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LOST WILLS: THE WISCONSIN LAW

ROBERT C. BURRELL* and JACK A. PORTER**

I. INTRODUCTION

The law of Wisconsin is well settled that once a will has been validly executed and has not been revoked, it may be admitted to probate even though the original copy of the will cannot be located at the death of the testator.¹ Wisconsin Statutes section 856.17 provides as follows:

Lost will, how proved. Whenever any will is lost, destroyed by accident or destroyed without the testator's consent the probate court has power to take proof of the execution and validity of the will and to establish the same. The petition for the probate of the will shall set forth the provisions thereof.²

Therefore, where the testator had a will which was valid at the time of execution but which cannot be located upon the death of the testator, the statute, in effect, prescribes the procedure for establishing that the will has not been subsequently revoked by the testator. Revocation of a will may be effected by "[b]urning, tearing, cancelling or obliterating the will or part, with the intent to revoke, by the testator or by some person in the testator's presence and by his direction."³ Other than revocation by the terms of a subsequent will or codicil⁴ or by opera-

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1. WIS. STAT. § 856.17 (1973); Estate of Fonk, 51 Wis. 2d 339, 187 N.W.2d 147 (1971); Estate of Markofske, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); Estate of Rosenkrantz, 191 Wis. 109, 210 N.W. 371 (1926).

2. This section has remained unchanged in substance since its enactment in 1849. The original version of the statute provided:

Whenever any will of real or personal estate shall be lost or destroyed, by accident or design, the court of chancery shall have the same power to take proof of the executive and validity of such will, and to establish the same, as in the case of lost deeds.

Wis. STAT. ch. 84, § 12 (1849). In 1858 a minor modification was made in the language of the 1849 version of the statute, and the circuit court rather than the court of chancery was designated to take proof of the will. WIS. STAT. ch. 98, § 14 (1858). In 1878 the county court was also given the power to take proof of the will. WIS. REV. STAT. § 3791 (1878). The statute then remained unchanged until enacted in its present form effective April 1, 1971. 1961 Wis. Laws, ch. 339, § 26.

3. WIS. STAT. § 853.11(1)(b) (1973).

4. WIS. STAT. § 853.11(1)(a) (1973).

tion of law upon the marriage,⁵ annulment or divorce⁶ of the testator, there is no other way to revoke a will in Wisconsin.⁷ Accordingly, if the original copy of the will is not found at the death of the testator and if it has not been revoked by the testator, it follows that the will must have been lost, destroyed by accident or destroyed without the testator's consent. In other words, if a will is lost, destroyed by accident or destroyed without the testator's consent, the testator could not have formed the requisite intent to revoke the will and the will should therefore be admitted to probate. Although this conclusion is easily stated, the required proof is dependent upon a number of interrelated issues of law and fact. It is the intention of this article to examine those issues and their interaction in such a manner as to provide a logical method for the analysis of a case of a missing will in Wisconsin.

II. PRESUMPTION OF REVOCATION

If an original will is destroyed by someone without the testator's consent⁸ or if it has been lost by a third person who had retained the original will in his possession,⁹ it is obvious that there was no intention on the part of the testator to revoke the will and it is entitled to be admitted to probate. However, a difficult situation arises where the will was last known to be in the possession of the testator, but simply cannot be found upon his death. In such a case it must be determined whether the will has been lost or accidentally destroyed or whether it has been revoked by the testator's intentional act causing the original document to be destroyed. In Wisconsin, the analysis must begin with the examination of a long established presumption.

Once it has been established (1) that the testator properly executed a valid will, (2) that the will was last known to be in the testator's possession and (3) that the will cannot be found upon the testator's death, a rebuttable presumption arises that the testator destroyed the will with the intention of revoking

5. WIS. STAT. § 853.11(2) (1973).

6. WIS. STAT. § 853.11(3) (1973).

7. WIS. STAT. § 853.11(4) (1973).

8. See *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Will of Donigian*, 265 Wis. 147, 60 N.W.2d 732 (1953); *Gavitt v. Moulton*, 119 Wis. 35, 96 N.W. 395 (1903). WIS. STAT. ANN. § 853.11, Comment—1969, at 163 (1971).

