IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

IN RE: ESTATE OF WARREN GLENN BROWN CANDICE MATHIS Petitioner/Appellant, v. JOE BROWN Respondent/Appellee.	)	Appeal No. 01A01-9809-PB-00471 Dickson County Probate No. 07-97-076-P

COURT OF APPEALS OF TENNESSEE

APPEAL FROM THE PROBATE COURT
FOR DICKSON COUNTY
AT CHARLOTTE, TENNESSEE

THE HONORABLE ANDREW JACKSON PRESIDING

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REVERSED AND REMANDED

PATRICIA J. COTTRELL, JUDGE

CONCUR:

CANTRELL, J.
KOCH, J.

OPINION

In this case, the decedent's grand niece, Candice Mathis, the petitioner, appeals the trial court's finding that she failed to establish, by clear and convincing evidence the lost or destroyed will of her grand uncle, Warren Brown. The trial court ordered that the administration of the estate proceed as an intestate estate. For the following reasons, we reverse.

Ms. Mathis and the Browns enjoyed a loving and extremely close family relationship.[1] The record shows that Ms. Mathis stayed with the decedent and his wife, Warren and Polly Brown, so frequently throughout her first eighteen years that she received mail at their home, had her own bed room and and possessed her own house key. One of the Brown's friends, their funeral director, recounted that "a lot of times" they referred to Ms. Mathis as their "daughter."

On July 22, 1987 Warren and Polly Brown executed their wills, which were very similar. Both wills conveyed the marital estate to the surviving spouse and left most of the remainder to Ms. Mathis. The attorney who drafted the will at issue

remembered that the Browns "were both very devoted to Candice." He observed that Ms. Mathis "was very special to them and he [the decedent] wanted to take care of her." Initially, Warren Brown kept the wills in a lock box at his bank.

In June of 1994, Mr. Brown learned that he had lung cancer. Polly Brown died in 1995. Around that time, after some delay in retrieving Polly Brown's will from the lock box, Mr. Brown moved his will to a box he kept in a buffet in Ms. Mathis's bedroom at his home.

Following his diagnosis, Warren Brown became concerned that he would become incapacitated. After obtaining permission from his brother, Joe Brown, Warren Brown executed a power of attorney authorizing his brother to act on his behalf should he become incapacitated. Ms. Mathis was a minor at the time.

Warren Brown was hospitalized during the week of May 5, 1997. During this hospital stay, he asked a friend, June McDonough, to pray for him to live long enough to attend Ms. Mathis's high school graduation. At that time, he told Ms. McDonough that he had left most of his estate to Ms. Mathis. Although Mr. Brown had learned that his cancer had returned in April, he told his doctors that wanted to postpone treatment because he did not want to risk being unable to attend Ms. Mathis's graduation. Mr. Brown was released from the hospital on Sunday, May 11 and returned home.

After experiencing pain in his legs, Mr. Brown sought medical attention on Thursday, May 15. Theorizing that the pain could be due to blood clots, the doctor arranged for Mr. Brown to have a CT scan on the following Monday. Mr. Brown attended Ms. Mathis's graduation on Friday, May 16. The next day Ms. Mathis left

for a vacation trip to Florida.

Warren Brown spent the afternoon of the Sunday before he underwent the CT scan with his brother and sister-in-law. That day Ms. Mathis called Mr. Brown from Florida. Both Ms. Mathis's mother and her grandmother visited Mr. Brown Sunday evening, as they customarily did. Her mother stayed until 9:00 or 9:30 p.m. During that visit, Mr. Brown told her that his funeral arrangements, insurance papers and will were in the box and actually pulled out the will and unfolded it. At this time, Warren Brown indicated his hope he could live long enough to see Candy again upon her return from Florida.

The next day, May 19, Joe Brown took his brother to the hospital for x-rays and a CT scan. Warren Brown had a stroke at around 3:10 p.m. while undergoing the CT scan. From that time until his death several days later, Warren Brown could not speak. Shortly after the stroke occurred, Joe Brown went to Warren Brown's home to obtain the power of attorney and living will.

