

1977

# In the Matter of the Estate of Harvard L. Wheadon, Deceased : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF  
THE STATE OF UTAH

In the Matter of the  
Estate of

HARVARD L. WHEADON,

Deceased.

Case No. 15329

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APPELLANT'S BRIEF

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Appeal from the Judgment of the 3rd  
District Court for Salt Lake County  
Hon. Peter F. Leary

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IN THE SUPREME COURT OF

In the Matter of the                         :  
Estate of                                      :  
  
HARVARD L. WHEADON,                     :  
  
Deceased.                                  : Case No. 15329

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## STATEMENT OF THE KIND OF CASE

This case arises under the provisions of Utah's Lost Will Statute, Utah Code Annotated, Sec. 75-3-26 (1953), and involves the issue of whether a lost will may be admitted to probate upon proof of its legal existence (non-revocation) or whether proof of its actual, physical existence at the time of the testator's death is required.

## DISPOSITION IN LOWER COURT

This case was tried to a jury; however, the lower court took the case from the jury upon objectors'-respondents' Motion for a Directed Verdict. The lower court held that a lost will may not be admitted to probate merely upon proof of due execution, content and non-revocation. The court stated that before a lost will can be admitted to probate, it must be shown to have been in actual, physical existence at the time of

the testator's death. Since physical existence was not shown, the court refused to admit the lost will to probate.

The petitioners-appellants moved the court for a directed verdict upon the ground that the due execution, contents and non-revocation of the lost will had been established by unrefuted evidence, and that it should be admitted to probate as a matter of law. This motion was denied by the lower court.

Petitioners-appellants moved the court for a new trial, pursuant to Rule 58, Utah Rules of Civil Procedure, and said motion was also denied.

#### RELIEF SOUGHT ON APPEAL

Petitioners-appellants seek reversal of the judgment and judgment in their favor as a matter of law, or that failing, a new trial.

### STATEMENT OF FACTS

The decedent, Harvard L. Wheadon, an unmarried man, died on April 14, 1976 in Salt Lake County, State of Utah, leaving real and personal property situate in said County and State.

On May 24, 1955, decedent duly executed a will (a conformed copy of which was introduced at trial; the contents of which are uncontroverted) leaving all his property, both personal and real, to his brother, Melvin S. Wheadon. The will gave nothing to his other brothers and sister, objectors and respondents herein. (Transcript 1-18; Exhibit 1-P)

In addition, the will named said Melvin S. Wheadon as the executor of the estate. (Transcript 1-21) Melvin S. Wheadon died on February 4, 1971, leaving two daughters, Ellen Wheadon Piercey and Iris Wheadon Jensen, petitioners and appellants herein. (Transcript 2-36, 2-45) Within 15 days of Melvin S. Wheadon's death, the decedent, Harvard L. Wheadon, executed a codicil to his last will and testament, whereby he changed his will to provide that Judy Burton and Sue Bateman should serve as the co-executrices of his estate. (Exhibit 2-P; Transcript 2-3) All other provisions of the will remained unaltered thus providing that his entire estate should go to the estate of his then-deceased brother, Melvin S. Wheadon. (Exhibits 1-P, 2-P)

The original will has not yet been located and it is not known whether decedent ever had possession of the document. No one ever saw it in his possession. Neither Mr. Everett Dahl, decedent's attorney, nor Mr. Dahl's former secretary, Ann Dahl, ever remembers having given

the document to the decedent. (Transcript 1-23, 24) Evidence showed merely that on occasion, Mr. Dahl would give the original document to the testator. (Transcript 1-23) Mr. Dahl testified that, in 1955, it was his practice, if asked by the client, to keep the original document. (Transcript 1-23, 2-27) He did not recall whether he kept the executed will or not. (Transcript 1-23) Nine years after the will was executed, Mr. Dahl and his partner separated and each took his own clients' documents. (Transcript 2-5) At this same time, an inventory was made of the wills Mr. Dahl had in his possession. (Transcript 2-5) That inventory showed that Mr. Dahl did not have the decedent's will in his possession. (Transcript 1-24; 2-6) Mr. Dahl also testified that it was his practice in 1955 to give a copy of the original will to the client. (Transcript 1-23). Shortly after the decedent's death, Mr. Dahl and his staff made a diligent search of his office and his files in order to locate the original will. Neither the will nor a copy of it was found as a result of this search. (Transcript 2-9; 2-12) However, on the day of trial, Mr. Dahl made another search for the missing will. At that time, he discovered the unexecuted copy of the will in his files, even though his prior diligence in searching had failed to locate it. (Transcript 2-11)

In 1971, when decedent executed his codicil, he insisted that Mr. Dahl retain the original document. (Transcript 2-7) Mr. Dahl did retain that document and it has been submitted for probate.

Mr. Wheadon, decedent, was a man possessed of a great awareness of the need for a will. (Transcript 3-4, 3-35) To his close

friends he indicated on a number of occasions that his affairs were in order and that all was taken care of, and that they too should get their affairs in order. (Transcript 3-3, Transcript 3-4, Transcript 3-5, Transcript 3-38) To one of his closest friends, Judy Burton, he stated several months before his demise that he had a will. (Transcript 3-2) The background for that statement was a discussion between the two of them shortly after Judy's step-father had died intestate, causing confusion to the surviving members of the family. (Transcript 2-49, 3-2)

Additionally, on the way to the hospital a few days prior to decedent's death, a newscaster on the radio reported the imbroglio surrounding the purported Howard Hughes will. (Transcript 3-3, 3-4) Again on that occasion, decedent told Judy Burton of his awareness of the importance of a will. (Transcript 3-4)

To Ray and Joyce Shepard, currently living in Oklahoma, decedent indicated that he had a will and that his affairs were in order. (Record 230)

A day or two after decedent's death, Bertha Tilbury and John Wheadon, along with Bertha's daughter, Helen Somer, asked Ray and Joyce Shepard (decedent's next-door neighbors, with whom he had left his keys) for the keys to the decedent's house for the purpose of obtaining a suit in which to bury decedent. (Transcript 3-62) At the time, Grant Palmer, a friend of the Shepards, was visiting at their house. (Record 227)

By affidavit, the Shepards stated that Bertha, John and Helen went to the house in company with Ray and Joyce Shepard and Grant Palmer. (Record 230-231) Once inside, Bertha and Helen went directly to the

cupboard where decedent was known to have kept some of his personal papers. (Record 230-231) The Shepards did not see what documents Bertha and Helen were handling. Nor did the Shepards see what documents, if any, were taken. Since the Shepards and Grant Palmer had gone to the house to get the Shepards' fish tanks and guns, those three left as soon as they had obtained their personal property. (Record 227, 230-231)

