CITATION:	*In the Estate of Thompson* [2021] NTSC 72
PARTIES:	IN THE ESTATE OF THOMPSON IN THE MATTER of an application to prove and admit to probate a copy of the Will of KEVIN JOHN THOMPSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2021-02905-SC
DELIVERED ON:	24 September 2021
DELIVERED AT:	Alice Springs
JUDGMENT OF:	Grant CJ

CATCHWORDS:

SUCCESSION – Wills, Probate and Administration – Probate and Letters of Administration

Application by the son of the deceased to prove a copy of the Will of the deceased – Whether the presumption of revocation rebutted – Copy of the Will proved and admitted to probate.

Cahill v Rhodes [2002] NSWSC 561, *Curley v Duff* (1985) 2 NSWLR 716, *Estate of Manning* [2015] NTSC 21, *Estate of Ponikvar* [2016] SASC 95, *Proud v Proud* [2012] WASC 134, *Warren (deceased)* [2014] QSC 101, referred to.

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

In the Estate of Thompson [2021] NTSC 72
File No: 2021-02905-SC

IN THE ESTATE OF THOMPSON

IN THE MATTER OF AN APPLICATION FOR LEAVE TO PROVE A COPY OF THE WILL OF KEVIN JOHN THOMPSON

CORAM: GRANT CJ

REASONS FOR ORDER

(Delivered *ex tempore* on 24 September 2021)

[1] The deceased died on 9 August 2020 at the age of 87 years. The deceased executed a Will on 7 May 2002 in compliance with the formal requirements. Following the death of the deceased, the original of that Will cannot be located and only a copy of that Will has been located. The copy Will names the deceased's children, Karen Janetta Thompson and John Patrick Thompson, as executors and sole beneficiaries of his estate in equal shares. Karen Janetta Thompson has made an affidavit renouncing probate. John Patrick Thompson has made an application for probate and has filed all necessary affidavits for that purpose. John Patrick Thompson has now made separate application to prove the copy of the Will and have it admitted to probate.

[2] That application is necessitated by the fact that an application for probate will ordinarily require the production of the original Will by the person seeking the grant of probate. This Court has power to recognise that the original of the Will has been lost, and to admit a copy of it to probate. However, in circumstances where the original of the Will cannot be produced after the death of the testator, a presumption of revocation arises. That is, there is a rebuttable presumption that the deceased destroyed the original of the Will with the intention of revoking it. The strength of that presumption will depend upon the circumstances, and if it is not rebutted an intestacy will result and the deceased estate is to be distributed according to the statutory rules on intestacy. It should be noted at the outset that the distribution of the estate and those having a claim on the estate will be the same regardless of whether the copy of the Will is admitted to probate or whether the estate is distributed on intestacy. In both circumstances, the son and daughter of the deceased will be the sole beneficiaries in equal shares.

[3] The onus of rebutting the presumption of revocation is on the person applying to the court for proof of a copy of the original Will. That requires the applicant to establish that it is more likely than not that the deceased did not destroy the Will with the intention of revoking it, and that the original of the document has simply been lost or misplaced: see *Cahill v Rhodes* [2002] NSWSC 561; *Curley v Duff* (1985) 2

NSWLR 716; *Estate of Manning* [2015] NTSC 21; *Proud v Proud* [2012] WASC 134; *Estate of Ponikvar* [2016] SASC 95. The presumption of revocation will be stronger in circumstances where the original of the will is thought to have been in the possession of the testator prior to that death. Conversely, the presumption of revocation is weakened where the will makes a careful and complete disposition of the testator's property and there are no other circumstances pointing to its probable destruction. In circumstances where the original of the will was last known to be in the custody of the testator's legal practitioner, the presumption of revocation will have no operation: see *Warren (deceased)* [2014] QSC 101.

[4] On the basis of the evidence which has been filed in both the application for probate and the application to prove the copy of the Will, I make the following factual findings:

(a) The deceased executed a Will on 7 May 2002. That Will was prepared for him by Christopher Warwick Turner, who was at the material times a legal practitioner in private practice in Alice Springs and who lived next door to the deceased. That Will was witnessed by Christopher Warwick Turner and Dianne McManus. Christopher Warwick Turner is now in palliative care and unable to give evidence in the matter or to provide any information in relation to the location of the original of the Will. Dianne McManus has identified that the copy of the Will sought to be

proved is an accurate and complete copy of the original Will, and I find that to be so.

(b) The Will executed on 7 May 2002 revoked all previous wills.

(c) The Will was properly executed according to law.

(d) In its terms, the Will makes a careful and complete disposition of the testator's property.

(e) The deceased was 69 years of age at the time he executed the Will, and his circumstances did not materially change between that time and the time of his death. In particular, the deceased was a widower at the time of the execution of the Will, he had no further issue following the execution of the Will, and he did not remarry following the execution of the Will.

(f) John Patrick Thompson found the copy of the Will in the deceased's personal effects following the death of the deceased. He has been unable to find the original of the Will in the deceased's house or personal effects despite conducting thorough searches, or in any other location. Following the execution of the Will, the deceased did not reside in any address other than the address in which he was residing at that time.

(g) The solicitor for the applicant has written to all other firms in Alice Springs which may have made a subsequent will for the deceased, or which may have held the original of the Will

executed on 7 May 2002, and those enquiries have not disclosed that the deceased made another will or that the original of the Will is held by any of those firms. The solicitor for the applicant has made enquiry of the Public Trustee for the Northern Territory, and that enquiry has not disclosed that the deceased made another will or that the original of the Will is held by the Public Trustee.

(h) It is likely that following the execution of the Will, Christopher Warwick Turner provided the copy of the Will subsequently found by the deceased's son following the death of the deceased and now deposited in the Court Registry, and kept the original of the Will as part of his practice for safekeeping. It is improbable that the deceased had possession of both the original and the copy of the Will and subsequently destroyed the original with the intention of revoking it, but kept the copy of the Will.

(i) At some time following the execution of the Will, Christopher Warwick Turner ceased private practice and became an employed legal practitioner with the Alice Springs Town Council. It cannot now be ascertained what was done with the files and other documents in his possession which related to his previous practice. The inquiries and investigations made by the solicitor for the applicant have identified very few records relating to Christopher Warwick Turner's private practice, none of which are related to the deceased in this matter.

(j) There is no person who might be prejudiced by the admission of the copy of the Will to probate.

[5] On the basis of those matters, I find that the presumption of revocation has been rebutted.

[6] I order that the copy of the Will executed on 7 May 2002 and now deposited in the Court Registry is proved and admitted to probate.

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