

Lost Wills

Take-Away: If the testator's Will cannot be found on his/her death, a legal presumption might arise that the testator intentionally destroyed his/her last Will, thus possibly leading to an intestate estate proceeding.

Background: The Estates and Protected Individuals Code (EPIC) provides that general principles of law and equity are intended to supplant, not replace, EPIC's provisions. [MCL 700.1203(1).] What that means is that the common law, and presumptions under the common law, are still important when it come to the administration or Wills and trusts, especially when EPIC is silent on 'lost Wills.' In this situation a court will then turn to Michigan common law. One such common law rule, or principle, is that when a Will is 'lost' and a copy of that Will is offered for admission to probate as the testator's last Will, there is a legal (evidentiary) presumption that the testator destroyed his/her Will, in effect, he revoked that Will.

Common Law Rule: Michigan's common law presumes the revocation of a lost Will in certain circumstances. This common law presumption of revocation is: *"that where the will is not traced out of the possession of the testator, it is presumed that it was destroyed by him animo revocano [i.e., an intention to revoke] ...in situations where a copy of the original will exists, but the testator's copy is missing... there is a rebuttable presumption that the testator destroyed the will with the intent to revoke it."* *In the Matter of the Christoff Estate*, 194 Mich App.468 (1992.)

- **Jury Instruction:** This common law presumption of a Will's destruction by its testator is part of the Standard Michigan Jury Instructions, which states that: "[a] will that is known to have existed and to have been in the decedent's custody during his/her lifetime and which cannot be found at his/her death raises a presumption that such will was destroyed with the intention of revoking it. [M. Civ JI 170.32.]
- **Burden of Proof:** The proponent of the copy of the decedent's Will bears the burden of showing facts or circumstances that are sufficient to overcome this legal presumption. *In re Smith Estate*, 145 Mich App 634 (1985.) Accordingly, the missing Will leads to a rebuttable presumption of the Will's destruction and revocation by its testator.

Recently the Michigan Court of Appeals had the occasion to invoke this common law rule.

In re Hughes Estate, Michigan Court of Appeals, No. 374611 (June 11, 2026)

Facts: The facts in this unpublished decision are a bit sparse. On Robert's death Randa, his sister, filed a petition for informal probate and she requested that she be appointed Personal Representative (PR) of Robert's estate. [MCL 700.1101] In her petition Randa alleged that Robert had died intestate. Robert died unmarried, and his only son Steven had been adopted by a stepparent, so he was no longer Robert's heir. Randa was appointed PR. About ten days after Randa's appointment as PR, attorney Gilbert filed a motion on behalf of Thomas Dunn for a testate probate proceeding, in which he sought authentication of a purported Will signed by Robert and the appointment of Dunn as PR, and to recover estate property from Randa. Attached to Dunn's petition it was a copy of the Last Will of Mr. Hughes, which bequeathed 60% of his assets to Steven and the residue of the estate to the VFW. The probate court then took testimony regarded the copy of the Will.

- **Missing Will:** This is where the facts get a bit squirrely. Dunn testified that he worked as a 'private contractor' for attorney Gilbert's law firm, and that Robert had entrusted him [Dunn] with safekeeping the original Will, and that the practice of the law firm was to make electronic copies for their files. Dunn testified that he did not have the original Will because it was destroyed when his [Dunn's] home caught fire, but he had access to the electronic version of Robert's original Will, which he printed off and offered it to the probate court with his petition. That printed-off copy is notarized and contained signatures of two witnesses who allegedly were present when the Will was signed by Robert. Dunn further testified in the probate court that Mr. Hughes never asked for the original Will to be returned to him and that, to his knowledge, Mr. Hughes did not sign any subsequent Wills. Interestingly, Dunn testified that he thought that attorney Gilbert had prepared the Will, but Mr. Gilbert denied ever drafting the Will. No other witnesses were offered in support of the copy of the alleged Will.

Probate Court: The court refused to accept the document as Mr. Hughes' Will. It reasoned that under Michigan law, a Will that is known to have existed and to have been in the decedent's custody during his lifetime, which then cannot be found at the time of death, 'raises a presumption that such a Will was, in fact, destroyed by the decedent with the intention of revoking that Will. The court acknowledged that this legal presumption can be overcome by facts and circumstances, but it found that the evidence Dunn presented (or more accurately, Dunn's credibility) did not overcome that evidentiary presumption of

revocation. Consequently, the court refused to admit to probate the purported copy as Mr. Hughes' Will. Mr. Hughes was determined to have died intestate. Dunn appealed.

Court of Appeals: This Court sustained the probate court's decision, deferring to the probate judge's assessment of witness credibility and the testimony taken in the probate court. It echoed an observation made by the probate court that Mr. Dunn's testimony did not establish whether the purported Will was located on his personal computer or Mr. Gilbert's computer, along with highlighting the contradiction of Dunn's testimony by attorney Gilbert that he adamantly denied preparing the Will. In sum, the ambiguities and discrepancies in testimony eroded the factual basis on which the probate court could have found that the common law presumption had been rebutted.

Conclusion: This is not a startling decision from the Michigan Court of Appeals. It does, though, underscore the problems when the testator is entrusted with his original Will after it is signed, but that Will cannot be found after the testator's death. If the Will cannot be located, then arguably disinherited heirs are back sharing the decedent's estate, and specific bequests of property under the Will are ignored when the estate is finally distributed. Do all testator's (or more appropriately their named Personal Representatives) know where the original Will is located? It is best if instructions are left where the decedent's estate planning documents can be found to avoid this legal presumption.

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