Grant Palmer, by affidavit, a copy of which is included in the record, stated under oath that by the time he and the Shepards arrived at decedent's home, John, Bertha and Helen were already inside. (Record 227) He observed that by the time he arrived, Bertha and Helen had taken decedent's personal papers from the cupboard, had them on the kitchen table, and were looking through them. (Record 227) When he and the Shepards left with the guns and fish tanks, the others remained behind. (Record 227) Mr. Palmer did not see any of the three outside the home until some 30 minutes later, when he observed Bertha come from the direction of the decedent's home and enter her own home. (Record 227)

Contrary to the affidavits of disinterested parties, Bertha testified at trial that she was not in the home at any time when the Shepards and Mr. Palmer were not present. (Transcript 3-71, 3-72, Record 227) She also testified that she did not handle the papers and documents in the cupboard. (Transcript 3-71, 3-72)

Helen also testified that she was not in the house at any time when the Shepards and Mr. Palmer were not present. (Transcript

3-76) Initially she also testified that she had never handled any of the documents or even opened the cupboard. However, upon being pressed on the matter, she finally admitted that the cupboard had been opened, but added, "Just a little." (Transcript 3-76)

Despite the testimony of Bertha and Helen, John testified that he was never in the house at the time in question. (Transcript 3-63) His testimony is also contradicted by that of Mr. Palmer and Mr. and Mrs. Shepard. (Record 227)

It was petitioners' intention to have Ray and Joyce Shepard testify at the trial; they had indicated that they would. Petitioners were providing the Shepards with plane tickets to Salt Lake City, Utah, and were making hotel accommodations for their stay--all at petitioners' expense. Because the Shepards lived in Oklahoma, they were beyond the subpoena powers of the Court. Despite that fact, as noted, the Shepards had agreed to voluntarily come to testify. However, within a matter of days, including a weekend, before the trial, the Shepards wavered in their willingness to testify, until finally just before trial, they refused to make an appearance. This was due to the illness of Mrs. Shepard at the time of trial and the fact that her brother-in-law had become critically ill.

Because of preparation for the trial, including drafting of petitioners' trial memorandum and jury instructions, and further preparation of petitioners' case-in-chief, petitioners' attorneys did not locate Grant Palmer for the purpose of finding out what he knew about

the incident. Petitioners' attorneys had never contacted Grant Palmer prior to trial, and his connection with the case seemed peripheral at best. It was only when the Shepards failed to appear and Bertha and Helen testified inconsistently as to the incident, that the importance of Mr. Palmer's knowledge became more apparent.

Objectors Tilbury and Wheadon were granted nothing by the will and thus would receive no property if the will were probated. If the decedent were found to have died intestate, they would each receive one-fourth of the estate.

At the close of petitioners' case-in-chief, both petitioners and objectors Tilbury and Wheadon moved for a directed verdict. Both motions were denied. (Transcript 3-41, 3-55)

At the conclusion of objectors' case, both petitioners and objectors moved again for a directed verdict. (Transcript 3-78, 79) Petitioners' motion was denied. (Transcript 3-79) Objectors' motion was granted on the ground that, as used in Section 75-3-26, U.C.A., the phrase "in existence" means actual, physical existence of the paper. (Transcript 3-80) While it was never proved that the will was not in actual physical existence, the Court held that the will's physical existence at the moment of the testator's death must be proved, and since it could not be proved it was not in physical existence at the pertinent moment, and thus the will was not entitled to be probated.

## ARGUMENT

The law in effect at the time of the decedent's death, and therefore the law which governs this case is contained in Section 75-3-26, Utah Code Annotated. That section provides:

No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. (Emphasis added.)

It is petitioners'-appellants' contention that "in existence", as used in this section, simply means legal existence, i.e., unrevoked. On the other hand, objectors-respondents claim that "in existence" means actual physical existence. While no Utah case has decided the issue, the judge at the trial indicated that most courts had interpreted the phrase to mean actual physical existence. Even though the will has never been shown not to exist, the trial court held that since its physical existence at the moment of testator's death was not shown, the will was inadmissible to probate. Petitioners-appellants contend that such a construction was erroneous, that legal existence is all that is required to carry out the purpose and intent of the statutes, and therefore they are entitled to a judgment in their favor as a matter of law.

### POINT I.

THAT LEGAL EXISTENCE IS SUFFICIENT UNDER UTAH CASE LAW TO SATISFY THE INTENT OF SECTION 75-3-36, UTAH CODE ANNOTATED.

While not dealing specifically with the issue of legal vis a vis physical existence, the only Utah case dealing with Section 75-3-26,

U.C.A. is In re Frandsen's Will, 50 Utah 156, 167 P. 362 (1917). In that case, the testatrix had executed a will in 1900. She executed two other wills later: One in 1911 and another in 1912. The latter two wills had been executed at a time when the testatrix was found to lack sufficient mental capacity, and therefore they were denied probate. The case then involved only the admissibility to probate of the will of 1900. That will had been duly executed and was recorded in the County Clerk's office. On July 5, 1911, testatrix was found and declared to be insane. The will was last seen in March, 1912--some three years prior to her death in 1915. The court faced the issue then of whether or not the will was in existence at testatrix' death. But rather than decide what "in existence" meant, the court based its decision on what "death" meant. In construing the statute, the court stated as the section's purpose, ". . . to prevent spurious wills from being proved." Frandsen, supra at 364. And further:

[I]f the whole purpose of the statute can be subserved, the court in furtherance of justice, may well give its provisions a fair and even a liberal construction rather than a narrow and strict one, when to do that would be unfair and unjust. (Frandsen, supra at 364.)

The court then proceeded to give the term "death" as used in the statute, a fair and reasonable interpretation. Rather than hold that "death" meant physical death, the court held that "death" meant legal or mental death, that is, loss of sufficient mental capacity either to make or revoke a will.

While she [testatrix] continued to live physically, she, however, was as much dead mentally for the purpose of making a will as she now is . . . When it is once shown that a testator is bereft of

the power either to change or to revoke an existing will, it is further shown, as here, that the will existed long after the power to revoke passed from the testator, then such a will fairly comes within the provisions of Section [75-3-26] and should be admitted to probate the same as though the testator had physically died. (Frandsen, supra at 365.)

The court thus drew a distinction between physical and legal death in order to reach a fair and just result. In the instant case, where it was conclusively shown that the will was unrevoked and therefore in legal existence, there is ample reason to comply with the mandate of the Frandsen decision, by construing the section liberally and fairly, and hold that legal existence sufficiently subserves the purpose of the section. To hold, as the trial court held, in limiting the statute to require physical existence, is to construe the statute narrowly and strictly with an unfair and unjust result.

## POINT II.

THAT A REQUIREMENT OF PHYSICAL EXISTENCE CONTRADICTS THE  
CLEAR INTENT OF SECTION 74-1-19, UTAH CODE ANNOTATED.

