*2008 Cal. App. Unpub. LEXIS 3471, **

Estate of ANNIE MAE AUSTIN, Deceased. RANDY **TAYLOR,** Petitioner and Respondent, v. GERALDINE **CARR,** Objector and Appellant.

B196838

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

2008 Cal. App. Unpub. LEXIS 3471

April 28, 2008, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]
APPEAL from an order of the Superior Court of Los Angeles County, No. P729335. Michael I. Levanas, Judge.

DISPOSITION: Affirmed.

CORE TERMS: probate, deposition, testator, new law, destroyed, died, signature, notice, revocation, operative date, decedent's, attend, monetary sanctions, discovery, secretary, revoke, destruction, admitting, witnessed, signing, discovery cutoff date, common law, cedar chest, transitional, custom, ticket, old law, commencing, typed, law applicable

COUNSEL: Ian Noel for Objector and Appellant.

Sullivan, Workman & Dee and Sherrill Y. Tanibata for Petitioner and Respondent.

JUDGES: TURNER, P. J.; ARMSTRONG, J., KRIEGLER, J. concurred.

OPINION BY: TURNER

OPINION

I. INTRODUCTION

Geraldine Carr appeals after the probate court ruled against her will contest and ordered a lost will admitted to probate. [1] Geraldine also appeals from orders regarding the taking of her deposition and directing her attorney of record, Ian Noel, to pay $ 3,936 in monetary sanctions. We affirm the order admitting the lost will to probate. We also affirm the deposition and sanctions orders in all respects.

FOOTNOTES

[1] This appeal concerns a number of parties who have the same surname. For clarity purposes and not of any disrespect, after initially identifying family members, we will refer to these persons by their first names.

II. BACKGROUND

A. The Petition To Admit The Lost Will

On July 20, 2005, Randy Taylor filed a petition for admission to probate the 1980 lost will of his deceased grandmother, Annie Mae Austin. Randy also sought the appointment of Beverly Nyoka Williams and Anthony Austin, to **[*2]** act as co-administrators of the will. Beverly and Anthony are Randy's cousins. The petition alleged that Annie Mae, who died on November 24, 1984, was married to Leon Austin who predeceased her. Annie Mae and Leon had nine children (Ester Austin, Geraldine, Margaret Taylor, Charles Lee Austin, Herndon Austin, Delbert Austin, Greek Austin, Alameda Smith, and Augusta Williams). Charles and Geraldine are the only two surviving children. Alameda predeceased Annie Mae. Herndon, Delbert, and Greek died after the death of their mother, Annie Mae. Ester, Margaret, and Augusta died while this petition was pending. With the exception of Ester, each of the deceased children themselves were parents. Ester is survived by his wife, Anna Austin. Randy is Margaret's son.

Attached to Randy's petition was a document entitled "LAST WILL AND TESTAMENT OF ANNIE MAE AUSTIN." The will indicated that it had been prepared by Arthur Levitas, an attorney. The will, dated March 21, 1980, contained a typewritten signature for Annie Mae and three witnesses, Mr. Levitas, Virginia B. McClure, and Vicki L. Marshall. On the signature line, preceding the typewritten signature are the characters "/s/." Above the witnesses' **[*3]** signatures is the following attestation: "The foregoing instrument consisting of seven (7) typewritten pages, this page included, was on the date last above written, signed, sealed, published and declared by ANNIE MAE AUSTIN to be her Last Will and Testament, in the presence of us, who at her request, in her presence, and in the presence of each other, have subscribed our names as witnesses thereto."

On July 20, 2005, Randy filed the declaration of Virgina B. McClure-Greenspun who declared she was formerly known as Virginia B. McClure. In the year 1980, she was employed by the Law Offices of David Blonder, which shared office space with Mr. Levitas. Mr. Levitas would sometimes ask her to witness wills that he prepared for his clients. It was Mr. Levitas' custom and practice, after executing and witnessing a will, to give the client a conformed copy of the will on which the names of the testator and witnesses were typed, preceded with "/s/." This notation indicated the original had been signed by the individual whose name appeared after the "/s/." Ms. McClure-Greenspun indicated that Annie Mae's will was an example of such a will.

Also on July 20, 2005, Randy filed proof of subscribing **[*4]** witness executed by Mr. Levitas and Ms. McClure. They declared: the document lodged with the probate court was a photographic copy of Annie Mae's will; Annie Mae personally signed her name in the presence of the witnesses; Annie Mae acknowledged in the presence of the attesting witnesses that her signature was on the instrument; Annie Mae acknowledged in the presence of the

attesting witnesses that the instrument signed was her will; and when they signed the document, they understood that it was Annie Mae's will.

On September 30, 2005, Geraldine filed a petition to determine whether objecting to the petition would violate a no contest clause in the 1981 lost will. On November 4, 2005, the parties filed a stipulation that Geraldine could file the objections and Randy would waive any right to assert that the no contest provision had been violated. On December 16, 2005, Geraldine filed her objections to the petition to probate Anne Mae's will. The objections alleged that probate of the will should be denied because: a prior petition to probate the lost will of Annie Mae was filed on October 13, 1988, under the same case number; the probate court denied the prior petition; and any prior **[*5]** decision is entitled to res judicata effect. It was further alleged and argued: Annie Mae had previously revoked any and all wills and had distributed her property to her children as she saw fit; the purported will was last in Annie Mae's possession; there is a presumption that any will was revoked by her; Randy had the burden to overcome the presumption; and Randy would be unable to overcome the presumption given that Annie Mae distributed her property by non-testamentary means prior to her death.

C. The Deposition And Sanctions Orders

Trial of the admission of the will to probate petition was set for April 17, 2006. The discovery cutoff date was March 20, 2006. Prior to trial, the probate court granted a motion to compel Geraldine to appear for her deposition on April 7, 2006. The order was issued under the following circumstances.

On March 7, 2006, Randy filed a motion to compel Geraldine to attend her deposition. In support of the motion, Randy's attorney, Sherrill Tanibata, declared that a notice of deposition was served on Geraldine on March 3, 2006, for a March 15, 2006 deposition. Mr. Noel called Ms. Tanibata on March 8, 2006. Mr. Noel stated that he and Geraldine were unavailable **[*6]** on March 15, 2006. However, Mr. Noel indicated that his calendar was clear on March 21, 2006. Ms. Tanibata noted that March 21, 2006, was beyond the March 20, 2006 discovery cutoff date. Ms. Tanibata asked Mr. Noel to waive the cutoff date and to stipulate to an order shortening time for a motion to compel prior to trial if necessary. When Ms. Tanibata attempted to confirm the arrangement, she received no response. Ms. Tanibata subsequently noticed Geraldine's deposition for March 21, 2006. Ms. Tanibata sent the notice with a letter requesting waiver of discovery cutoff. On March 9, 2006, Ms. Tanibata received a letter from Mr. Noel stating that he was available on March 9, 2006 to conduct scheduled depositions for third party witnesses. These depositions had been taken off calendar due to a calendar conflict. However, Mr. Noel then stated that he was unavailable for March 21, 2006 even though Ms. Tanibata had been previously informed he was available on that date. Ms. Tanibata subsequently served a notice of deposition for March 21, 2006, and requested a waiver of the discovery cutoff. Mr. Noel stated in a letter that he was unavailable on March 21, 2006.

