

1977

In the Matter of the Estate of Harvard L. Wheadon, Deceased : Brief of Respondents

Utah Supreme Court

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Johnson, Durham, Monkley; Attorneys for Petitioner Jensen & Lewis; Attorneys for Judy O. Batemen Ray, Quinney, and Nebeker; Attorneys for Petitioners-Objectors

Recommended Citation

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In the Matter of the
Estate of

Deceased.

Case No. 15329

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

FILED

Clerk, Supreme Court, Utah

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

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HARVARD L. WHEADON, :
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The petitioners Iris Jensen and Ellen Piercy, nieces of the decedent Harvard L. Wheadon, filed a petition to admit a lost will and existing codicil to probate. They claim the provisions of the purported lost will make them the sole beneficiaries of the decedent's estate. The petitioner-objectors, George Wheadon, John Wheadon, and Bertha W. Tilbury, brothers and sister to the decedent, objected to the petition of the nieces, and filed their own petition claiming that the estate of the decedent should pass by the intestacy laws of the State of Utah.

The trial court directed a verdict in favor of the petitioner-objectors George Wheadon, John Wheadon and Bertha W. Tilbury and against the petitioners Iris Jensen and Ellen Piercy. The trial court dismissed the petition of Iris Jensen and Ellen Piercy to admit the purported lost will and existing codicil to

probate. The trial court also ordered the estate of Harvard Wheadon to be distributed according to the intestacy statutes of Utah in existence at the time of trial. The court reserved decision as to the appointment of an administrator or executor.

RELIEF SOUGHT ON APPEAL

The respondents George Wheadon, John Wheadon and Bertha W. Tilbury seek affirmation of the trial court judgment.

STATEMENT OF FACTS

The decedent, Harvard L. Wheadon (hereafter decedent) died on April 14, 1976. He never married and left no issue. He was survived by the respondents, George Wheadon, John Wheadon and Bertha W. Tilbury, who are his brothers and sister. Another brother, Melvin Wheadon, died in 1971. The appellants, Iris Jensen and Ellen Piercy, are Melvin's daughters, and, of course, the decedent's nieces.

No original will of the decedent could be found after his death although a careful, diligent search was made for it.

The petitioners Jensen and Piercy introduced evidence tending to show that Harvard L. Wheadon executed a will on or about May 24, 1955 (hereafter 1955 Will). That will was apparently prepared by an attorney, Everett Dahl, and witnessed by Mr. Dahl and his wife. In that will the decedent bequeathed all his property to Melvin and also named Melvin as executor. Shortly

after Melvin's death, the decedent apparently executed a codicil to the 1955 Will which codicil named Judy O. Burton and Sue O. Bateman as executrices.

Evidence introduced at trial revealed that after Melvin's death, decedent had some conflicts with Melvin's daughters. Mrs. Burton indicated that shortly after Melvin died, Harvard Wheadon told her he felt hurt by actions of Melvin's daughters (TR 3-15 through 3-17). He wanted them to sell him Melvin's property and felt badly when they would not. (Tr 3-16). In the latter part of 1971, Harvard Wheadon told his sister he was hurt and feeling badly because Iris Jensen and Ellen Piercy would not sell. Mrs. Tilbury recalled ". . . [H]e complained all the time that he didn't want to have anything to do with either one of them after that." (Tr 3-66). Harvard Wheadon apparently mentioned the subject to Judy Burton as late as 1975 (Tr 3-18).

The evidence introduced at trial was that the 1955 will was delivered to the decedent. Mr. Dahl testified his usual practice in 1955 was to give the original will to a testator (Tr 1-23). His testimony was:

"So, the best of my recollection is that he (a testator) was given the original and my usual procedure was to also give him a copy." Id.

Mr. Dahl had no recollection of deviating from this usual procedure insofar as Harvard Wheadon was concerned (Tr 2-18).

Ann Dahl, Mr. Dahl's wife and former secretary, similarly testified that Mr. Dahl's usual procedure in 1955 was to tell a testator he should keep his will in a safety deposit box or leave it with the county clerk (Tr. 2-27). This testimony corroborated Dahl's own testimony that in 1955 he generally did not retain his client's wills because at that time he did not have an adequate fireproof place in which to store wills (Tr. 1-23). Unless specifically requested, Dahl did not keep the original will of his clients in 1955. Id. There was no evidence that Harvard Wheadon ever asked Mr. Dahl to keep the 1955 will.