The Code is explicit on the ways in which wills may be revoked. And by the very language of the statute, the ways prescribed thereunder are exclusive. Section 74-1-19, U.C.A. states:

Except in cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

(1) By a written will or other writing of the testator declaring such revocation or alteration executed with the same formalities with which a will should be executed by such testator; or

(2) By being burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

As seen from the language of that section, there are two physical ways of revoking a will: (1) By making a second will and (2) by destroying the will with the intent and purpose of revoking the same. The other ways provided by "except in the cases in this chapter mentioned" are by operation of law. Section 74-1-24,<sup>1</sup> U.C.A. provides for the revocation of a will in the case where the testator marries and has children after having executed a will. Section 74-1-25,<sup>2</sup> U.C.A. provides for the revocation of a testator's will where the testator marries after making his will. Section 74-1-31,<sup>3</sup> U.C.A. provides for the revo-

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<sup>1</sup> 74-1-24. Effect of marriage and issue after making will. If after making a will the testator marries and has issue of such marriage born either in his lifetime or after his death, and the wife or issue survives him, the will is conclusively presumed to be revoked, unless provision is made for such issue by some settlement, or unless such issue is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no evidence of other facts to rebut the presumption of such revocation can be received.

<sup>2</sup> 74-1-25. Effect of marriage, if wife survives. If after making a will the testator marries and the wife survives him, the will is conclusively presumed to be revoked, unless provision has been made for her either by marriage contract, or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in her favor in his will, or unless she is provided for in the will or in such way mentioned therein as to show an intention not to make such provision; and no evidence of other facts to rebut the presumption of revocation can be received.

<sup>3</sup> 74-1-31. Child born after making will. Whenever a testator has a child born either in his lifetime or after his death, or adopted, after the making of his will, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

cation, pro tanto, of a will in the case where a child is born to the testator after execution of the will. Section 74-1-32,<sup>4</sup> U.C.A. provides for the revocation of a will in the case of a pretermitted heir. As noted, the four exceptions to Section 74-1-19, U.C.A. are all by operation of law. The legal statutory scheme then for revocation of wills is clear: Unless the will is revoked by operation of law, a will may be revoked only by a subsequent will, or by destruction with intent to revoke. Loss of a will clearly does not revoke the will under Utah law.

Except in the operation-of-law cases, two elements must be shown to prove an effective revocation: (1) A physical act--either making a new will or destroying the old one; and (2) intent to revoke. In the case of a subsequent will, the act and intent are apparent from the will itself. In the case of a destroyed will, however, mere destruction does not necessarily evince an intent to revoke. If the will is accidentally or mistakenly destroyed, since there is no intent, there is no revocation; for under Section 74-1-19, U.C.A. the intent element is explicit and essential. "With the intent and for the purpose of revoking the same." (Emphasis added.) Thus, absent the requisite intent, there is no revocation. Loss of a will may create a presumption of revocation, but such presumption is clearly overcome by contrary statements from the testator.

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<sup>4</sup> 74-1-32. Failure to provide for child or child's issue. When any testator omits to provide in his will for any of his children, natural or adopted, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceeding section.

What is the effect of Section 75-3-26, U.C.A. upon statutory scheme outlining the exclusive means for revocation of a will? Section 75-3-26, U.C.A. requires that the will must be shown to be "in existence" at the testator's death. If the will were accidentally or mistakenly destroyed by testator during his lifetime, but without the intent to revoke, under Section 75-1-19, U.C.A. it is still a valid will and has not been revoked, and should be legally operative. But if "in existence" means physical existence, since the paper is no longer in existence, the will cannot be probated. Thus, the result is that an unrevoked will, one which disposes of the testator's property as he wanted and intended, and one which he intended to be effective as a will, cannot be probated. Such a result abrogates the intent of the testator and is, thus, absurd, unfair, unjust, and it does not subserve the purpose of the statute as outlined in Frandsen, and also contradicts the liberal construction demanded by Frandsen.

The New York Court of Appeals, in In re Fox Will, 174 N.E.2d 499 (N.Y. 1961), construed their lost will statute which is almost identical to Utah's. In that case, the will had actually been physically destroyed. Later the testator, on learning of its destruction, "orally adopted" the destruction. The court stated:

However sophisticated the reasoning may appear, to speak of a destroyed will which is valid and unrevoked but which may not be admitted to probate is legal sophistry unless the refusal to admit it is based on reasonable doubt as to whether the will was really the testator's will . . . Here, there is no doubt whatsoever that the will offered for probate was the testator's will. Nor is there

any question that it was not revoked with the formality required by law. There is, under these circumstances, no reason for denying it probate. (Fox, supra at 505 [emphasis added].)

In the instant case, there was no evidence presented at trial that the will was destroyed; objectors and respondents relied totally upon an inference of destruction, since the will could not be found. This apparent conflict between the two Code sections is obviated by construing "in existence" to mean legal existence. The result is that since there is no intent to revoke, there is no revocation, the will continues to exist legally, fairly fits within the ambit of Section 75-3-26, U.C.A. and thus is admissible to probate. The evidence adduced at trial showed indisputably that the testator had no intent to revoke his will. He told Lawrence Leak that he, Howard L. Wheadon, had his affairs in order and that Mr. Leak should get his affairs in order. Decedent told Darlene Oakeson shortly before his death that his affairs were in order. To Judy Burton, decedent on at least two occasions, said he had a will and that his affairs were in order.

The statements to Judy Burton and Darlene Oakeson all occurred in the context of a discussion about someone who had died not having his affairs in order, i.e., dying intestate. When Darlene's step-father-in-law had died intestate, the family was left in a state of uncertainty and confusion. When decedent and Darlene talked about the situation, decedent then indicated he had his affairs in order.

The first time decedent told Judy Burton he had a will was about the same time he had the above discussion with Darlene. Decedent and Judy were talking about the death of Judy's step-father who had died intestate. At that time, Judy asked him directly whether he had a will. Emphatically, decedent said he did.

The other occasion occurred when a radio newscaster reported the dispute surrounding Howard Hughes' estate. Again decedent indicated to Judy that he had a will.

As was shown at trial, the decedent was acutely aware of the importance of having a will. And he was very much aware of the contents of his will. Within 15 days of the death of his appointed executor, decedent executed a codicil changing the executor of his estate.

In contrast, there was not a scintilla of evidence indicating a desire on the part of decedent to revoke or modify his will. Never did decedent express dissatisfaction with the will or its provisions. From the date it was written in 1955, until 1971, the will remained unchanged. Only when the executor died was the will changed, and that change was solely to replace executors. The fact that decedent went back to his lawyer to effect the change indicates that he felt the need for legal assistance when dealing with changes in his testamentary plans. There was no evidence that he ever consulted an attorney to change his beneficiary or revoke his will.

### POINT III.

#### THAT A REQUIREMENT OF PHYSICAL EXISTENCE TURNS THE REBUTTABLE PRESUMPTION OF REVOCATION INTO A CONCLUSIVE PRESUMPTION OF REVOCATION.