As a result, on March 9, 2006, **[*7]** Ms. Tanibata notified Mr. Noel she intended to file an ex parte application on March 13, 2006 for an order shortening time for a noticed motion to extend the discovery cutoff date and to compel the taking of Geraldine's deposition. On March 17, 2006, the probate court set the matter for a hearing on March 29, 2006. Geraldine opposed the motion arguing that it was premature because on March 13, 2006, she had not failed to appear at a deposition.

Mr. Noel did not attend the March 29, 2006 hearing to compel Geraldine to attend her deposition. Rather, an attorney named Lonnie Benson appeared at the hearing to extend the discovery cutoff date and to compel Geraldine to submit to a deposition. The probate court indicated that it thought the deposition should go forward and that the parties should meet and confer as to a date. The probate court further indicated that it was extending the

discovery cutoff date so Geraldine's deposition could be taken. After Ms. Tanibata and Mr. Benson met and conferred, the probate court asked if they had agreed to a date. Ms. Tanibata advised the probate court that the parties agreed to have the deposition on April 7, 2006. The probate court then granted the **[*8]** motion to compel Geraldine's deposition and ordered it held on April 7, 2006, in Northern California. The probate court also ordered the discovery cutoff date waived solely for the purpose of taking Geraldine's deposition.

On April 4, 2006, Mr. Noel gave Ms. Tanibata notice that he was making an ex-parte application for an order vacating the March 29, 2006 order compelling Geraldine's deposition on April 7, 2006. At the ex parte hearing on April 6, 2006, Mr. Noel argued that the probate court lacked jurisdiction to order Geraldine's deposition be held. The probate court denied the ex-parte application.

On April 11, 2006, Randy filed a motion for an order imposing issue and evidentiary sanctions against Geraldine. Randy's motion also sought the imposition of monetary sanctions against Geraldine and Mr. Noel, for failing to appear at the court ordered April 7, 2006 deposition. In support of the motion, Ms. Tanibata declared that she had attempted to meet and confer with Mr. Noel on April 4, 2006, about the discovery disputes pending between the parties. On April 6, 2006, at the ex parte hearing, Ms. Tanibata attempted several times to confirm that Geraldine's deposition on April 7, 2006, **[*9]** would proceed. The only response she received was that Mr. Noel did not have a ticket. Ms. Tanibata flew to Oakland on April 7, 2006. The 7 a.m. flight that she took on Southwest Airlines was half-empty. Randy sought sanctions in the amount of $ 6,500 for bad faith and misuse of the discovery process against Geraldine and Mr. Noel pursuant to Code of Civil Procedure section 2023.010.

Geraldine opposed the sanctions request on the ground that the probate court order requiring her to appear on April 7, 2006, was in excess of its jurisdiction because she had never failed to previously appear at a court ordered deposition. Geraldine also argued: after the probate court ordered the deposition to occur in Martinez, Ms. Tanibata unilaterally changed the location to "at or near Benicia"; Mr. Noel had been out of the country and was unable to make arrangements to be in the Oakland area on April 7, 2006; and issue and evidentiary sanctions were inappropriate because she was not listed as a witness. Geraldine argued monetary sanctions should not be awarded because: Ms. Tanibata did not justify the request in a declaration; the amount was excessively high; and the motion did not identify the specific **[*10]** Code of Civil Procedure sections under which the evidence, issue, and monetary sanctions were sought.

In a declaration, Mr. Noel stated that he was out of the country from March 23 until April 4, 2006. Thus, on March 29, 2006, when the probate court ordered Geraldine to appear at the deposition on April 7, 2006, he was unavailable. On March 30, 2006, Ms. Tanibata sent a letter stating that the deposition would be in Martinez. However, on April 3, 2006, Ms. Tanibata sent a notice of ruling stating the deposition would be held at or near Benicia. According to Mr. Noel, at the April 6, 2006 ex-parte hearing, he explained to Ms. Tanibata that he was unable to obtain a ticket. To which she replied, '"Well, start driving.'" Also on April 6, 2006, Ms. Tanibata sent a letter changing the place of the deposition to a different place. Mr. Noel then had his staff telephone Ms. Tanibata at 1:45 p.m. and inform her staff, "Mr. Noel did not have a ticket to attend but if she insisted on having the deposition, [Geraldine] was going to attend." Ms. Tanibata subsequently went to Vallejo to conduct the deposition.

In reply, Randy argued that the issue of the probate court acted in excess of its jurisdiction **[*11]** in ordering Geraldine's deposition was a matter for an appellate court. Mr. Noel's claim that he had no ticket does not provide substantial justification for failing to appear at the court ordered deposition because: there is no evidence as to why he could not obtain a ticket; his office chose the April 7, 2006 date; and the date was chosen on March 29, 2006,

nine days before the deposition was scheduled. The deposition location was changed because the Martinez location was closed on Fridays. Ms. Tanibata informed opposing counsel of the location on March 30, 2006, immediately after she learned that the Martinez location was unavailable. Geraldine lives in Benicia, which is 7.5 miles from Martinez and 9 miles from Vallejo. Martinez is 15 miles away from Vallejo. According to Randy, Geraldine was within one-half hour from the deposition site whether she was coming from Benicia or Martinez. Ms. Tanibata telephoned Mr. Noel's office four times between 11:20 a.m. to 12:30 p.m. on April 7, 2006. Ms. Tanibata was told the Geraldine was en route. Ms. Tanibata admitted that in exasperation she told Mr. Noel, "Maybe he should start driving." Ms. Tanibata attempted to telephone Mr. Noel's office **[*12]** to discuss the possibility of proceeding with the deposition if Geraldine appeared. Ms. Tanibata explained that she gave notice of ruling as "at or near Benicia, California" in order to conform to the 75 mile rule for the maximum distance to travel to a deposition. Ms. Tanibata reduced the monetary sanctions request to $ 5,000.

On April 24, 2006, a hearing was held on the issue, evidence, and monetary sanctions motion. On May 4, 2006, the probate court issued an order refusing to impose issue and evidentiary sanctions against Geraldine. However, the probate court ordered Mr. Noel to pay $ 3,936 in monetary sanctions pursuant to Code of Civil Procedure section 2023.030, subdivision (a). In imposing monetary sanctions, the probate court found: "On March 29, 2006, the Court granted [Randy's] Motion to Compel the deposition of [Geraldine] and ordered that the deposition occur on April 7, 2006. [Mr. Noel], counsel for Geraldine Carr, failed to appear for this deposition and failed to give authorization to proceed with the deposition of [Geraldine] in his absence. The deposition was scheduled to start at 11:00 a.m. At 11:20 a.m., Ms. [Tanibata], counsel for Petitioner Randy Taylor, telephoned **[*13]** Mr. Noel's office as neither Ms. Carr nor Mr. Noel had appeared. Ms. Tanibata was told that Ms. Carr was running late and that Mr. Noel was not able to acquire an airplane ticket. Between 11:20 a.m. and 12:50 p.m., Ms. [Tanibata] telephoned Mr. Noel's office two more times, at 12:15 p.m. and 12:30 p.m., to inquire regarding the whereabouts of [Geraldine] and to get authorization to proceed with the deposition of [Geraldine] without his presence. Mr. Noel's office repeated that Mr. Noel would not be appearing and was able to give authorization for Ms. [Tanibata] to proceed with the deposition with Mr. Noel being present. At 12:50 p.m., Ms. [Tanibata] cancelled the deposition as Mr. Noel had not authorized the deposition to proceed without his presence and, despite assurances that [Geraldine] was coming, [Geraldine] had not yet arrived. [Geraldine] arrived just after the record was made as to [Geraldine's] and Mr. Noel's non-appearances and the court reporter was packing up (about 12:50 p.m.). Mr. Noel's failure to attend the deposition and his failure to authorize the deposition to proceed in his absence insured that the deposition of [Geraldine] could not go forward. Mr. Noel asserts **[*14]** that he was unable to acquire an airline ticket to Oakland so that he could attend the deposition. Contrary to this vague assertion, the Court finds compelling the assertion made by Ms. [Tanibata] in her declaration that her flight to Oakland on April 7, 2006 at 7:00 a.m. was 'one-half empty.' The Court finds that Mr. Noel has not shown any substantial justification for his non-appearance."

