Wills & Estates
Winter Term 2025

Lecture Notes – No. 9

VIII. REVOCATION OF WILLS

The *Succession Law Reform Act* provides:

> **Revocation generally**
>
> 15 A will or part of a will is revoked only by,
>
> (a) marriage, subject to section 16;
>
> ***Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, clause 15 (a) of the Act is repealed. (See: 2021, c. 4, Sched. 9, s. 2)***
>
> (b) another will made in accordance with the provisions of this Part;
>
> (c) a writing,
>
> (i) declaring an intention to revoke, and
>
> (ii) made in accordance with the provisions of this Part governing making of a will; or
>
> (d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it. R.S.O. 1990, c. S.26, s. 15.
>
> **Revocation by marriage**
>
> 16 A will is revoked by the marriage of the testator except where,
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage;
>
> (b) the spouse of the testator elects to take under the will, by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario; or
>
> (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate. R.S.O. 1990, c. S.26, s. 16.
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> ***Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, section 16 of the Act is repealed. (See: 2021, c. 4, Sched. 9, s. 3)***

Revocation, change in circumstances

17 (1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, subsection 17 (1) of the Act is amended by striking out "Subject to subsection (2)" at the beginning and substituting "Except as otherwise provided in this section". (See: 2021, c. 4, Sched. 9, s. 4 (1))

Exception on termination of marriage

(2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

(a) a devise or bequest of a beneficial interest in property to his or her former spouse;

(b) an appointment of his or her former spouse as executor or trustee; and

(c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator. R.S.O. 1990, c. S.26, s. 17.

Note: On January 1, 2022, the day named by proclamation of the Lieutenant Governor, section 17 of the Act is amended by adding the following subsections: (See: 2021, c. 4, Sched. 9, s. 4 (2))

Exception on separation

(3) Subsection (2) applies, with necessary modifications, on the death of the testator, if the spouses are separated at the time of the testator's death, as determined under subsection (4). 2021, c. 4, Sched. 9, s. 4 (2).

Same

(4) A spouse is considered to be separated from the testator at the time of the testator's death for the purposes of subsection (3), if,

(a) before the testator's death,

(i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,

(ii) they entered into an agreement that is a valid separation agreement under Part IV of the Family Law Act,

(iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or

(iv) a family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

(b) at the time of the testator's death, they were living separate and apart as a result of the breakdown of their marriage. 2021, c. 4, Sched. 9, s. 4 (2).

Transition

(5) Subsection (3) applies in respect of a separation if an event referred to in clause (4) (a) occurs on or after the day subsection 4 (2) of Schedule 9 to the Accelerating Access to Justice Act, 2021 came into force, even if the will was made before that day, except that in the case of subclause (4) (a) (i), the spouses must also have begun to live separate and apart on or after that day. 2021, c. 4, Sched. 9, s. 4 (2).

The following provision is repealed in respect of deaths after January 1, 2022:
s.15(a) Revocation by Operation of Law: Marriage

Traditionally, the orientation of the law was built on the recognition that marriage represents a fundamental change in one's life by which one acquires significant new rights and obligations based on social expectations which are recognized by law. Now, social circumstances are said to have presented a new problem that eclipses this traditional orientation to respond to the problems of "predatory marriages".

Banton v Banton **(1998), 164 DLR (4th) 17 (Ont. Gen. Div.)*;* cb, p.363** is a well known case that demonstrates the problem that these amendments are said to cure. Here an elderly man married a second wife many years his junior in suspicious circumstances and then executed a new Will. Justice Cullity held that the man had capacity to marry but not capacity to make or revoke a new Will; however, as his existing Will was revoked by operation of law on the marriage, the result was that his second wife acquired inheritance rights in respect of his estate which would pass on an intestacy. Justice Cullity held:

> **It is well established that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves. The burden of proof on this question is on those attacking the validity of the marriage and, in my judgment, it has not been discharged in this case. There is virtually nothing in the evidence to suggest that George Banton's mental deterioration had progressed to the extent that he was no longer able to pass this not particularly rigorous test.** The medical evidence indicates his acceptance of the marriage and even in the last months of his life when he was at Village Park, he spoke of his wish to return to his wife -- albeit along with his then caregiver and companion, Ms. Yolanda Miranda.
>
> …

> **While I believe that it may well be the case that a person who is incapable both with respect to personal care and with respect to property may be incapable of contracting marriage, I do not believe that incapacity of the latter kind should, by itself, have this effect. Marriage does, of course, have an effect on property rights and obligations, but to treat the ability to manage property as essential to the relationship would, I believe, be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate.** Elderly married couples whose property is administered for them under a continuing power of attorney, or by a statutory guardian, may continue to live comfortably together. They may have capacity to make wills and give powers of attorney. I see no reason why this state of affairs should be confined to those who married before incapacity to manage property supervened.
>
> [Emphasis added.]

Thus the problem became that where an elderly person with cognitive impairments had capacity to marry, the "predatory" partner would take the estate where the victim could not make a new Will. The victim, then, is the older adult (who acquires a spouse with potential *inter vivos* access to his or her assets) and his or her intended heirs (who would inherit a lesser sum or nothing at all given the newly acquired spouse's intestate rights). While attacking capacity to marry by seeking an order that the marriage is void *ab initio* on the question of capacity may be available on the facts, it is a steep hill to climb; *Hunt v. Worrod*, 2017 ONSC 7397 (S.C.J.); cf. *Tanti v. Tanti*, 2020 ONSC 8063 (S.C.J.).

Revocation by Act of Testator

15. A will or part of a will is revoked only by,

(c) a writing,

(i) declaring an intention to revoke, and
(ii) made in accordance with the provisions of this Part governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it.

Re Davies
[1928] Ch 24; cb, p.383

The Will may be revoked by an express declaration of revocation in a subsequent testamentary instrument - the declaration must evidence the intention to revoke but need not be in any particular form of words. A declaration of complete or partial revocation can be implied in the wording of a later instrument. The entirety of the earlier Will need not be revoked in such circumstances.

In this case a farmer made a Will which gave 'all my farms and lands' in a certain parish in trust, and the residue of the estate in other trusts. He later bought additional land in the same parish

and made a codicil to his will giving that land to his daughter for life, and then to his grandson – the codicil, however, didn't vest fee simple ownership in the land to anyone, merely established life interests. It was held that the provisions of the Will itself were not revoked, and that title went with the other lands into the established testamentary trust in respect of 'all my farms and lands' in the earlier instrument.

Leonard v Leonard
[1902] P 243; cb, p.387

The testator may evidence his intention to revoke the Will through a physical act of destruction of the Will itself. Like an express or implied revocation through a subsequent instrument, the revocation can be intended to be partial if the remaining part left un-destroyed is intelligible on its own.

Here the testator left a Will of 5 pages, but it was apparent that the first two pages were made after the last three pages (though attested to by the same witnesses) and included a general revocation of earlier instruments. Were the three pages of the earlier will revoked? Yes – the destruction of the first two pages was an act of revocation, notwithstanding that the last page still had a signature. Moreover, the three remaining pages were not intelligible on their own. Per Gorell Barnes J:

> This case is a remarkable illustration of the danger of testators meddling with their wills when once they have executed them properly.
>
> …
>
> **Applying the principles to be gathered from those cases, I am of opinion, from an examination of the last three sheets of this document, that they are practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2, and that the destruction of sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will. The testator must be taken to have intended what his act would necessarily lead one to conclude as to his intention: having destroyed the earlier portions - pages 1 and 2 - he must have intended to revoke also the remaining portions - pages 3, 4, and 5. He did not intend these last three pages to be his operative will without doing something more. He intended to put two other sheets on to them. Up to that point the will was, in my opinion, legally revoked.**
>
> …
>
> It becomes, therefore, a question whether, at the time the deceased in the present case signed and caused the witnesses to put their signatures to these two pages (1 and 2), he did that as his will or part of his will, or simply to shew that they formed part of a will to which the signature at the end of the will was to give validity.
>
> In my opinion those signatures were only put on the two pages in question to identify them, and to make them valid if the will was valid at the end. That was, unfortunately, an abortive act. The later sheets had no effect by themselves, and they had no effect to render the sheets 1 and 2 operative.
>
> The result is that none of the sheets can be treated as a valid document of a testamentary character, and my judgment - unfortunate, I am afraid, for some of the parties - must be that this will must be pronounced against, and, if there is no

other will, there will be an intestacy as to the whole of the deceased's estate.

Hayduk v. Gudz
2022 ONSC 2249 (Ont. S.C.J.).

A testator may designate a beneficiary to a RRSP or a RRIF in a Will, which will have the effect of revoking an earlier inconsistent designation. However the two designations may be able to operate in tandem. Revoking a Will in which a designation is made, however, would have the effect of revoking the designation in the Will itself.

Presumptive Revocation

Sugden v. Lord St. Leonards
(1876), 1 P.D. 154 (Eng. C.A.)

Edward Sugen was an eminent lawyer. A successful advocate, he was appointed King's Counsel, served as Lord Chancellor of Ireland and later as Lord Chancellor of Great Britain. It was odd that on his death in 1875 his will could not be located. Stranger still, Lord St. Leonards, as he was at his death, was said to be was in the habit of reading his will every night, and that his daughter Charlotte had to listen to it so many times over the years that she had memorized most of it. *Was the will revoked?*

In the appellate stage of the probate proceedings, Cockburn C.J. said '[i]t seems to me utterly impossible to suppose that... such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.' Charlotte's written recollection of the will was admitted to probate.

In Canada, *Sugden v. Lord St. Leonards* is still accepted for the proposition that the presumption of revocation is ''more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction;' *Lefebvre v Major* [1930] SCR 252, 257 per Anglin C.J.C.

'Dependent Relative Revocation'

'Dependent Relative Revocation' is a term to describe conditional revocation of a Will on substitution by another Will. Thus, if the first Will is revoked on the condition that the second Will is effective, the first will remains effective if the second Will fails – however, this is a presumption that is rebuttable in respect of whether such a condition was in fact intended by the testator.

Thus, the testator must have considered the substitution of the second Will for the first will at the time of revocation (e.g. tearing up the first Will) – the act of destruction alone doesn't allow the presumption to operate.

Re Bolton Estate
(1961), 29 D.L.R. (2d) 173 (Man. C.A.); cb, p.401

Freedman J.A.:

1 **On September 22, 1952, the testator, John Bolton, executed his will at the office of his solicitor, Mr. T. P. Hillhouse, Q.C. In October, 1958, he destroyed this will by burning it in the kitchen stove at the home of a distant relative**, one Ronna Lee Patton, where he was then staying. At or about the time of this act of destruction the testator, according to Mrs. Patton, expressed the intention of making a new will. **The petitioners, who are beneficiaries under the instrument that was destroyed, propounded a photostatic copy thereof for probate in solemn form** before Macdonell, Surr. Ct. J. **They contended that under the doctrine of dependent relative revocation the instrument dated September 22, 1952, is still to be regarded as the testator's last will and testament and that the photostat thereof accordingly qualifies for admission to probate. The administrator opposed the application, contending that the will had been destroyed *animo revocandi*, with a resulting intestacy.** The learned surrogate court judge found in favour of the administrator's contention. From his decision the petitioners now appeal, and this case accordingly presents us with a consideration of the doctrine of dependent relative revocation and of the proper limits of its application.