The general rule is that where a will was last known to be in testator's possession, and cannot be found after his death, the will is presumed to have been destroyed with the intent to revoke. Garrett v. Butler, 317 S.W.2d 283 (Ark. 1958); In re Fox Will, 174 N.E.2d 499 (N.Y. 1961); In re Morgan Estate, 59 N.E.2d 800. But it has just as uniformly been held that the presumption is rebuttable. In re Frandsen's Will, 176 P. 362, 365 (1917); Garrett v. Butler, 317 S.W.2d 283 (Ark. 1958); In re Findley's Estate, 93 P.2d 318 (Wash. 1939); Hoff v. Armbruster, 226 P.2d 312 (Colo. 1950).

If, however, Section 75-3-26 is construed to require "physical existence", then while the presumption may be rebutted, the will still cannot be probated because the paper may no longer be in existence. The upshot is that the rebuttable presumption becomes conclusive. Such a result is unfair and unjust, and would entirely thwart the desires and intentions of the testator. Frandsen clearly holds that the purpose of the lost will statute is to avoid this result.

#### POINT IV.

THAT MERE FAILURE TO LOCATE A WILL DOES NOT MEAN THAT  
THE TESTATOR DESTROYED THE WILL WITH THE INTENT TO REVOKE.

Just because the will has not been found, doesn't mean it has been destroyed. As noted, subsequent to testator's death, a diligent but unfruitful search was made of the house and his safe deposit box, with the result that only a copy of his codicil was found in his safe deposit box. Also, decedent's attorney, Everett Dahl, made an exhaustive search through his own files, but found only the original codicil and a conformed copy of the will. On the day of the trial, Everett Dahl, checking through his files one final time to insure that he did not have the will, found the third copy of the will--the copy that Dahl would normally have given to the testator to retain. Dahl could not explain why he had that copy, nor why he had not been able to locate it earlier.

At trial it was shown that Mr. Dahl could not locate the original will. This, however, does not establish that he did not keep it in 1955 or that it had not been in his possession. The inference that Mr. Dahl had the will is strengthened by the fact that after testator executed the codicil, he insisted that Mr. Dahl retain the original copy of that document. Testator may have asked Mr. Dahl to keep the original will just as he asked him to keep the original codicil.

The only evidence which even intimates that the testator had the original will are: (1) Dahl's practice at the time to give the original will to the testator, and (2) the inventory sheet showing that Dahl didn't have the original. With respect to number (1), Dahl also stated he would have retained the original had he been asked. Decedent asked him to keep the original codicil, just as he may have asked him to keep the original will. With respect to the inventory, it was taken nine years after the will was executed. Within that nine-year period, the will may well have been misplaced or lost. In that case, testator never had the document and there is no presumption of revocation. Thus, the will is in existence; it just cannot be found. In In re Morgan's Estate, 59 N.E.2d 800 (Ill. 1945), the will could not be found, but the evidence indicated testator had not revoked it. The court, at p. 801, said:

[I]t is not necessary that the court be able to determine what happened to a will if there is evidence that indicates it was not revoked or cancelled by the testator.

In In re Auritt's Estate, 27 P.2d 713 (Wash. 1933), the will could not be located, but as here, the evidence showed that the will had not been revoked. At p. 716, the court said:

From a reading of the record, we can come to no other conclusion than that arrived at by the trial court, namely, that Rosa Auritt never revoked her will, but that it was in existence, somewhere, at the time of her death. (Emphasis added.)

In In re Moramarco's Estate, 184 P.2d 740 (Cal. 1948), the will was not found, but it was found to be unrevoked. The California Supreme Court said at p. 746:

If there is no evidence pointing toward destruction of the will, other than the presumption previously mentioned, and there is circumstantial evidence of substance tending to prove that it was not destroyed, we are satisfied that the court may properly find that it was in existence at the testator's death. Certainly, we may not hold, as a matter of law, that proof that a will cannot be found is also proof that it has been destroyed. (Emphasis added.)

Finally, in In re Hoffman's Estate, 290 P.2d 669 (Cal. 1955), on facts similar to those in the instant case, the court held at p. 673:

It is not known what happened to the original, executed drafts of the will and first codicil, but the record affords substantial evidence in support of the trial court's finding "that said will and first codicil were in existence at the time of decedent's death and have either not been found or have been lost or destroyed by some person other than decedent".

All the evidence introduced at trial shows that decedent did not revoke his will. Evidence that it cannot be found, which formed the entire basis of objectors' and respondents' case, does not prove that it is not in existence or that it was revoked.

As additional evidence showing that the Will was in existence at the time of decedent's death, and explaining why it has not been found, is the fact that Bertha and Helen rifled through the documents in the cupboard. Besides the two brothers, one of whom was in the house with Bertha and Helen, they were the only ones who had a motive for wanting the will destroyed. Spending as much time as they did at a place in the house where the decedent was known to have kept some of his papers and documents, afforded them ample opportunity to find and confiscate the will.

Also, when asked at trial about the above incident, both Helen and Bertha were very equivocal and evasive, and even contradictory in

recounting what actually occurred. Such suspicious circumstances indicate that some impropriety may well have occurred. Therefore, pursuant to the above-cited cases, the court should have found that the will was in existence at testator's death and either that it just has not been found, or that it was destroyed subsequent to testator's death by parties interested in the decedent's intestacy.

#### POINT V.

THAT THE GREAT WEIGHT OF AUTHORITY FROM OTHER JURISDICTIONS WITH SIMILAR STATUTES HOLDS THAT LEGAL EXISTENCE IS SUFFICIENT TO SATISFY THE INTENT OF THIS KIND OF STATUTE.

The statute, Section 75-3-26, U.C.A., requires a will to be "in existence at the time of the death of the testator" to be admitted to probate. The court found that the section requires that the physical existence of the document at the time of death be shown, and since in this case the will has not been found, it was therefore not in existence. Assuming arguendo, however, that the paper has been destroyed, a fact unsupported by any evidence, petitioners and appellants contend that the purpose of the section is fulfilled only if the section is construed to require legal existence; that is, that it be unrevoked by the testator. Proof of non-revocation is all that should be required; for as was said in Frandsen, supra, at p. 363: "The purpose of the statute is to prevent spurious wills from being proved." Once non-revocation is shown, there is no reason not to probate the will, even though the original document is lost. Where there is no question that the will being offered for probate is genuine, and "[I]f the whole purpose of

the statute can be subserved, the court, in furtherance of justice, may well give its provisions a fair and even a liberal construction rather than a narrow and strict one, when to do that would be unfair or unjust." Frandsen, supra at 364. The court proceeded to follow its own counsel holding that, as used in the statute, "death" meant "legal death for purposes of making a will" and not "physical death". There is no reason to strictly construe the term "in existence" as the trial court did in this case, when to do so would circumvent the stated and proven intention of the testator in an unfair and unjust manner.

