INTRODUCTION

A presumption of revocation arises when a will, traced to the testator's possession, cannot be found following his death. To overcome the presumption, proponents of the will must present evidence negating the inference that the testator destroyed the will with the intent to revoke.

In In re Estate of Shaw, the Oklahoma Supreme Court considered the presumption of revocation in a duplicate will case. The decedent, Shaw, executed his will in duplicate and took possession of the original will several months before his death. His lawyer retained the executed duplicate. Upon Shaw's death, the original will could not be found; however, Shaw's lawyer presented the duplicate for probate.

The trial judge admitted the duplicate will for probate and upon the court of appeals' reversal, the Oklahoma Supreme Court granted certiorari.


5. Id. at 230. The terms of the will provided for complete disposition to the testator's sister should she survive him, but if she should predecease the testator, the estate was to go to the Abby Tarr-Glen C. Shaw Foundation. The will explicitly provided that none of the estate should go to any other relative or heir. Testator's sister did not survive and no Abby Tarr-Glen C. Shaw Foundation was ever established. Id. at 230-31.

6. Id. at 231.

7. Id. at 229-30. Certiorari was granted in response to an application under
that no presumption arose from failure to account for all copies of the executed will, and (2) that the presumption of revocation was raised by the absence of the testator's copy, but was overcome by the survival of another executed duplicate.

The reasoning of the Oklahoma Supreme Court was not only ambiguous, but was also contrary to the general rule. If a will traced to the testator's possession cannot be found at his death, it is reasonable to presume that the will was destroyed with the intent to revoke. Absent evidence establishing a contrary intent, the presumption serves to infer an intention that is most probable in the factual situation. Of those jurisdictions that have considered the issue, this presumption has applied regardless of the survival of a duplicate in a third party's possession.

The presumption reflects a general policy that the testator's intent should be given effect. Because the testator's copy was unproduced in Shaw, most courts would have denied probate on the basis of the presumption of revocation. Instead, the Oklahoma Supreme Court admitted the surviving duplicate to probate. The court is not criticized for its ultimate decision, but rather for the

Rule 3.14A(1), 12 Ch. 15 App. 3 "where the Court of Appeals has decided a question of substance not heretofore determined by this court." Id. at 230 n.1.

8. Id. at 229. This holding is found in the syllabus. In Oklahoma, the court is required by law to write the syllabus; it is a statement of the law by the judge.

9. 572 P.2d at 233.

10. See generally notes 18-21 and accompanying text infra.

11. See note 12 and accompanying text supra.
reasoning that leads to its decision. Shaw expanded the equal status doctrine, a doctrine based on the testator's intent, without mentioning intent. Likewise the court spoke in terms of the presumption, but not in terms of the underlying intent upon which the presumption is founded. This failure to discuss the testator's intent resulted in a questionable decision and raises several issues concerning the concept of duplicate wills, the applicability of the presumption to duplicate wills, and the ultimate desirability of duplicate wills.

BACKGROUND

The General State of the Law on the Presumption of Revocation When a Will Cannot Be Found

The testator's intent is the primary determinant in will cases. Intent or inferred intent is only defeated by a conflicting rule of law. If a will last traced to the testator cannot be found upon his death, a presumption that he destroyed it animo revocandi arises. The purpose of the presumption is to give effect to the testator's intent, except for its first cousin, burden of proof. Generally, a rebuttable presumption shifts the burden of going forward with the evidence, but does not shift the risk of nonpersuasion. Nevertheless courts have recognized at least eight different applications of the term. In re Estate of McGowan, 197 Neb. 596, 603, 250 N.W.2d 234, 238 (1977). Although the application of the "presumption" of revocation may vary in evidentiary importance from a probable inference, to a shift in the burden of persuasion, any presumption may be outcome determinative in many will cases, since evidence of the testator's intent is often unavailable. See generally In re Estate of Baird, 343 So. 2d 41 (Fla. 1977); Iowa Wesleyan College v. Jackson, 249 Iowa 91, 86 N.W.2d 126 (1957); Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968); T. Atkinson, supra note 13, § 146 at 817. A will should be interpreted to effectuate the testator's intentions. When such intention is not apparent the will should be construed according to flexible rules of construction. Id. See Note, 27 St. John's L. Rev. 168, 168-70 (1953). The rules of construction should never defeat manifested intention, but should instead be used to "infer" intent where manifestation is absent. T. Atkinson, supra note 13, § 146 at 814. Any evidence presented establishing actual intent will prevail over a rule of construction. The presumption of revocation is an example of a rule of construction. Id. at 807. A rule of law, on the other hand, is inflexible and will defeat the testator's intent. For example, the requirement of due execution constitutes a rule of law. Regardless of the testator's intent, faulty execution prohibits admission of the instrument to probate. Id. § 62 at 292-93. See note 12 and accompanying text supra.

