2026 IL App (2d) 250539-U
No. 2-25-0539
Order filed August 7, 2026

NOTICE: This order was filed under Illinois Supreme Court Rule 23(b) and is not precedential except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF WARREN A. ROGERS SR., Deceased

(Daniel Rogers, Petitioner-Appellant, v. Karen Wein Rogers, Individually, and as Executor of the Estate of Warren A. Rogers Sr., Deceased, Respondent-Appellee).

Appeal from the Circuit Court of Kane County.
Honorable Joseph M. Grady, Judge, Presiding.
No. 23-PR-191

JUSTICE MULLEN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: In this action seeking to have decedent's will declared revoked, the trial court properly dismissed the petition for failing to state a claim sufficient to invoke the presumption of revocation.

¶ 2 Respondent, Karen Wein Rogers, was appointed executor of the estate of her deceased husband, Warren A. Rogers Sr. The trial court admitted to probate a photocopy of decedent's 1992 will, which had been kept in Karen's possession. The original will, which had been kept solely in decedent's attorney's possession, had been inadvertently destroyed years earlier. Petitioner, Daniel Rogers, decedent's son, filed a petition seeking to have the will declared revoke based on the presumption of revocation. Daniel argued that, because a second photocopy of the will once held by decedent was not found among his belongings at death, the court must presume that he revoked

it. Karen moved to dismiss Daniel's petition under section 2-615 of the Illinois Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615 (West 2024)). Karen argued that the presumption of revocation did not apply because decedent never had possession of the original will and the presumption did not apply to photocopies. The trial court granted Karen's motion to dismiss. On appeal, defendant contends that the trial court erred by (1) granting Karen's motion to dismiss his petition for failing to state a claim sufficient to invoke the presumption of revocation and (2) striking certain allegations in his petition as violative of the Dead-Man's Act (see *id.* § 8-201). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 27, 2023, Karen filed a "Petition for Probate of Will and Letters Testamentary" with respect to decedent who died on August 22, 2017 (petition for probate). The petition for probate alleged that decedent left a will dated October 26, 1992. An "Affidavit of Heirship," listed as decedent's heirs, (including Karen as decedent's wife), the following four surviving children: "Laura Ramzy," "Linda Sawyer," "Daniel Rogers," and "Warren Alan Rogers, Jr." Karen, Laura, and Linda, filed supporting affidavits. Karen attached to her affidavit, a photocopy of decedent's will, which left his estate to Karen.

¶ 5 On May 10, 2023, Karen filed an "Amended Petition to Admit Copy of Will to Probate" (amended petition) along with a supporting memorandum of law. In addition to her own affidavit, Karen referenced the affidavit of Darrell L. Jordan, the attorney who prepared decedent's will. According to the amended petition and supporting memorandum, Karen and decedent began dating in 1975 and dated each other exclusively until they were married in June 2016. On October 26, 1992, decedent executed a will prepared by Jordan. Jordan retained the original will at his Aurora office for safekeeping and gave decedent two copies of the will. Decedent never had possession of

the original will. One day in 1992, decedent gave Karen an envelope containing a photocopy of his will. Karen kept the photocopy of the will in her dresser drawer. In July 1996, the original will was destroyed in a flood. Upon decedent's death, no will was found in his home, files, or personal effects.

¶ 6 Karen contended that the photocopy of the will should be admitted to probate. She argued that (1) there was no evidence that decedent affirmatively revoked his will, (2) the presumption of revocation did not apply because decedent never had possession of the original will, and (3) even if the presumption applied, the evidence of decedent's continued love and affection for Karen (established by supporting affidavits) sufficiently rebutted it.

¶ 7 On May 12, 2023, Daniel filed a "Cross-Petition for Letters of Administration." Karen responded on June 7, 2023. The court ordered discovery. Karen and Jordan were deposed on August 25, 2023, and October 3, 2023, respectively.