On June 16, 1997, Joe Brown filed a petition seeking appointment as the administrator of Warren Brown's estate. On June 27, Ms. Mathis filed a petition asking that her copy of Warren Brown's will be admitted to probate. Her petition stated that her copy appeared to be complete, but the will's pagination included a fourth page which not present.

A consolidated hearing on these petitions was held on October 8 and 29, 1997. At the hearing, it became apparent that page four of the copy which reflected signatures was missing. Eventually, the lawyer who drafted the will was able to find his copy of the will, which included the missing page. The lawyer's file copy did not

reflect signatures. The copy filed by Ms. Mathis included signatures and the testator 's signature on each page. The two copies were identical except for the presence of the signatures and the absence of page four from Ms. Mathis's copy. The lawyer's copy was admitted into evidence. Warren Brown's lawyer testified that he drafted the Browns' wills at the same time, acted as a witness when Mr. Brown executed his will, and remembered seeing Warren Brown sign the will. Attached to the will was an attestation clause which stated that the witnesses understood that the document they were signing was a will, duly signed by Warren Brown's lawyer and another witness.

Warren Brown's will provided that in the event his wife predeceased him, Ms. Mathis was to receive $10,000 and, if she had not reached the age of eighteen, the sum was to be held in trust until she attained that age. The will also left several smaller sums and items to other relatives. However, the rest, residue and remainder, which included a life insurance policy and most of his personal effects, was left in a trust set up for Candice Mathis. The trustee was instructed to use the cash value of the life insurance policy for Ms. Mathis's education after she turned nineteen years of age. The trustee was authorized to give Ms. Mathis any of Mr. Brown's personal effects that she desired. The will specified that Polly Brown's rings and the silver bowls and platters were to be kept for Ms. Mathis's personal use and not sold. The trustee was to retain all real property until Ms. Mathis turned twenty-one, but allow her to choose any of the real property as her residence prior to that time. The remaining real property was to be leased and the resulting income was to be used for Ms. Mathis's support and maintenance. The remainder of the estate was to be

placed in investments with the interest therefrom used to pay Ms. Mathis's educational expenses.[2] The trust terminated when Ms. Mathis turned twenty-one. The will provided that if Ms. Mathis died before reaching that age, the assets of the trust were to be divided between several other relatives. Joe Brown was not mentioned in the will.

At the hearing, Joe Brown testified that his brother approached him about the power of attorney in June 1996, shortly after his diagnosis. At that time, Joe Brown went to his brother's home and was given a copy of the power of attorney. He stated that his brother had showed him where the original would be. When asked if he knew where his brother kept his valuable papers, Joe

Brown testified:

> I know where he kept the power of attorney and living will and where he had some ledger sheets that he had showed me all his assets. He showed me where he kept them. . . The ledger sheets were in a wooden box about 18 inches square and it was sitting in the floor under his dresser . . . in his spare bedroom.

He also informed Joe Brown about his lock box at the bank. Joe Brown denied that his brother had ever mentioned his will and denied ever seeing Warren or Polly Brown's wills.

Joe Brown testified that he had a close relationship with his brother, "the last year particularly, the last two years. . . We got reacquainted basically to going places together and stuff there after his wife died."

Joe Brown testified that he took his brother to the hospital on Monday for the CT scan. He stated that the next day, after his brother suffered the stroke, he

went alone to Warren Brown's home to obtain the power of attorney and living will. He denied seeing the original will while searching in the box for the other documents. Joe Brown testified that he returned to the house after Warren Brown's death a few days later to find the lock box keys. He also testified that he entered the house on May 21 to obtain the clothing for his brother's burial and he searched the house on May 27. He claimed that he found the ledger missing and had the locks changed after he observed Ms. Mathis leaving the house.

