

Where's the Will? Indiana Court of Appeals Reverses Trial Court's Presumption of Revocation for Lost Will

Article By:

Sarah Jenkins

Jason M. Rauch

Background

Recently, the Indiana Court of Appeals decided the case of [Trowbridge v. Estate of Trowbridge](#). The case involved a man, Everett, who, despite their divorce, remained on good terms with his ex-wife, Christal. After the divorce, Everett executed a will in which Christal and Michael Trowbridge (Trowbridge), who was Everett's brother, were named as co-executors. The will left to Christal: (a) the former marital home, which Everett received according to the dissolution order (but which Christal never deeded to Everett as required by the dissolution order); (b) the entirety of one retirement account; (c) 25% of another retirement account, and (d) all Everett's personal property. The will left to Trowbridge only the other 75% of the second retirement account. According to Christal, Everett told her that he wanted her to have his things because his father would be dead, and he didn't have anyone else that he wanted to inherit his property.

Everett died 6 years after executing the new will. A week after Everett's death, Trowbridge petitioned to open an intestate estate, asserting that Everett had no will. Christal then called the estate's attorney, Michael, and told him that she had Everett's will. Christal then met Michael at his office. According to Christal, she told Michael during this meeting that Everett gave her his original will in 2012 after he executed it. Michael contends Christal told him that Everett gave her a **copy** of his will and left the original in his home's safe. Michael's notes from the conversation support his version. Michael contends that he told Christal he needed to research whether a copy of a will could be offered for probate before attempting to probate the will she provided. Michael said he then contacted Trowbridge and asked whether he found a will in Everett's safe. Trowbridge admitted to searching Everett's house and safe "right after" Everett's death. But he denied that there was a will inside.

According to Michael, his research uncovered the rule that where a testator retains possession or control of a will, and the will isn't found at the testator's death, a presumption arises that the will was destroyed. Under this rule, the proponent of the will may rebut this presumption by introducing evidence that supports the conclusion that the will was **not revoked**. In addition, if a copy of the will is offered for probate and contested, the **contesting party** (in this case, Trowbridge) has the burden of proof to establish that the will was, in fact, revoked. The presumption aids in satisfying this burden

but, again, the presumption can be rebutted. According to Michael, after discovering this rule, he wrote to Christal and told her he would not offer the will for probate and suggested she retain an attorney.

Christal then petitioned the court to probate the will. After the hearing, the trial court found for Trowbridge, holding that the presumption of revocation operated to establish that Everett revoked his will. Christal appealed, and the Indiana Court of Appeals reversed. The Court of Appeals held that before the presumption of revocation applies, there must be a predicate finding that the will had remained in the testator's possession or control. The only evidence on this point was from Christal, who testified that **she** maintained possession of the original will.

So another hearing ensued, after which the trial court found that the evidence supported the finding that Trowbridge maintained possession of the original will. In particular, the court credited Michael's testimony, supported by his notes, that when he first spoke with Christal — before either of them knew the law on probating a copy of a will — Christal told him that she had a copy and Everett kept the original in his safe. Accordingly, the trial court again applied the presumption of revocation and declined to probate the will, determining that Everett revoked his will. Christal appealed again.

Indiana Court of Appeals' Analysis

In its analysis, the Court of Appeals first easily affirmed the trial court's finding that Trowbridge maintained possession of the will. Accordingly, Trowbridge properly received the benefit of the presumption that Everett revoked his will. But this presumption, the Court of Appeals explained, is not the end of the inquiry.

Again, it's ultimately up to the person **contesting** the copy of the will to show that it was revoked, and the trial court ignored the evidence supporting Christal's argument that it was not revoked. In particular, the Court of Appeals noted, among other things, that:

- Everett didn't execute his will until **after** he and Christal were divorced.
- Everett continued to list Christal as the beneficiary of his accounts as recently as the year before he died.
- Everett never enforced the dissolution order requiring Christal to deed the former marital property to him.

Accordingly, the Court of Appeals reversed and remanded to the trial court with instructions to consider the evidence rebutting the presumption to determine whether Trowbridge, not Christal, has satisfied his burden of showing that Everett revoked his will.

Going Forward

This unanimous published opinion underscores an important, but often overlooked aspect of litigation: procedural rules that shift the burden from one party to another often make a real difference in the outcome of a case. Questions on estate planning or litigation should be directed to legal counsel.

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