C. The Trial

On June 12, 2006, the trial to admit the lost will began. Ms. McClure-Greenspun testified that she was a legal secretary and worked for Mr. Blonder in March 1980. Mr. Levitas worked in the office where she was employed. On occasion, she would witness wills for Mr. Levitas. Ms. McClure-Greenspun testified that she recalled the execution of Annie Mae's will. She testified: "Well, she had Mr. Levitas prepare a will for her, and when she came in to sign it that day [Mr. Levitas] asked me and [Ms. Marshall] if we could come in and witness the signing of the will." The "/s/" was used to conform a copy to indicate that it had been signed by the people's names which had been typed. It would be typed in after the document "was actually signed" by the witnesses or other signatories. Ms. McClure-Greenspun **[*15]** did not actually remember the moment in time when the will was witnessed. However, Ms. McClure-Greenspun's name was on the document. Also, on June 12, 2006 Ms. McClure-Greenspun

remembered Annie Mae. On June 12, 2006, Ms. McClure-Greenspun did not know the content of the will and did not recall whether Annie Mae was accompanied by anyone.

During the pertinent period, when Ms. McClure-Greenspun would act as a witness to a will that Mr. Levitas prepared, he had a procedure for execution and witnessing testamentary instruments. She described the customary procedure as follows: "[Mr. Levitas] would ask me if I was available to come and witness the will and I would say yes or make myself available, and at that particular time [Ms. Marshall] and I were working in the office together and we would go in and Mr. Levitas would introduce us to the person that was going to be signing [his or her] will and ask [him or her] if it was [his or her] intention that [he or she] wanted to sign this will and that it was [his or her] intention that we should witness the signing or [his or her] signing of the will. [P] And [he or she] would say yes, and we would introduce everybody and then the person would **[*16]** sign the will and then we would sign our names and put our addresses down." Ms. McClure-Greenspun further testified that she would witness the person signing the instrument and the witnesses then signed the document in each others' presence. This was true for all the wills that she witnessed for Mr. Levitas. Ms. Marshall and Mr. Levitas were also present when the original will was signed.

On cross-examination, Ms. McClure-Greenspun described Annie Mae as an elderly African-American woman. Ms. McClure-Greenspun could not remember if Annie Mae was tall or short. Ms. McClure-Greenspun could not remember if Annie Mae had brown or blue eyes. Ms. McClure-Greenspun was testifying based on: what the normal procedure would be; a recollection of the name "Annie Mae Austin"; and Mr. Levitas introduced Annie Mae to the witnesses as, "Miss Annie Mae Austin who would like me to witness her will." Because Ms. McClure-Greenspun was not Mr. Levitas' secretary, she did not know if he kept a copy of the will or gave the original to others. After witnessing the wills, she would leave Mr. Levitas's office. Ms. McClure-Greenspun did not know what happened to this particular will.

Mr. Levitas testified that **[*17]** he had a law office in March 1980. Mr. Levitas, who was born in 1915, had since retired from the practice of law. His law practice was mostly devoted to the preparation of wills. The will contains his name and the address where his office was located. He "vaguely" recalled Annie Mae. It was Mr. Levitas's custom and practice to have the witnesses be in the same room when the testatrix signed her name. It was not an established rule or order but normally, the witnesses would sign in the presence of each other and Mr. Levitas. Mr. Levitas testified as to his office procedures as follows: he would make conformed copies of the will; he would introduce the testatrix or testator to the witnesses prior her signing the will; and after the original will was signed, someone from his office would type in the signatures of the persons who subscribed the instrument. When Mr. Levitas first starting preparing wills, copies were made on carbon paper. The "/s/" on the carbon paper would show that the original had been signed on the carbon paper rather than photocopies.

Mr. Levitas identified his signature on exhibit No. 12 which was a letter dated February 21, 1980, and addressed to Herndon, one of Annie **[*18]** Mae's children. Exhibit No. 12 explains that wills had been prepared for Annie Mae and her husband, Leon. The letter further describes the contents of the wills including beneficiaries and testamentary intent about the real and personal property that belonged to the couple. Reading the letter brought back Mr. Levitas' recollection as to his preparation of the will for Annie Mae.

Mr. Levitas testified on cross-examination that due to the number of years that had passed, Mr. Levitas could not give a description of her physical attributes. His normal procedure was to keep a conformed copy of the will and give the original to the client. Sometimes, Mr. Levitas would give his clients a copy of the will with the names of the signatures typed in or when he had a copy machine, he would give them a signed copy with the actual signatures.

In response to the probate court's inquiry, Mr. Levitas testified that he believed that the

document produced during trial was the copy of the will that he would have kept in the file. Mr. Levitas clarified that he might sometimes have a photocopy of the original with signatures but that he also had a typed copy of the signatures. If he had a copy with the signature, **[*19]** it would be kept together with the copy of the typed signatures. According to Mr. Levitas, the "/s/"on the will "refers to signature" and nothing else. The "/s/" notation would be inserted after the instrument had been signed.

Ms. Marshall testified that she worked for Mr. Levitas from about 1972 until 1981. She would type letters and wills for him. The name of "Annie Mae Austin" was familiar to Ms. Marshall. But Ms. Marshall had no independent recollection of acting as a witness of Annie Mae's will. Ms. Marshall testified as to Mr. Levitas' practices during that time. According to her, the practice was: he would come to where the secretaries were and ask if they could witness a will; the secretaries would follow him back to his office; they would be introduced to the client who needed a witness for the will; the client would sign the will; and then the secretaries would sign the will as witnesses. They would always be introduced to the person executing the instrument and they would be asked to act a witness to a will. The formalities were observed each time she witnessed a will for Mr. Levitas. Ms. Marshall explained that the "/s/" on the document "was kind of the standard procedure **[*20]** in the office" when Annie Mae's will was executed. The signature would be typed after the will was executed and indicated that it was an original signature on a document.

Charles, who had been convicted of a felony, was the youngest child of Annie Mae and Leon. At the time of the trial, Charles's only surviving siblings were Ester and Geraldine. Greek, a brother, died in 1992. Prior to dying, Greek spoke to Charles about several matters. Charles testified as to their conversation, "[H]e had asked me to take care of some of his specific affairs with his family because he felt he was dying." Further, Charles described some documents provided by Greek, "He also provided me a number of papers that he had obtained from my brother Herndon and that is when I discovered he was dying." Greek knew about the will. Charles discovered the will while going through the papers. Charles testified that at that time he was too busy with his own life and just let the papers lay dormant in his files for years. He also knew that Greek had attempted to probate their mother's estate in 1987 or 1989. Charles's sisters Margaret and Geraldine had filed objections to Greek's petition. Charles did not recall whether **[*21]** Greek filed the petition as though there were no will.