There is however, additional evidence that the will was delivered to the decedent. In 1963 or 1964 Mr. Dahl and his former partner decided to go their separate ways. At that time a complete inventory of wills was prepared which included not only original wills on file, but also copies of wills on file (Tr. 2-5). From that inventory it was evident to Mr. Dahl that at least as late as 1964, he did not have the original will of Harvard Wheadon (Tr. 2-6). Mr. Dahl's records do indicate he kept the 1971 codicil of Harvard Wheadon. After Mr. Wheadon's death, Mr. Dahl located that codicil. However, he did not find the original 1955 will--he only found an unsigned office copy of that document (Tr. 2-8).

Harvard Wheadon maintained a safety deposit box at the West Jordan Branch of First Security Bank of Utah. He began renting that box on August 24, 1966. The decedent was the sole

owner of the box and the only person entitled to enter it (Tr. 3-27). According to entrance tickets to that box, the decedent was the only person to enter the box while he was alive (Tr. 3-32). The last time the decedent entered the box before his death was on June 23, 1975 (Tr. 3-30). The bank has no record of anyone entering the box from that time until after Harvard Wheadon's death (Id.)

None of the witnesses who appeared at trial testified to having seen the original 1955 will after the date it was signed. Neither Mr. nor Mrs. Dahl had any recollection of seeing that document after May 24, 1955 (Tr. 2-19, 2-27). The secretary of Mr. Dahl who prepared the codicil never saw the 1955 will (Tr. 2-35). And neither did Judy Burton (Tr. 3-21), nor Laurence Leak (Tr. 3-39). Similarly, John Wheadon and Bertha Tilbury denied having knowledge of that will (Tr. 3-59; Answer of Bertha Tilbury to petitioners' interrogatory nos. 1 through 3).

Judy Burton did testify that in the month prior to his death she asked the decedent point-blank if he had a will. She said the decedent replied: "Yes, it's in my safety deposit box." (Tr. 3-2, 3-3). This evidence was not introduced as evidence that Harvard actually had a will, but rather, counsel for the nieces introduced it for the limited purpose of showing the decedent's state of mind (Tr. 2-50, 2-51, 2-54 and 3-1). In any event nothing in that statement referred to the terms of the 1955 will or equated the alleged will in the safety deposit box with the 1955 Will. The following colloquy appears in the transcript:

Q. Indeed, you specifically asked him, "Harv, do you have a will?"

A. I did.

Q. And he said, as best you can recall, "Yes, and I keep it in my safety deposit box."

A. He said, "Yes, I have it; I keep it," or, "I have it in my safety deposit box."

Q. He didn't say, "I have an unsigned copy of a codicil in the safety deposit box," did he?

A. No.

Q. He said he had a will. He didn't say when he made that will; did he?

A. No, he didn't.

Q. He didn't define the terms of that will?

A. No, he never did.

Q. Didn't say that in that will he left everything to Melvin or his daughters?

A. No, he didn't.

Q. Just said generally, "I have a will and I keep it in my safety deposit box."

A. Yes, he did.

Q. No equation with that will with any will executed in 1955; isn't that true?

A. He did not mention what the will was or what it contained.

(Tr. 3-19, lines 1 through 25)

Of crucial significance is the fact that within a few days after Harvard's death, Judy Burton had the safety deposit box examined and neither the original nor any copy of the 1955 will was there (Tr. 3-20). The box contained an unsigned copy of

the 1971 codicil and some time certificates of deposits (Tr 3-11, 3-20). Mrs. Burton admitted that based upon what Harvard had told her, she expected to find an original will in the box and was surprised when none was there (Tr. 3-20, 3-21).