15. See note 75-86 and accompanying text infra.
16. See notes 87-89 and accompanying text infra.
17. The term presumption itself is ambiguous. Dean McCornick indicated that the term presumption is the "slipperiest" member of the legal terminology family except for its first cousin, burden of proof. C. McCornick, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 802 (2d ed. 1972). Generally, a rebuttable presumption shifts the burden of going forward with the evidence, but does not shift the risk of nonpersuasion. Nevertheless courts have recognized at least eight different applications of the term. In re Estate of McGowan, 197 Neb. 596, 603, 250 N.W.2d 234, 238 (1977). Although the application of the "presumption" of revocation may vary in evidentiary importance from a probable inference, to a shift in the burden of persuasion, any presumption may be outcome determinative in many will cases, since evidence of the testator's intent is often unavailable. See generally In re Estate of Baird, 343 So. 2d 41 (Fla. 1977); Iowa Wesleyan College v. Jackson, 249 Iowa 91, 86 N.W.2d 126 (1957); Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968); T. Atkinson, supra note 13, § 146 at 817.
18. T. Atkinson, supra note 13, § 146 at 811-13. A will should be interpreted to effectuate the testator's intentions. When such intention is not apparent the will should be construed according to flexible rules of construction. Id. See Note, 27 St. John's L. Rev. 168, 168-70 (1953). The rules of construction should never defeat manifested intention, but should instead be used to "infer" intent where manifestation is absent. T. Atkinson, supra note 13, § 146 at 814. Any evidence presented establishing actual intent will prevail over a rule of construction. The presumption of revocation is an example of a rule of construction. Id. at 807. A rule of law, on the other hand, is inflexible and will defeat the testator's intent. For example, the requirement of due execution constitutes a rule of law. Regardless of the testator's intent, faulty execution prohibits admission of the instrument to probate. Id. § 62 at 292-93. See note 12 and accompanying text supra.
tator's probable intent. Because of the ambulatory character of the will, and its availability to the testator, it is reasonable to presume that the unfound will was intentionally destroyed. If a missing will was not in the testator's possession prior to his death, no presumption of revocation exists. Such a presumption would be groundless since inaccessibility to the instrument would make destruction by the testator improbable.

To rebut the presumption of revocation arising from the loss of a will in the testator's possession, the proponent of the will must prove due execution, must establish the will's terms, and must defeat the inferred intent of revocation by explanation of the will's nonproduction. The burden is the same whether or not duplicates were executed. However, in the case of an executed duplicate will, due execution is presumed because of the existence of the executed duplicate, and the terms are established by the surviving instrument. Defeat of an inferred intent to revoke is therefore crucial in duplicate will cases. For example, proof that the will was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime rebuts the presumed intent. If the testator's intent to revoke is effectively rebutted, the will is deemed lost and is admitted to probate. Without such rebuttal, however, probate is denied on the basis of inferred intent to revoke.