9. See *In re Steinke's Will*, 95 Wis. 121, 70 N.W. 61 (1897).

it.¹⁰ This presumption is not a strong one and may be rebutted by a mere preponderance of the evidence.¹¹ The rationale underlying the presumption is the assumption that revocation is the most logical explanation of the fact that the will cannot be located.¹² Wisconsin law assumes that, while a missing will may have been accidentally lost or destroyed by the testator or have been destroyed by disinherited heirs, most often the explanation for the fact that the will is missing is that it has been destroyed by the testator with the intention of revoking it.¹³ Since, as the argument goes, destruction with intent to revoke is the most frequent explanation for the fact that the will cannot be located, any other explanation for the failure to produce the will should be demonstrated by affirmative evidence.

It is suggested that the validity of this underlying assumption may be open to some doubt, especially when one considers that the most likely result of the denial of admission of the lost will to probate is that the testator will be deemed to have died intestate.¹⁴ It would seem improbable that the testator having made a will at one time, or perhaps more significantly, a series of wills, thereafter planned to die intestate. Although the average person having made a will is likely to understand the dispositive effects of that will, it is less likely that he understands the laws of intestate succession. Therefore, it is unlikely that he would rely upon such laws to dispose of his estate. Moreover, by executing the missing will the testator has already demonstrated a conviction that, at least at the time of execution, the disposition of his property should be governed by a formal writ-

10. See, e.g., *Estate of Fonk*, 51 Wis. 2d 339, 187 N.W.2d 147 (1971); *In re Will of Valentine*, 93 Wis. 45, 67 N.W. 12 (1896); Wis. STAT. ANN. § 853.11, Comment—1969, at 163 (1971).

11. See note 10 *supra*. See also *Estate of Lambert*, 252 Wis. 117, 31 N.W.2d 163 (1948); *Wendt v. Ziegenhagen*, 148 Wis. 382, 134 N.W. 905 (1912); *In re Will of Valentine*, 93 Wis. 45, 67 N.W. 12 (1896).

12. *Estate of Fonk*, 51 Wis. 2d 339, 187 N.W.2d 147 (1971); 3 W. PAGE, LAW OF WILLS § 29.139 at 697-98 (Bowe-Parker rev. 1961).

13. *Id.*

14. *But see* Wis. STAT. § 853.11(6) (1973) which provides that when a will has been revoked by a subsequent will, a later revocation of the revoking instrument by physical act of the testator effects a revival of the prior will, provided that (1) clear and convincing evidence is adduced that the testator intended to revive the prior will or (2) the revoking instrument is a codicil which revoked only part of the will by inconsistency and not expressly, and the evidence is insufficient to prove that the testator intended no revival. A will, codicil or part cannot be revived unless the original will or codicil is produced in court.

ten instrument, rather than by the rules of intestate succession. In addition, if by force of the presumption of revocation alone, the will is excluded from probate,¹⁵ then the effect of the presumption is to effect a revocation of the will without evidence of compliance with the statutory formalities required by Wisconsin Statutes section 853.11. Those formalities are designed not only to prevent fraud, but to prevent any mistake as to the testator's true intentions by compelling a clear manifestation of an intention to revoke.¹⁶ Such formalities also act to help prevent inconsiderate action by the testator and to induce him to act with appropriate caution in disposing of his property. For these reasons, it can be forcefully argued that a presumption which would favor the admission of a lost will is more apt to further the testator's purpose and is more in line with modern patterns of estate planning than is the presumption of revocation. However, the 1971 Revisor's Comment explaining Wisconsin Statutes section 853.11(1)(b), which deals with revocation of a will by the purposeful physical act of its destruction, appears to reject the foregoing argument.¹⁷ The Comment states in part as follows:

Although witnesses might be required for the destruction of a will, the popular notion that a testator may revoke simply by destroying the will itself is too widespread to permit a change in the law. This section did not change former law in this regard. That a will in the possession of the testator is missing at his death gives rise to a presumption of revocation, but this presumption is easily overcome by evidence that he referred to his will as still in force, that others who would benefit by loss of the will had access, or the like.¹⁸

Although the presumption of revocation itself has remained unchanged over the years, the effect of the presumption has undergone recent evolution because of changes in the Wisconsin law of evidence. Prior to 1961 the Wisconsin case law established that if the proponent of the will produces some evidence contrary to the presumption and such evidence, if uncontradicted, is sufficient to support a finding of accidental loss or

15. See *Estate of Fonk*, 51 Wis. 2d 339, 187 N.W.2d 147 (1971), where the court in excluding the lost will found that there was no probative evidence to overcome the presumption of revocation.