The only possible reason for requiring that the paper's physical existence be shown is to prevent fraud. The terms of the will can just as easily be proved by an exact copy as by the original copy itself. Where the will is unrevoked, a copy shows the testator's intent just as readily as the missing original. And if testator's intent is clearly shown, and it is clearly shown that he did not revoke the will, there is no fraud. Thus, no reason exists to exclude the unrevoked will (see In re Fox' Will, 174 N.E.2d 499, 505 (N.Y. 1961)).

On the other hand, to deny probate to an unrevoked though missing will, would totally frustrate the intent of the testator. It would also deny him the right to dispose of his property as he deemed best.

At the trial, the court required that the will's physical existence be shown. However, a reading of the cases of other jurisdictions reveals that by far, the most common construction of "in existence" is legal and not physical existence.

Listed in alphabetical order, the construction of similar statutes in other jurisdictions is as follows:

#### ARKANSAS.

Arkansas Statutes Sec. 60-304 requires that the will be shown ". . . to have been in existence at the time of the death of the testator." In construing the statute, the Supreme Court of Arkansas, in Garrett v. Butler, 317 S.W.2d 283 (Ark. 1958) noted that even though the will could not be found, nothing had changed to alter the disposition of the property as provided by the will. Also, there was ". . . a total absence of any testimony he tried or wanted to make any change in or revoke his will." The court then stated:

The vital question with which we are concerned of course is whether or not the will was revoked. We are confronted with no proof but with a presumption only that it was revoked. We think the testimony and attending circumstances are sufficient to overcome that presumption. Garrett, supra at 285 (emphasis added).

The unrevoked though missing will was thus admitted to probate.

#### CALIFORNIA

California's Probate Code Section 350 is almost identical to Utah's Section. In interpreting their section, the intermediate appellate courts of California have gone both ways.

However, the Supreme Court in deciding two cases has held that legal existence is all that is required.

In In re Moramarco's Estate, 194 P.2d 740 (Cal. 1948) the evidence adduced at trial showed only that the will could not be found.

If there is no evidence pointing toward destruction of the will, other than the presumption previously mentioned, and there is circumstantial evidence of substance tending to prove that it was not destroyed, we are satisfied that the court may properly find that it was in existence at the date of testator's death.

The only other California Supreme Court case in point, In re Bristol's Estate, 143 P.2d 689 (Cal. 1943) held "existence" to mean "unrevoked". In that case, it was proved that the will had been duly executed, but had never been seen by anyone after testator's death. The only evidence showing revocation was the presumption of revocation, based on the fact that the will could not be found. The Supreme Court, after citing testimony from the trial, stated:

The above-quoted testimony obviously depicts a state of mind of the testator which the trial judge could well have concluded was consistent only with the lost codicil's being, in [testator's] belief, unrevoked and potentially operative. Bristol, supra at 693 (emphasis added).

Of the three California appellate court decisions on the subject, one has held that legal existence was sufficient, while two have held that physical existence was necessary.

In In re Flood's Estate, 119 P.2d 168 (Cal. 1941), the will could not be shown to exist after the death of the decedent. Nor was there any evidence rebutting the presumption of revocation. The court posed the question it would have to answer as ". . . whether there is sufficient evidence in the record to justify a finding that the will was lost, and that it was in existence at the time of death. This may sound contradictory, but it is obvious the words 'in existence' import 'unrevoked'.

Flood, supra at 169 (emphasis added). Finding there was insufficient evidence to overcome the presumption of revocation, the court held that the presumption prevailed and that the will had been revoked. It was on that ground that the will was denied probate and not that the paper was no longer in physical existence.

The two cases holding that physical existence is required are In re Estate of Strickman, 55 Cal.Rptr. 606 (1966) and In re Estate of Lane, 86 Cal.Rptr. 620 (1970). In the Strickman case, the testatrix had told a friend that she wanted to change a number of provisions on page three of her will. The friend typed the changes on another piece of paper. At the testatrix' death, the first two pages of the original will, along with the newly typed, but unexecuted, third page, were found together in the testatrix' safe deposit box. Since the original third page could not be found, the presumption of revocation arose. However, in that case, no evidence was offered to rebut the presumption of revocation. From the evidence it was clear that the intent of the testatrix was to revoke that portion of her will. The court held, and rightfully so, that because the third page was no longer in physical existence and was not where it should have been, it had been revoked. But it is also important to note that in that case, the testatrix had expressed dissatisfaction with the provisions of the will and had actually had a friend type a new page. In the instant case, the testator never expressed any dissatisfaction with the disposition of his estate. Only when his brother died did he change the executors. Additionally, in Strickman there was no evidence overcoming the presumption of

revocation; whereas, in the instant case, it was conclusively shown that the testator had no intent to revoke his will, and therefore there was no revocation. Thus, the court in Strickman was not faced with the circumstances present in this case, and therefore its holding and rationale do not apply to this case.

In In re Estate of Lane, 86 Cal.Rptr. 620 (1970), the second California case requiring physical existence, the question was not one of physical versus legal existence. Rather, it was a question of standing to contest the probate of a subsequent will. In order to show that standing, the contestant had to show the will was "in existence" at the testator's death and that they were takers under the will. Since there had been no evidence introduced showing the will was in existence, either legal or physical, the court concluded that the contestant had no standing. In its discussion of the meaning of existence, the court stated:

The word "Existence" used in the code section means "physical existence" rather than "legal existence". Lane, supra at 622.

As authority for its holding, the court relied on the following decisions:

(1) Strickman, supra. See above discussion.

(2) In Estate of Kidder, 6 P. 326 (Cal. 1885) the evidence showed that the testatrix had actually destroyed the will herself by throwing it into the fire. There was no evidence showing she did not intend to revoke it. Thus, while the will was not in physical existence, it was also not in legal existence. Its probate was thus properly denied under either interpretation.

(3) In Estate of Johnson, 66 P. 845 (Cal. 1901) the evidence showed that the testator intentionally destroyed the will, thinking that a subsequent will would be sufficient, when in fact it was not. Since testator had destroyed his will with the intent to revoke, the will was not in legal or physical existence.

(4) Finally, in Estate of Patterson, 102 P. 941 (Cal. 1909) the will in question was in testator's house when it burned down. The testator had time to execute a new will, but failed to do so. The court denied probate on the ground that the will was not in physical existence at the testator's death. An important fact supporting that result is that the testator, while having the opportunity to execute a new will, never did so. The court thusly denied probate.

In all the above cases, it is important to note that the will had actually been physically destroyed and in most cases by the testator or testatrix. In the instant case, there is no evidence that the will was actually destroyed; there is merely an inference that it might have been. Also, there is substantial evidence that testator never intended to revoke his will, thus rebutting the presumption of revocation. In the above cases no evidence was introduced rebutting the presumption of revocation. It is apparent, therefore, that the California cases requiring physical existence are inapplicable to the instant case. On the other hand, the facts of Moramarco are on all fours with the facts of the instant case, and would be controlling if this case were brought in California.