After he learned of the decedent's death, Mr. Dahl undertook an exhaustive search for the 1955 will. He checked his will inventory. He had his secretary physically inventory all wills on file to see if by any chance Mr. Wheadon's will had been misfiled (Tr. 2-9). He, himself, personally inventoried all wills in his possession (Id.). He supervised a thorough search of the decedent's home and went through all of his papers, drawers, cupboards and desks. (Id.) Judy Burton testified that in this search, contents of metal boxes were examined together with papers in the kitchen and the bedroom. They went through "every single drawer in the house; [and] took everything out of every drawer and cupboard." (Tr.3-7).

Mr. Dahl continued his search by checking with the secretary of his former partner to see if any will of decedent was there (Tr. 2-10). He contacted another attorney in Midvale and checked the records of the Salt Lake County Court to see if the will was there (Id.). Finally, he directed Judy Burton to go to First Security Bank and check the contents of the decedent's safety deposit box (Id.). None of these efforts disclosed the existence of any will of the decedent.

Both Mr. Dahl and representatives of the bank denied ever withholding the 1955 or any other will from the decedent. (Tr 2-21, 3-32, 3-33).

ARGUMENT

POINT I. THE TRIAL COURT CORRECTLY HELD THAT "IN EXISTENCE" WITHIN THE MEANING OF SECTION 75-3-26 OF THE UTAH CODE ANNOTATED, 1953 REFERS TO PHYSICAL AND NOT TO MERE LEGAL EXISTENCE.

At the time of Harvard Wheadon's death and at the time of trial Section 75-3-26 of the Utah Code Annotated, 1953 contained the following language which governs this case:

"Proof of will lost or destroyed, --

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)

The petitioners Wheadon and Tilbury contend that when one reads the entire section of the statute, it is much more probable that "in existence" means physical existence as opposed to mere existence in contemplation of law. If the statutory term "in existence" does not require the physical presence of the will, the statutory language about fraudulent destruction within the testator's lifetime is gross surplusage. A will could not possibly be fraudulently destroyed during the testator's lifetime if the actual testamentary document did not need to be produced.

Such a will, though not in actual existence would exist in contemplation of law and, thus, could not be fraudulently destroyed within the testator's lifetime. It is an obvious maxim of statutory construction that a statute should be construed in such a manner as to give effect to all its contents. 73 Am.Jur.2d Statutes, § 191, pp. 389-390.

From the plain language of Section 75-3-26 it is evident that its contents have to do with the evidentiary requirements of proving a lost or destroyed will. The statute says that physical existence is not required if the will is shown to have been fraudulently destroyed during the testator's life. Otherwise, there must be proof that the will was in actual existence when the testator died. Section 75-3-26 does not address itself to revocation, but rather to evidentiary sufficiency. Section 75-3-26 does not conflict with Section 75-1-19 which deals with revocation of wills since each statute has a different purpose. Section 75-1-19 deals with how a will may be revoked--not with evidentiary questions of proof. Section 75-3-26 deals not with the substantive question of revocation, but rather with the minimum evidentiary conditions which must be shown before an alleged lost or destroyed will could be admitted to probate. See In re Estate of Strickman, 55 Cal Rptr. 606, 608 (1966).

Not only does the express language of the statute point to the conclusion that "in existence" means physical existence, but the only Utah case in point clearly assumes that "in existence"

means the physical reality of the testamentary document at the time of the testator's death. In the decision In re Frandsen's Will, 50 Utah 156, 167 Pac. 362 (1917), the Utah Supreme Court interpreted the precursor of Section 75-3-26 and held that for purposes of the will statutes, when the testatrix in that case became insane, she was legally dead. A will was shown to have been in existence at the time the decedent lost her sanity. And since that will physically existed at the time of her insanity, it also existed at the time of her death for proof of will purposes.

However, in order to get to the point that a testatrix's insanity equals death for proof of will purposes, the court assumed that "in existence", within the meaning of the statute, meant physical existence. The opinion contains the following language:

" . . . [O]n July 19, 1900 the testatrix then of sound and disposing mind and memory duly executed the will last proposed for probate and . . . deposited the same with the County Clerk of Carbon County; that thereafter and before any of the other proposed wills were executed, the testatrix, at least once, in the presence of one witness, saw the will in the County Clerk's office, and she then, and at other times according to the evidence, expressed herself as being satisfied with its provisions; that the will was recorded in a book in the county clerk's office by a young lady who held some official position in said office; that the will was last seen in the County Clerk's office by the witnesses who testified at the hearing in March, 1912, and its contents were then examined by them." 50 Utah 160-161, 167 Pac. at 363 (emphasis added).

