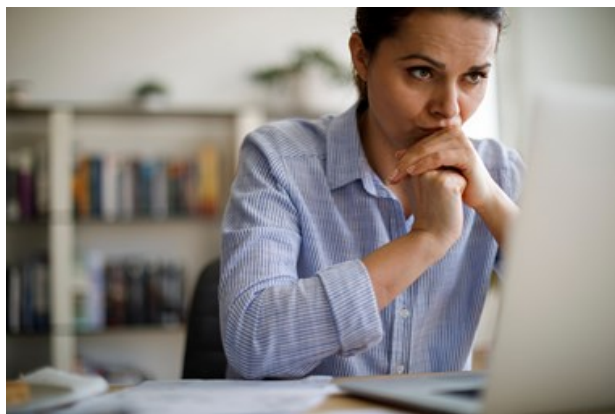




What can be done if the original Will is missing or lost?

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Date: Sunday June 25, 2023

We have recently received a number of queries where the formal Will of the deceased cannot be located; that is, the original Will is missing or lost. It may be that a copy of the Will has been found but not the original document. The question then is what to do and whether a [Grant of Probate](#) can still be made where only a copy of the Will is located.

This article only relates to where there is a copy of a Will which, on its face, looks to have been properly drafted and signed. It does not apply to, say, a document which looks like a copy of a Will but does not appear formally drawn and signed as a Will (for example, it may not appear to have been signed by the deceased in the presence of 2 adult witnesses).

That situation falls under the area of law dealing with informal Wills and is outside the scope of this article.

A missing Will may be presumed revoked in the absence of evidence to the contrary

In the absence of evidence to prove who last held the original Will, then it is assumed that the document was last in the possession of the Will maker. The Will is then presumed to have been revoked by the Will maker unless there is evidence to indicate that the Will maker had not revoked the Will.

Consider this example:

There may be evidence that the Will maker believed that the Will was in their home. They had made representations to family and/or friends about the content of the document and those

representations aligned with the provisions in a copy of the Will found at the time of death.

This is only an example of what might be sufficient evidence, but each case depends upon its own particular facts.

Where evidence indicates that the Will was held by someone else (not the Will maker), such as a lawyer, then that person will be required to provide evidence about the loss of the original Will.

Formal evidence required when seeking to use a copy of the Will for probate

If there is enough evidence to show that the Will was not revoked, then there is still additional evidence required where it is intended to use a copy of the Will in an [application for a Grant of Probate](#).

This includes the following:

- Evidence that there was an original signed Will which appears to include the intentions of the deceased person as to how his or her assets should be distributed following death. This may be evident from the copy of the document, but there may be difficulties if the copy appears to be an incomplete copy.
- Evidence that the document revoked previous Wills. This is very important since if the copy of the Will has not formally referred to revoking earlier Wills, then such document may not be seen as the last Will, and there may be other Wills or documents which must be considered.
- Details as to what the terms of the Will are. This goes more to establishing that the copy of the Will has terms which are effective for determining what the deceased wanted in relation to the distribution of the assets owned by the deceased.
- Evidence of the signing of the original Will. The formal requirement for signing a Will is that two adults should witness the signing by the deceased. In that case, it is imperative to identify who were the witnesses to the signing and, where possible, obtain an affidavit from them confirming what took place. Where the witnesses cannot, after exhaustive investigation, be located, evidence might be provided that the deceased intended that the document was his or her Will.

Consent of persons affected if using a copy of a Will for probate

A notice needs to be served on any people who may be adversely affected by the making of the application for a Grant of Probate of the copy of the Will. Alternatively, their consent to the making of the application may be provided.

Adversely affected people include all those named in the copy of the Will and those who would be entitled on an intestacy. That means those people who would have received benefits from the deceased if [the deceased had not made a Will](#). In that situation, the statutory rules under the *Succession Act* are used for determining the distribution of assets.

Undertaking by the executor to lodge original Will if ultimately found

The executor, who will be making the application for Grant of Probate of the copy of the Will, is required to give an undertaking to lodge the original Will (or a more authentic copy of it) if it is found.

Get help from a Wills and Estates lawyer

There is certainly a lot more work to be done by an executor when only a copy of the Will is available. And the evidence to support the application for the Grant of Probate needs to be carefully considered and presented to the Court.

We can assist you in exploring all the evidence and determining if it is sufficient to support the application. We can also assist in preparing the evidence in proper form acceptable to the Court.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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