## COLORADO

Colorado's lost will statute was formerly Sec. 5205. In 1953, the section number was changed to Sec. 152-5-29. In 1973, the codes were revised and apparently the lost will section was deleted. As it stood prior to deletion, the section was substantially the same as Utah's.

The first case dealing with the section was In re Eder's Estate, 29 P.2d 631 (Colo. 1933). No evidence showed the physical existence of the paper subsequent to the testator's death. There was also no evidence that the will had been revoked. In construing the term "in existence" the court said:

A will must be reduced to writing (citing the applicable code section) but its continued existence as a will should not be held to depend at all events upon the production and exhibition of the writing . . . [A] will, once validly made and published, remains a will, although the writing, the best evidence of it, in the absence of intent to revoke, be lost or destroyed. Thus considered, the word "existence" in our statute has to do with the will of the testator as manifested by his intent that the terms of the writing shall be carried out on his death. Eder, supra at 634 (emphasis added).

The most recent Colorado decision on the issue in question is In re Estate of Enz, 515 P.2d 1133 (Colo. 1973) where following decedent's death, the original will was not found. In holding declarations of the decedent admissible to show non-revocation of the will, the court stated:

However, the presumption may be rebutted by evidence of decedent's declaration tending to prove decedent believed the will to be in existence unrevoked. Enz, supra at 1136, 1137 (emphasis added).

Finally, In re Varnum's Estate, 357 P.2d 320 (Colo. 1960) dealt with Colorado's lost will statute. While it was not shown whether

or not the will was revoked, the basis for the court's holding was not the non-existence of the will, but rather because the terms of the document could not be adequately proved. This is clear from the words which the court emphasized in italics. Additionally, the court cited Eder, supra as authority and in no way indicated disapproval with Eder's holding. Also, subsequent to Varnum in the Enz decision, the court equated "in existence" with non-revocation. Indisputably, then, the Colorado position is in line with the great weight of authority, to-wit, proof of non-revocation proves existence.

#### IDAHO

Prior to 1971 when the lost will section was repealed, Idaho's lost will statute was the same as Utah's and was contained in Idaho Code Sec. 15-231. Three cases were decided under that section, only one of which was concerned with whether the will was "in existence" at the time of the testator's death. That case, In re Kilgore's Estate, 387 P.2d 16 (Id. 1963) made two trips to the Supreme Court. The first was in 1962 (see 370 P.2d 512) when the main issue litigated was the competency of a beneficiary to testify to the contents of the will. Holding such a witness competent, the Supreme Court sent the case back to the trial court for retrial. After the second trial, the case went back to the Supreme Court (Kilgore, 387 P.2d 16). The question posed by the trial court setting forth the requirements of the code section were:

1. Was the will in question revoked by [decedent] prior to his death?

2. If the will was not revoked, have the contents been proved as provided by law? Kilgore, supra at 16.

Finding that there had not been sufficient evidence to sustain the jury's finding on the first question, i.e., revocation, the court remanded stating: "The case is remanded for a new trial limited to the question of revocation." Kilgore, supra at 21 (emphasis added).

As is apparent from a reading of the Kilgore case, Idaho's definition of "in existence" is legal existence, i.e., whether or not the will has been revoked.

#### ILLINOIS

Illinois does not have a lost will statute. However, the Supreme Court was faced with a case where the physical existence of the will could not be shown in In re Morgan's Estate, 59 N.E. 800, 801 (Ill. 1945). The court held that:

The test applied in the cases which have been before this court, is whether the evidence shows that it is unlikely that the testator destroyed his will. To determine this, evidence of the statements made by the testator a short time before his death is competent. As was held in Matter of Page, 8 N.E. 852 (Ill. 1886), it is not necessary that the court be able to determine what happened to a will if there is evidence that indicates it was not revoked or cancelled by the testator. (Emphasis added.)

#### INDIANA

Indiana's lost will statute is contained in Sec. 29-1-7-5. In Fletcher v. Fletcher, 115 N.E. 582 (Ind. 1917), one of the few cases

The "continued existence of the will" does not mean its continued physical existence. A will may continue to exist though the paper it was written upon is destroyed.

#### MINNESOTA

Initially, Minnesota's lost will statute was the same as Utah's. Under that section, the leading case the court decided was In re Havel's Estate, 194 N.W. 633 (Minn. 1923). The will was not shown to be in physical existence at the time of the testator's death. The court posed the question as follows: "Does this section require physical existence of the document at the moment of the testator's death; or is existence in contemplation of law, without the coexistence of the paper and writing all that is demanded?" The court answered the question thusly: The section ". . . is construed not to require physical existence of the will at the time of the testator's death in order to permit its probate, in the manner indicated, as a lost or destroyed will. Its continued legal effect, unrevoked is all that is required." Havel's Estate, supra at 634 (emphasis added).

Recognizing that injustice had often resulted from some courts requiring physical existence, the legislature changed the statute to provide in pertinent part that no lost will ". . . shall be established unless it is proved to have remained unrevoked . . ." M.S.A. Sec. 525.261.

Minnesota, in 1975, changed its entire probate code and deleted the code section altogether. Thus, there is no lost will statute today in Minnesota.

decided under the statute, the Supreme Court did not decide whether physical or legal existence would be required. The court simply said, "The record would have to show that the trial court found as a fact that the alleged will was in existence at the time of the death of the testator." Fletcher, supra at 583. But the court did not say what it meant by "in existence". No other case from Indiana has been reported which bears on the issue involved herein.

#### KANSAS

The Kansas statute, Sec. 59-2228, while not using the term "in existence", requires that the original will be shown to have been lost after the death of the testator. In Churchill v. Dill, 68 P.2d 337 (Kan. 1937) it could not be shown that the will was not lost before the testator's death; there was no evidence as to when it was lost. The court held that legal existence at the testator's death was sufficient. "The question tried in this case was whether the will was in existence, or in force, at the time of the death of the testator." Churchill, supra at 340. The trial court found that the will was in force at the time of testator's death, and the Supreme Court affirmed, holding that legal existence was sufficient to fulfill the purposes of the statute.

#### MAINE

The Main statute, Sec. 18-103, requires the "continued existence of the will. In Appeal of Thompson, 96 A. 238, 239 (Me. 1915) the Supreme Judicial Court said:

## MONTANA

In 1904, Montana's lost will section read the same as Utah's.

In re Colbert's Estate, 78 P. 871 (Mont. 1904) the Supreme Court, in construing the statute said:

[T]he statute is to the effect that the proponent of a lost will must prove either that the will was actually in existence at the time of the testator's death, or that it is in existence in contemplation of law. If it was fraudulently destroyed in his lifetime it is still so in existence. If appellant cannot prove that the will was in existence, either actually or in contemplation of the law, at the time [decedent] died, it follows that his case cannot stand. Colbert, supra at 974 (emphasis added).