Ms. Mathis testified that Warren Brown, her "Uncle Chunky," had given her a copy of his will after her Aunt Polly Brown had died. She hid it under her mattress in her bedroom at Mr. Brown's home. Ms. Mathis stated that Mr. Brown kept the box containing his important papers in the buffet in that same room.

Ms. Mathis testified that she retrieved her copy of the will and some photographs on the day of the funeral, using her key to enter Mr. Brown's home. She looked in the box for Mr. Brown's original will but it was not there. According to Ms. Mathis, while she was there, she found a copy of her aunt's will, which had also been given her by Warren Brown, in a file box in her closet, but did not remove it.

Ms. Mathis testified that after the locks were changed and she was told no will could be found, she went back, entering with the help of a locksmith, to retrieve some of her belongings and to search further for the original will. At that time, she discovered that the copy of her aunt's will that she had seen a few days earlier was missing. She testified she thought it unusual that Joe Brown had not called her when he could not find the will.

One of Warren Brown's friends, June McDonough, testified that prior to his death, he had told her that he had a will and had left almost everything to Candice Mathis. When she telephoned him the week before he died, he reiterated that he had a will and left most of his estate to Ms. Mathis, "because she was just like his daughter."

Fay Eaton, Mr. Brown's maid, testified that Mr. Brown spoke of his will from time to time. He told her that the will was in a little box he kept "in Candy's bedroom." One day in March he asked her to get the will for him because he wanted to work on it. According to Ms. Eaton, he had discussed leaving his church and Ms. Mathis's brother some money, "but he said the rest of it was Candy's." She also testified that he took the will to the bank or the library to work on it and, later, when he handed the box back to her, it was heavier than before.

Ms. Mathis's mother testified that Mr. Brown had discussed adding a codicil to his will, but she had not seen one. However, she stated that he discussed the will regularly:

> we talked about what he intended to have happen, you know, the whole time, but whenever he would get where he was having a really bad day or, you know, really feeling sick, he would always want to go over it. He would want to go over the will and his funeral arrangements and make sure that we understood where everything was.

According to Ms. Mathis's mother, the night before his stroke, Warren Brown took out his will and showed it to her:

> I visited Uncle Chunky on Sunday before his birthday on Monday and I was there probably – I went by every day except for maybe just one or two and I was there from probably 7:00

> that night until 9:30 that night. He knew his cancer had come back and I knew it and he wanted to go over all the details that night.

She testified that the will was in the box that night:

> He took the top off and I recognized it as being the same papers that he had looked at many times before. And I just said to him, Uncle Chunky, we're not going to talk about that right now. You know, I didn't want to talk about it. And I said we're not going to talk about that. We know where everything is. It's in the box.
>
> And he said, okay, I just want to make sure you understand where everything is. And I said, yes, I know where everything is. . . I was very upset because he was so sick and I just didn't want to sit down and discuss it with him that much. . . He unfolded it . . . and I put it back in and I said, Uncle Chunky, we're not going to talk about this. But he told me everything is here in this box and that was Sunday night. And if he told me it was in there, it was in there.

Ms. Mathis's grandmother testified that between 1974 and 1995 Joe Brown visited the Browns "very seldom," meaning no more than two or three times during the twenty year period. She testified that until Warren Brown "got sick, he didn't have any relationship with Joe. They might have talked on the phone. They didn't visit each other." Ms. Mathis's grandmother testified that she read the will in the spring of 1993, during a visit with Polly Brown.

> The night before his stroke, she visited Mr. Brown. She testified: I went to his home most every day, if I could, and I was there and he told me that he hoped that nothing happened to him before Candy got back. And he also told me then that he had Candy taken care of, everything he had would go to Candy and he didn't want any hard feelings over it. And then when I got ready to leave, he went to the back of the bedroom, Candy's bedroom, took out the box and showed me the box that contained his will and his funeral plans and his living will.