¶ 8 During his deposition, Jordan testified that he had prepared decedent's will. He could not remember whether he had given decedent two copies of the will, but he stated that it was his "custom and practice" to do so. He recalled decedent telling him, at some point, that he had two copies. According to Jordan, decedent's will was destroyed in a flood on July 17, 1996. Thereafter, Jordan told decedent that he should execute a new will. Karen testified that decedent had given her one copy of the will; she did not recall seeing a second copy.

¶ 9 On November 22, 2023, Daniel filed his response to Karen's amended petition. In support, he attached Karen's and Jordan's deposition testimony, along with his own affidavit. Daniel contended that the trial court should presume that decedent had revoked his will because decedent (1) executed an original will, (2) possessed two "duplicates" of his original will, (3) provided one "duplicate" to Karen in 1992, (4) knew that his original will had been destroyed, (5) had been

advised to execute a new will, (6) never executed a new will, and (8) the "duplicate" that he possessed could not be found in his personal effects at his death.

¶ 10 On November 30, 2023, Karen filed "Motion to Strike Portions of Pleadings Barred by the Dead-Man's Act." In particular, Karen sought to bar the following statement from Daniel's affidavit: "On more than one occasion, my father has expressed to me his intention and desire that the Yorkville farm remain part of the Rogers family and that as a result my siblings and I would inherit it."

¶ 11 On December 26, 2023, Daniel filed a response to Karen's motion to strike, arguing that (1) because Karen had not yet been appointed as executor of the estate, she lacked standing to raise the Dead[-]Man's Act and (2) "the Dead[-]Man's Act only applies to the 'trial of any action.' "

¶ 12 A hearing on the amended petition was set for May 16, 2024.

¶ 13 On May 2, 2024, Karen moved for summary judgment on her amended petition.

¶ 14 The matter was continued to July 11, 2024, for a hearing on the amended petition and motion for summary judgment.

¶ 15 On July 11, 2024, the trial court entered a "Misc. Order[ ]" (1) granting Karen's amended petition to admit a copy of the will to probate and (2) withdrawing "as moot" Daniel's cross petition. (The record does not contain a transcript from this proceeding.) On July 16, 2024, the court entered an order admitting the will to probate and appointing Karen as the executor of the estate.

¶ 16 On January 15, 2025, Daniel filed a "Petition to Declare Will of Warren A. Rogers Revoked," (Daniel's petition) asking the trial court to apply the presumption of revocation and declare that decedent had revoked his will. Daniel raised essentially the same arguments that he

advanced in his response to Karen's amended petition.[1] His petition, at paragraph 11, also included the following allegation: "After execution of the Will, [decedent] met with his son, Daniel ***, and expressed his intention that the farmland located at ***, Yorkville, *** would remain in the Rogers family after his death."

¶ 17 On February 13, 2025, Karen moved to strike paragraph 11 of Daniel's petition based on the Dead Man's Act. Daniel filed a response, and Karen filed a reply. On April 24, 2025, the trial court granted Karen's motion to strike paragraph 11.

¶ 18 On July 17, 2025, Karen filed a motion to dismiss Daniel's petition under section 2-615 of the Civil Code (*id.* § 2-615), contending that, because Daniel admitted that decedent had not retained a copy of the original will, he had failed to allege facts sufficient to warrant application of the presumption of revocation.

¶ 19 In response, Daniel contended that the presumption of revocation applied because decedent's original will had been destroyed and the copy retained by decedent could not be located after his death.

¶ 20 Following a hearing on October 30, 2025, the trial court granted Karen's motion to dismiss. The written order includes a finding "that there is no basis to delay the time for which an appeal of this order may be taken, per Illinois Supreme Court Rule 304a [(eff. March 8, 2016)]."

¶ 21 Daniel timely appealed.

[1]We note that "the admission of a will to probate is not *res judicata* as to issues that may be raised in a later will contest, and such a contest allows the relitigation of the same issues raised in the admission proceeding." *In re Estate of Alfaro*, 301 Ill. App. 3d 500, 503 (1998).

¶ 22 II. ANALYSIS

¶ 23 Daniel contends that the trial court erred in granting Karen's motion to dismiss his petition for failing to state a claim sufficient to invoke the presumption of revocation. See 735 ILCS 5/2-615 (West 2024). According to Daniel, because a second photocopy of the will once held by decedent was not found among his belongings at death, the court must presume that he revoked it. Daniel also contends that the court erred by striking paragraph 11 from his petition based on the Dead-Man's Act (*id.* § 8-201).