Finding, however, that the presumption of revocation was not overcome, the court denied probate. It is patently clear that had such presumption been overcome, the will would have been in existence "in contemplation of law" and that the court would have admitted it to probate.

In 1947, the Montana Codes were revised with the concomitant renumbering of the section, but its provisions remained identical. The Supreme Court, in 1974, had occasion to deal with the section in a case factually similar to the Colbert case, supra. As in the Colbert case, the proponent failed to rebut the presumption of revocation. With respect to the existence of the will, the court said that the test was whether ". . . the will was actually in existence or in existence in contemplation of the law at the time of deceased's death." In re Estate of Newman, 518 P.2d 800 at 804 (Mont. 1974). Finding the presumption of revocation not overcome, the court found the will not in physical or legal existence, and thus denied probate.

In 1975, the Montana Probate Code was revised, and the lost will section was deleted. No new section was adopted which deals with lost wills.

## NEVADA

Nevada's Section 136.2402(3) is identical to Utah's lost will section. It has, however, not been construed by the Nevada courts.

## NEW YORK

Prior to 1966, New York's Surrogate's Court Act Sec. 134 was identical to Utah's Section 75-3-26. After vacillating from requiring physical existence in Matter of Kennedy's Will, 60 N.E. 442 (N.Y. 1901) to requiring legal existence in Schultz v. Schultz, 35 N.Y. 653, the court of appeals, in In re Fox' Will, 174 N.E.2d 499 (N.Y. 1961) explicitly held that legal existence was sufficient to meet the requirements of the law. In that case, the decedent's will had been in Germany and was destroyed in a bombing raid during World War II. Upon hearing of the will's destruction, the testator purportedly "orally adopted" the destruction. The court held that such an adoption of destruction was ineffective because the testator had not complied with the applicable code sections, and also because no intent to revoke had accompanied the destruction.

The court was then faced with the issue of whether the incontrovertibly destroyed will was "in existence" at the testator's death so as to fit within the ambit of Section 143 of the Surrogate Court Act. The court said at page 504:

The purpose of Section 143 is to impose on the proponent of a lost or destroyed will the burden of overcoming this common-law presumption of proving, that is, that the lost or destroyed will was not revoked by the testator during his lifetime . . . In other

words, all that Section 143 requires is proof that the testator himself had not revoked the lost or destroyed will, proof that would overcome the common-law presumption of revocation. (Emphasis added.)

As authority for its holding, the court in Fox cited Schultz, supra, which held:

"[T]he will of the testator has never been legally revoked or cancelled" and that it followed necessarily that the will was either "in existence at the time of the death of the testator; or fraudulently destroyed in the lifetime of the testator."  
. . .

In other words, the court in the Schultz case reasoned that the fact that the will had not been revoked by the testator necessarily implied compliance with the statutory requirement that the will either had been in existence at the time of death or had been "fraudulently destroyed". Fox, supra at 504.

To drive the point home, the court further said:

But, as is clear from an analysis of Section 143 and from a reading of the Schultz opinion, the design of the section is solely to require proof that the lost or destroyed will offered for probate was not destroyed by the testator animo revocandi. Fox, supra at 505.

Finally, as was quoted earlier in this brief, the court in Fox said at page 505: "However sophisticated the reasoning may appear, to speak of a destroyed will which is valid and unrevoked but which may not be admitted to probate is legal sophistry. . ."

Five years after the Fox decision, the legislature revised New York's lost will statute to read in pertinent part:

A lost or destroyed will may be admitted to probate only if

1. It is established that the will has not been revoked . . . (S.C.P. Sec. 407).

The change is significant because it removes all doubt as to the purpose of the statute. Following the section, in the New York Codes, is the "Practice

Commentary" by John L. Goldman. Commenting on the change, Mr. Goldman states:

The text of S.C.A. Sec. 143 has been changed in the present section so as to clarify the legislative intent that the sole question to be resolved by the court is whether the testator did not intend to revoke his will. (See comments following Sec. 1407, S.C.P.; emphasis added.)

#### OKLAHOMA

Oklahoma has a statute substantially the same as Utah's. No Oklahoma case construing the section, however, has involved a situation similar to that of the instant case.

#### SOUTH DAKOTA

While South Dakota has a section identical to Utah's, it has not been construed.

#### WASHINGTON

Washington's current statute, R.C.W. 11.20.070 is, except for the number, the same as its predecessor, Rev. St. Sec. 1390, which proscribed a lost or destroyed will from being proved ". . . unless the same shall be proved to have been in existence at the time of the death of the testator." The State Supreme Court has vacillated on the meaning of "in existence" under the section.

In In re Auritt's Estate, 27 P.2d 713 (Wash. 1933), the will of the decedent had never been found. The presumption of revocation was overcome by proof that her feelings toward the beneficiary remained constant from the date of execution until the date of death; this was

shown by, among other things, the decedent's declarations prior to death. The court, at page 716, said:

From a reading of the record, we can come to no other conclusion than that arrived at by the trial court, namely, that [the decedent] never revoked her will, but that it was in existence, somewhere, at the time of her death. (Emphasis added.)

A careful reading of the underscored language reveals that the court admitted the will to probate, not on the basis of its physical existence, but on the basis of its legal existence. That follows from the fact that its physical existence could not be shown. Only its legal existence, i.e., non-revocation, could be shown and thus its admission to probate must have been on that ground.

Notwithstanding the above authority, in In re Kerckhof's Estate, 125 P.2d 284 (Wash. 1942), the court was faced with facts substantially different from those of either the instant case or those of Auritt decision. In Kerckhof, supra, the testator directed that his will be torn up and destroyed in his presence. His purpose in doing so was to make certain that the provisions of the will would not be effective. Thus it is clear that he not only destroyed his will, but also that he did so with the intent to revoke it. As such, it was not in physical or legal existence at the testator's death. The court based its holding on the fact that it was not physically in existence.

When [the legislature] said that such will must be proved to have been in existence at the time of the death of the testator, it meant--just as the language plainly signifies--the physical existence of the written document. Kerckhof, supra at 287.

As noted, the facts were that the will had been revoked. Since that is not the situation in the instant case, the holding of that decision is inapplicable.