20. T. ATKINSON, supra note 13, § 97 at 506.
25. Note, 27 ST. JOHN'S L. REV. 168, 168-69 (1952); Note, 24 ST. JOHN'S L. REV. 314, 315 (1950). Neither malice nor dishonesty is necessary to establish fraud. However, the mere showing of an opportunity to destroy the will for a person who has ample reason to wish the will destroyed, is not sufficient to obviate the presumption. Id. at 315. In lost will cases, fraud encompasses any destruction without the consent of the testator, and includes accidental destruction. Id. See also Note, 75 HARV. L. REV. 432, 433 (1961); Note, 47 MISS. L.J. 318 (1976). In re Estate of Yost, 117 So. 2d 753, 755 (Fla. 1960); In re Estate of Fisher, 173 Neb. 510, 515, 113 N.W.2d 625, 628 (1962); Note, 27 ST. JOHN'S L. REV. 168 (1953).
26. Walsh, supra note 24, at 452. Probate of a lost will is desirable to discourage and minimize the danger of fraudulent behavior on the part of interested parties. The primary purpose in admitting a lost will to probate is to determine the decedent's distributive intent. A secondary motive is avoidance of intestacy. Furthermore, a lost will may have revoked another will offered for probate. Id. at 456.
Duplicate wills have been defined as "a single will executed in duplicate." Each executed duplicate is of "equal dignity" with any other. The instruments perfectly reflect one another: language and witnesses are identical; subscriptions and publications are concurrent. Each duplicate constitutes the testator's will. Just as only one copy of any agreement executed in exact duplicate need be presented to a court, only one duplicate will need be presented for probate. Although only one duplicate is necessary to allow probate, each unproduced duplicate must be accounted for to avoid the presumption of revocation by destruction. "It is universally held that the revocation of one of duplicate or triplicate wills operates as a revocation of the other or others." An important distinction must be made between the issue of revocation and the issue of presumption of revocation. The question in Shaw was not whether all copies were revoked by the revo-

30. J. ALEXANDER, 1 COMMENTARIES ON THE LAW OF WILLS § 116, at 135 (1917). See also Evans, Testamentary Revocation by Act to the Document and Dependent Relative Revocation, 23 KY. L.J. 559, 568 (1935); Note, 35 HARV. L. REV. 626 (1922). For purposes of this casenote, "executed copy," "duplicate will," "executed duplicate," and "copy" are synonymous terms. This casenote speaks in terms of duplicate execution; however, the same analysis applies to wills executed in triplicate or more.
31. In re Janes' Estate, 18 Cal. 2d 512, —, 116 P.2d 438, 441 (1941); Jones v. Mason, 234 La. 116, —, 99 So. 2d 46, 47 (1958); See Note, 35 HARV. L. REV. 626 (1922). Probate of only one duplicate avoids the question of disposition of the same property twice, once by each instrument. A problem arises, however, with the presentation of only one duplicate if the challengers of the will argue that the will is not a duplicate. In such a case, the court must require presentation of the outstanding will to determine whether there are duplicate wills. If the outstanding will is dissimilar, it may well revoke the instrument presented. Evans, supra note 30, at 568-69. See generally 1 J. ALEXANDER, supra note 30, at §§ 116-118.
32. 1 J. ALEXANDER, supra note 30, § 116. Each duplicate is the will of the testator and the fact that one was executed a few moments subsequent to the other is not a revocation of the former. Id.
34. 1 J. ALEXANDER, supra note 30, § 118 at 137. See generally note 12 and accompanying text supra.
35. 1 J. ALEXANDER, supra note 30, § 118 at 137-38.
36. In re Drake's Estate, 150 Neb. 568, 573, 35 N.W.2d 417, 421 (1948); Note, 1949 U. ILL. L.F. 177, 178. See Evans, supra note 30, at 569. Multiple execution is not necessarily limited to execution in duplicate. Regardless of how many instruments are executed, the analysis is the same.
37. The question of presumption precedes the issue of revocation. The presumption of destruction with intent to revoke does not conclusively revoke all duplicates. If the presumption is rebutted, the surviving duplicate is unrevoked and admitted to probate. See generally T. ATKinson, supra note 13, § 101 at 552-54.
cation of one, but rather, whether the nonproduction of the testator's copy created a presumption of revocation. 38

APPLICATION OF THE PRESUMPTION OF REVOCATION IN DUPLICATE WILL CASES

Courts have consistently held that a presumption of revocation arises where a duplicate in the testator's possession cannot be found. 39 However, in those situations where a copy in the testator's possession survives, the courts have been inconsistent in their analysis of the presumption of revocation. 40 Although probate has ultimately been allowed, the courts have proceeded upon two divergent rationales: (1) no presumption arises; 41 or (2) a presumption arises but is immediately overcome by survival of another duplicate. 42

Since the presumption of revocation is defeated only by rebuttal of the inference of destruction animo revocandi, the better analysis is that the presumption never arose. It is valueless to recognize the presumption and then immediately and automatically allow its defeat. 43 Regardless of which rationale is chosen, the outcome is the same; the will is probated.

