

PROBATE CORNER

ARTICLE: REBUTTING THE PRESUMPTION OF INTENTIONAL REVOCATION OF A LOST WILL

Evidence that a testator's will was in his possession prior to death and cannot be located subsequent to death gives rise to a rebuttable presumption that the testator destroyed the will with the intention of revoking it. What is the standard and the evidence necessary to rebut the presumption of intentional revocation of a lost will?

STANDARD: To avoid a finding of revocation, the proponent of the lost will bears the burden of coming forward with “competent substantial evidence” that would justify a finding that the will had not been revoked. *See* Balboni v. Larocque, 2008 Fla. App. LEXIS 15130 (Fla. 4th DCA 10/1/08), *citing* In re Estate of Baird, 343 So. 2d 41 (Fla. 4th DCA 1977) and In re Estate of Evers, 34 So. 2d 561 (Fla. 1948).

EVIDENCE: In Balboni, Judge Stevenson wrote: “Evidence that can serve to rebut the presumption of intentional revocation of a lost will consists of evidence that the will was either accidentally lost or destroyed, or willfully and fraudulently destroyed by an adverse party. [In re Estate of Evers, 34 So. 2d 561 (Fla. 1948)]. In several cases, Florida courts have found the presumption of intentional revocation to be rebutted by a showing of: 1) evidence that a person with an adverse interest, and the opportunity, may have destroyed the will, *see* In re Estate of Washington, 56 So. 2d at 547; Lonergan v. Estate of Budahazi, 669 So. 2d 1062 (Fla. 5th DCA 1996); Upton v. Estate of Carville, 369 So. 2d 113 (Fla. 1st DCA 1979); 2) evidence that the will was accidentally destroyed, *see* In re Estate of Carlton, 276 So. 2d at 833 (presumption was rebutted where decedent repeatedly spoke of his will and his intention to leave his estate to the petitioner, although the decedent's safe was found waterlogged and the papers inside turned to "mush"); 3) evidence that the original will had been seen among the decedent's papers after her death, *see* Silvers v. Estate of Silvers, 274 So. 2d 20 (Fla. 3d DCA 1973); and 4) evidence that the decedent was insane and thus did not have testamentary capacity to effectively revoke the will, *see* In re Estate of Niernsee, 147 Fla. 388, 2 So. 2d 737 (Fla. 1941).”

Additionally, competent substantial evidence could be found to exist under the following circumstances:

Evidence that an interested party had: (1) access to a testator's home; (2) an opportunity to destroy the will; and (3) a pecuniary interest in destroying the will. *See* Pierre v. Estate of Pierre, 928 So. 2d 1252 (Fla. 3d DCA 2006).

Evidence that: (1) after the decedent's death a conformed copy of the will and the original of the codicil were found together among the decedent's personal possessions; (2) after the execution of the will, the decedent showed continuing affection for the beneficiaries under the will; and (3) after the execution of the will, the decedent wrote a letter to one of the beneficiaries stating that property devised in the will would someday be theirs. In re Estate of Kuszmaul, 491 So.2d 287 (Fla. 4th DCA 1986).

Evidence that: (1) the wife of an heir-at-law of the decedent had free access to her home, both before and after her death, and had the will in her possession; (2) two weeks before the decedent's death, the decedent stated that she wanted her will to remain in effect, and that an heir-at-law and the wife of another heir-at-law had urged her to sign some papers; and (3) during the last two weeks of her life, it is unlikely that the decedent would have had enough strength to tear up her will. In re Estate of Walton, 601 So.2d 1266 (Fla. 3rd DCA 1992).

Evidence that (1) the decedent's husband, who was excluded from the will and whose pecuniary interest was contrary to the will, had access to the resident to which the will had been mailed by the decedent's attorney; (2) the decedent and her husband experienced extreme marital discord in the months preceding the execution of the will; and (3) joint bank accounts owned by the decedent and her husband which the decedent changed into her name along at the time she executed the will excluding her husband were never returned to joint ownership by the decedent. In re Estate of Budahazi, 669 So.2d 1062 (Fla. 5th DCA 1996).

In contrast, facts that merely show that a person had the opportunity to destroy the testator's will and "might possibly have done so" are insufficient to rebut the presumption of revocation. *See* Daul v. Goff, 754 So. 2d 847 (Fla. 2d DCA 2000); Balboni (petitioners theorize that the will was accidentally lost or discarded due to increased traffic and paperwork in the home during decedent's illness, and that nurses and visitors, third parties who have no interest in the will, caused the will to be misplaced).