

What Happens When a Will Goes Missing? Understanding the Legal Presumption of Destruction

The Law

When a deceased person's will cannot be found after their death, it raises important legal questions about how their estate should be handled. This article provides an update on recent legal developments in this area of law.

If the original Last Will and Testament of a deceased person cannot be found, and that person was the last known individual to possess it, there is a legal presumption that the deceased person died intestate, meaning without a valid will.

At the heart of this issue is the legal concept known as the "**presumption of destruction.**" This presumption comes into play when the original will, which was once in the possession of the deceased person, cannot be located after their death. In such cases, the law assumes that the deceased intentionally destroyed the will, likely because they no longer wanted it to represent their final wishes regarding the distribution of their estate.

However, this presumption is not absolute. To challenge it and have the missing will upheld, those who support the validity of the will must provide evidence that it was lost, stolen, or accidentally destroyed. This requirement exists because, if the original will did indeed reflect the deceased person's intentions, and it was lost, stolen, or destroyed unintentionally, it's reasonable to assume that the deceased would still want their estate distributed according to those terms.

If the presumption of destruction is not successfully overturned—meaning there's no convincing evidence that the will was lost, stolen, or destroyed by accident—the default assumption is that the deceased person no longer intended the will to be their final testament. In such cases, if a previous will exists, it will be treated as the deceased's valid testamentary document. If no earlier will can be found, the distribution of the estate will follow the rules set out by the law for individuals who die without a will.

Case Study: Re.Finsant.Estate.(2024)

A recent case from the Supreme Court of British Columbia, *Re Finsant Estate*, 2024 BCSC 217, addressed this issue. Rosemary Finsant passed away in 2021 without a will, despite having executed a valid one in 2001, which named her grandniece, Megan Beggs, as the sole beneficiary.

After Ms. Finsant's death, a search of her property failed to uncover the original will. Since Ms. Finsant was the last known person to possess it, the court applied the presumption that the will had been destroyed. Ms. Beggs contested this presumption, asserting that the 2001 will should still be enforced. However, the court found that Ms. Beggs did not provide sufficient evidence to prove the will was lost, stolen, or destroyed accidentally. As a result, the court ruled that Ms. Finsant must be presumed to have died intestate, and her estate was distributed according to the laws of intestacy (dying intestate means without a will).

Factors Considered by the Court in Re.Finsant.Estate.

In deciding whether the presumption of destruction could be rebutted, the court considered the following factors:

1. **Reasonableness of the Will's Terms:** if the terms of the will are reasonable, the deceased is more likely to have wanted them upheld. Unusual or unexpected terms might indicate the will was reconsidered or destroyed.
2. **Relationship with the Beneficiaries:** If the deceased maintained good relationships with the beneficiaries of the will up until their death, this suggests they probably intended for the will to reflect their final wishes.
3. **Destruction of Personal Effects:** If personal effects such as clothing or bedding were destroyed before the search for the will, it could indicate that the will was also unintentionally destroyed, potentially by fire or another accident.
4. **Nature of the Deceased's Character:** If the deceased was organized and careful with personal items, the court may assume they intentionally destroyed the will. Conversely, if the deceased was disorganized, it is more likely the will was lost by accident.
5. **Disposition of Assets:** If the deceased had distributed assets in a way that aligns with the will's terms, it suggests the will reflected their intentions. Distributing assets in a manner inconsistent with the will could suggest the will was intentionally destroyed.
6. **Statements Made by the Deceased:** Any statements made by the deceased while alive which contradict the terms of the will may indicate that the will was intentionally revoked. Conversely, statements made affirming the will suggest it reflects the deceased's final wishes.
7. **Storage of Valuable Papers:** If the deceased had a designated place for storing important documents, such as a safe or filing cabinet, the court is more likely to conclude that the will was intentionally destroyed if it was not found in such a place.
8. **Understanding of Intestacy:** If the deceased understood the legal consequences of dying without a will, and had previously executed one, it is reasonable to infer that the will was lost or accidentally destroyed, as the deceased likely would have wanted to avoid dying intestate.
9. **Statements about Having a Will:** If the deceased told others that they had a will, and made statements aligning with the terms of the missing will, this would support upholding the will.

Conclusion

The presumption of destruction plays a pivotal role when a will goes missing. While the law generally assumes that a missing will was intentionally destroyed by the deceased, this presumption can be challenged. By providing evidence that the will was lost, stolen, or unintentionally destroyed, it may still be possible to have the missing will enforced. Legal decisions, like the one in *Re Finsant Estate*, provide valuable insight into how courts evaluate the circumstances surrounding missing wills and how they balance the presumption of destruction with the possibility of inadvertent loss.

Flow Chart

To help readers better understand the process involved in considering the presumption of destruction, I have created the flowchart below. Its purpose is to simplify the concepts discussed in this article, and I hope you find it helpful.

1. Start → Death of Testator

- After the testator (person who made the will) passes away, the search for the will begins.

2. Is the Will Missing?

- If the will is found, proceed with probate (probate is the legal process through which a deceased's person's will is validated).
- If the will is missing and it was last known to be in the possession of the testator, proceed with the next steps.

3. Presumption of Destruction

- The law presumes that the testator intentionally destroyed the will if it cannot be located and it was last known to be in the possession of the testator.

4. Challenge the Presumption

- Can you prove the will was lost, stolen, or accidentally destroyed?
 - **Yes:** Move to the next step to challenge the presumption.
 - **No:** The estate is treated as intestate (no valid will) unless there is a previous will that was executed by the testator. If such a will exists, it will be followed as the deceased's Last Will and Testament.

5. Provide Evidence (Challenge Process)

- Present evidence such as:
 - Will's reasonableness, relationship with beneficiaries, etc (consider the factors the court relied on in *Re Finsant Estate*).

6. Was the Presumption Overturned?

- **Yes:** The will is enforced, and the estate is distributed according to its terms.
- **No:** The estate is treated as intestate (no valid will) unless there is a previous will that was executed by the testator. If such a will exists, it will be followed as the deceased's Last Will and Testament.

Author of Article

This article was written by Shamim Aidun, an associate lawyer at Sabey Rule LLP. He specializes in estate litigation and estate planning. He handles disputes involving wills, trusts, and incapable adults, and assists with drafting legal documents such as wills, powers of attorney, and representation agreements. He has appeared as counsel at all levels of court in British Columbia, including the British Columbia Court of Appeal; Supreme Court of British Columbia, and Provincial Court of British Columbia along with various tribunals.

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