Charles made about 30 copies of the will and passed them out to his siblings and relatives. This occurred at Charles's oldest brother Delbert's funeral in 1996 or 1997. According to Charles, Greek came into possession of the will after Herndon died. Herndon's widow, Mildred, called Greek to come and get the will and other family documents that were in a safe. At the same time he was given the will, Charles also received the February 21, 1980 letter from Mr. Levitas to Herndon.

Anna, the widow of Ester, visited Annie Mae about once or twice a month. Anna thought Annie Mae was a wonderful and truthful lady. During their visits, Annie Mae liked to talk about her property. Anna testified that Annie Mae wanted the properties to be divided with all of "her nine" children. Annie Mae never changed her mind prior to her death always saying she was dividing the properties among all her children. Annie Mae never showed the will to Anna. Annie Mae was "sort of out of it" for about two to three months before her death. Annie Mae was in no condition to talk about wills or documents of any kind.

Beverly was Annie Mae's granddaughter. Augusta, who **[*22]** died in 2003, is Beverly's mother. Between 1980 and 1984, Beverly visited Annie Mae. Beverly stayed with Annie Mae two or three times a year. Annie Mae mentioned all her properties she owned including the ones in Apple Valley and Oklahoma. Annie Mae would also talk about her residence. Annie Mae always spoke of the properties being equally divided amongst all her children. In the discussions about the land, Annie Mae included the children of a predeceased daughter,

Alameda.

During visits between 1980 and 1984, Beverly would see Herndon with Annie Mae. Herndon did a number of things for Annie Mae. For example, Herndon took care of Annie Mae's business. Margaret was Annie Mae's caretaker. Margaret was with Annie Mae every day. Between 1982 and 1984, Beverly had a conversation with Annie Mae. They discussed Annie Mae's will. Annie Mae showed a will to Beverly and Augusta. Beverly described what Annie Mae wanted, "[S]he wanted the older kids to run her business, take care of her business but she did not want the older ones to cheat the younger ones out of one red penny." The older children were Ester, Herndon, and Margaret. Beverly saw the will but she did not read it. Beverly also saw **[*23]** Annie Mae's signature on the will. Annie Mae eventually put the will in her cedar chest in her bedroom at the foot of the bed. She then locked the chest with a key.

Randy testified that Margaret and Herndon were Annie Mae's primary caretakers during the early 1980's. Randy saw Annie Mae twice a year when he came back from medical school at Christmas and during the summer. According to Randy, his grandmother had a very limited education if she had one at all. Annie Mae could not read or write but she could sign her name. Margaret and Herndon would assist their mother, Annie Mae, in reading important documents. In June 1984, when he returned from school, Randy had to remind his grandmother of who he was. Annie Mae did not know who he was. But Annie Mae did recognize Margaret. The cedar chest was moved to Margaret's home after Annie Mae died. Geraldine lived in Margaret's home from about 1998 until 2002.

Randy called Geraldine, the objector, as a witness. Geraldine was Annie Mae's youngest daughter. Geraldine knew that Annie Mae made a will. Annie Mae went to an attorney. Annie Mae showed Geraldine a will that was prepared by an attorney. The will that Geraldine saw dealt solely with property **[*24]** in Oklahoma. Geraldine recalled that it was Charles who took their mother to Mr. Levitas' office to prepare the will. Margaret provided most of the care for their mother. Geraldine lived in Santa Barbara but would visit her Annie Mae on the weekends.

There was some property in Victorville that had been in Annie Mae's name. However, the property was now in Geraldine's name. According to Geraldine, she purchased the property. But Annie Mae's name was on the title because Geraldine was young. Geraldine testified that Annie Mae kept important papers in a safe and in a brass trunk with a lock and key. Annie Mae never had a cedar chest but a sister owned one.

Rona Carr is Geraldine's daughter. Rona testified that Annie Mae's business and financial affairs were handled by Geraldine and Margaret. Herndon was more like a handyman. Rona visited Annie Mae about three times a year. However, the year Annie Mae died, Rona made only a single visit. During that year, Rona did not speak to Annie Mae by telephone.

After argument, the probate court took the matter under submission. The probate court subsequently directed the parties to file supplemental briefs on: whether section 8223 replaced former sections 350 **[*25]** and 351; the effective date of a comment in an appendix to the 1991 pocket part of the West Annotated California Probate Code regarding the application of former section 350 to estates of decedents who died before January 1, 1985; the effective date of section 3 as it relates to section 8223; if the effective date of section 3 is later than the comment in the pocket part would section 3 apply and in that case would section 8223 apply to estates of decedents who died before January 1, 1985; decisional authority which addresses whether former sections 350 or 8223 apply; and assuming former section 350 applied, whether the enumerated requirements were met.

On December 13, 2006, after the parties filed supplemental briefs, the probate court issued its ruling admitting the lost will to probate. In admitting the will to probate, the probate court

ruled that section 8223 governed the matter rather than former section 350. The probate court found that section 8223 was applicable pursuant to section 3, which was effective July 1, 1991. The probate court then found that Randy had produced competent and compelling evidence to establish due execution and the content of the last will. The probate **[*26]** court cited as evidence of due execution that Randy had produced: the testimony of the attorney who drafted and witnessed the will; the testimony of two legal secretaries who acted as witnesses; the testimony of Ms. McClure-Greenspun as to the custom and practice of witnessing wills for Mr. Levitas; the testimony of Mr. Levitas regarding the custom and practice of conforming copies of wills in his office; the testimony of Ms. Marshall regarding the custom and practice of witnessing wills and conforming executed wills; the testimony of Mr. Levitas that he had written the February 21, 1980 letter to Herndon; and the testimony of Randy that Annie Mae could sign her name.

With regard to the presumption of revocation, citing *Estate of Olbernolte* (1979) 91 Cal.App.3d 124, 129, the probate court found, "[Geraldine] has not produced evidence sufficient to raise the presumption of revocation in that she has not provided any credible and compelling evidence that [Annie Mae was competent] until death." The probate court further found: "[Anna], who saw [Annie Mae] frequently prior to [Annie Mae's] death, has testified that [Annie Mae] 'was out of it' prior to her death such that they were unable **[*27]** to continue their conversations about her favorite subjects-her real estate holdings and her children. [Anna] has also testified that in the months before her death, [Annie Mae] . . . 'was too out of it to talk about property and will.' . . . [P] [Randy] has testified that in the months prior to her death, [Annie Mae] had to be reminded of who he was that he was [Margaret's] son. . . . [P] [Geraldine's] sole witness, her daughter [Rona], has testified that during the period 1974 (when she graduated from college) and 1984 (the year of [Annie Mae's] death) she saw her grandmother three to four times per year, for one hour to a half day at a time, occasionally a day. She testified that she would come to visit her mother, [Geraldine], who lived in Santa Barbara during much of this period, and she would use the opportunity to also visit [Annie Mae]. She further testified that in the year of [Annie Mae's] death, 1984, she visited only one time, and did not speak to her by telephone at all. . . . [P] Neither [Geraldine nor Rona] has produced compelling evidence that [Annie Mae] was competent until her death or at the time of her death. Nor has any other evidence of [Annie Mae's] competence **[*28]** at the time of death been introduced by [Geraldine]. The compelling evidence in the record is that [Annie Mae] was out of it and could not answer questions or talk about property and wills. [P] To avail oneself of the benefits of a presumption, a party must prove the existence of the basis facts giving rise to the presumption by a preponderance of the evidence. Absent evidence that the will was last in [Annie Mae's] possession and that *she was competent until death*, the presumption does not arise. [Citations.]"