"As we have seen the court found that on July 5, 1911 and on June 27, 1912, the testatrix 'was not of sound mind or memory' and that she then was 'incapacitated from making, executing or understanding a will.' We thus have a case where the will in question was shown to have existed some eight months after the testatrix had become insane, as found and declared by the court, which finding and declaration we have seen is binding upon us and upon the parties in interest." Id. (emphasis added)

If all that were needed was that the will have legal existence, there was no reason for the Supreme Court to emphasize the physical existence of the 1900 will at and after the date the testatrix became insane. To counsel for the Wheadons and Mrs. Tilbury it appears that the court in Frandsen took it for granted that "in existence" meant physical presence.

That conclusion is buttressed by further language from the Frandsen decision:

"Now in this case it is conclusively shown that the will existed for a period of about eight months after the testatrix became insane and incapacitated from either making or revoking a will. True, the testator continued her physical existence. Her mind, however, the one thing necessary to make or revoke a will, was gone . . ." Id. at 165, 167 Pac. at 365. (emphasis added)

Again, if existence in contemplation of law were sufficient, the court would not have emphasized the actual physical existence of the testamentary document itself. It would not have spoken of the will in the past tense. If existence in contemplation of law were all that were required, the court would have regarded the will as a present and not a past item. Based upon

all the foregoing, it appears to counsel for the respondents that the court in Frandsen understood the "in existence" as used in the statute to mean physical existence.

The court in Frandsen indicated that the Utah precursor of § 75-3-26 was similar to a California statute. The most recent California decisions these counsel have found construe "in existence" in the California successor statute to mean physical existence. In re Estate of Lane, 7 Cal.App.3d 402, 86 Cal. Rptr. 620 (1970); In re Estate of Strickman, supra.

As counsel for the appellants argue in their brief, an earlier California decision held that legal existence was sufficient. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689 (1943). However, Bristol was a 4-3 decision and Justice Traynor wrote a stinging dissent which was cited with approval by the later California decision in Strickman. Strickman, supra, at 608. In addition, Bristol has been criticized by at least one California scholar. Ferrier "Statutory Restrictions on Probate of Lost Wills," 32 California Law Review 221,223.

If the later California decisions do not expressly reverse Bristol, they at least announce a departure from it and clearly set forth a physical existence criterion.

In Strickman, the third page of a will could not be found, even though there was evidence that that page had originally been part of the will. A substitute page, unexecuted by the

testatrix was located, however. Witnesses identified the original first two pages and a copy of the original page 3.

The California statute, Section 350 of the California Probate Code provided:

"No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

After reviewing with favor the Traynor dissent in Bristol, the intermediate appellate court held:

"We have concluded that although the three-page will of 1962 was validly executed, page 3 thereof cannot be probated because it was no longer in physical existence at the time of the death of the testator." 55 Cal.Rptr. at 608. (emphasis added)

In the decision In re Estate of Lane, supra, certain claimants under a 1963 will attempted to have that will admitted to probate. The petitioners could not produce the original 1963 will, but had a copy which had been furnished by the attorney who prepared it. There was no evidence that the will was in existence at the time of the testatrix's death. The case arose under Section 350 of the California Probate Code cited earlier.

The court affirmed a summary judgment against the 1963 will claimants, holding:

"Insofar as lost or destroyed wills are concerned, those requirements are specifically spelled out in Probate Code Section 350. The words 'unless proved to have been in existence at the time of the death of the testator' may not be equated with proof the will has not been revoked. The word 'existence' used in the code section means 'physical existence' rather than 'legal existence.'" Lane, supra, 86 Cal.Rptr. at 622 (emphasis added).

Another recent western state decision was In re Estate of Newman, 518 P.2d 800 (Mont. 1974). The applicable Montana statute, Section 91-1202, R.C.M., 1947, provided:

"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."

