Michigan Law Review

Volume 50 | Issue 4

1952

WILLS-EXECUTION AND REVOCATION OF DUPLICATE WILLS

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WILLS—EXECUTION AND REVOCATION OF DUPLICATE WILLS—Testatrix executed three identical copies of her will. Counsel advised her that in the

event she should desire to make a new will she must destroy "both copies of the will in her possession and he would 'definitely destroy the copy' which he retained."[1] Thereafter, testatrix destroyed one of the two copies retained by her and struck out an objectionable devise in the other copy. Testatrix made no attempt to alter or destroy the third copy, although she was in temporary possession of it at a later date. The legatee (plaintiff) was successful in setting aside the decree of final settlement of the decedent's estate according to the laws of intestacy, and he secured an order that the altered copy of the will be probated. The administratrix (defendant) appealed, alleging the court erred in not finding a revocation. *Held,* affirmed. *Roberts v. Fisher,* (Ind. App. 1951) 98 N.E. (2d) 215, rehearing denied 98 N.E. (2d) 918.

The chief point of interest in the principal case is the handling by the court of the common law presumption of a testator's intent to revoke when an executed copy of a will in his possession is destroyed or missing.[2] This presumption is applied even when an executed copy of the will is produced by its custodian.[3] The court in the principal case refuses to apply the presumption where the testator has lost or acted upon only one of several duly executed copies retained by him. It leaves the question of intention to revoke entirely to the jury.[4] There is authority in support of this position,[5] one case even going so far as to reverse the common law presumption under these circumstances.[6] Many leading text writers, however, would prefer that the presumption be "weakened," rather than abolished.[7] Some courts have "weakened" or refused to apply the presumption in cases where the testator: (a) later came into possession of the duplicate without destroying it;[8] (b) showed a "continuing fondness" for the sole legatee;[9] (c) indicated satisfaction with the remaining copy.[10] Still, the presumption stands, and in many cases it controls the result.[11] It is apparent that any such presumption does, in effect, rewrite the usual statute of wills, which requires

[1] Principal case at 217. Counsel likewise advised testatrix against interlineations, indicating that they would be ineffective.

[2] 2 PAGE, WILLS, 3d ed., 720 (1941); Stevens v. Hope, 52 Mich. 65, 17 N.W. 698 (1883); In re Kennedy, 167 N.Y. 163, 60 N.E. 442 (1901).

[3] 1 PAGE, WILLS, 3d ed., 788 ff. (1941); 1 JARMAN, WILLS, 7th ed., 139 ff. (1930); 48 A.L.R. 297 (1927); In re Field, 109 Misc. 409, 178 N.Y.S. 778 (1919); McDonald v. McDonald, 142 Ind. 55, 41 N.E. 336 (1895).

[4] Principal case at 218.

[5] Doe ex. dem Strickland v. Strickland, 8 C.B. 724, 137 Eng. Rep. 693 (1849).

[6] Roberts v. Round, 3 Hagg. Eccl. 548, 162 Eng. Rep. 1258 at 1260 (1830).

[7] 1 WOERNER, AM. LAW OF ADM. 131 (1923); 2 GREENLEAF, EVIDENCE, 16th ed. 626 (1899); 1 JARMAN, WILLS, 7th ed., 138 ff. (1930) and cases cited.

[8] In re Walsh, 196 Mich. 42, 163 N.W. 70 (1917).

[9] Managle v. Parker, 75 N.H. 139, 71 A. 637 (1908).

[10] Ibid; also Onions v. Tyrer, 2 Vern. 741, 24 Eng. Rep. 418 (1716).

[11] Bates' Estate, 286 Pa. 583, 134 A. 513 (1926); Jones v. Harding, 58 L.T. (N.S.) 60, 52 J.P. 71 (1887); Matter of Schofield, 72 Misc. 281, 128 N.Y.S. 190 (1911). In a recent case concerning duplicate wills the court classified the presumption as "strong," requiring more than ordinary proof to rebut, holding that "clear and satisfactory" evidence was necessary for this purpose. In re Drake's Estate, 150 Neb. 568, 35 N.W. (2d) 417 (1948).

that *animo revocandi* be proved without the benefit of presumption when the will is destroyed[12] and which allows lost wills to be probated.[13] In the case of duplicate wills a strong attack may be made against the application of a presumption of intent to revoke. The primary purpose of the duplicate copy is to secure the will against loss or destruction, either accidentally or by interested relatives. To apply a presumption of complete revocation when a copy retained by the testator is missing would nullify the purpose of the duplicate. As courts are also inclined to take an attitude of suspicion when only the custodian's copy of two duly executed instruments is missing,[14] the chance for difficulty in probating a duplicate will is again increased. It has, therefore, been suggested that an unexecuted copy of the will would better serve the testator's purpose.[15] Clearly the testator should deposit the executed copy with an impartial, readily available custodian, and retain the unexecuted copy himself. The latter copy would then serve the dual purpose of refreshing the testator's memory during his life and aiding the proof of the will's contents on his death. So long as the presumption of intention to revoke remains, it is unwise for the testator to retain an executed copy of his will, and the "precaution" of a duplicate will is illusory.

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[12] 57 AM. JUR. 343 ff. (1948).

[13] Id. at 433 ff.

[14] In re Robinson's Will, 257 App. Div. 405, 13 N.Y.S. 324 (1939); Crossman v. Crossman, 95 N.Y. 145 (1884). The former case is doubtful authority for the proposition that both copies of the will must be presented or else probate denied. The court cited dictum in the Crossman case (at page 152) to the effect that it would be "proper" for the judge to require both copies of identical instruments as a precaution in proving contents and to insure that the other copy was not revoked.

[15] 1949 UNIV. ILL. L.F. (Spring) 177 at 179.