After considering the evidence, the trial court held that the proof was insufficient to establish a lost or destroyed will. Ms. Mathis moved for a new trial. In denying her motion, the trial court stated that the evidence showed that the original will was in the possession of Warren Brown from the date of its execution until the date of his death. The court also found that page four of the will was not proved to have been properly signed and witnessed. Ms. Mathis now appeals and she argues that reversal is required because she successfully established, by clear and convincing evidence, the lost will.

Our standard of review in this case is *de novo* on the record, with a presumption of the correctness of the trial court's findings of fact. The decision of the trial court will be affirmed unless the evidence preponderates against its findings of fact or the trial court committed an error of law. *See* Tenn. R. App. P. 13(d); *In re Estate of Ross*, 969 S.W.2d 398, 400 (Tenn. App. 1997). Questions of law receive plenary review. *See Malone & Hyde Food Services v. Parson*, 642 S.W.2d 157, 159 (Tenn. App. 1982)

I.

> To prove a lost or destroyed will, the proponent must establish:
>
> (1) that the testator made and executed a valid will in accordance with the forms of law; (2) the substance and contents of the will;

> and (3) that the will had not been revoked and is lost or destroyed or cannot be found after a due and proper search;

See In Re Estate of West, 729 S.W.2d 676 (Tenn. App. 1987); *Shrum v. Powell*, 604 S.W.2d 869, 871 (Tenn. App. 1980). These elements, which are imposed to prevent fraud, must be proved by "clear, cogent and convincing proof. *See Shrum* at 871.

Without question, Ms. Mathis clearly established that Warren Brown had made and executed a valid will. Testimony of Mr. Brown's lawyer and the various witnesses who read the will proved that element. The lawyer produced his file copy, which included five pages. Pages one, two, three and five matched exactly the xerox copy introduced by Ms. Mathis. He also testified he remembered Mr. Brown's signing the will. The proof shows, by affidavit or testimony of the subscribing witnesses, that the will was executed in accordance with all legal requisites.

We disagree with the trial court as to the effect of the missing page four of the copy of the executed will. The copy shows Warren Brown's signature on each of the pages filed. The missing page four was proved by the unsigned copy from the lawyer's file.[3] There is no requirement that a testator sign each and every page, and the signature of the testator and the witnesses on the last page is sufficient to validate the will.

The substance and contents of the will were also established. A copy of all but one page of the signed and witnessed will was admitted into evidence, and, eventually, a complete, unsigned copy was admitted. Moreover, a number of witnesses testified as to the contents of the will. *See Haven v. Wrinkle,* 29 Tenn.

App. 195, 213, 195 S.W.2d 787, 793 (1945); *Morris v. Swaney*, 54 Tenn. 591, 599 (1872). Our cases have not required more.

II.

The more difficult question is whether the third element was sufficiently proved: that the will had not been revoked and was lost or destroyed or could not be found after a due and proper search. Generally, when a will known to be in the sole custody of a testator or testatrix is not found upon that person's death, a presumption arises that the decedent destroyed the will in order to revoke it. *See Shrum*, 604 S.W.2d at 871; *Haven*, 29 Tenn. App. At 214, 195 S.W.2d at 793. The trial court's finding that the original will had been in the decedent's possession since its execution relates to this presumption. This presumption is not conclusive, but the burden of rebutting it rests upon the proponent of the will. *See id*. The trial court made no additional findings of fact regarding circumstances which might rebut, or for that matter, buttress the presumption.

The presumption may be rebutted in a number of ways, by direct or circumstantial evidence, and the declarations of the testator, both before and after making the will, are admissible to support or destroy the presumption of revocation. *See Moore v. Williams*, 30 Tenn. App. 479, 480, 207 S.W.2d 590 (1947).

Our courts have long relied on the following authority regarding lost or destroyed wills.