16. WIS. STAT. ANN. § 853.11, Comment—1969, at 163 (1971).

17. *Id.*

18. *Id.*

destruction or of destruction by a third party without the testator's consent, the presumption of revocation disappears and the case is to be decided upon all the facts free from the presumption.¹⁹ Although not expressly acknowledging the fact, by adopting the rule that the presumption drops out of the case upon production of sufficient quantum of contrary evidence, the Wisconsin Supreme Court was utilizing the "bursting bubble" theory of presumptions found in the Model Code of Evidence.²⁰ Under this "bursting bubble" theory, which was created by Thayer²¹ and popularized by Wigmore,²² a presumption vanishes, or drops out, upon the introduction of evidence supporting a finding of nonexistence of the presumed fact.²³ However, in *Schlichting v. Schlichting*,²⁴ a 1961 non-will case, the Wisconsin Supreme Court specifically rejected the "bursting bubble" theory with respect to presumptions based upon logic or reasonable inference. Presumptions based upon logic or reasonable inference may be contrasted with policy-based presumptions which are invoked without regard to whether the presumption bears any relationship to the actual fact presumed.²⁵ The *Schlichting* court held that, in cases where a

19. Will of Donigian, 265 Wis. 147, 150, 60 N.W.2d 732, 733 (1953). See Will of Faulks, 246 Wis. 319, 349, 17 N.W.2d 423, 435 (1943).

20. MODEL CODE OF EVIDENCE rule 704 (1942).

21. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 313-52 (1898). See also Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

22. See J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

23. *Id.*

24. 15 Wis. 2d 147, 157, 112 N.W.2d 149, 155 (1961). In *Schlichting* the Wisconsin court dealt with the presumption that a transfer of a homestead was induced by undue influence if the conveyance were without consideration. Although the defendant introduced "some evidence" contrary to the presumption, the court ruled the inference of undue influence remained even though the presumption itself was removed because the presumption was based upon logic or reasonable inference rather than upon policy.

25. See *Schlichting v. Schlichting*, 15 Wis. 2d 147, 156, 112 N.W.2d 149, 155 (1961). Examples of policy based presumptions are (1) the presumption that a deceased party exercised due care for his own safety; see, e.g., *Voight v. Voight*, 22 Wis. 2d 573, 126 N.W.2d 543 (1964); *Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140 (1962); (2) the presumption that a person, who cannot recall the facts of an injury because he has suffered retrograde amnesia as a result of the accident, exercised due care for his own safety; see, e.g., *Ernst v. Greenwald*, 35 Wis. 2d 763, 151 N.W.2d 706 (1967); *Davis v. Fay*, 265 Wis. 426, 61 N.W. 2d 885 (1953); *Vogel v. Vetting*, 265 Wis. 19, 60 N.W.2d 399 (1953); and (3) the presumption that a person, relation or state, once established, exists until evidence of a change is shown, such as the presumptions of lack of change in the condition of goods, *Laughlin v. Chicago & N.W. Ry.*, 28 Wis. 204 (1871), marriage, *Hillard v. Wisconsin Life Ins. Co.*, 137 Wis.

presumption is based upon logic or reasonable inference, an inference nevertheless survives and will support a finding in favor of the presumed fact even where rebutting evidence is adduced.²⁶

Although several Wisconsin lost will cases have been decided since *Schlichting*, the force of the presumption of revocation has not been discussed in light of the *Schlichting* rule.²⁷ For example, in its post-*Schlichting* decision of *Estate of Fonk*,²⁸ the Wisconsin Supreme Court quoted from Professor Page's treatise on wills as follows:

This presumption has been adopted as the rule which conforms most of the actual facts of human life. While wills are occasionally destroyed by disinherited heirs, they are much more frequently destroyed by testator, with the intention of revoking them. This presumption, therefore, takes the normal case as the standard, and requires affirmative evidence of the abnormal case.²⁹

Although such a view is equivalent to finding that the presumption is based on logic or probable inference, the court quoted with approval a passage from *Will of Faulks*³⁰ to the effect that when some evidence is introduced which is contrary to a presumption, such presumption has no probative force.³¹ However, in *Fonk* this discussion of the probative effect of a presumption was dicta because the court held that no evidence to rebut the presumption of revocation had been presented.³²

Under the *Schlichting* rule, the mere establishment of facts giving rise to a presumption did not shift the burden of

208, 117 N.W. 999 (1908), and status as a corporate officer, *State ex rel. Northwestern Dev. Corp. v. Gehrz*, 230 Wis. 412, 283 N.W. 827 (1939).