2 What is the doctrine? It is well described in the following language by Williams on Wills, vol. 1, at p. 100:

In particular, revocation may be relative to another disposition which has already been made or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect. Such a revocation is known as a dependent relative revocation, and if from any cause the other disposition fails to take effect, the will remains operative as it was before the revocation.

3 Although the doctrine has not given rise to an extensive jurisprudence in Canada, it has received consideration in several English cases. Among many that could be cited are Powell v. Powell (1866) LR 1 P & D 209, 35 LJP & M 100; and In re Botting Estate, [1951] 2 T.L.R. 1089, [1951] 2 All ER 997.

4 A review of the cases satisfies me that, although they differ in detail, they all have one thing in common, namely, that the act of revocation — by destruction or otherwise — is always "referable, wholly and solely, to the intention of setting up some other testamentary paper" (Powell v. Powell, supra, at p. 213). Unless the destruction is wholly and solely referable to such an intention, "and so dependent thereon that revocation is not intended unless that other disposition takes effect," the doctrine cannot successfully be invoked. Clearly the facts in each case will determine whether a particular act of revocation was conditional or absolute. In my view the facts in the present case compel the conclusion that the destruction of the will was done with the intention of revoking it absolutely; that it was not dependent upon the making of a new will or referable, wholly

and solely, thereto; and that accordingly the doctrine of dependent relative revocation does not apply.

5 At the time when the will was destroyed the testator was no longer living at the home of the petitioners. He had by then been living in Petersfield at the home of Mr. and Mrs. Patton for over a year. Such a change in circumstances could well have prompted the testator to put an end to the dispositions contained in his will. Those dispositions may not, in his view, have fitted the situation in which he then found himself. A conscious and deliberate act of burning the will hardly supports a conditional revocation. By itself it seems final and absolute enough. Indeed so it would be in this case, counsel for the petitioners admits, were it not for the testator's declaration that he intended to make a new will. But surely the court must be satisfied that the destruction of the will depended entirely upon the carrying out of such intention. The learned surrogate court judge was not satisfied that such was the case. I can only add that I agree. Indeed the facts strongly support a conclusion that the act of destruction of the will was performed deliberately and animo revocandi.

6 Events subsequent to the destruction appear to confirm this view. A testator who destroys a will only because he intends to replace it with a new one would normally be expected to be vigilant in implementing such intention. Here however the testator lived on for more than two years without making a new will, and without even — except in the most casual way — discussing the matter of a new will with his solicitor. Admittedly lapse of time is not alone decisive. But it is a circumstance entitled to some weight, especially so here in the **light of evidence relating to the testator's subsequent dealings with his solicitor. Some time after the burning of the will the testator was at Mr. Hillhouse's office. The evidence makes it plain that he did not go there for the purpose of discussing a will, but for another purpose. After leaving the office in company with two other men he returned and — as a kind of afterthought — said "that he had no will and wanted [Mr. Hillhouse] to draw one for him." This language strengthens the view that the testator believed he had no will; in other words, that its destruction had occurred animus *revocandi*.**

7 The evidence falls measurably short of establishing that the burning of the will was referable, wholly and solely, to an intention on the part of the testator to replace it by a new will. To look upon the destruction as conditional, without such evidence, would be to extend the doctrine of dependent relative revocation to an area where it does not properly belong. Testators who destroy an existing will often have in mind the subsequent making of a new will. They may even give expression to their thoughts. That does not mean, however, that a mere statement — no matter how vague or casual — of an intention to make a new will must automatically invest the deliberate destruction of an old will with a quality of conditional revocation. That the destruction depended upon the implementation of such intention must clearly appear, and it does not do so in the present case. We would be very unwilling to encourage the notion that the doctrine of dependent relative revocation could be applied in a case of this kind, where we have nothing more than that a testator when destroying his will contemplated the making of a new will.