In the course of the opinion, the court cited its earlier decision in In re Colbert's Estate, 31 Mont. 461, 471, 78 P.2d 971, 974:

"Now, as we have heretofore seen, the 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 Colbert died, it follows that his case cannot stand." Newman, supra, at 802-803.

As is evident from the cited passage, Montana, like California, requires physical existence except where the will is shown to have been fraudulently destroyed during the testator's

lifetime. The existence in contemplation of law is not a blanket of abandonment of the necessity for proof of the will's physical existence at the time of the testator's death. Rather, physical existence is required except where the will is proved to have been fraudulently destroyed during the testator's lifetime.

Other authorities could be cited, but respondents urge that the plain language of the statute, the Frandsen decision, and the cited California and Montana cases based on statutes similar to section 75-3-26 all indicate that "in existence" means physical existence. As a matter of policy the legislature of this state decided that lost or destroyed wills could only be proved by showing one of two things: 1) fraudulent destruction during the testator's life or 2) actual existence of the will after the testator's death. If the proponent of a purported lost or destroyed will cannot establish either fraudulent destruction or existence at the time of death, the document cannot be probated.

For reasons set forth herein, it is urged that the better reasoned cases in states having statute's similar to 75-3-26 require physical existence. The Frandsen decision seems to adopt the physical existence standard as the law of this state and the lower court properly applied that standard to the facts in this case.

POINT II. THE PRESUMPTION THAT A WILL MISSING AT THE TIME OF THE TESTATOR'S DEATH WAS DESTROYED BY HIM WITH INTENT TO REVOKE APPLIES IN THIS CASE AND WAS UNREBUTTED.

The Frandsen decision cited earlier refers to the following general rule:

"When it is shown that the testator made a will, but that it could not be found at his death, then, ordinarily, the presumption arises that he himself destroyed it for the purpose of revoking it before his death" Frandsen, supra, at 161-162, 167 Pac. at 363-365.

Although the court in Frandsen held that the presumption is overcome where the testator has left his will with another and did not have access to it after its deposit and before his death, Frandsen, supra, at 165, 167 Pac. at 355, the general presumption does apply where the testator retained actual control of or had easy access to the will at the time it was last seen. The court in Frandsen cited with approval language from the case of Schultz v. Schultz, 35 N.Y. 653, where the New York court wrote:

"If the will had remained in the custody of the testator, or if it had appeared that, after its execution he had access to it, the presumption of law would be from the fact that it could not be found after his decease, that the same had been destroyed by him" 167 Pac. at 364.

The evidence introduced at trial compels the conclusion that Harvard Wheadon either had or had access to the original will after its execution. The attorney who drafted the will indicated his policy, at the time the original will was signed,

was to leave the original with the testator, since at that time the attorney did not have a fire-proof safe. (Tr. 1-23, 2-18) The will file of that attorney did not reflect any original will kept by the attorney; (Tr. 2-6, 2-7) only the codicil. A diligent search disclosed no will.

In their brief, appellants recognize the rule that where "a will was last known to be in the testator's possession and cannot be found after his death, the will is presumed to have been destroyed with the intent to revoke . . ." Appellant's Brief p. 16. Their only response is that the language of 75-3-26 makes the presumption conclusive. This simply is not the case. If a proponent of a lost or destroyed will can prove fraudulent destruction of the will during the testator's lifetime, the physical document need not be produced. The problem the petitioners have is they failed to prove any fraudulent destruction during the testator's lifetime or the actual existence of the will at the time of the decedent's death.

Though witnesses testified the decedent felt his affairs were in order and remarked about the general advisability of having a will, the only evidence wherein the decedent allegedly specifically referred to the location of his will was in a conversation with Judy Burton when he told her the will was in his safety deposit box. (Tr. 3-2, 3-3) It is to be emphasized that this statement was introduced not to show that the decedent actually had a will, but only to show his state of mind as to

whether he thought he had a will (Tr. 2-50). Of critical importance is that shortly after his death Mrs. Burton and others looked in the box and found no 1955 will - only a copy of the codicil. Mrs. Burton indicated she was surprised when no original will was there.