Application of the presumption in duplicate will cases depends upon who possess the surviving will. Each of four factual situations must be considered.

(1) The testator possesses one duplicate; a third party possesses another. Only the testator's copy survives. 44

(2) A third party possesses both duplicates. One or both are missing. 45

(3) The testator possesses both duplicates. Only one sur-

38. 572 P.2d at 230.
39. See note 12 and accompanying text supra.
43. Note, 35 Harv. L. Rev. 826 (1922).
45. Note, 27 St. John's L. Rev. 168 (1952). The presumption of revocation does not arise when the lost duplicate was not one in the possession of the testator. This is true because of the nonaccessibility of the will to the testator. Accordingly, no presumption exists when a third party has possession of both duplicates and one or both are missing. Id. at 169.
vives.  

(4) The testator's only copy is missing. A third party possesses a duplicate that survives.

Each factual situation dictates a predictable result. In the first and second factual situations, the surviving will should be admitted to probate. Allowing probate is consistent with the testator's inferred intent since inaccessibility makes his destruction of the missing will improbable.

In category three, where one of the two duplicates held by the testator is missing, the presumption of revocation is described as being of the weakest character, and preservation of one duplicate overcomes the presumption. The presumption in this case is overcome, or not recognized at all, because of the unlikelihood that the testator would intend to revoke, yet retain one of the validly executed copies. No other evidence of the testator's intent need be considered to defeat the presumption; it is rebutted by the mere existence of the other copy. Therefore, the better analysis is simply to recognize that no presumption is involved in such situations.

Where a duplicate in the testator's possession survives, the courts have allowed probate by applying an "equal dignity" ration-

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47. Estate of McKeever, 361 A.2d 16 (D.C. 1976); *In re* Estate of Baird, 343 So. 2d 41 (Fla. 1977); *In re* Estate of Millsap, 55 Ill. App. 3d 749, —, 371 N.E.2d 185, 186 (1977). If the testator retained more than one executed copy and none of the testator's copies could be found, the analysis should be the same as in situation four. This analysis would reflect the inferred intent of the testator.

48. Occasionally an unpredicted decision is reached. See note 104 and accompanying text *infra* for an illustration of resulting problems.


Since each executed duplicate is of equal dignity with every other executed duplicate, the courts have held that the survival of one validly executed will is sufficient to allow probate. The courts have applied this rationale where it furthers the underlying policy of giving effect to the testator's probable intent. Consistent with the policy goal of implementing intent, the equal dignity doctrine generally does not apply where the testator's only copy is unaccounted for. In this final situation, the presumption arises that the testator destroyed the instrument with the intent to revoke. The presumption is grounded on the principle of inferred intent: the testator had exclusive control of the will; destruction *a
dimo revocandi* is presumed to be a result of that control, destruction with intent to revoke constitutes valid revocation. The surviving copy will not be admitted to probate absent evidence refuting this presumed intent to revoke.

With the exception of *Shaw*, courts have indicated that in an effort to carry out the testator's probable intent, the duplicate retained by the testator must either be produced or satisfactorily accounted for if the surviving copy, not in the testator's possession, is to be probated. The presumption arguably serves to prevent deprivation of the testator's power to revoke his will in private. The presumption also protects implementation of the testator's intent, when he revokes, in the event he forgets other copies were in existence.


61. *See note 12 and accompanying text supra.*


63. *Id.*
COURT'S REASONING

In Shaw the Oklahoma Supreme Court allowed probate of a
duplicate will in the possession of the testator's attorney even
though the original in the testator's possession did not survive. In
its decision, the court interpreted Oklahoma's lost will statute as
creating a presumption of revocation when the proponent fails
to produce a will known to have been in the testator's possession
prior to his death. The court then focused on the status of the
surviving executed duplicate, and reasoned that since the dupli-
cate was of "equal dignity" with any other duplicate, the surviving
copy could be admitted for probate. In the court's opinion, the
lost will statute was therefore inapplicable because the petition
did not seek to probate a lost or destroyed will, but rather a com-
plete, valid one.