8 The appeal must be dismissed, with costs.

Revival of Revoked Wills

The Succession Law Reform Act provides:

> 19.(1) A will or part of a will that has been in any manner revoked is revived only,
>
> (a) by a will made in accordance with the provisions of this Part; or
>
> (b) by a codicil that has been made in accordance with the provisions of this Part, that shows an intention to give effect to the will or part that was revoked, or,
>
> (c) by re-execution thereof with the required formalities, if any.
>
> (2) Except when a contrary intention is shown, when a will which has been partly revoked and afterward wholly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.
>
> 21. When a will has been revived in the manner described in section 19, the will shall be deemed to have been made at the time at which it was so revived.

Re Ott
[1972] 2 OR 5 (Surr Ct); cb, p.404

The deceased separated from his wife and made a second Will (revoking the first). The parties made a separation agreement including a clause renouncing all rights to the administration of each other's estate. The deceased sent a copy of his second Will to the wife saying that he would change it if she wished. She said she preferred the first Will. The deceased then destroyed the second Will believing the first Will would be revived. It was held that the deceased attempted to do what is not possible legally – to revoke a Will conditionally on an earlier and revoked Will becoming revived. The deceased should have executed the first Will again – though technically consistent with the statute and authority, the conclusion to the argument seems quite questionable on policy grounds given clear testamentary intent to give effect to a document properly attested to and without any allegation of fraud or undue influence.

IX. PROOF OF DEATH

At common law, *the fact* that someone has died and that there is no body available for the issuance of a Death Certificate can be resolved through proof before a court. The person seeking that judicial declaration can be aided through a rebuttable *presumption of death* where a person is missing and has not been heard of for seven years. The exact date of death may still require some form of proof even where the presumption applies and this is a question of fact for the court; **Re Miller (1978), 22 O.R. (2d) 111 (H.C.J.); cb, p.415.** Here the deceased was missing for many years and the court held that it had jurisdiction to fix the date of death (which might be important for a variety of reasons).

While a person remains missing, there is jurisdiction under the **Absentees Act, RSO 1990, c.A.3; cb, p.418,** to make a an order for administration of the absentee's assets and discharge of his or her obligations. Under the Rules of Civil Procedure, R.1.03(1), a person who is absent under that statute is a person 'under a disability' thus allowing the court to appoint a Litigation Guardian to litigate for that person.

As for declarations of death proper, the situation in Ontario (and elsewhere) has changed somewhat in the aftermath of 9/11. The **Declarations of Death Act 2002,** aims to streamline the process of *declaring* a person dead where no remains can be located (the fact of death can still be pleaded and proved in an individual case). The Act allows a single application to be brought for a declaration that suits a wide variety of legal purposes.

Declarations of Death Act, 2002, S.O. 2002, c.14

Definitions

1. In this Act,
"interested person" means any person who is or would be affected by an order declaring that an individual is dead, including,
(a) a person named as executor or estate trustee in the individual's will,
(b) a person who may be entitled to apply to be appointed administrator of the individual's estate on intestacy,
(c) the individual's spouse,
(d) the individual's next of kin,
(e) the individual's guardian or attorney for personal care or property under the *Substitute Decisions Act, 1992*,
(f) a person who is in possession of property owned by the individual,
(g) if there is a contract of life insurance or group insurance insuring the individual's life,
(i) the insurer, and
(ii) any potential claimant under the contract, and
(h) if the individual has been declared an absentee under the *Absentees Act*, the committee of his or her estate; ("personne intéressée")

Order re declaration of death

2. (1) An interested person may apply to the Superior Court of Justice, with notice to any other interested persons of whom the applicant is aware, for

an order under subsection (3).

Notice

(2) Notice under subsection (1),
(a) if given by or to an insurer, shall be given at least 30 days before the application to court is made;
(b) if not given by or to an insurer, shall be given as provided by the rules of court.

Power of court

(3) The court may make an order declaring that an individual has died if the court is satisfied that either subsection (4) or (5) applies.