The Bank records indicated that the decedent was the only person who had access to the safety deposit box. Prior to his death no one but the decedent had been into the box. The decedent, however, had made rather frequent entries to the box prior to his death. There was no evidence that the decedent ever claimed to have lost the original will or surrendered its custody to third persons under circumstances where he was denied access to it. To the contrary, the evidence was clear that at least at some time after its execution, the decedent had the will or had access to it.

The petitioners Wheadon and Tilbury contend that the better reasoned cases, which have considered the issue under facts similar to those in this case, hold that alleged statements of a testator prior to his death as to the existence of a will do not destroy the general presumption of revocation. In the decision In re Casey's Estate, 127 N.J.Eq. 101, 11 A.2d 38 (1940), it appeared that a testator made a will in 1937. The testator took the original will while his attorney kept an unexecuted copy. On frequent occasions thereafter the decedent-testator referred to the 1937 will. The last occasion he referred to the will was on

February 5, 1938. The following day, February 6, 1938, the testator-decedent disappeared and was never seen alive again. The coroner determined his death to have been on February 8, 1938, and the cause thereof suicide. A diligent search for the 1937 will was unsuccessful.

The lower court held that the

". . . proofs adduced were not sufficient to rebut the presumption of revocation which arose from the fact that deceased had possession of the will; that the proofs did not exclude every possibility of the destruction of the will by the deceased himself; and that under the proofs there was a possibility that deceased had destroyed his will animo revocandi between February 5, 1938 and the date of his death [citation omitted]." 11 A.2d at 39.

The New Jersey Court of Errors and Appeals affirmed the holding denying probate of the copy of the will.

In In re Rokofsky's Will, 111 N.Y.S.2d 553 (Surr.Ct. 1952), the decedent executed a 1948 will which could not be located after her death. One Miss Neuer, an attorney who drafted the 1948 will, testified that a short time before the testatrix's death she called Miss Neuer and indicated she lost the will while babysitting, but expressed her intention that the property be devised according to that will. The attorney indicated she would prepare another will, but failed to do so before the decedent's death.

The New York court referred to the rebuttable presumption that where a will is shown once to have existed and to have been

in the testator's possession, but cannot be found after his death, it is presumed to have been revoked. The court held:

"The evidence offered in behalf of the petitioner consisted of the testimony of Miss Neuer concerning statements by the decedent to the effect that the December 4, 1948, will had been lost and that the decedent believed that certain of her relatives may have obtained possession of it and destroyed it. Such evidence is incompetent to establish the fact that the will was not revoked during the decedent's lifetime [citations]." 111 N.Y.S.2d at 556.

The court concluded:

"The will of December 4, 1948 must be denied probate as the petitioner has failed to show either that the will was in existence at the time of the decedent's death or was fraudulently destroyed during her lifetime . . ." Id. at 557.

And see In re Duffill's Estate, 58 P.2d 185 (Cal.App. 1936), where the appellate court affirmed a decision of the trial court. In that case the alleged continuous declarations of a testator that he had a will which he kept in a metal strong box in his home did not constitute a preponderance of evidence sufficient to rebut the presumption of revocation when no will was found.

The presumption was un rebutted. The petitioners Jensen and Piercy failed to sustain their burden of proof. And, consequently, the trial court correctly directed a verdict against them.

POINT III. SINCE THE 1955 WILL IS PRESUMED DESTROYED AND REVOKED,
THE 1971 CODICIL IS ALSO REVOKED.

Since the appellants have failed to rebut the presumption that a missing will is presumed destroyed with intent to revoke it, the 1955 will is presumed to be revoked. Section 74-1-30 of the Utah Code Annotated which was in effect at the time of decedent's death and the time of trial provides:

"Revocation revokes codicils - The revocation of a will revokes all its codicils."

Since the 1955 will is presumed revoked, its revocation also revokes the 1971 codicil.

For reasons set forth above, respondents urge that the presumed destruction of the 1955 will operated to revoke the 1971 codicil.