D. The Notice Of Appeal

On February 9, 2007, Geraldine filed a timely notice of appeal. The notice of appeal states: "Respondent and Appellant, Geraldine Carr, hereby appeals the judgment of this court on December 13, 2006 admitting the lost will of Annie Mae Austin to Probate and overruling the will contest of Geraldine Carr. She also appeals the order of the court on March 17, 2006 granting Randy Taylor's [ex-parte] application to extend the discovery [cutoff] date and to set a motion on March 29, 2006 to compel Geraldine Carr's deposition. She also appeals the court's order of March 29, 2006 granting Petitioner's motion to compel Geraldine Carr's deposition. She also appeals **[*29]** the court's order of May 4, 2006 compelling Geraldine Carr's deposition and granting discovery sanction of $ 3500.00 to Randy Taylor against attorney Ian Noel." Mr. Noel signed the notice of appeal; but he did not file a separate notice of appeal.

III. DISCUSSION

A. The Admission Of The Lost Or Destroyed Will

1. Retroactivity concerns

In this case, Geraldine claims that the order admitting the lost will to probate is not supported by the evidence as to questions of: due execution; proof of the lost or destroyed will and; revocation. A contestant's claim that probate findings are not supported on appeal is reviewed in the evidence in a light most favorable to the prevailing party where are all reasonable inferences are indulged in a manner that tends to uphold the judgment. (*Estate of Beach* (1975) 15 Cal.3d 623, 631; *Estate of Bristol* (1943) 23 Cal.2d 221, 223; *Estate of Stone* (1943) 59 Cal.App.2d 263, 264.)

At issue here is whether the probate court properly admitted a lost will to probate. Section 8000, subdivision (a) provides that an interested person may file a petition to appoint a personal representative and to probate a will. The petition may be brought even though the will has been **[*30]** lost or destroyed. (§§ 8000, subd. (b), 8223; *Swift v. Superior Court of San Francisco* (1952) 39 Cal.2d 358, 361; *Estate of Thompson* (1921) 185 Cal. 763, 777.) This is because a validly executed will is no less effective even if it was destroyed or lost in the absence of circumstances establishing that the will was revoked. (*Estate of Arbuckle* (1950) 98 Cal.App.2d 562, 567-568; *Estate of Holmes* (1948) 88 Cal.App.2d 360, 365.) The rule was explained by *Estate of Arbuckle, supra*, 98 Cal.App.2d at page 568 as follows: "Destruction without intention to revoke is not a prescribed method of revocation; neither is destruction by someone other than the testator, not done in his presence, and done without his direction and without his knowledge or consent, a prescribed method of revocation. Under the statutes such destruction does not operate to revoke a will. The duly executed will has a potential existence, subject to defeat only by revocation or by reason of impossibility of proof under the law." (See *Estate of Holmes, supra*, 88 Cal.App.2d at p. 365.)

The questions to be resolved are whether: the will was destroyed by Annie Mae or at her direction; the distribution occurred under such conditions **[*31]** as to revoke the will; and the proof satisfies any statutory evidentiary or degree of proof requirements for admitting the will to probate. (*Estate of Patterson* (1909) 155 Cal. 626, 637; *Estate of Arbuckle, supra*, 98 Cal.App.2d at p. 568.) Lost or destroyed wills are subject to stringent proof requirements in order to avoid fraud. (*Estate of Janes* (1941) 18 Cal.2d 512, 518; *Lauermann v. Superior Court* (2005) 127 Cal.App.4th 1327, 1331-1332.) The proponent of a will seeking to establish it as a lost or destroyed testamentary document has the burden of proving that the instrument was in existence at the time of the decedent's death. (*Estate of Bristol, supra*, 23 Cal.2d at p. 224; *Estate of Benson* (1944) 62 Cal.App.2d 866, 870; *Estate of Flood* (1941) 47 Cal.App.2d 809, 811-812.) Furthermore, two rebuttable inferences arise that the will was destroyed by the testator and the destruction was with the intent to revoke. (*Estate of Arbuckle, supra*, 98 Cal.App.2d 562, 566; *Estate of Moramarco* (1948) 86 Cal.App.2d 326, 334.) The rebuttable inferences arise that there was destruction with intent to revoke where: the decedent was competent until death; the will was last seen or known to be in **[*32]** the possession of the decedent; and neither the will nor a duplicate can be found after the decedent's death. (*Estate of Ross* (1926) 199 Cal. 641, 646; *Estate of Obernolte, supra*, 91 Cal.App.3d at p. 128, *Sparks v. Lauritzen* (1967) 248 Cal.App.2d 269, 274-275; *Estate of Flood, supra*, 47 Cal.App.2d at pp. 812-813.) However, the proponent of the revocation presumption has the burden of establishing by a preponderance of evidence the basic or foundational essential facts that trigger the presumption. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1410; *Valentine v. Membrila Ins. Services, Inc.* (2004) 118 Cal.App.4th 462, 469; *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 545 overruled on a different point in *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1265, fn. 4.)

2. Former and current probate provisions

Prior to addressing the sufficiency of the evidence claims, however, we must determine the applicable Probate Code provisions. There is some complexity to this question. The Legislature made major procedural and substantive changes to the Probate Code between the time the will was executed in May 1980 and before and after **[*33]** Annie Mae's death in November 1984. Two central statutes are sections 3 and 6031.

One such provision is section 3, which sets forth transitional rules applicable to the changes in the Probate Code. In 1983, the Legislature added former section 3 to address the application of certain code provisions for estates of decedents who died before January 1, 1985. Former section 3, which was to be operative until January 1, 1985, was repealed in 1984. Current section 3 was derived from a version of the statute which was added in 1988 and amended in 1989 to explain the general transitional rules applicable to the Probate Code. (Stats. 1988, ch. 1199, § 24.5, p. 3891, amended by Stats. 1989, ch. 21, § 1, pp. 70-71.)

The current version of section 3 [2] was enacted in 1990 and effective on July 1, 1991. The purpose of section 3 was to make legislative amendments to the probate law applicable on their operative date whenever possible subject to enumerated exceptions. (*Rice v. Clark* (2002) 28 Cal.4th 89, 99.) Section 3, subdivision (b) states that the entire section governs the application of a new law. But there is an exception to section 3, subdivision (b) and that is when the new law expressly otherwise **[*34]** provides. Section 3, subdivision (c) sets forth the general rule that a new law applies immediately on its operative date to all matters, including pending proceedings. (*Rice v. Clark*, supra, 28 Cal.4th at p. 100; *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1127.) The general rule is qualified by the exceptions listed in section 3, subdivision (d) which provides that the contents, execution, and notice of papers and documents are governed by the law applicable when the paperwork is filed. Further exceptions are set forth in section 3, subdivision (e) concerning the date upon which an order is made. And, as noted, section 3 does not apply if another law expressly provides otherwise. (§ 3, subd. (b).)