26. *Schlichting v. Schlichting*, 15 Wis. 2d 147, 157, 112 N.W.2d 149, 155 (1961). See also UNIFORM RULE OF EVIDENCE 301(a). Cf. *Estate of Barnes*, 14 Wis. 2d 643, 651-52, 112 N.W.2d 142, 146 (1961) (concurring opinion). Justice Currie, who also wrote the opinion of the court in *Schlichting*, suggested that "whether the rule be stated in terms of an inference or a presumption makes very little difference from a practical standpoint."

27. See *Estate of Fonk*, 51 Wis. 2d 339, 187 N.W.2d 147 (1971); *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Estate of Slama*, 18 Wis. 2d 443, 118 N.W.2d 923 (1963).

28. 51 Wis. 2d 339, 187 N.W.2d 147 (1971).

29. *Id.* at 342, 187 N.W.2d at 149, quoting 3 W. PAGE, LAW OF WILLS § 29.139 at 697-98 (Bowe-Parker rev. 1961).

30. 246 Wis. 319, 17 N.W.2d 423 (1943).

31. 51 Wis. 2d 339, 341-42, 187 N.W.2d 147, 148 (1971).

32. *Id.* at 346, 187 N.W.2d at 150.

persuasion.³³ The effect of a presumption upon the burden of proof in Wisconsin was changed by the adoption of the new Wisconsin Rules of Evidence which became effective on January 1, 1974.³⁴ Section 903.01 of the Rules provides that where the facts establishing a presumption exist, the opposing party must prove that the nonexistence of the presumed fact is more probable than the existence of the presumed fact.³⁵ Accordingly, under the Rules of Evidence, the establishment of the presumption is effective to shift the burden of persuasion as well as the burden of going forward with the evidence. In light of *Schlichting* and the Rules of Evidence, it is now appropriate to say that once the facts giving rise to a presumption are established, the burden of proof shifts to the opposing party. As the opposing party comes forward with evidence to meet its burden, the presumption disappears but the inference arguably remains to be considered along with the other evidence in determining whether the opposing party has met its burden.³⁶

Although the difference as to which party has the burden of persuasion could conceivably determine the outcome of a lost will case, as a practical matter the difference is probably not relevant to most cases involving lost wills. The proponent of a will has the burden of proof as to its valid execution. Proof by the proponent of a lost will that the testator validly executed the will creates a presumption that the will is valid.³⁷ However, once the opponent has established that the missing will was last in the possession of the testator, a presumption arises in favor of revocation.³⁸ Consequently, at that point both the bur-

33. 15 Wis. 2d 147, 156, 112 N.W.2d 149, 154-55 (1961); Wis. STAT. ANN. § 903.01, Judicial Council Committee's Note — 1974 (1975). *But see* UNIFORM RULE OF EVIDENCE 301(a).

34. Wis. STAT. § 903.01 (1973). These rules apply to courts of record and thus apply to probate court proceedings. Wis. STAT. §§ 901.01 and 911.01 (1973).

35. Wis. STAT. § 903.01 (1973) provides:

Presumptions in General. Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the non-existence of the presumed fact is more probable than its existence.

36. *See In re Estate of Malnar*, 73 Wis. 2d 192, 203 n.2, 243 N.W.2d 435, 441 n.2 (1976).

37. *In re Estate of Malnar*, 73 Wis. 2d 192, 199, 243 N.W.2d 435, 439 (1976); *Estate of Barnes*, 14 Wis. 2d 643, 112 N.W.2d 142 (1961).

38. Cases cited note 10 *supra*.

den of persuasion and the burden of going forward with the evidence shift to the proponent requiring him to establish that the will was not revoked. That is, the proponent must prove that the will was lost, destroyed by accident or destroyed without the testator's consent.