The court rejected the argument that nonproduction of the tes-
tator's copy operated as a presumed revocation. In dismissing
this argument, the court relied on two inconsistent grounds: (1)
the presumption of revocation did not arise; (2) the presumption
arose but was immediately defeated by survival of a duplicate with
"equal dignity."

ANALYSIS

The Oklahoma Supreme Court is not criticized for its decision
to probate the will, but rather for the underlying reasoning upon
which its decision is based. The court's analysis is ambiguous and
incomplete. The court expressed recognition and rejection of the
presumption of revocation. Regardless of its exact view on the ap-
plicability of the presumption, the court allowed the surviving will
to be probated by expanding the equal status doctrine. Generally,
the testator's intent determines the applicability of the equal sta-

64. 572 P.2d at 233.
65. OKLA. STAT. ANN. tit. 58, § 82 (West 1965) provides:
No will shall be proved as a lost or destroyed will, unless the same is
proved to have been in existence at the time of the death of the testator or
shown to have been fraudulently destroyed in the lifetime of the testator,
nor unless its provisions are clearly and distinctly proved by at least two
credible witnesses.
66. 572 P.2d at 232.
67. Id. For a discussion of "equal dignity," see notes 55-57 and accompanying
text supra.
68. 572 P.2d at 232.
69. Id.
70. Id. at 230.
71. Id. at 233.
tus rationale, yet the Shaw court failed to mention the testator's intent.

Use of ambiguous language renders the Shaw court’s analysis questionable. In its decision, the Oklahoma court contradicted itself by first holding “that no presumption of revocation of a will arose from failure to account for or to produce all copies of executed duplicate wills”; 72 and by then concluding that “the presumption of revocation brought about by the missing duplicate was overcome.” 73 Although admission of the duplicate to probate is the result under either rationale, 74 the holdings are nevertheless antithetical.

Coupled with this ambiguous language is the court’s expansionary interpretation of the equal dignity doctrine, without an expressed consideration of the testator’s intent. The Shaw court held that the presumption of revocation was not applicable because the equal dignity doctrine permitted probate of the surviving will. 75 To support this conclusion, the court relied on decisions in which the surviving will was probated in spite of the fact that a duplicate will was missing. 76

The cases cited by the Shaw court support the general rule of the equal dignity doctrine: probate of the surviving duplicate will will be allowed if the facts do not evidence an intent to revoke. 77 Three

72. Id. at 229. For discussion of the quote, see note 8 and accompanying text supra.
73. 572 P.2d at 233.
74. For a discussion of this similarity of outcomes, see notes 39-43 and accompanying text supra.
75. 572 P.2d at 232.
76. Id. at 231. The court relied upon In re Janes’ Estate, 18 Cal. 2d 512, 116 P.2d 438 (1941); Jones v. Mason, 234 La. 116, 99 So. 2d 46 (1958); In re Mittelstaedt’s Will, 280 A.D. 163, 112 N.Y.S.2d 166 (1952); Howard v. Combs, 113 S.W.2d 221 (Tex. Civ. App. 1938).
77. For a discussion of the general rule, see notes 55-60 and accompanying text supra. In Janes’, the court held that “[i]f valid duplicate wills are executed, either may be probated if there is no evidence indicating that the missing copy was destroyed with intent to revoke, and if there is no basis in its disappearance for a presumption of revocation.” 18 Cal. 2d at —, 116 P.2d at 442. The Jones decision also centered around the intent issue, holding “[t]his case... presents the question of whether the presumption of destruction with intent to revoke would arise when a testator who has executed his will in multiple originals had two originals in his possession, but only one is found after death.” 234 La. at —, 99 So. 2d at 48-49.
78. The Mittelstaedt court adopted a view that if the testator was possessed of both copies and destroyed but one, the presumption of revocation would be weak. 280 A.D. at —, 112 N.Y.S.2d at 169. The court held “[s]uch a statement... is more likely to carry out the purpose of testators... No layman would ever regard such a testament as having been lost or destroyed.” Id. at —, 112 N.Y.S.2d at 169.

Finally, in Howard the court considered the equal dignity question but held “[t]hat question is only before us as an incident to the one of intention by testatrix
of the cases involved situations in which the testator's copy survived. Because of this fact each court found intent to revoke was improbable. This fact distinguished the cases from Shaw, in which the testator's copy did not survive. In the fourth case, the testator's copy was unaccounted for, but the court held that the presumed intent to revoke was defeated by a factual finding that the testatrix destroyed her copy to keep the will a secret rather than to revoke it.