FOOTNOTES

2 Section 3 provides in part: "(b) This section governs the application of a new law except to the extent otherwise expressly provided in the new law. [P] (c) Subject to the limitations provided in this section, a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement **[*35]** of a proceeding, making of an order, or taking of an action. [P] (d) If a petition, account, report, inventory, appraisal, or other document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law; but any subsequent proceedings taken after the operative date concerning the petition, account, report, inventory, appraisal, or other document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law. [P] (e) If an order is made before the operative date, including an order appointing a personal representative, guardian, conservator, trustee, probate referee, or any other fiduciary or officer, or any action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise **[*36]** provided by statute. . . . [P] (g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law. [P] (h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the

new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference." (Stats. 1990, ch. 79, § 14, pp. 463-464.)

The Law Revision Commission Comment to the 1990 amendment to section 3 states as follows. "Section 3 provides general transitional rules applicable to changes in the Probate Code. The section continues the substance of Section 3 of the repealed Probate Code with revisions that make clear that the section applies both to the act which enacted the **[*37]** new Probate Code and to any subsequent act which changes the new code, whether the change is effectuated by amendment, addition, or repeal of a provision of the new code. [P] The rules stated in Section 3 are general provisions that apply absent a special rule stated in the new law. Special rules may defer or accelerate application of the new law despite the general rules stated in Section 3. See subdivision (b). [P] The general rule prescribed in subdivision (c) is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by the exceptions listed in subdivision (d) (contents, execution, and notice of papers and documents are governed by the law applicable when the paper or document was filed), subdivision (e) (orders are governed by the law applicable when the order was made, subject to any applicable modification procedures), and subdivision (f) (acts are governed by the law applicable when the act was done). [P] Where a new law fails to address a matter that occurred before its operative date, subdivision (g) makes clear that old law continues to govern the matter. [P] Because it is impractical to attempt **[*38]** to deal with all the possible transitional problems that may arise in the application of the new law to various circumstances, subdivision (h) provides a safety-valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests. [P] In addition to governing other substantive provisions, Section 3 also governs itself. It therefore becomes operative on the date the new code becomes operative and applies to provisions enacted and operative before, on, or after that date." (Cal. Law Revision Com. com., 52 West's An. prob. Code (2002 2d.) foll. § 3, pp. 10-11.)

In addition to this general transition provision set forth in section 3, section 6103 states: "Except as otherwise specifically provided Chapter 1 (commencing with Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3 (commencing with Section 6120), Chapter 4 (commencing with Section 6130), Chapter **[*39]** 6 (commencing with Section 6200), and Chapter 7 (commencing with Section 6300) of this division and Part 1 (commencing with Section 21101) of Division 11, do not apply where the testator died before January 1, 1985, and the law applicable prior to January 1, 1985, continues to apply where the testator died before January 1, 1985." As noted, Annie Mae died on November 24, 1984.

3. The execution requirements are evaluated under former section 50

Geraldine argues the probate court failed to apply former section 50 to determine whether the will was duly executed. Under current law, the execution of a will is governed by section 6110. [3] However, pursuant to section 6103 (see page 30, *supra*), the execution of a will in this case is not governed by section 6110 because Annie Mae died on November 24, 1984, prior to January 1, 1985. Therefore, on November 24, 1984, the law applicable prior to January 1, 1985, continues to apply. (§ 6031.) At the time of Annie Mae's death in November 1984, a former version of section 6110 governed the execution of wills. This version of former

section 6110 was added to the Probate Code by amendment in 1983. (Stats. 1983, ch. 842, § 55, p. 3049.) The 1983 version **[*40]** of former section 6110 provided: "(a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section. [P] (b) The will shall be signed either: (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction. [P] (c) The will shall be witnessed by being signed by at least two person each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will." Former section 51 was superseded by the 1983 version of former section 6110. (Stats. 1983, ch. 842, § 18, p. 3024.) The 1983 version of former section 6110 was repealed in 1990. (Stats. 1990, ch. 79, § 13, operative July 1, 1991.) In 1984, the Legislature enacted section 6103 (Stats. 1984, ch. 892, § 21.7, p. 2994) to provide that the 1983 version of former section 6110 did not apply where the testator died on or before January 1, 1985.

FOOTNOTES

3 Section 6110 provides: "(a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section. [P] **[*41]** (b) The will shall be signed by one of the following: [P] (1) By the testator. [P] (2) In the testator's name by some other persona in the testator's presence and by the testator's direction. [P] (3) By a conservator pursuant to a court order to make a will under Section 2580. [P] (c) The will shall be witnessed by being signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will."

Both parties assert and we agree that the applicable law relating to due execution is former section 50, which was enacted in 1931 and amended in 1982. (Stats.1931, ch. 281, § 50, p. 589, amended by Stats. 1982, ch. 187, § 1, p. 569.) Former section 50 provided: "Except as provided for holographic wills, every will shall be in writing and shall be executed and attested as follows: (1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. A person who subscribes the testator's name, by his direction, should write his **[*42]** own name as a witness to the will, but a failure to do so will not affect the validity of the will. [P] (2) The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time. [P] (3) The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will. [P] (4) There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their place of residence, but a failure to do so will not affect the validity of the will." (Stats. 1982, ch. 187, § 1, p. 569.)

Here, the probate court found that Randy had established due execution under former section 50. Three witnesses testified as to Annie Mae's execution of her will. The witnesses included: Mr. Levitas, the attorney who drafted and witnessed the execution of the will; his former secretary; and another secretary in the office. No doubt, Ms. McClure-Greenspun could not recall specific details of Annie Mae's appearance or the actual **[*43]** signing of the will. But Ms. McClure-Greenspun did remember that Annie Mae was an older Black woman. All three witnesses recalled Annie Mae's name. Mr. Levitas testified that his principle area of practice was drafting wills. All the witnesses testified as to the custom and practice of witnessing the execution of wills during March 1980 when Annie Mae executed the instrument. There was testimony that: Mr. Levitas would call the secretaries into the office; Mr. Levitas would introduce the secretaries to the testator; they would be asked to witness

the execution of a will; the testator would sign in their presence; and the witnesses would then sign in each other's presence. Mr. Levitas and Ms. Marshall testified as to the law office's custom and practice of conforming copies at that time. All the witnesses testified that "/s/" followed by the typewritten signatures on the copy meant that the Annie Mae and the three witnesses had signed the original will. This was sufficient evidence to establish due execution.

D. Admission to probate is governed by section 8223

Randy asserts that since 1990 lost or destroyed wills are admitted to probate pursuant to standards set forth in section 8223. **[*44]** Geraldine argues that former section 350 controls the disposition of this case. For the reasons stated below, we disagree with Geraldine and conclude that the probate court properly resolved this case under standards set forth in section 8223 as opposed to former section 350. Section 8223 provides: "The petition for probate of a lost or destroyed will shall include a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate." Section 8223 is the current Probate Code provision which governs admission of lost or destroyed wills. Section 8223 was enacted in 1988. (Stats. 1988, ch. 1199, § 81.5, p. 3938.)