III. REBUTTING THE PRESUMPTION

The Wisconsin Supreme Court has consistently held in many lost will cases over the years that the presumption of revocation can be and often is easily overcome by evidence demonstrating that the testator did not intend that his will be revoked. Of course, this may be established by evidence that the testator lacked the capacity to revoke the will.³⁹ More likely, however, the evidence will relate to the testator's affirmations of the existence of the will, to his propensity not to retain or properly care for valuable documents, to the access of adverse parties affording them an opportunity to cause the disappearance or destruction of the will, to the testator's history of relying on written wills and to the relationship between the testator and his heirs-at-law and the beneficiaries of his will. In most instances, the proponent will attempt to present a broad spectrum of evidence indicating a pattern of the testator's intention to effect a testamentary disposition of his assets. Each case will usually involve several factors and it is fair to say that no single factor has controlled the court's decisions. However, it is possible to categorize these factors into basic groups which will almost inevitably be the focus of any case involving the attempt to probate a will which was allegedly lost, destroyed by accident or destroyed without the testator's consent.

A. *Evidence of Carelessness with Valuable Papers*

The Wisconsin Supreme Court has often considered whether the testator's character traits, habits or behavior patterns were of such a nature as to support a finding that the testator accidentally misplaced or lost his will.⁴⁰ Accordingly, evidence of a testator's carelessness with valuable papers is

39. WIS. STAT. § 853.01 (1973); cf. *Estate of Svendsen*, 257 Wis. 335, 43 N.W.2d 343 (1950).

40. *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Estate of Lambert*, 252 Wis. 117, 31 N.W.2d 163 (1948); *Gavitt v. Moulton*, 119 Wis. 35, 96 N.W. 395 (1903); *Jamison v. Snyder*, 79 Wis. 286, 48 N.W. 261 (1891).

frequently cited by the court as indicating the accidental loss or destruction of the will rather than its revocation.⁴¹ For example, in *Estate of Lambert*,⁴² the contestant contended that because the will was not found in the testator's strong box, it was probably revoked by the testator. In response the court emphasized that the fact that a large check was found in the testator's shirt pocket indicated that the testator was careless with his valuable property so that the absence of the will from the box would not preclude the trial court from concluding that it had not been revoked. In *Gavitt v. Moulton*,⁴³ the court admitted a lost will to probate and in doing so noted that the testator was over eighty years old and careless in the keeping of his important papers. In *Estate of Markofske*,⁴⁴ the court found it significant that during a search of the testatrix's room a large number of negotiable bonds were found under newspapers, leaving an inference that testatrix did not make suitable provision for the safekeeping of her important documents. Conversely, evidence of habitual care in the keeping of important papers can be used to support the presumption. In *Jamison v. Snyder*⁴⁵ the court pointed out that the testator was careful in the keeping of his numerous valuable papers in his possession and stated, "[I]t is certainly strange, if he had not intentionally destroyed his will, that it was not found among these papers."⁴⁶

B. History of Relying on Wills

If the testator had a history of relying upon written wills as his intended means of disposing of his property at death, such past reliance is a strong indication that he would be unlikely to intentionally die intestate.⁴⁷ Similarities or general trends for the disposition of the testator's property which can be discerned among the testator's prior wills and the lost will are further evidence that the testamentary plan is an established one which the testator would not purposefully forsake.⁴⁸ For

41. Cases cited note 38 *supra*.

42. 252 Wis. 117, 31 N.W.2d 163 (1948).

43. 119 Wis. 35, 96 N.W. 395 (1903).

44. 47 Wis. 2d 769, 178 N.W.2d 9 (1970).

45. 79 Wis. 286, 48 N.W. 261 (1891).

46. *Id.* at 288, 48 N.W. at 261.

47. *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Will of Donigian*, 265 Wis. 147, 60 N.W.2d 732 (1953); *Will of Lauburg*, 170 Wis. 502, 175 N.W. 925 (1920).

48. Cases cited note 45 *supra*.

example, in *Will of Lauburg*,⁴⁹ the testatrix made one will in 1913, but later revoked it by executing a new will in 1915 which could not be found at the time of her death. The court noted that in both her wills the testatrix "steadfastly adhered to her purpose" of making the special provisions contained in the lost will in favor of two of her children, and held that this was one of the "facts and circumstances" which rebutted the presumption of revocation.⁵⁰ The court further noted that the testatrix was an intelligent person who must have known that if she revoked her will and died intestate, then contrary to her intention all of her children would share equally in her estate.⁵¹ In *Will of Donigian*,⁵² a case involving a testator who had made a series of wills during his lifetime, the court found that when the testator became dissatisfied with his current will, "his custom was to replace it with one more to his liking."⁵³ The court also noted that the most recent of the wills in the series executed by the testator established a pattern of making generous provisions for his nephew and for various charities.⁵⁴ Similarly, in upholding a lost will in *Estate of Markofske*,⁵⁵ the court found it significant that a comparison of testatrix's two prior wills with a copy of the lost will showed few substantial differences.⁵⁶