> The presumption that the will was destroyed by the testator, *animo revocandi,* may be rebutted, and its loss or destruction by other means may be shown, by circumstantial as well as positive evidence, as: [1] by showing that the testator did not have the custody and control of the instrument after its execution; [2] that he had lost his testamentary capacity for a

> period before his death and that the will was in existence at the time the mental alienation occurred; and the like. The declarations of the testator, before or after making the will, are admissible in evidence to support or destroy the presumption of revocation.

Pritchard, § 51, p. 83 (citations omitted).

The two methods of overcoming the presumption specified in the quotation above have been relied on in refusing to find or "set up" a lost or destroyed will. In *In Re Estate of West*, 729 S.W.2d at 676, the testator executed a will in 1981 making his wife's nephew his heir if his wife predeceased him. In 1984, shortly after his wife's death, the testator executed a new will leaving his estate to his niece. The testator used the same attorney to draft both wills and, at the execution of the later will, was advised by his attorney to destroy the earlier one. At the testator's death later that year, the earlier will could not be found. This court upheld the trial court's finding that the nephew had failed to overcome the presumption that the testator had destroyed the earlier will. Thus, although the court implied in its opinion that the failure to overcome the presumption was based on a failure to prove that the testator did not have custody or control of the prior will or that he lacked testamentary capacity, the facts in that case clearly supported the presumption of revocation.

We are not of the opinion that those are the only two methods by which the presumption can be overcome. A review of the cases involving proof of a lost or destroyed will convinces us that the presumption that the testator destroyed the will can be overcome by the circumstances of the case.

In *Wolfe v. Williams*, 1 Tenn. App. 441 (1925), the appellate court upheld

a jury verdict establishing a lost or destroyed will. The execution and substance of the will were not disputed, and the primary issue was whether the presumption that the testator had destroyed the will had been overcome. The evidence showed that the testator had executed a will leaving some property to his siblings but the bulk of his estate to his stepdaughter who had lived with him from her childhood. The will was left in the drawer of testator's desk at his house in Memphis. The testator and his stepdaughter went out of town together to visit relatives. While on this trip the testator died, and the stepdaughter telegraphed his relatives to that effect. When she returned to Memphis, the will could not be found. In review of the jury's decision, this court stated:

> This evidence . . . shows the close and affectionate relationship between C. S. Williams and Margaret unbroken and undisturbed, . . . he made this will mainly for her benefit in 1920; his feelings toward her remained the same down to the time of his death. It seems incredible that he would have destroyed this will for the purpose of cutting her off absolutely. If he died intestate, she, not being related in blood to him, would take nothing from his estate. This being so, we can well see how the jury would find it more difficult to believe that he destroyed this will than that it was lost or destroyed in some other way. We can well imagine the jury applying the language of the chancellor's charge and saying: "We do not believe, we cannot believe, he destroyed this will, or that he intended for it to be destroyed; the evidence is clear, cogent, and convincing to us that he did not destroy it."
>
> If the execution of the will being established beyond controversy and the proof and circumstances convince the mind that the decedent could not have destroyed it, is not this sufficient to overcome the natural presumption which ordinarily obtains that he, rather than some one else, did destroy the will?
>
> . . .
>
> If the evidence creates a situation which convinces the jury that is impossible to believe that C. S. Williams destroyed the will or intended to revoke it, and that it is possible to believe that he did not revoke it, notwithstanding the presumption to the contrary,

then the burden is met and the verdict must stand.

Wolfe, 1 Tenn. App. at 447-448.

Similarly, *Morris v. Swaney*, 54 Tenn. at 591, involved review of a jury verdict finding a lost or destroyed will. Most of the opinion discussed the issue of the type of evidence needed to prove the existence and contents of the will. On the issue of the validity of the jury's verdict regarding the presumption of testator revocation, the court held:

> We can not say that the jury were wrong in giving credence to the testimony upon which their verdict is founded. The jury were told that if the will was proven to have been in the possession of Swaney the testator, the law presumes, as it was not found after his death, that it was revoked; but that if the facts and circumstances satisfied them that it was not revoked, they would so find. Without reviewing the evidence upon the subject, it will be sufficient to say, that there are circumstances sufficient to sustain the finding of the jury in this respect.