Prior to its repeal, former section 350 provided, "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." (Stats. 1957, ch. 1964, § 1, p. 3507.) Former section 350 **[*45]** was repealed in 1983, effective January 1, 1985. (Stats. 1983, ch. 842, §§ 28, 58, pp. 3038, 3092.) However, when the Legislature repealed former section 350, it was not replaced with a new statute, which contained a standard of proof comparable to former section 350. Rather, the Legislature addressed the application of section 350 in the uncodified provisions of section 52 of the Statutes 1984, chapter 892, at page 3003 as follows, "Notwithstanding the repeal of Section 350 of the Probate Code, the section shall continue to apply to any case where the testator died before January 1, 1985." And, as noted, Annie Mae died on November 24, 1984.

Despite this specific reference to former section 350 in section 52 the uncodified provision of the Statutes 1984, chapter 892, section 52, page 3003, uncertainty exists as to whether 350 still applies to lost or destroyed wills. This is because in 1988, the Legislature enacted section 3 as a general transitional provision governing probate cases. As stated above, there are no current provisions of the Probate Code which address admission of lost or destroyed wills except section 8223. Because there is no law which applies to lost or destroyed wills **[*46]** except section 8223, it must apply. (§ 3, subd. (c); *Rice v. Clark, supra*, 28 Cal.4th at pp. 99-100.)

Further, section 6103 sets forth the exceptions to the new law for a proceeding when the decedent died on or before January 1, 1985. Section 8000 et seq. contains standards for petitions to probate wills including proof of wills (§ 8220) and lost or destroyed wills. (§ 8223.) However, none of these statutes are among the expressly excepted provisions of section 6103 requiring application of laws which were in force prior to January 1, 1985. Hence, the probate court correctly ruled that section 8223 was the applicable law given the transitional provisions contained in section 3, subdivision (c). (See also § 6103.)

Application of section 8223 shows that the probate court did not err in admitting the will to probate. Here, a copy of the will containing the testator's intent was produced for probate. The copy contains the testamentary words of decedent which was properly admitted to probate pursuant to section 8223.

4. The probate court did not rely on incorrect revocation authority

Geraldine argues the probate court erroneously relied on section 6124 to find whether Annie Mae had revoked **[*47]** the will. Section 6124 currently provides in this regard: "If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with intent to revoke it. This presumption is a presumption affecting the burden of producing evidence." (Stats. 1990, ch. 79, § 14, p. 686, operative July 1, 1991.) As can be noted, section 6124 was adopted after Annie Mae died on November 24, 1984. The Court of Appeal has explained, "[S]ection 6124 creates a presumption of revocation where a will known or believed to have been executed cannot be found." (*Lauermann v. Superior Court, supra*, 127 Cal.App.4th at pp. 1331-1332.) The statutory presumption is one affecting the burden of producing evidence rather than one affecting the burden of proof. (*Lauermann v. Superior Court*, *supra*, 127 Cal.App.4th a p. 1332, fn. 8.; see *Estate of Bristol, supra,*23 Cal.2d at pp. 224-225.)

Geraldine argues the probate court improperly relied upon the section 6124 statutory presumption to determine the revocation issue. However, there is no evidence **[*48]** the probate court erroneously relied on section 6124. Rather, the record shows that in reaching its conclusion the probate court relied on *Estate of Obernolte, supra,* 91 Cal.App.3d at page 127. In 1979, *Obernolte* explained that, at that time, there was no statutory rebuttable presumption of revocation of a will; rather, it was "a common law or judicially originated" presumption. (*Id.* at p. 129, fn. 7 citing *Estate of Bristol, supra,* 23 Cal.2d at pp. 234-237.) *Obernolte* explained that there was a common law double rebuttable presumption of revocation. First, under the common law, the will is presumed to have been destroyed by its disappearance. Second, the common law presumed revocation from the will's destruction. (*Estate of Obernolte, supra,* 91 Cal.App.3d at p. 129, fn. 7.) The rebuttable presumption arose where: the decedent remained competent until death; the will was last seen or known to be in the decedent's possession; and neither the will nor a duplicate can be found. (*Estate of Ross, supra,* 199 Cal. at p. 646; *Estate of Obernolte, supra,* 91 Cal.App.3d at p. 129; *Sparks v. Lauritzen, supra,* 248 Cal.App.2d at pp. 274-275; *Estate of Flood, supra,* 47 Cal.App.2d at pp. 812-813.)

In **[*49]** any event, the Law Revision Commission Comment which preceded the 1990 enactment of section 6124 explains that the statute is a merely a codification of existing law described in *Obernolte*. (Cal. Law Revision Com. com. 53, West's Ann. Prob. Code (1991 ed.) foll. § 6124, p. 289.) Thus, under both the common law and section 6124, there is a presumption which can be rebutted by production of evidence showing that it is "'equally probable'" the will was inadvertently destroyed or without any intent to revoke it. (See *Estate of Bristol, supra,* 23 Cal.2d at pp. 224-225 [common law]; *Estate of Obernolte, supra,* 91 Cal.App.3d at p. 129 [common law]; see also § 6124; *Lauermann v. Superior Court*, *supra*, 127 Cal.App.4th a p. 1332, fn. 8 [interpreting section 6124 and citing *Estate of Bristol, supra,* 23 Cal.2d at pp. 224-225 and *Estate of Obernolte, supra,* 91 Cal.App.3d at p. 129].) In short, there is simply no merit to Geraldine's claim the order is reversible because the probate court improperly relied on section 6124.

Geraldine argues the presumption of an intention to revoke was not overcome. As previously noted, the rebuttable presumption arises when: there is evidence the decedent remained **[*50]** competent until death; the will was last seen or known to be in the decedent's possession; and neither the will nor a duplicate can be found. (*Estate of Ross, supra,* 199 Cal. at p. 646; *Estate of Obernolte, supra,* 91 Cal.App.3d at p. 129; *Sparks v. Lauritzen, supra,* 248 Cal.App.2d at pp. 274-275; *Estate of Flood, supra,* 47 Cal.App.2d at pp. 812-813.) As the proponent of a presumption, Geraldine had the burden of establishing by a preponderance of evidence the existence of basic or foundational facts which would trigger the presumption. (*In re O.S., supra,* 102 Cal.App.4th at p. 1410; *Valentine v. Membrila Ins. Services, Inc., supra,* 118 Cal.App.4th at p. 469; *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co., supra,* 12 Cal.App.4th at p. 545.)

The probate court found that Geraldine had not triggered the presumption because there was no evidence that Annie Mae remained competent until death. There was evidence that, when she was lucid, Annie Mae frequently talked about her properties to her relatives. Annie Mae continued to express her wishes that the properties be divided among her "nine." which included the grandchildren who survived their parents. Annie Mae indicated **[*51]** that she did not want any of the "nine" to have an advantage over any of the others. The undisputed evidence established that by the end of her life Annie Mae was no longer lucid. More than one witness testified that, during the last year of her life, Annie Mae was mostly unaware of events and circumstances. Annie Mae had to be reminded that Randy was her grandson. One witness testified that Annie Mae was mostly "out of it" such that she was in no condition to discuss "wills" or any other business matters. Geraldine produced no evidence that Annie Mae remained competent until death such that the revocation presumption was triggered. Thus, the probate court's finding the revocation presumption was not triggered must be upheld.