¶ 24 A motion to dismiss under section 2-615 of the Civil Code (*id.* § 2-615) challenges the legal sufficiency of a complaint based on defects apparent on its face. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 14. The critical inquiry in reviewing a dismissal under section 2-615 is whether the allegations in the complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 16. In making this determination, the court accepts as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). This court reviews *de novo* a trial court order granting a section 2-615 motion. *Northwestern Illinois Area Agency on Aging v. Basta*, 2022 IL App (2d) 210234, ¶ 33.

¶ 25 To the extent our review requires us to interpret relevant provisions of a statute, we do so *de novo*. See *Thomas v. Weatherguard Construction Company, Inc.*, 2018 IL App (1st) 171238, ¶ 63. The plain language of a statute is the best indicator of the legislature's intent. *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 43 (2003). When that language is clear, it will be given effect without resort to other aids of statutory construction. *Id.*

¶ 26 " '[R]evocation of a will is a matter of intent, an act of the mind of the testator manifested by some physical act.' " *In re Estate of Brewer*, 2015 IL App (2d) 140706, ¶ 12 (quoting *In re Estate of Davies*, 5 Ill. App. 3d 15, 16 (1972)). In Illinois, the methods by which a will may be revoked are prescribed by section 4-7 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/4-7 (West 2024). It provides:

> "A will may be revoked only (1) by burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (2) by the execution of a later will declaring the revocation, (3) by a later will to the extent that it is inconsistent with the prior will or (4) by the execution of an instrument declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will." *Id.* § 4-7(a)(1)-(4).

¶ 27 In addition to the statutory methods of revocation, it is well established that "where a last will and testament, after its execution, is retained in the exclusive control of the decedent and upon his or her death cannot be found, a presumption arises that the decedent destroyed the will *animo revocandi* [(with the intent of revocation)]." *In re Estate of Frakes*, 2020 IL App (3d) 180649, ¶ 44 (collecting cases). "The rationale for this presumption appears to stem from the inherent ignorance a court would face concerning the testator's intent regarding the will and whether any physical acts were visited upon the will manifesting that intent." *Id.* "Given this ignorance, courts have found it best to presume the will was revoked and place the burden on the proponent to prove otherwise." *Id.* "There are two necessary predicates for the presumption to apply. First, the will must be traced to the decedent's possession. [Citation.] Second, the will must be unable to be located after [the] decedent's death. [Citation.]" *Id.* ¶ 49.

¶ 28 Here, the predicates for application of the presumption of revocation are absent. Decedent never possessed the original will; it remained exclusively in his attorney's custody. Therefore, the presumption simply does not arise. Nevertheless, Daniel contends that the presumption of revocation should apply to the missing copy of the will that had once been in Daniel's possession because decedent knew that the original will had been destroyed. According to Daniel, by failing to apply the presumption of revocation to the copy that Daniel possessed, the court "elevated a third party's mere possession of a copy of a [w]ill over [decedent's] intention." Daniel's argument does not find support in the law.

¶ 29 Daniel relies primarily on *In re Estate of Holmberg*, 400 Ill. 366 (1948), however, it is readily distinguishable. In *Holmberg*, the decedent executed a typewritten original will, and at the same time, a carbon copy attested by the same witnesses. *Id.* at 367. Decedent retained the executed carbon copy and gave the original will to a friend for safekeeping. *Id.* Upon decedent's death, both wills were filed: the typewritten original, which had been in the possession of decedent's friend, and the carbon copy, which had been found in decedent's pocketbook. *Id.* at 367-68. The carbon copy had the word " 'Void' " and decedent's apparent signature written across each page. *Id.* at 368. The lower court denied admission of the will to probate. *Id.* at 368-69. At issue on appeal was "whether an otherwise effective revocation of a will is nullified by the continued existence, in the possession of another, of a duplicate original bearing no mark or evidence of revocation." *Id.* at 370. The supreme court recognized "the general rule that the cancellation by a testator of one of two *duplicate originals* of his will cancels and revokes the other duplicate original left in the custody of another person." (Emphasis added.) *Id.* (collecting cases). The court noted that it had no need to rely on a presumption of revocation because it had "actual and definite evidence of the testator's intent." *Id.* at 371. The court held: "[D]ecedent's revocation of the executed carbon copy

of her will was sufficient and effective to revoke the executed original impression of the same will which she had entrusted to the custody of a friend." *Id.* at 372.