The lower court did not determine who was to be executor or administrator of the decedent's estate. Respondents urge that the administrator should be appointed pursuant to the intestacy statutes of Utah in effect at the time of decedent's death, since both the 1955 will and the 1971 codicil are deemed to be revoked. If, however, this court should determine that the 1971 codicil may be probated, respondents urge it be admitted for the sole purpose of naming the executrices. Otherwise the estate should pass by intestacy. In re Sapery, 28 N.J. 599, 147 A.2d 777 (1959).

POINT IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING PETITIONERS' MOTION FOR NEW TRIAL ON THE GROUNDS OF ALLEGED NEWLY DISCOVERED EVIDENCE.

On pages 4 through 7 of the appellants' brief and under the heading of Statement of Facts, appellants refer to the contents of two affidavits submitted after trial. Naturally, respondents did not have the opportunity to cross-examine any of the affiants at trial, and respondents object to any use of the content of those affidavits except insofar as those affidavits are used in conjunction with appellant's alternative motion for a new trial.

Respondent's essential position is that the contents of the two affidavits do not raise material issues which would justify a new trial. And in any event, the information in the affidavits was available to appellants long before trial.

Rule 59(a) of the Utah Rules of Civil Procedure lists as one ground for granting a new trial:

"(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at trial." (emphasis added)

Appellants moved that the trial court order a new trial on precisely the same grounds it urges this court so to order. The trial court denied that motion. A major legal encyclopedia states as a general rule:

". . . Granting of a new trial on the ground of newly discovered evidence is within the sound discretion of the court, not reviewable except for a palpable abuse of discretion. . ." 5 Am.Jur. 2d Appeal and Error, § 851, p. 295 (1962). See also Crellin v. Thomas, 122 Utah 122, 124, 247 P.2d 264, 265 (1952) where this Court wrote:

". . . A wide discretion is reposed in the trial court in granting or denying a new trial on the basis of newly discovered evidence. . . ."

And see further Lindsay v. Eccles Hotel Company, 3

Utah 2d 364, 284 P.2d 477, 478 (1955).

In Klopenstine v. Hays, 20 Utah 47, 57 Pac. 712 (1899),

the Utah Supreme Court wrote in an opinion dealing in part with a motion for new trial on account of newly discovered evidence:

"The appellant contends that the court erred in refusing to grant a new trial based upon the affidavit of one Lamb because of newly discovered evidence. The facts presented in this affidavit, if true, would tend to impeach and contradict the testimony of the plaintiff. In some respects the testimony is cumulative, and no reason is shown why with reasonable diligence the witness Lamb could not have been produced at the trial. It is well settled that to entitle a defeated party to a new trial on the ground of newly discovered evidence it must appear, 1st, that he used reasonable diligence to discover and produce at the former trial the newly discovered evidence, and that his failure to do so was not the result of his own negligence. 2d, That the newly discovered evidence is not simply cumulative. 3d, That such evidence is not sufficient if it simply be to impeach an adverse witness. 4th, It must be material to the issues and so important as to satisfy the court by reasonable inference that the verdict or judgment would have been different had the newly discovered evidence been introduced on the former trial. 5th, That the defeated party had no opportunity to make the defense, or was prevented from doing so by unavoidable accident, or the fraud or improper conduct of the other party without fault on his part [citations omitted]." Klopenstine, supra, at 55, 57 Pac. at 714 (emphasis added).

And a Tenth Circuit case, Baruch v. Beech Aircraft Corp.,

172 F.2d 445 (10th Cir. 1949), contains the following language:

"It also seems to be the general rule that in the absence of unusual or extraordinary circumstances, the trial court will not grant a new trial on newly discovered evidence, which is intended to or has the effect of discrediting or impeaching the testimony of the movant's witnesses in the original trial [citations omitted]. The cases are not agreed upon what constitutes an unusual or extraordinary circumstance, but the manifest purpose of the rule is to discourage new trials based upon afterthoughts, while at the same time preserving the power of the court to correct gross injustice or to rectify a fraud. [citations omitted]." Id. at 445-446. (emphasis added)

On page 38 of their brief the appellants recite:

"The evidence which is newly discovered is that the objectors [Respondents] possibly had access to the document which cannot be found." (emphasis added).

