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Estate litigation: Where's the will?

A fellow estates and trusts practitioner — let's call him "Mac" — called me recently to discuss an estate he just was engaged to administer.

Mac's client, Judy, is the decedent's second wife (now widow), and his nominated executrix; they were married 43 years. Mac and Judy were unable to locate her late husband's last will and testament.

By MICHAEL A. BURGER
Daily Record Columnist

The will bequeathed and devised 60 percent of the estate to Judy as the surviving spouse, with the remaining 40 percent going to the decedent's two adult children from his first marriage. The decedent's prior will bequeathed and devised 40 percent of the estate to Judy, and 60 percent to the adult children. The estate is valued at about $1 million.

The adult children retained counsel to contest the will, and now had an arrow in their quiver — a missing will is presumed revoked. Mac had drawn the wills and supervised the execution ceremonies. Aside from now being a potential witness, he is not a litigator. Although Mac remained in place as the estate's general counsel, he wanted trial counsel to collaborate with him on the litigation in Surrogate's Court. See 22 NYCRR §207.32.

At our first conference we reviewed the salient facts:

• Born on Sept. 25, 1927, the decedent passed away Aug. 13, 2010.

• The missing will was executed Oct. 12, 2003, before two attesting witnesses, who still are alive (one of whom was the decedent's physician), revoking all prior wills.

• The decedent had testamentary capacity and the execution of the will was supervised by a veteran estate attorney.

• The immediately prior will was executed Jan. 23, 1985.

• On Sept. 24, 2008, the decedent entered a nursing home for treatment of Parkinson's disease and mild dementia.

• On the morning of May 26, 2010, in response to repeated handwritten demands from the testator over the previous three months, Mac delivered the decedent's original 2002 will to the decedent's nurse at the nursing home (the decedent was undergoing a stress test at the time) along with a proposed codicil specifically bequeathing his 1968 Aston Martin to his niece.

• Mac retained a conformed copy of the 2002 will in his law office file.

• During his May 26 stress test, the testator suffered a stroke rendering him unconscious for four days.

• On June 1, the decedent's nurse gave him the documents, after he regained consciousness.

• Medical records establish that the decedent no longer knew his name, nor recognized his family.

• The documents never were seen again, and the decedent never regained the capacity to execute his codicil before his death about six weeks later.

Surrogate's Court Procedure Act, §1407

The pertinent section governs missing wills and states that a lost or destroyed will may be admitted to probate only if

• It is established that the will has not been revoked;

• Execution of the will is proved in the manner required for the probate of an existing will; and

• All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

The burden of proof in our example would be on the Judy, the decedent's widow, as the proponent of the conformed copy of the missing will. Judy would have to establish by clear and convincing evidence that the missing will was not intentionally revoked by the testator. See *In re Estate of Fogarty*, 155 Misc. 727, 729 (N.Y. Sur. Ct. 1935).

There is "a strong presumption that a will which cannot be found after the testator's death was revoked *animo revocandi*." *Id. Animo revocandi* is a Latin phrase meaning with intention to revoke — that is, *scienter*. See *In re Kennedy's Will*, 167 N.Y. 163, 169 (1901).

"When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in the place of positive proof." *Collyer v. Collyer*, 110 N.Y. 481, 486 (1888); see also *In re Staiger's Will*, 243 N.Y. 468, 472 (1926); *In re Estate of Philbrook*, 185 AD2d 550, 552 (Third Dept. 1992).

Although the presumption of revocation is a heavy one, it is rebuttable when the proponent can establish "fraudulent destruction," which is a term of art. No actual fraud is required. When a testator did not intend to revoke his will (had no *animo revocandi*), the destruction was not be considered revocation. For instance, when the will is not in the decedent's possession or control at the time of its destruction, the destruction is deemed "fraudulent," or unintentional. See *In re Estate of Kalenak*, 182 AD2d 1124 (Fourth Dept. 1992); see also *In re Estate of Fox*, 9

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NY2d 400 (1961); *In re Estate of Gray,* 143 AD2d 751, 752 (Second Dept. 1988) (probate denied when it is "unclear ... whether the testator was in possession of the original will prior to his death or whether it remained [with] attorney"); cf. *In re Will of Eisele,* 31 Misc 2d 173, 174-75 (Surr. Ct., Dutchess Cty 1961) (original will existed at time of the testatrix's death and thereafter was lost or destroyed by fire).

