y. Supp. 671 (Surr. Ct. 1936).