Of critical importance is that nowhere in any affidavit did the uncrossexamined affiants ever claim to have seen John Wheadon, Bertha Tilbury or Helen Sower with or looking for a will. Nowhere in any of the affidavits nor in any evidence produced at trial was there any suggestion that the decedent ever kept the will in the kitchen cupboard. Even if Bertha and Helen had gone through that cupboard looking for documents (and they have denied removing any such documents Tr. 3-76, 3-77, 3-72), no evidence presented to date indicates the will was ever there. Judy Burton, the appellant's own witness, said she thought the alleged will was in the safety deposit box (Tr. 3-20). She also testified the decedent kept important papers in a tin box or boxes in the cellar (Tr. 3-7). And Judy Burton had the key to the box or boxes containing those papers (Tr. 3-22). In short nothing in the affidavits contains any substantive evidence

concerning the actual existence or location of the 1955 will as of the date of the "cupboard incident."

Bertha Tilbury and Helen Sower were both examined by counsel for the appellants at trial with respect to the alleged cupboard search. John Wheadon was also subject to appellant's cross-examination generally. As early as August 5, 1976, in Answer to Interrogatory No. 2 of respondents' first set of interrogatories, appellants suggested that respondents "possibly had access to the documents which cannot be found." Appellant's Brief p. 38. Answers to Interrogatories by Mrs. Tilbury indicated that the Shepards and Grant Palmer were in the house when Bertha, John and Helen were. All this information was available to Jensen and Piercy well before the trial date. There is no indication that Mr. Palmer was unavailable at the time of trial. No attempt was made to have the deposition of the Shepards taken prior to trial, nor was a motion made to postpone the trial because their absence would prejudice Mrs. Piercy's and Mrs. Jensen's case. See Lindsay v. Eccles Hotel Company, supra.

At trial counsel for appellants presented a thorough, effective and lawyerlike exposition of their case. That presentation emphasized the alleged legal existence of the will. Having lost on that theory, the appellants now wish to pursue a new theory, i.e. the possible disappearance of the will after the decedent's death. The purported facts contained in the affidavits

of the Shepards and Mr. Palmer filed after the trial are not illuminative as to the whereabouts of the 1955 will. At best, those affidavits only attack the credibility and ability to recall of John Wheadon, Bertha Tilbury and Helen Sower.

The respondents urge that the alleged newly discovered evidence is not "new." Even if it were, it could have been discovered with reasonable diligence on the part of Mrs. Jensen and Mrs. Piercy prior to trial. In any event, the allegations in the Affidavits do not raise issues which justify holding a new trial. Those allegations merely attack credibility of witnesses and require the broadest speculative leaps before they have any evidentiary value. The motion for new trial on grounds of newly discovered evidence should be denied.

CONCLUSION

The trial court correctly held that "in existence" within the meaning of Section 75-3-26 of the Utah Code requires proof of actual physical existence at the time of the testator's death.

The appellants failed at trial to rebut the presumption that a will missing at the time of the testator's death is presumed destroyed by him with intent to revoke.

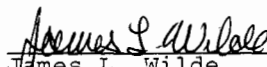
Since the 1955 will is presumed destroyed and revoked, the 1971 codicil is also revoked.

The trial court did not abuse its discretion in refusing to grant a new trial on grounds of newly discovered evidence.

RESPECTFULLY SUBMITTED and DATED this 3rd day of November, 1977.

RAY, QUINNEY & NEBEKER


Clark P. Giles


James L. Wilde

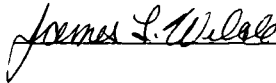
CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF
OF RESPONDENTS was duly served on attorneys of record, by
mailing a copy thereof, postage prepaid, addressed as follows:

J. Brent Garfield, Esq.
David S. Walsh, Esq.
JOHNSON, DURHAM, MOXLEY
& McCULLOUGH
Attorneys for Petitioners,
Iris Jensen and Ellen Piercy
1320 Continental Bank Building
Salt Lake City, Utah 84101

Kay M. Lewis, Esq.
JENSEN & LEWIS, P.C.
Attorneys for Judy O. Burton
and Sue O. Bateman
320 South Third East, Suite One
Salt Lake City, Utah 84111

this 3rd day of November, 1977.

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