Finally, In re Estate of Nelson, 537 P.2d 765 (Wash. 1975), the most recent Washington decision, reaffirms the Auritt holding, and indicates that legal existence is sufficient. The pertinent facts showed only that the will had not been revoked--not that it had not been destroyed. Said the court at page 769:

The statutory requirement of proof of existence simply codifies the common-law presumption that a will that cannot be found was destroyed animo revocandi, which may be rebutted by evidence as to the testator's attitude of mind, as indicated by his declarations made between the time of executing the will and the time of his death . . . [citing Auritt, *supra*]. Recognizing that the fundamental concern is fulfillment of the testator's intent, we have in previous cases found evidence showing that a will was in existence at the time of death adequate, although it was far from overwhelming . . . [W]e hold that the preponderance of the evidence shows that the will was in existence at the time of [the decedent's] death and was not destroyed by her with the intent to revoke it." Nelson, *supra* at 769, 770.

Even though the physical existence of the will could not be shown, it was admitted to probate because it was shown that it had not been revoked and therefore in legal existence.

Clearly, then, the Washington construction of the section comports with the position being urged by petitioners. The only case indicating otherwise, Kerckhof, *supra*, is not applicable because of the above-noted factual distinctions.

#### WYOMING

Wyoming has a statute similar to that of Utah's, but to date it has not been construed.

POINT VI.

THAT A NEW TRIAL SHOULD BE GRANTED WHEN EVIDENCE WHICH COULD NOT BE PRODUCED AT TRIAL IS NEWLY DISCOVERED.

Pursuant to Rule 59(4), U.R.C.P., a new trial should be granted when after trial there is ". . . newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial." By affidavit, petitioners-appellants adduced evidence after trial which would have changed the trial court's holding. Denying the motion for a new trial was an abuse of discretion by the trial judge.

The evidence which is newly discovered is that the objectors possibly had access to the document which cannot be found. They were the only ones who had a motive for wanting the will destroyed. And their contradictory testimony at trial, coupled with the above facts, indicates that a grave injustice may result if a new trial is not granted.

The evidence adduced at trial showed that those who knew Harvard L. Wheadon well, knew he kept some of his papers and documents in a particular cupboard. The Shepards have stated under oath that Bertha and Helen went immediately to that cupboard and started rifling through the documents. Grant Palmer's affidavit states that Bertha and Helen were already rifling through those documents when he arrived. The slight discrepancy as to time only is not nearly as important as the fact that both Bertha and Helen went foraging through those documents.

Of import, also, is the fact that they and the decedent's two brothers were the only ones who would profit from the loss of the will. This, coupled with the fact that Bertha said the cupboard door was never open, Helen's equivocal and evasive initial statements that no one opened the cupboard, and then finally admitting that it was opened "just a little", and John's denial that he was ever there prior to the funeral, points the finger of suspicion in the direction of the objectors-respondents. Especially is this so in light of the disinterested testimony of Grant Palmer and the Shepards, wholly contradicting Bertha's, Helen's and John's testimony, and indicating that Bertha and Helen spent a substantial amount of time looking through documents which had come from a cupboard, which obviously was much more than "just a little" open.

Furthermore, as Grant Palmer stated under oath, none of the three interested parties, John, Bertha or Helen, was seen outside the house until nearly a half hour later, when he observed Bertha enter her home from the direction of the decedent's home.

As noted previously, the attorneys for petitioners-appellants would have been able to present this evidence at the previous trial, except that only at the last minute did the Shepards back down from their willingness to testify.

Because of the paucity of time, petitioners' attorneys could not, by reasonable diligence, have obtained similar testimony from Grant Palmer. Petitioners' attorneys had never been in contact with Mr. Palmer. They had learned of his presence on the occasion in question

before the trial; but at that time, the Shepards were still expected to testify. By the time the Shepards had completely backed out, petitioners' attorneys were so engrossed in the final preparation of their case-in-chief, that reasonable diligence could not ". . . have discovered and produced at the trial . . ." the evidence contained in the affidavits.

To be grounds for a new trial, newly-discovered evidence cannot be merely cumulative (U. S. v. Eldredge, 5 Utah 161, 175, 13 P. 673). The only evidence on the issue of possible destruction by Bertha and Helen was by Bertha, Helen and John. However, their testimony was equivocal, inconsistent and highly suspect. Because the Shepards refused to testify, and Grant Palmer's knowledge of the matter was unknown to petitioners' attorneys, petitioners were unable to present any testimony whatsoever on this issue. Thus, Mr. Palmer's testimony would not be cumulative.

In Jensen v. Logan City, 89 Utah 347, 380, 57 P.2d 708 (1936), the plaintiff, after trial, discovered a disinterested witness who could shed substantial light on a vital issue. The trial court denied the motion, but on appeal, the Supreme Court reversed, stating:

Where disinterested testimony on the vital point in a case is very scant, newly discovered testimony on that point appearing from affidavits in support of the motion for a new trial to be apparently reliable, when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and that there is no element of holding such witness in reserve for purposes of obtaining a new trial . . . and it appears likely that such evidence would change the result, a new trial should be granted.

In the instant case, all the criteria for a new trial specified in Jensen are present. The testimony of Grant Palmer is that of a disinterested witness; he will gain nothing irrespective of the outcome. It concerns a vital issue: Possible destruction of the will by interested parties--thus showing the will was in existence at the testator's death. Since Palmer was present on the day in question, his testimony is reliable and its reliability is strengthened by the Shepards' affidavit. Petitioners' attorneys were not negligent in not obtaining the testimony: They did not know it existed until shortly before the trial when the Shepards refused to testify, and by that time it was too late to obtain it. Petitioners were not holding such witness in reserve since they did not even know what his testimony would be. And finally, since that testimony is material since it is disinterested and explains the inconsistency in the objectors' testimony, it could clearly change the result of the trial. This is especially true here where it now can be shown that the objectors may have had access to decedent's important papers, including his will. (See Baumgarten v. Hoffman, 9 Utah 338, 34 P. 294 (1893); and Turner v. Stevens, 8 Utah 75, 30 P. 24 (1892).)

In sum, the great majority of jurisdictions have held the term "in existence" to mean legal existence. Each of the cases holding otherwise, California, Indiana, New York and Washington, is factually distinguishable from the facts of the present case, and therefore they are not applicable. With the exception of Indiana, the cases from each

of those jurisdictions which are factually similar to the instant case have construed the section to require only legal existence. There is no Indiana case which is factually similar.

Since the overwhelming weight of authority holds that "legal existence" is sufficient, the petitioners-appellants urge that the Utah statute be construed to require a showing only of legal existence.

#### CONCLUSION

Since the purpose and intent of Section 75-3-26 Utah Code Annotated is to prevent spurious wills from being probated, and where there is evidence conclusively proving that the purported will is in fact the will of the testator, and that he had no intent to revoke it as his will, there is no justifiable reason to deny the will probate and thereby thwart the testator's intent. Especially is this so where, as here, the only thing preventing the will from being probated is a rebuttable presumption of revocation.

Dated this 7th day of <sup>Oct. 6<sup>th</sup></sup>~~September~~, 1977.

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of October, 1977, a true and correct copy of the foregoing Appellant's Brief was mailed, with first-class postage prepaid thereon, addressed to:

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