Because of factual similarities between the fourth case, Howard, and Shaw, a comparison of the analysis employed by each court illustrates inadequacies in the Oklahoma court's reasoning. In each case the decedent's duplicate failed to survive his or her death. While the Howard court recognized an inferred intent to revoke, the Shaw court expressed neither acceptance nor rejection of such an inference. In each case the record revealed facts tending to rebut the inference. The Howard court weighed the facts and expressly found them sufficient to overcome the inference. In contrast, the Shaw court expressed no opinion on the stipulated facts relating to intent.

The Shaw court expressly incorporated the "equal status doctrine" into its decision, but not the doctrine's crucial element: refutation of an intent to revoke. The Shaw court conceded that it could find no precedent to directly support its decision, but nevertheless held: "[t]here seems no valid reason to attach deciding emphasis upon the single fact that a duplicate . . . known to have to revoke, and we shall therefore go no farther than to discuss testatrix's acts as they relate to intentions to revoke her will." 113 S.W.2d at 225.

80. See notes 44-60 and accompanying text supra.
82. Id.
83. 572 P.2d at 229-33.
84. For a discussion of the facts in Howard, see note 81 and accompanying text supra. The Shaw record showed that the lawyer testified that he had explained to Shaw that a copy or duplicate could be presented for probate, that duplicate wills would be executed as a safeguard in the event the original will was misplaced, lost or inadvertently destroyed. Evidence was also presented indicating a ransacking of Shaw's domicile after his death. Finally, Shaw did not mention revocation to his lawyer, though Shaw had conversed with the lawyer on legal matters many times after taking possession of the will. 572 P.2d at 229-30.
85. 113 S.W.2d at 225-27.
86. 572 P.2d at 229-33.
87. Id. at 231.
been in the possession of the testator prior to his death is not found or produced. We do not hesitate to go one step further . . . .”88 Without the support of its cited authority, the Shaw court extended the equal dignity doctrine and apparently disregarded a logical and well founded principle: a will in the possession of the testator, that cannot be found after his death, is deemed destroyed **animo revocandi** unless evidence can refute such an intent to revoke.89

The Shaw decision, with its ambiguous language and weak analysis should have little influence on future decisions in other jurisdictions. Three weeks after the Oklahoma decision, the Illinois Supreme Court decided a case similar to Shaw.90 The Supreme Court of Illinois recognized that the presumption of an intent to revoke must be rebutted before a surviving copy held by a third person may be probated. The court emphatically rejected the proponent’s contention that a different rule should apply when a duly executed copy of a missing will is sought to be admitted, holding “it is also well established that when a . . . ribbon copy is traced to the testator's possession and cannot be found, as we find here, not only is the original copy revoked, but all duplicates of the original are presumed revoked as well.”91

The confusing nature of the Shaw decision raises the question of whether duplicate wills are desirable. Execution of duplicate wills may cloak the testator's intent with uncertainty.92

Courts have held that when a testator's executed copy cannot be accounted for at death, a presumption of destruction **animo revocandi** prohibits probate absent evidence of contrary intent.93

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88. *Id.* at 232.
90. *In re Estate of Millsap*, 55 Ill. App. 3d 749, 371 N.E.2d 185 (1977). In this case, the decedent executed his will in duplicate, retaining the original and giving the executed carbon copy to a neighbor. About three months later, the decedent died. The original will could not be found or accounted for. The neighbor sought to probate the surviving executed copy. *Id.* at —, 371 N.E.2d at 185-86.
91. *Id.* at —, 371 N.E.2d at 187. If a carbon impression or a typewritten duplicate is duly executed, it stands on the same plane, or has the same effect as the original. Note, 1949 U. ILL. L.F. 177, 178. The distinction between a carbon copy and an executed duplicate is irrelevant. If one is a carbon, it might be called a copy instead of an original, but the question is wholly unimportant if the two are in fact or effect duplicates, and both are executed. Evans, *supra* note 30, at 568.
92. See note 100 and accompanying text *infra*.
93. See note 12 and accompanying text *supra* for a discussion of the rule and a list of those jurisdictions following the rule.
The presumption has been justified by courts and authorities on grounds of inferred intent. It is argued that "the average testator regards the will in his possession as important, while he is usually ignorant of the effect of copies."\(^{94}\) It is thus reasonable to infer revocation by destruction if a copy cannot be found. The presumption is sound since it establishes a uniform rule and deprives the testator of none of his powers.\(^{95}\)

