

Can a copy of a will be probated?

When an original of a will cannot be located, the courts generally presume that the deceased person destroyed the original will to make it null and void. There are ways to revoke a will, one of which is its physical destruction. While it is difficult to probate a copy of a will, it is not impossible. Those who wish to probate a copy of a will assume the burden of demonstrating that the person (testator) did not intend to revoke his will by destroying it. Clear and convincing evidence that a person other than the testator destroyed the testament without the direct consent or permission of the testator is sufficient to overcome the presumption that the testator revoked the will by its destruction.

In a recent 2008 case, the courts ruled a copy of the will could not be probated. Mr. Smith died in October of 2005. He was survived by his wife, his mother and a child from a prior marriage. He had executed a notarial will in March of 2002 naming his wife as universal legatee. If she predeceased him, the will provided that his child from the prior marriage would be the universal legatee. After his death the original 2002 testament was never located. However, Mr. Smith had kept a copy of his will in an unlocked strongbox in his home.

The wife filed a petition to probate the copy of the will. His son opposed the probate of the copy. There was a two day trial in which a number of witnesses testified. At the end of the trial, the court declined to probate a copy of the will, declared it to be invalid, and dismissed the wife's petition.

The wife appealed the Judgment. The Court of Appeals summarized the basic law regarding probating a copy of a will. They noted the methods of revocation of a will which included the physical destruction of the will. When a testament cannot be located at the testator's death, there is a presumption that the

testator destroyed the will with the intent of revoking it. This presumption may be rebutted by clear proof: (1) that the testator made a valid testament; (2) of the contents or substance of the will; and (3) that the testament was not revoked by the testator. The burden to provide this proof rests on the person wishing to probate a copy of the will.

The Appeals court summarized the evidence presented at trial. The decedent's surviving spouse introduced evidence of oral statements by her husband that he did not want his son to inherit from him and that he had a will to that effect. She also presented evidence that her deceased's husband's son or mother may have had access to his house in the days prior to his death. On the other hand, the son produced evidence that his dead father's relationship with the wife was less than perfect and the father stated prior to his death that she "wasn't a wife to him."

Based on the conflicting testimony, the court of appeal found that the wife had not rebutted the presumption that the decedent destroyed his testament by clear and convincing evidence. Therefore, the court of appeal affirmed the ruling of the trial court which would not allow the copy of the will to be probated.

The attorney who had prepared the 2002 will had no personal recollection of the will, and according to his file, the original will was mailed to Mr. Smith about a week after it was signed. The court of appeal concluded that Mr. Smith definitely received the original will as shown by the attorney's records.

In a different succession, the court allowed a copy of a will to be probated. Mrs. Jones executed a will in 1993 in which she left the majority of her estate to her church and to a Children's Home. Following her death, the original will could not be

located. The court appointed a notary to conduct a search for the will and a hearing was conducted. At the hearing an attorney who had done work for the family testified that he met with Mrs. Jones' children at Mrs. Jones' home after her death and at this meeting he saw the 1993 will and recalled the basic provisions of the will. Mrs. Jones' children agreed that the meeting took place, but denied that a will was discovered that day.

The trial court probated an original copy of the will. The testimony of the attorney was clear proof that Mrs. Jones had made a valid testament and that she had not revoked it. He also testified as to the contents of the will.

Additionally, it may be possible to probate a copy of a will if all legatees under prior wills or presumptive intestate heirs agree to the probate.