Other examples of fraudulent destruction are accidental destruction caused by fire, flood or inadvertence. Similarly, unauthorized destruction by a third party, such as perhaps a disinherited child, will not operate to revoke a will. A third party's mere motive to destroy the will is insufficient to establish fraudulent destruction, however. See *In re Staiger's Will,* 243 N.Y. 468 (1926). Fraud, duress or undue influence also rebut the presumption of revocation.

Revocation must be the free and intentional act of the testator. See *Voorhees v. Voorhees,* 39 N.Y. 463, 466 (1868) ("The testator only consummated what was designed and put in motion by his son, George; under whose sinister influence he did what, if left to the operation of his own untrammeled will, he would not have done."). Note that the standard for proving fraud also is clear and convincing evidence. See Pattern Jury Instructions §7:60 (West, Second Ed. 2010).

Lack of mental capacity also will negate fraudulent destruction. See *In re Sharp's Will,* 134 Misc. 405, 407 (Surr. Ct., Kings County 1929). Just as testamentary capacity is necessary to execute a will, it is essential to its revocation. If evidence can "exclude every reasonable possibility of such testamentary capacity by the decedent from the time the will was last seen in his possession up to the time of his death" the surrogate ought to admit the conformed copy of the will to probate and issue letters testamentary to Judy. *Id.*; see also *In re Estate of McCabe,* 116 Misc. 637, 638 (N.Y. Sur. Ct. 1921) ("The destruction of the lost will by the testator when he was of unsound mind would not be a valid revocation.").

Mac was pleased to see the results of our research take the form of a summary judgment motion seeking dismissal of the contestants' objections. As is often the case, however, settlement discussions were afoot and Mac, prudently, still wanted to know what would happen if we lost the motion and the trial and the 2002 will was not admitted. Would the 1985 will be admitted to probate, substantially diminishing Judy's legacy? The short answer is probably not, but the law is in flux.

It is settled that a revoked will still operates to revoke prior wills if it contains such appropriate revocation language. See, e.g., *In re Wear's Will,* 131 A.D. 875, 876 (Second Dept. 1909). There appeared to be no challenge to the 2002 will's validity, other than the allegation that it had been intentionally revoked by a deliberate act of the testator. Accordingly, the 2002 will's execution effectively revoked the 1985 will at the time it was executed. Unless, perhaps, the testator's revocation of the prior will somehow was conditional.

The doctrine of dependent relative revocation operates to revive a revoked will if the testator only revokes it in contemplation of executing a new will, but never had the chance to do so before he died. Adapting the principle to their purposes, clever contestants might argue the decedent's act of executing the 2002 was conditioned upon the 1985 will remaining in force if the alternative was intestacy. That's clever, but unavailing: The doctrine of dependent relative revocation does not apply to lost wills. See generally *Matter of Sharp,* 889 NY2d 323 (Third Dept. Dec. 3, 2009), rev'g, 19 Misc. 3d 471; 852 NY2d 713 (Surr. Ct., Broome Cty 2008); *In re Estate of Borden,* 149 Misc. 2d 82, 86 (Surr. Ct., Richmond Cty 1990); EPTL §3-4.1.

In general, intestacy results when a lost will is deemed revoked. See EPTL Article 4. The presumption of revocation arises even when only one of duplicate or multiplicate wills go missing. See *In re McGuigan's Will,* 10 Misc. 2d 865, 866 (N.Y. Surr. Ct., Westchester Cty. 1957). The adult children's objections were summarily dismissed by the court after motion practice.

Judy received her full legacy. Mac earned his fee, and his client's gratitude. And justice prevailed.

Michael A. Burger is a litigation partner in the law firm of Davidson Fink LLP (www.davidsonfink.com). He dedicates this month's column to Mac and Judy.