Opponents of the presumption argue that the testator's intent to revoke should not be inferred in the case of duplicate wills. It is conceivable that a testator who has executed duplicate wills may fail to preserve carefully his instrument because he knows there is another in the depository's possession.\(^{96}\) Justice Butt illustrated such a view in *Jones v. Harding*:\(^{97}\)

If you show that a will was in the possession of the maker thereof, and cannot be found after his or her decease, there is a presumption that such will has been destroyed by the testator or testatrix *animo revocandi*. But where there is a duplicate, known by the maker of the will to be in existence, does the presumption arise, or is it not a stronger presumption required in such cases than where there is no duplicate? The question is, does the presumption arise on the bare fact of one of the duplicates having disappeared? If a testatrix intends to revoke her will, the presumption is, that she would write to the banker or solicitor who has the duplicate, which she knows to be equally effectual, as a will, as the one in her own possession, and would intimate to him her intention of revoking it. Would she not say to herself, "I know my solicitor has an equally effective duplicate; I must take care to destroy that also?"\(^{98}\)

Because of precedent, the court nevertheless decided against this reasoning; failure to find the testatrix's copy triggered a holding that the duplicate in the lawyer's possession was likewise revoked.\(^{99}\)

Both the majority contention and Justice Butt's argument constitute reasonable inferences of the testator's intent. Inferred in-
tent may become undeterminable in duplicate will cases. Each
time a will is executed in duplicate and the one in the testator's
possession fails to survive, the courts must face uncertainty in ap-
plication of the inferred intent of revocation.100

Three factors render the desirability of duplicate execution
dubious: (1) the unanswerable questions in the conceptual frame-
work of duplicate wills;101 (2) the increased possibility of acci-
cidental loss and uncertainty in explanation of such loss; (3) the
advantageous alternative of unexecuted duplicates. Probate of an
unproduced will burdens the will's proponent with proof of due ex-
ecution, establishment of terms, and explanation of nonproduc-
tion.102 Duplicate wills are subject to a presumption of revocation
if one of the executed copies is lost. Attorneys execute wills in
duplicate as a precaution against the loss or destruction of one of
the instruments.103 Instead of the risk that one instrument will be
lost, there exists the risk that one of two or more instruments will
be lost. With the objective of enhancing the chances of dying tes-

100. Evans, supra note 30, at 570; Note, 22 COLUM. L. REV. 684 (1922); Note, 27 ST.
JOHN'S L. REV. 168, 170 (1952); Note, 1949 U. ILL. L.F. 177, 179. See In re Estate of

101. It is unclear whether each duplicate is a part of the whole will, or a com-
plete will in itself. For example, Professor Atkinson spoke of but one will in legal
contemplation, and then continued to suggest the issue of whether there is one
will—each instrument a part of the whole—or several—each instrument a complete
will—for purposes of revocation. T. ATKINSON, supra note 13, § 141 at 331. Courts
have been unclear on the issue. The court in In re Rinder's Estate, 196 Misc. 657, 92
N.Y.S.2d 320 (Sur. Ct. 1959), held that where there has been multiple execution of a
will, all of the counterparts collectively constitute the will; one seeking to establish
a will must produce each part. Id. at —, 92 N.Y.S.2d at 322. Accord, Note, 24 ST.
on the other hand, each instrument was viewed with equal dignity as any other and
-treated as an independent will. Id. at —, 99 So. 2d at 47. Accord, In re Janes' Estate,
18 Cal. 2d 512, —, 116 P.2d 438, 441 (1941); Note 35 HARV. L. REV. 626 (1922); Note, 56

Conceptual problems develop with each view. If the court adopts the view that
each instrument represents part of the whole and also recognizes partial revoca-
tion, what part of the will has been revoked by failure to account for an instrument
identical to a surviving one? In cases in which each instrument is viewed independ-
ently and the court generally recognizes only one will, see Conlee v. Conlee, 300
Ky. 685, —, 190 S.W.2d 43, 46 (1945), which instrument is the will, the lost one or the
surviving one? The questions remain unanswered. If the court recognizes the
existence of two wills, see Timberlake v. State Planters Bank of Commerce and
Trusts, 201 Va. 950, 115 S.E.2d 39 (1960), either could be probated, but the rule that
revocation of one duplicate revokes all duplicates is prohibitive. Note, 56 MICH. L.
REV. 1036 (1958). Each duplicate is thus viewed independently for purposes of exe-
cution, but dependently for purposes of probate. Id.