C. Relationships with Beneficiaries and Heirs

If, after the execution of the lost will, testator's relationships with the beneficiaries (or non-beneficiaries) of that will remained essentially unchanged, it may be assumed that the testator would have no reason to revoke his will.⁵⁷ In *Wendt v. Ziegenhagen*,⁵⁸ the court held that the only issue was whether the presumption of revocation had been rebutted.⁵⁹ The court then found that the only perceivable reason for the testator to destroy his will with the intention to revoke would have been

49. 170 Wis. 502, 175 N.W. 925 (1920).

50. *Id.* at 505-06, 175 N.W. at 926.

51. *Id.* at 505, 175 N.W. at 926.

52. 265 Wis. 147, 60 N.W.2d 732 (1953).

53. *Id.* at 152, 60 N.W.2d at 734.

54. *Id.*

55. 47 Wis. 2d 769, 178 N.W.2d 9 (1970).

56. *Id.* at 777, 178 N.W.2d at 14.

57. *Will of Lauburg*, 170 Wis. 502, 175 N.W. 925 (1920); *Wendt v. Ziegenhagen*, 148 Wis. 382, 134 N.W. 905 (1912).

58. 148 Wis. 382, 134 N.W. 905 (1912).

59. *Id.* at 388, 134 N.W. at 907.

to enlarge his son's share of his estate. However, just prior to the execution of the missing will, the testator had brought two lawsuits against his son indicating, in the opinion of the court, animosity toward the son. The court concluded that the testator's relationship with his son had not changed and, therefore, that the testator had no reason to change the disposition of his estate by revoking the will. Similarly, in *Will of Lauburg*⁶⁰ the testatrix made special provision in the lost will for two of her seven children. In admitting the lost will to probate the court noted that the children who received the special treatment were the testatrix's son who was mentally handicapped and her daughter who lived in the testatrix's home.

In both *Wendt* and *Lauburg*, the court admitted the lost wills to probate because, among other things, the testator's relationship with the beneficiaries had not changed since the execution of the lost will. Conversely, where the testator's relationship with the beneficiaries has changed, this change may be a factor in refusing to admit the lost will to probate. For example, in *Estate of Fonk*⁶¹ the court noted that after the testatrix allegedly reaffirmed a will which left her estate to persons other than her heirs-at-law, the circumstances of her life changed. The testatrix moved to another city to live with her sister, one of her intestate heirs. The court stated that this substantial change in circumstances could lead to the inference that good reason existed in the testatrix's mind for the revocation of her will.⁶² Similarly, in *Estate of Slama*,⁶³ a case in which the will was not actually lost but had been mutilated by the tearing off of the first page, the court noted that if the will were not admitted, the testator would die intestate. However, the court felt that such a result was entirely consistent with the testator's intentions. The will was made of heavy bond paper which would have taken a conscious effort to tear and would preclude the possibility of a thoughtless or mistaken act. Moreover, there was substantial evidence that the testator had become disenchanted with the beneficiaries of the missing will and had formed the opinion that although they wanted his money, they were unwilling to care for him.

60. 170 Wis. 502, 175 N.W. 925 (1920).

61. 51 Wis. 2d 339, 187 N.W.2d 147 (1971).

62. *Id.* at 346, 187 N.W.2d at 151.

63. 18 Wis. 2d 443, 118 N.W.2d 923 (1963).

D. Affirmations of the Existence of the Will

Perhaps the factor most frequently found in Wisconsin lost will cases involves the testator's declarations affirming the existence of the missing will.⁶⁴ In fact, to date, in every Wisconsin case in which a lost will has been admitted to probate, the testator had in the opinion of the court at some time and to some extent affirmed the existence of the will. In *Estate of Markofske*,⁶⁵ the testatrix affirmed the existence of her will four or five months before her death by informing her sister that the sister's son was the executor of the will. This reaffirmation, together with other factors, was held sufficient to rebut the presumption of revocation. In *Will of Donigian*,⁶⁶ the missing will was executed five months prior to the testator's death and he had expressed satisfaction with its provisions three weeks before his death. In *Gavitt v. Moulton*⁶⁷ the court noted that not long before the testator's death, he had declared that this will was executed and was still effective. In *Estate of Lambert*,⁶⁸ the testator made persistent statements of satisfaction with the contents of his will up to the day of his death. Similarly, in *Will of Lauburg*,⁶⁹ the testatrix made statements up to the time of her death affirming the existence of her will which made special provision for her mentally handicapped son. In *Wendt v. Ziegenhagen*,⁷⁰ the court found that the testator recognized the will's existence and affirmatively asserted that he did not wish to change it. The statements were made on four different occasions — once three or four years prior to his death, again a year or two before his death, a third time during the last years of his life and finally during the last year of his life.