Morris, 54 Tenn. at 603.

The circumstances proved in that case were the testator's frequent statements that he had made a will which would take care of "Eliza," the mother of his children, whom he had not married, testimony from people who had had the will read to them, and statements by testator that he intended Eliza's children to live on the land devised.

In *Sanders v. McClanahan*, 59 Tenn. App. 590, 442 S.W.2d 664 (1969), this court reversed a trial court's decision setting up a lost or destroyed will. This court specifically found that the complainants had failed to prove either the execution or the contents of a valid will. In discussing the additional failure to overcome the presumption that the testator destroyed the will, the court found it

significant that no one had seen the purported will for at least six months before the decedent's death, stating, "this fact alone would not justify a conclusion the testator did not within the remaining months of his lifetime destroy the will with the intention of revoking it." *McClanahan*, 59 Tenn. App. at 599. The court further stated:

> Without some evidence tending to show that the will was actually lost or fraudulently or accidentally destroyed against and not in accord with the testator's wishes and intentions, the presumption stands and the will must fail.

Id.

Haven v. Wrinkle, 29 Tenn. App. at 195, S.W.2d at 787 is often cited as authority for the rules regarding proof of a lost or destroyed will. That case included testimony that the testatrix knowingly and purposely destroyed the will at issue in order to reinstate an earlier will. The court relied in part on the *Pritchard* section quoted above, as well as the sentence preceding the earlier quoted portion, " He [who seeks to establish a lost or destroyed will] must go further and show by facts and circumstances that the will was actually fraudulently or accidently lost or destroyed, against and not in accordance with, the wishes and intention of the testator." *Haven*, 29 Tenn. App. at 213, 195 S.W.2d at 794.

In *Moore v. Williams,* this court again focused on the circumstances of the case and found that " Under the facts and circumstances of this case we are satisfied that Ida Mai Moore did not revoke her will." *See Moore*, 207 S.W.2d at 591-592. In *Moore*, the testatrix had devised a life estate to her surviving husband with the remainder to her step-daughter, an adoptive son, and adoptive grandchild. Over the years, the testatrix had had little contact with her siblings, who contended that the testatrix never made a will or, if she had, destroyed it. *Id.* at 591. The

testatrix and her husband had executed wills at the same time. Her husband had given his will and her will to the testatrix for safekeeping and later saw those documents, other important documents, and money in a drawer. When the testatrix's will, her husband's will, and some money could not be found, the trial court declined to make a finding of intestacy. Instead, it found that the presumption that the testatrix had destroyed the will was weakened by several facts and circumstances. After taking into consideration the quality of the relationship between the parties and the testatrix, the trial court stated that it was inclined to believe that the testatrix was aware of the consequences of dying intestate. As the court noted:

> The relationship is devoid of anything which would cause the Court to think that her brothers and sisters were the object of her bounty, or that she ever entertained a desire that they should inherit her property.

Id. In addition, the court considered the fact that both the testatrix's will and her husband's nearly identical will, and some money disappeared at the same time. Because the testatrix was much younger than her husband, and his will left her a life estate, the court found it implausible that she had destroyed her husband's will. The trial court concluded that it "found it impossible to believe that the testatrix destroyed the will." *Id.* at 593. Finding that the will was "accessible to anyone bent on an unlawful mission, and it is not necessary, under the law, for the Court to determine who did destroy, or make away with these papers, except to find that it was not done by, or at the instance of the testatrix," the court declined to apply the presumption that the testatrix had destroyed the will. The court reasoned that:

> [i]t is inconceivable that this woman who thought of herself as a

> mother and grandparent, would have destroyed the very instrument which she had previously made for the purpose of bestowing upon the natural objects of her bounty, all her earthly possessions. To conclude from the record in this case, and to say that she did such an act in order to permit her kin, who had become distantly removed in human relationship, to inherit, would be to overturn and render impotent the natural love, affection and devotion of a woman for her husband and children. This the Court is not willing to do.