¶ 30 Daniel claims that *Holmberg* holds "that a testator's presumed revocation of a copy he controls also revokes the copy in a third party's possession." However, at issue in *Holmberg* was an affirmative revocation of a "duplicate original," not a photocopy. Here, unlike in *Holmberg*, decedent never had possession of an executed duplicate original; it was merely a photocopy, and, on these facts, we are asked to presume revocation. As noted, the original was, at all times, in his attorney's possession. Thus, *Holmberg* provides Daniel no support.

¶ 31 Daniel's opening brief fails to acknowledge our decision in *Brewer*, 2015 IL App (2d) 140706, which involved acts of revocation performed on a copy of a will. In *Brewer*, after the decedent's will was admitted to probate, one of the heirs filed a petition to contest the will. *Id.* ¶ 4. Attached to the petition was "an unsigned and unattested copy of the will," containing writing, which, according to the petitioner, cancelled the will. *Id.* The petitioner also alleged that the decedent's original will was " 'lost, misplaced, or otherwise not in the possession of [the decedent]." *Id.* The trial court dismissed the petition for failing to state a claim. *Id.* ¶ 7. On appeal, the petitioner argued that "cancellation of a copy of a will is a sufficient manifestation of an intent to cancel an original will if the original will was believed to be lost, misplaced, or otherwise not in the testator's possession." *Id.* ¶ 12. We disagreed, reasoning:

> "Under the plain language of the Probate Act, only a 'will' may be revoked by cancellation. Specifically, the Probate Act provides that '[a] *will* may be revoked only (1) by burning, cancelling, tearing or obliterating *it*.' (Emphases added.) 755 ILCS 5/4-7(a) (West 2012). The pronoun 'it' references the word 'will.' A 'will' must meet specific statutory requirements. Under section 4-3 of the Probate Act, '[e]very *will* shall be in

writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by 2 or more credible witnesses." (Emphasis added.) 755 ILCS 5/4-3(a) (West 2012). An unsigned will is not a 'will.' See *In re Estate of Wedeberg*, 226 Ill.App.3d 948, 949-50 *** (1992) (decedent's name handwritten by decedent at the top of her will for purposes of titling the will did not meet the signature requirement of the Probate Act and thus will was not valid). An unattested will is not a 'will.' See *In re Estate of Lum*, 298 Ill.App.3d 791, 792-93, *** (1998) (decedent's will declared invalid where it was not signed by the witnesses)." *Id.*¶ 14.

We found that, because the will purportedly cancelled by the decedent was an unsigned and unattested copy of the original will, it was not a " 'will' " for purposes of section 4-7 of the Probate Act. *Id.* Thus, we concluded that any act taken by the decedent upon that unsigned and unattested copy did not amount to a revocation of the will under the Probate Act. *Id.*

¶ 32 We noted that our conclusion was "supported by courts of other jurisdictions that have held that a revocatory act performed on any photocopy is legally ineffective." *Id.* ¶ 15 (collecting cases). Of particular note is *Gushwa v. Hunt*, 2008-NMSC-064, 145 N.M. 286, 197 P. 3d 1. In *Gushwa*, after the decedent died, his wife sought to be appointed personal representative of his estate and asserted that the decedent died intestate. *Id* ¶ 5. The decedent's niece objected, arguing that decedent had executed a will that was still in effect. *Id*. The wife argued that the will had been revoked by the decedent's act of writing " 'Revoked' " on a photocopy of the will. *Id.* ¶ 6. The reviewing court found "that the act of writing " 'Revoked' " on the photocopied will was not a legally effective revocatory act because such an act must be done on an original or a duplicate original and not a photocopy." *Id.* ¶ 7. The supreme court of New Mexico agreed. *Id.* The court rejected the wife's argument that a photocopy of a will and an executed original should be given