102. T. ATKINSON, supra note 13, § 97 at 506; Note, Probate of Lost Wills in New
Walsh, supra note 24, at 452.

103. Note, 22 COLUM. L. REV. 684, 685 (1922); Note, 27 ST. JOHN'S L. REV. 168, 169
(1952).
tate, duplicate wills fail in their objectives, and in effect, double the odds of dying intestate.\textsuperscript{104}

Execution in duplicate creates a presumption of due execution,\textsuperscript{105} this single advantage is insufficient to counteract the accompanying disadvantage.\textsuperscript{106} A duplicate will also establishes the will's terms, but no more effectively than an unexecuted copy would.\textsuperscript{107} With the exception of the due execution presumption, any advantage realized by an executed copy is equalled by an unexecuted one. A lost, unexecuted copy of the will creates no presumptions of revocation and thus provides better insurance for implementation of a testator's intent.\textsuperscript{108} As lawyers continue to draft duplicate wills in an effort to protect the testator's intent,\textsuperscript{109} confusion, as illustrated in Shaw, proliferates.

CONCLUSION

\textit{In re Shaw}\textsuperscript{110} is a decision that is questionable because of its ambiguous language and its expansion of the equal status doctrine without mention of the testator's intent to revoke. The decision is against the weight of authority and contrary to controlling policy considerations. A subsequent Illinois case upheld a presumption of revocation when the testator's copy could not be found, and facts refuting the testator's destruction \textit{animo revocandi} could not

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\textsuperscript{104} \textit{In re Robinson's Will}, 257 A.D. 405, \textemdash, 13 N.Y.S. 324, 326 (1939).

One who makes a will in duplicate subjects it to a double hazard of loss or accidental destruction, which cannot be accounted for, and this may defeat the testator's intention by mere accident, or by the \textit{carelessness of a custodian of one of the duplicates} or even by the deliberate fraud of one having an interest in defeating the will. \textit{Id.} (emphasis added). \textit{In re Robinson's Will} illustrates the problem now being considered. The court in that case did not limit its application of the presumption to duplicates that had been traced to the testator's possession. In that case the court noted that the presumption could apply to a will in a third party's possession. Although such a holding conflicts with the underlying purpose of fulfilling the testator's intent, it nevertheless illustrates the confusion and danger resulting from duplicate execution. Note, 27 St. John's L. Rev. 168, 169 (1952), "Duplicate wills with the purpose of doubling the chances of dying testate fail in their purpose, and, in effect, double one's chances of dying intestate." Note, 1949 U. Ill. L.F. 177, 179. The lesson learned from presumption problems is to avoid such problems by having extra unexecuted copies rather than executed duplicates. Note, 56 Mich. L. Rev. 1036, 1038 (1958).

\textsuperscript{105} Note, 1949 U. Ill. L.F. 177, 178-79.

\textsuperscript{106} \textit{Id.} at 179.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} Evans, supra note 30, at 570. See note 104 and accompanying text supra.


\textsuperscript{110} 572 P.2d 229 (Okla. 1977).
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be presented. As evidenced by this decision, the impact of Shaw has not yet reached beyond Oklahoma's boundaries.

Shaw nonetheless illustrates recurring as well as new problems involved in duplicate will cases and therein suggests questions concerning the value of duplicates. Policy considerations demand that the testator's intent be carried out. With the exception of Shaw, courts have attempted to meet this demand by presuming an intent to revoke when the testator's copy cannot be found. Because valid arguments can be made both for and against such inferred intent in duplicate will cases, fulfillment of the testator's intent is necessarily uncertain. To avoid this uncertainty, unexecuted copies should replace and thus eliminate duplicate wills.

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