Disappearance in circumstances of peril

(**4) This subsection applies if,**
(a) the individual has disappeared in circumstances of peril;
(b) the applicant has not heard of or from the individual since the disappearance;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Seven-year absence

(5) This subsection applies if,
(a) the individual has been absent for at least seven years;
(b) the applicant has not heard of or from the individual during the seven-year period;
(c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;
(d) the applicant has no reason to believe that the individual is alive; and
(e) there is sufficient evidence to find that the individual is dead.

Scope of order

(6) The declaration of death applies for all purposes unless the court,
(a) determines that it should apply only for certain purposes; and
(b) specifies those purposes in the order.

Same

(7) The declaration of death is not binding on an interested person who did not have notice of the application.

Date of death

(8) The order shall state the date of death, which shall be,

(a) the date upon which the evidence suggests the person died, if subsection (4) applies; or
(b) the date of the application, if subsection (5) applies.

Same

(9) The order may state a date of death other than that required by subsection (8) if the court is of the opinion that it would be just to do so in the circumstances and that it would not cause inconvenience or hardship to any of the interested persons.

PROOF OF LOST WILLS

A Will that was known to be in the possession of the testator or testatrix at death and cannot be found after the fullest inquires will invoke the '**presumption of revocation**.'

This is a presumption which can be rebutted on a balance of probabilities, and many cases can be found where the presumption is rebutted by evidence to show, for example: the testator considered the Will valid at death – *Re Perry* (1924), 56 OLR 278 (CA); or that the testator put the Will in what he regarded to be a safe and secure place which was interfered with by a third party; *Re Cole* [1994] NSJ No. 256 (CA).

The leading Canadian dicta is that of Anglin CJC in Lefebvre v Major [1930] SCR 252:

> **... the presumption of revocation arising from the will, traced to the possession of the testator, [and] not being forthcoming... is said by Cockburn C.J., in *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, to be *presumptio juris*, but not *de jure*, 'more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator.**

Thus a lost Will – a Will is known to have existed in circumstances where its loss is not consistent with an act of revocation – can be proved by evidence of due execution, testamentary capacity and intent, and its contents. How? Solicitor's notes, copies of the Will, etc.

Goold Estate v Ashton
2016 ABQB 303 (Alta. Q.B.); cb, p.431

The testator made a holograph Will. After death, a photocopy could be found but not the original. Between the making of the Will and her death, the testator suffered from dementia. In considering whether the circumstances rebutted the presumption of revocation the court considered a number of factors set out in *Haider v. Kalugin*, 2008 BCSC 930 (B.C.S.C.), per A.F. Wilson J.:

> [8] The applicable law is not in dispute. When an original will has been lost, mislaid or destroyed or is not available, an application may be made for an order admitting the will to probate by a copy, a completed draft, a reconstruction or evidence of its content: British Columbia Probate and Estate Administration Manual, 2nd edition, 2007, s.5.61.

[9] If a Will last known to be in custody of testator is not found at his death, the presumption is that the testator destroyed it with the intention of revoking it ("animo revocandi"). However, that presumption may be rebutted by evidence, written or oral, of the facts. The strength of the presumption will depend upon the character of the custody which the testator had over the Will: *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154 (English C.A.).

[10] In *Sigurdson v. Sigurdson* 1935 CanLII 247 (MB CA), [1935] 2 D.L.R. 445 (S.C.C.), at paragraph 49, Davis J. said:

> [49] It needs very clear and convincing evidence to establish what is alleged to be a lost will. . . .The person propounding such a will has a burden of proof that persists throughout the whole trial to satisfy the court at its conclusion that the will is in fact lost and was not destroyed by the testator with the intention of putting an end to it. Each case of course turns upon its own facts but the principles respecting the well-settled presumption against the Will must be applied to the facts.