Id.

The Court of Appeals found that the trial court "was fully justified in his finding of facts and conclusions therefrom and we concur therein. In *Moore*, all the facts and circumstances led to the logical conclusion that the testatrix did not destroy her will.

Similar reasoning applies to the fact and circumstances in this case. The record is replete with evidence that the Browns viewed Ms. Mathis as a daughter and that she was the natural object of their bounty. Warren Brown's comments about his will to his friends and family show he was cognizant of the consequences of dying intestate. The record shows that Warren and Joe Brown had little contract until recent years. While Joe Brown certainly assisted his brother during the last two years of his life, nothing in the record demonstrates that the relationship was on the same level as that shared by Warren Brown and Ms. Mathis. Therefore, there is nothing in the record to support any conclusion that Warren Brown had decided to disinherit Ms. Mathis in favor of his brother or other siblings. The separate disappearance of Polly Brown's will, after Warren Brown's death and days after his will was not found in its usual place, weakens the presumption that he destroyed his will.

Mr. Brown had told a number of people over time where he kept his will

and other important papers. He knew he was gravely ill. His conduct indicates a desire that his will be found and followed. Mr. Brown had his will in a box in its customary place the night before he went in the hospital. He indicated then his intention to leave it in that place. He voiced this intention expressly so that the will could be found if anything happened to him. In this situation, we are asked to apply the presumption that sometime between 10:00 p.m. on that Sunday night and the time he entered the hospital the next morning Mr. Brown decided to destroy the will, thereby leaving distribution of his estate to the laws of intestacy, and decided not to mention that fact to anyone, including his brother. Everything in the record about Mr. Brown's actions and statements contradict such a presumption. The loss or destruction of his will was contrary to, and not in accord with, his often and recently stated wishes.

The guiding principle underlying the law of wills, to which all other rules must yield, is that the intent of the testator must prevail. *See Third Nat'l Bank v. Stevens*, 755 S.W.2d 459, 462 (Tenn. App. 1988). Warren Brown's own words provide persuasive evidence that he had no interest in destroying the will. He told his lawyer, his funeral director, his maid, his sister-in-law, his niece, and his friend of the existence of his will or of his desire that Ms. Mathis take under his will. He provided Ms. Mathis with a copy, albeit incomplete, of the will. The night before his death, his thoughts were focused on the will and assuring that his family knew of its location. The thoroughness with which he instructed his family and others on such matters appears inconsistent with the testimony that Warren Brown never mentioned his will to his brother, whom he chose to act with his power of attorney.

In any event, as in *Moore*, after Mr. Brown entered the hospital, the will was " accessible to anyone bent upon an unlawful mission" and it is not necessary for us to determine what actually happened to the will.

The reasons for the stringent requirements to prove a lost or stolen will have been stated - to prevent fraud. An overly-mechanical application of those requirements could, however, have the opposite effect. Where, as here, a copy of an executed will exists and its validity of execution is proved, the law should not make it impossible for the beneficiary to have the testator's wishes enforced. To apply the presumption in a way that requires a beneficiary to prove absolutely, rather than circumstantially, that the testator did not revoke the will would create an almost impossible barrier.

Having reviewed the facts and circumstances of this case, we find that the presumption that Warren Brown destroyed his will was rebutted. Absent the application of the presumption, the evidence showing that Warren Brown did not destroy his will is clear and convincing. *See Shrum*, 604 S.W.2d at 871.

Accordingly, the judgment of the trial court is reversed and this case is remanded for further proceedings consistent with this opinion. Costs of this appeal shall be taxed to Appellee, for which execution may issue if necessary.

_____
PATRICIA J. COTTRELL, JUDGE

CONCUR:

_____

BEN H. CANTRELL,
PRESIDING JUDGE, M. S.

_____
WILLIAM C. KOCH, JR., JUDGE