

Article Information

Authors: Donna Benge, Nicole Harford

Service: Estate & Succession Planning, Estate Administration, Wills & Estate Planning

Sector: Private Clients

Deceased estate dilemma: What if the Will is missing?

Occasionally, the original Will of a deceased cannot be located. If that is the case then thorough searches for the original Will need to be conducted. This may include searching the deceased's property and personal papers, contacting the solicitor who drafted the Will as well as former solicitors, accountants, banks and advertising in the public notices.

If the original Will is still lost or misplaced despite extensive searching, the law presumes that if the deceased had possession of the Will, then the deceased destroyed it with the intention of revoking it, unless evidence suggests otherwise. This legal principle is referred to as the presumption of revocation.

In some circumstances where a copy of the Will is available, the executor may seek a Grant of Probate on the copy of the Will. If the executor is seeking to administer the estate according to a copy of the deceased's Will, the executor needs to prove that even though only a copy of this Will can be found, the deceased intended this to be his or her Will.

To enable the Court to grant probate of a copy Will, it requires evidence including but not limited to the:

1. last known location of the original Will and whom had possession of it;
2. original Will having been properly executed in accordance with the relevant legislation;
3. deceased's knowledge of the contents of the original Will and that it revoked all former Wills;
4. copy of the Will being a complete and accurate copy of the original Will;
5. deceased's intentions, words or actions which support that the deceased intended the Will to be his or her last Will;
6. circumstances surrounding how the original Will was lost or information which rebuts the presumption that the deceased intended to revoke the Will;
7. details of the investigations and searches which were made to locate the original Will; and
8. information about the persons who may be prejudiced by the copy of the Will being admitted to probate and their consent to the application, if they will provide it and have legal capacity to do so.

An application to admit a copy of a Will can cause delays and be costly to the deceased's estate. Further, if the Court determines that the deceased intended to revoke his or her last Will, then the penultimate Will of the deceased may in fact be their last valid Will or the estate may be required to be administered according to the statutory rules on intestacy. This may result in a very different distribution of the deceased's estate than intended.

Consequently, we recommend that:

1. willmakers inform their executors where their original Will is stored;
2. if the original Will is stored at home, that it be moved to a secure location or left in safe custody of a professional advisor;
3. Wills are reviewed regularly to ensure they remain up to date and appropriate for the circumstances; and
4. if an executor or family cannot locate the original Will of a deceased, that they seek specialist legal advice in regard to the necessary steps to admit a copy of the Will to probate.