In *In re Steinke's Will*,⁷¹ the testatrix reaffirmed the existence of her will three days prior to her death and made a num-

64. *Estate of Fonk*, 51 Wis. 2d 339, 187 N.W.2d 147 (1971); *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Will of Donigian*, 265 Wis. 147, 60 N.W.2d 732 (1953); *Estate of Lambert*, 252 Wis. 117, 31 N.W. 2d 163 (1948); *Will of Lauburg*, 170 Wis. 502, 175 N.W. 925 (1920); *Wendt v. Ziegenhagen*, 148 Wis. 382, 134 N.W. 905 (1912); *Gavitt v. Moulton*, 119 Wis. 35, 96 N.W. 395 (1903); *In re Steinke's Will*, 95 Wis. 121, 70 N.W. 61 (1897).

65. 47 Wis. 2d 769, 178 N.W.2d 9 (1970).

66. 265 Wis. 147, 60 N.W.2d 732 (1953).

67. 119 Wis. 35, 96 N.W. 395 (1903).

68. 252 Wis. 117, 31 N.W.2d 163 (1948).

69. 170 Wis. 502, 175 N.W. 925 (1920).

70. 148 Wis. 382, 134 N.W. 905 (1912).

71. 95 Wis. 121, 70 N.W. 61 (1897).

ber of statements to different people that the will was unchanged and was still in the possession of the notary public who drafted it. The court held that if the notary had lost the will, the presumption of revocation would never arise because the testatrix would not have had the opportunity to destroy it. Turning to the possibility that she did in fact have the will in her possession, the court stated:

Her declarations upon the subject of the existence or non-existence of the will and its custody, up to or within a short time previous to her death, are competent evidence to rebut such presumption, and to show that she died in the belief that the will was still in existence as a valid disposition of her estate.⁷²

Finally, in *Estate of Fonk*⁷³ the court summarized the cases in which the presumption of revocation was held to have dropped out because of, among other factors, recent reaffirmations of the existence of the will or expressions of satisfaction with its contents. However, the court found in that case that the testatrix's inquiry to her attorney six years prior to her death as to the validity of her will was so ambiguous as to be entirely without probative value.⁷⁴ It was pointed out that the inquiry could be interpreted not only as a declaration that the testatrix wanted her will to remain in effect, but as an inquiry as to whether or not she should change it. With this dated, ambiguous declaration as the only evidence to rebut the presumption of revocation, the court held that the presumption had not been overcome.

An examination of the foregoing cases involving recent reaffirmations of the will by the testator will reveal that evidence as to additional factors has almost uniformly been presented. Such additional evidence is especially helpful because of the difficulty in determining the relevancy and weight of the affirmations in light of the time difference between the last affirmation and the date of death. Presumably for this reason the cases, especially *Fonk*, may be read as requiring that the testator's reaffirmation of the will's existence must have been relatively close to death to be probative. This is not to say there is some arbitrary date beyond which the statements are not pro-

72. *Id.* at 126, 70 N.W. at 62.

73. 51 Wis. 2d 339, 187 N.W.2d 147 (1971).

74. *Id.* at 343, 87 N.W.2d at 149.

bative. Rather, the effect of the reaffirmations, if any, must be examined in the context of all of the other evidence in determining whether or not the presumption of revocation has been overcome.