"the same legal significance." *Id.* ¶ 26. The court noted that its probate code—like our Probate Act—required "that a revocatory act be performed 'on the will' " and that "[w]hile the Code [did] not explicitly require that the act be performed on the original or on an executed original, such a requirement [was] implicit in the statutory term 'will.' " *Id.* ¶ 27 (quoting NMSA 1978, § 45-2-507(A)(2) (1993)). It stated further that "[r]equiring that the revocatory act be performed on an original, or on a fully executed copy, simply comports with the statutory requirements for executing a will." *Id.*

¶ 33 We agree with the reasoning of *Brewer* and *Gushwa*. Here, although the photocopy of decedent's will includes reproduced images of signatures, the photocopy does not contain the original signature of decedent or the two attesting witnesses. Thus, the photocopy of decedent's will is not a "will" for purposes of section 4-7 of the Probate Act. See 755 ILCS 5/4-3 ("Every will shall be in writing, signed by the testator *** and attested in the presence of the testator by 2 or more credible witnesses."). Given that decedent's will could not be revoked by an act done on the photocopy of the will, it follows that, under the circumstances, the absence of the photocopy at decedent's death is insufficient to warrant application of the presumption of revocation. We reject Daniel's assertion that the presumption of revocation should apply simply because a copy of a will can, in some circumstances, be admitted to probate. The ability to admit a copy does not elevate the copy to the status of a will; it is merely evidence offered to prove the contents of a missing original. See *id.* § 6-4 (in seeking to admit a will to probate, "[t]he proponent may also introduce any other evidence competent to establish a will").

¶ 34 We note too that decedent's knowledge of the fact that his original will had been destroyed does not change our analysis because it does not change the character of the photocopy in his possession. Further, the inadvertent destruction of the original will cannot constitute revocation

because there was no affirmative act by the decedent and no intent to revoke. See *Brewer*, 2015 IL App (2d) 140706, ¶ 12 (" 'Revocation of a will is a matter of intent, an act of the mind of the testator manifested by some physical act.' " (quoting *Davies*, 5 Ill. App. 3d at 16)). Nor can decedent's subsequent failure to act after learning of the will's destruction be deemed tantamount to revocation. See *Frakes*, 2020 IL App (3d) 180649, ¶¶ 53, 54 (rejecting the argument that the decedent's failure to execute a new will after his will was stolen was tantamount to revocation, as it would be "a departure from the text and spirit of the statutory means of revocation").

¶ 35 Finally, we note that Daniel cites two cases for the first time in his reply brief, asserting that they support his argument that a testator's intent as to a copy of a will in his possession should control over the retention of a copy by another. However, because Daniel did not cite these cases in his opening brief, he has forfeited our consideration of them. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Finko v. City of Chicago Department of Administrative Hearings*, 2016 IL App (1st) 152888, ¶ 23 (finding that the petitioner forfeited consideration of a case cited for the first time in his reply brief as additional support for his arguments). In any event, neither case warrants a different conclusion here. Like *Holmberg*, each case involved executed copies, not photocopies. See *In re Will of Nassano*, 489 A.2d 1189, 1189-91 (N.J. Super. Ct. App. Div. 1985) (writing "null and void" on "a fully executed duplicate" copy sufficient to revoke original will retained by attorney); *In re Minsky's Estate*, 46 Ill. App. 3d 394, (1977) (evidence established that "the will had been executed in triplicate," "only two of the copies were accounted for," and two witnesses testified that decedent expressed his intent to revoke his will and tore papers that he identified as his will).

¶ 36 Based on the foregoing, we affirm the order of the trial court of Kane County granting Karen's motion to dismiss Daniel's petition. We need not consider Daniel's argument that the trial court erred in striking paragraph 11 from his petition because, even if error, it would not change the result here.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 39 Affirmed.