Furthermore, even if the presumption had been triggered, sufficient evidence exists to sustain the probate court's findings. (*Estate of Bristol, supra*, 23 Cal.2d at p. 224; *Estate of Obernotle, supra*, 91 Cal.App.3d at pp. 128-129.) There is no evidence of destruction or loss other than the presumption. However, there was circumstantial evidence from which the probate court could conclude that it was equally probable that the loss or destruction was not accomplished **[*52]** with intent to revoke. The undisputed evidence established that Annie Mae talked about her real property to her relatives. She always indicated that she wanted to divide the property with her "nine." The three witnesses to the execution of the will testified that they remembered Annie Mae's name. Mr. Levitas testified that he prepared a will for Annie Mae. Further, Mr. Levitas wrote a letter to her son outlining the disposition of the property in accordance with her wishes. The will showed a disposition of the property consistent with her discussions about her intentions regarding her "nine" including her grandchildren, whose parents predeceased Annie Mae. Annie Mae showed the will to daughter, Augusta, and granddaughter, Beverly. Annie Mae reaffirmed that she was committed to making an equal disposition of the property which was consistent with the provisions of the lost will. The last person to see the will was Beverly who saw Annie Mae place the will in the cedar chest. Annie Mae then locked the cedar chest. There was evidence that a number of people could have had access to the will prior to and after Annie Mae's death. Several witnesses testified that Annie Mae's children took **[*53]** care of her prior to her death. After Annie Mae's death, Margaret received possession of the cedar chest. Margaret moved the cedar chest into her home. Geraldine subsequently lived with Margaret for several years. There was sufficient evidence to rebut any presumption of destruction with intent to revoke. (*Estate of Bristol, supra*, 23 Cal.2d at pp. 223-224; *Estate of Ronayne* (1951) 103 Cal.App.2d 852, 858-859; *Estate of Moramarco, supra*, 86 Cal.App.2d at pp. 336-338.) Accordingly, Geraldine has failed to show any basis for reversing the order admitting Annie Mae's will to probate.

C. The Sanctions Orders

1. The probate court had authority to compel Geraldine to attend her deposition

Geraldine claims the court lacked authority to issue the March 29, 2006 order compelling her to submit to a deposition. Geraldine argues when Randy brought the motion to compel on March 17, 2006, she had not failed to appear at the March 21, 2006 scheduled deposition. Citing Code of Civil Procedure section 2025.450, Geraldine argues the probate court had no authority to issue an order compelling her to submit to a deposition until she actually failed to appear to be deposed. Code of Civil Procedure section 2025.450 **[*54]** provides in part, "If, after service of a deposition notice, a party to the action . . ., without having served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, . . . the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document or tangible thing described

in the deposition notice."

We disagree. The probate court possessed the jurisdiction to compel Geraldine to be deposed under the circumstances of this case. That is, notwithstanding Code of Civil Procedure section 2025.450, the California Supreme Court has expressly held a trial court has inherent authority to compel witnesses to testify at a deposition. In *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264-265, the Supreme Court held: "Such power necessarily exists as one of the inherent powers of the court and such power should be exercised by the courts in order to insure the orderly administration of justice. We find nothing in the code sections relating to the taking of depositions which can be construed as an attempt to withdraw that power with respect to deposition proceedings. It is true **[*55]** that the language of section 2021 of the Code of Civil Procedure permits the taking of a deposition 'at any time' and that the permissive language of said section may be said to confer a right upon the litigants. But such right is not an absolute right but is a right which, like all rights relating to procedural matters, is qualified by the existence of the power of the court to exercise a reasonable control over the exercise of such right. To deny the existence of such power is to deny the power of the trial court to order the continuance of a deposition in case of the illness of the witness or in case of the illness or the death of a party or his counsel. We do not believe that it would be seriously contended that the power to order a continuance does not exist under such circumstances . . . ." The probate court could exercise its inherent power to order Geraldine to attend her deposition.

Furthermore, at the March 29, 2006 hearing on the motion to compel, Geraldine's counsel stipulated to a court order that the deposition occur. At no time during the March 29, 2006 hearing was it asserted the probate court lacked jurisdiction to compel Geraldine to attend a deposition. As a result, **[*56]** the stipulation to have Geraldine appear at the deposition is deemed to be consent to any act in excess of jurisdiction. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 8-9; *West Coast Constr. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 698.)

In any event, she has not demonstrated that the probate court abused its discretion in compelling her to submit to a deposition. The motion was made in conjunction with a request to extend the discovery cutoff date and there was an approaching trial date. Although Randy served notice of deposition, the attorneys were unable to reach an agreement as to a date prior to the court's intervention. Once the issue was raised on March 29, 2006, in court, the parties reached a stipulation as to the time and the place. Under the circumstances, the probate court did not abuse its discretion in exercising its inherent authority to compel Geraldine's appearance at the deposition on April 7, 2006.

2. The monetary sanctions award must be upheld

Geraldine also argues the $ 3,936 in monetary sanctions order against her attorney of record, Mr. Noel, for failure to appear at the April 7, 2006 court-ordered deposition must be reversed. A trial court possesses **[*57]** broad discretion to impose monetary sanctions which is subject to reversal only for arbitrary, capricious, or whimsical action. (*In re Marriage of Michaely* (2007) 150 Cal.App.4th 802, 809; *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1350; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176.) The probate court imposed the sanctions pursuant to Code of Civil Procedure section 2023.030, subdivision (a) which allows the court to impose monetary sanctions against attorneys who engage in or advise the misuse of the discovery process. A misuse of the discovery process includes: failing to submit to authorized discovery; disobeying a court order to provide discovery; unsuccessfully opposing a discovery motion without substantial justification; or failing to meet and confer in good faith where statutorily required to do. (Code Civ. Proc., § 2023.010, subds. (d), (g), (h), (i); *In re Marriage of Michaely, supra*, 150 Cal.App.4th at p. 809; *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214.)

The probate court acted within is discretion to impose monetary sanctions against Mr. Noel. As noted, the probate court had the authority to order **[*58]** Geraldine to attend her deposition. Monetary sanctions may be imposed against an attorney who has employed a discovery method that causes undue burden and expense and for failing to make a reasonable and good faith attempt to informally resolve a dispute. (Code Civ. Proc., § 2023.010; *Leko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1123-1124.) The probate court could reasonably find a number of motions, delays, and hearings resulted from Mr. Noel's refusal to cooperate in having his client deposed. Mr. Noel knew that there was an existing order to have Geraldine appear for her deposition to be taken but he failed to: attend the court ordered deposition; secure another attorney to attend the court ordered deposition; or advise his client to obey the probate court's order. Mr. Noel also apparently made himself unavailable by telephone which meant that the court-ordered deposition did not take place. The probate court could reasonably fined the deposition was not conducted on April 7, 2006 solely because of Mr. Noel's conduct. There is nothing arbitrary, capricious, or whimsical about the probate court's well-reasoned decision to impose sanctions against Mr. **[*59]** Noel for his conduct regarding the circumstances of the aborted April 7, 2006 deposition. Accordingly, the probate court's order imposing the sanctions must be affirmed. We need not address Randy's standing contentions.

IV. DISPOSITION

The orders under review are affirmed in all respects. Randy Taylor is awarded his costs on appeal from Geraldine Carr.

TURNER, P. J.

We concur:

ARMSTRONG, J., KRIEGLER, J.