E. Adverse Party's Access to Will

Unlike the other factors, the effect of an adverse party's access to the will involves considerations extraneous to the testator's state of mind. The disappearance of the will can be significant only in revealing the testator's intention as to revocation if he was responsible for its disappearance.⁷⁵ If others are responsible for the will's disappearance without the testator's knowledge or after his death, the requisite intent of the testator to revoke is necessarily absent. Thus, the interest of a party whose economic interest may be detrimentally affected by the existence of a will has been a factor given weight in several missing will cases. For example, in *Gavitt v. Moulton*⁷⁶ a woman purporting to be the testator's wife had access to the testator's rooms and papers for several days prior to his death and while he was unconscious. In addition, the evidence revealed that the woman had, in fact, removed some papers from the testator's room after his death. The court concluded that this access, together with other factors present in the case, was sufficient to overcome the presumption of revocation. The court commented, "True, the mere fact that the contestant had an opportunity to destroy the will would not of itself overcome the presumption that it was destroyed by the testator with the intent to revoke it; still it is a circumstance to be considered with other proof."⁷⁷

Direct proof of wrongdoing by the person benefiting from the absence of a will is unnecessary. In *Will of Donigian*,⁷⁸ the court noted that there was no evidence to suggest that the search had not been conscientiously done, but nevertheless found that the force of the presumption was diminished by the access of interested parties to the will:

We consider, further, that the very existence of the presump-

75. *Estate of Markofske*, 47 Wis. 2d 769, 178 N.W.2d 9 (1970); *Will of Donigian*, 265 Wis. 147, 60 N.W.2d 732 (1953); *Gavitt v. Moulton*, 119 Wis. 35, 96 N.W. 395 (1903).

76. 119 Wis. 35, 96 N.W. 395 (1903).

77. *Id.* at 49-50, 96 N.W. at 400.

78. 265 Wis. 147, 60 N.W.2d 732 (1953).

tion . . . depends on the tacit assumption that a diligent search was made for the will by persons trying to find it. We are far from charging that the contestant and his associates did not search in good faith and there is no evidence but what they did; but whatever virtue the presumption created by a failure to find may start with, that virtue is seriously diminished when it must depend on a search made by those whose interests will be impaired by production of the will.⁷⁹

Similar language in *Estate of Markofske*⁸⁰ provides that the fact that the search for the missing will involved a party whose interest would be furthered by the lack of a will is a factor which "lessens the impact of the presumption of revocation."⁸¹ Conversely, it would appear that evidence of the lack of access to the will by adverse parties may be valuable in establishing the revocation of the will. For example, it is suggested that such lack of access could be especially significant to an opponent who wishes to rely on the presumption of revocation by helping to establish that the missing will was last known to be in the testator's possession.

IV. CONCLUSION

Where it is established that (1) the testator properly executed a valid will, (2) the will was last known to be in the testator's possession and (3) the will cannot be found upon the testator's death, a rebuttable presumption arises that the testator destroyed the will with the intention of revoking it. Although the rationale underlying this presumption may be subject to question, it is suggested that the presumption appears so well established that it will continue to constitute the basis of analysis of future Wisconsin decisions involving lost wills.

The application of the *Schlichting* rule to a lost will case is probably not significant. Any inference remaining as a result of the presumption of revocation is presumably offset by the inference remaining from the presumption of validity arising from the proof of valid execution. Under the new Wisconsin Rules of Evidence, the fact that the existence of a presumption shifts the burden of proof may significantly aid the opponent of the will. That is, the burden of proving that the missing will

79. *Id.* at 153, 60 N.W.2d at 735.

80. 47 Wis. 2d 769, 178 N.W.2d 9 (1970).

81. *Id.* at 778, 178 N.W.2d at 14.

was not revoked shifts to the proponent of the will as soon as the opponent has established that the validly executed but missing will was last known to be in the testator's possession. Although it is possible that, in the absence of other credible evidence, a lost will case could be decided solely on the basis of the effect of presumption of revocation, it is suggested that other probative evidence will almost always be available. Although this evidence can be categorized and stated in broad terms, it will inevitably involve many items which may not, in themselves, appear significant. Evidence of an uncashed check found in an unlikely place, a subtle pattern discerned from a previous will, a small gift on an occasion to one party but not to another or a passing remark as to who the testator believes will handle his estate may have little weight when considered as isolated items. However, it is an analysis of items such as these that, when taken together, will establish (1) the testator's capacity or lack thereof to revoke; (2) his propensity or lack thereof to retain or properly care for valuable documents; (3) an adverse party's opportunity or lack thereof to cause the disappearance or destruction of the will; (4) the testator's pattern of relying on a will or wills to effect a testamentary disposition of property; and (5) the nature of the relationship of the decedent to the proponents of and the objectors to the missing will.