[11] In *Welch v. Phillips* (1836) 1 Moo PC 299, at 302, referred to in *Bobersky Estate (Re)* [1954] A.J. No. 12 (Alta Dist. Crt.), at paragraph 6, the court said:

> [6] If a will traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by the deceased himself; and that presumption must have effect, unless there is good and sufficient reason to repel it. It is a presumption founded on good sense, for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety and would not be either lost or stolen, and if, on the death of a maker, is not found in his usual repositories or else where he resides, it is in a high degree of probable that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others, which raises a higher degree of probability to the contrary.

[12] As stated by MacKeigan, C.J.N.S. in McBurnie v. Patriquin [1975] N.S.J. No. 447, at paragraph 10:

[10] I should emphasize that the burden on the person who is trying to rebut the presumption is a very heavy burden.

[13] Some of the factors considered in determining whether the presumption has been overcome are:

- whether the terms of the Will itself were reasonable: *Pigeon Estate v. Major*, 1930 CanLII 4 (SCC), [1930] S.C.R. 252 (S.C.C.);
- whether the testator continued to have good relationships with the beneficiaries in the copy of the Will up to the date of death: *Pigeon, supra*;
- where personal effects of the deceased were destroyed prior to the search for the Will being carried out: *Pigeon, supra*;

- the nature and character of the deceased in taking care of personal effects: *Pigeon, supra*;

- whether there were any dispositions of property that support or contradict the terms of the copy sought to be probated: MacBurnie v. Patriquin, supra; *Anderson v. Kahan Estate* [2006], B.C.J. No. 716 (B.C.S.C.);

- statements made by the testator which confirm or contradict the terms of distribution set out in the will: *Bobersky Estate*, supra, Anderson, supra, Holst Estate v. Holst [2001], B.C.J. No. 1560 (B.C.S.C.), *Re Green Estate* [2001], A.J. No. 1253 (Alta Q.B.);

- whether the testator was of the character to store valuable papers, and whether the testator had a safe place to store the papers: *Bobersky Estate*, supra, *Brimicombe v. Brimicombe Estate* 2000 NSCA 67 (CanLII), [2000], N.S.J. No. 157 (N.S.C.A.);

- whether there is evidence that the testator understood the consequences of not having a Will, and the effects of intestacy: *Bobersky Estate, supra*;

- whether the testator made statements to the effect that he had a will: *Bobersky Estate, supra*.

The photocopy of the Will was admitted to probate.

Procedure:
Re O'Reilly
2009 CanLII 60091 (Ont. S.C.J.)

Per Brown J:

> [1] This is an application under Rule 75.02 of the *Rules of Civil Procedure* to prove the validity and contents of a will, the original of which has been lost, and of which only a copy remains. In light of the evidence filed about the search for the original will conducted by the applicants, including their efforts to obtain the original from the solicitor who acted for their mother, and in view of the consents from all the potential beneficiaries, I grant the order sought.
>
> [2] My only purpose in writing this brief endorsement is to deal with the form of the order. Since the *Rules of Civil Procedure* do not prescribe the form for an order made under Rule 75.02, judges see a wide range of language submitted for proposed orders proving lost wills. **In order to bring some uniformity to this type of application, I would ask applicants to submit draft orders using the language recommended several years ago by (now retired) Justice Haley. The draft order should read:**
>
> **I declare that the Will of [insert name of deceased] dated [insert date of will] has been proved and that the copy of the Will adduced in evidence shall be admitted to probate as the last Will of [insert name of deceased] deceased, until such time as the original may be found.**

I direct that, subject to the filing of the appropriate documents with the Court, a Certificate of Appointment of Estate Trustee with a Will for the Will of [insert name of deceased] dated [insert date of will] be issued to the applicant(s).

To this language should be added any other orders sought by the applicant, such as dispensing with service of the application, etc.

[3] Judges considering these applications are provided with a template endorsement using this language. Therefore, in order for an applicant to avoid the delays associated with submitting a draft with different language and then having to submit a revised order that tracks the language of the endorsement signed by the judge, the language I have set out above should be used in the draft order submitted with the application record.