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Where Oh Where Could My Lost Will Be?

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Categories : Clerks of Superior Court, Estates

Tagged as : Clerk of Superior Court, estate administratoinprobate of will

Date : May 24, 2017

You did your homework, made your estate plans, and executed your last will and testament. However, after your death, your family or friends are unable to locate your original will. They may have only a signed or unsigned copy or nothing at all. Perhaps the original will was destroyed in a fire or lost in a move or a family member was told that the handwritten will wasn't worth the paper it was written on and they tore it up and threw it away (true story) or your relatives simply are unable to find your original will (tip to friends and family - don't forget to check the family bible or the freezer).

In these situations, is all hope lost? Will your property descend pursuant to intestate succession (i.e. to heirs according to State law) despite your careful estate planning? Well, not quite. It is possible to probate a lost or destroyed will in North Carolina upon certain proof to the court. This process is not set forth in statute, but instead is derived from case law. So where exactly does one seeking to probate a lost or destroyed will start? Below are some key questions to consider when facing this situation.

What court has the authority to determine whether or not to admit a lost or destroyed will to probate?

The clerk of superior court has jurisdiction to probate a lost or destroyed will. *See* Anderson v. Atkinson, 234 N.C. 271 (1951) (noting that "under the law of North Carolina the issue of whether an unprobated script is, or is not, a man's last will can not be properly brought before the superior court for determination in an ordinary civil action"). The clerk of superior court has exclusive original jurisdiction over the probate of wills. G.S. 28A-2-4(a)(1). The jurisdiction of the clerk to take proof of a particular will is "not affected by its loss or destruction before probate." Anderson v. Atkinson, 234 N.C. 271, 273 (1951).

What does someone file with the clerk to probate a lost or destroyed will?

The process for applying for probate of a lost or destroyed will mirrors the process for when the original will is available. A person entitled to apply for probate (the propounder) may file an application for probate in common form (typically, an ex parte informal proceeding before the clerk) or a petition for probate in solemn form (a more formal court proceeding with a hearing and notice to interested parties). *See* In re Hedgepeth's Will, 150 N.C. 245 (1909) (probate of lost will in common form); In re Will of Herring, 19 N.C App. 357 (1973) (probate of lost holographic will in solemn form). However, some practitioners note that it is a best practice to probate the lost or destroyed will in solemn form. *See* Edwards' N.C. Probate Handbook § 5:8 (2016). Ultimately, it is up to the propounder of the lost or destroyed will to choose to whether to apply for probate in common or solemn form. *See* NC Clerk of Superior Court Procedures Manual, pg. 72.18. It is advisable for the propounder to sign and verify the application or petition so that the statements contained therein and filed with the court are under oath.

There is no form published by the N.C. Administrative Office of the Courts specifically for the probate of a lost or destroyed will. Form E-201 is typically used to apply for probate in common form. Edwards' N.C. Probate Handbook published a form application, affidavit, and order practitioners and courts may use as a guide in the case of a lost attested written will when a copy of the will is available. *See* Edwards' N.C. Probate Handbook § 5:21 (application), 5:22 (affidavit), and 5:23 (order) (2016).

Who may apply to probate a lost or destroyed will?

Although there is no NC case directly on point that answers this question, it would seem appropriate that the same persons who can apply for probate of a will may apply for probate of a lost or destroyed will. This includes the executor and any beneficiary or other person interested in the estate if no executor applies to have the will probated within 60 days after the death of the testator. G.S. 28A-2A-1; G.S. 28A-2A-2.

What must the person seeking to probate the lost or destroyed will prove in order for the court to admit the will to probate?

The propounder must provide evidence of each of the following elements below before the clerk may admit the will to probate. *See* In re Wood's Will, 240 N.C. 134, 137 (1954).

1. ***The death and domicile of the testator.***

The application should include a sworn statement as to the fact of death. The clerk may rely on any evidence the clerk deems sufficient to confirm the fact of death. G.S. 28A-6-1(c). Typically, the clerk relies on the sworn statement in the application together with a certified or authenticated copy of a death certificate from an official or agency of the place where the death occurred.

The application should also include a sworn statement that the testator was domiciled in the county at the time death, or left property or assets in the county, or was a nonresident motorist who died in North Carolina. *See* G.S. 28A-3-1.

2. ***Proper execution of the will.***

The application or other evidence submitted by the propounder should include facts that demonstrate that the will was properly executed. *See* In re Wood's Will, 240 N.C. 134, 137 (1954); Hewett v. Murray, 218 NC 569 (1940). If the lost or destroyed will is an attested written will, proper execution may be shown by submitting affidavits of the subscribing witnesses, if they are living and available. *Id.* If any of the witnesses are dead or unavailable, the propounder should provide evidence as to why they are absent and may then submit other competent evidence to prove due execution of the will. *See* In re Will of McCauley, 356 NC 91 (2002); In re Hedgepeth's Will, 150 NC 245 (1909). In the case of a lost holographic will, the propounder should present evidence through a witness or other means to prove proper execution of a holographic will, including the fact that the will was signed by and written in the handwriting of the decedent. Hewett v. Murray, 218 N.C. 569 (1940).

Ultimately, whether evidence of proper execution is satisfactory to admit the will to probate is up to the discretion of the clerk. McCauley, 356 N.C. at 92. In a more recent case involving a lost attested written will, one subscribing witness to the will had no memory of witnessing the will and the other witness was unknown. *Id.* The court found that the testimony of the secretary for the attorney who drafted the will could be sufficient evidence to prove due execution of the lost will. *Id.* The secretary testified that she discussed changes to the will with the testator, transcribed the will, read the will back to the testator, and observed and notarized the signatures of the testator and two witnesses. *Id.*

3. ***The contents of the will.***

The most straightforward way to prove the content of a lost or destroyed will is if a copy is available and admissible into evidence. However, if a copy is unavailable, the contents of the will may be shown by the testimony of a single witness. In re Hedgepeth's Will, 150 N.C. 245 (1909). The witness may be a beneficiary or otherwise interested under the will. *Id.* Note, the witness does not have to provide evidence as to the entire contents of the will. If there is satisfactory evidence as to only a portion of the will, then the clerk may admit only the portion of the will to probate supported by such evidence. *See* McCauley, 356 N.C. at 93; Hewett v. Murray, 218 NC 569 (1940).

4. ***The will was lost or destroyed and the loss or destruction did not occur by or at the direction of the testator with an intent to revoke the will.***

The propounder of the will must provide some evidence that the will was lost or destroyed *and* that the loss or destruction was not due to the fact that the testator revoked the will. Regarding the loss or destruction, the propounder may include in the application facts that describe the circumstances that resulted in the destruction of the will, such as a fire or flooding, or reasons why the will might be lost, such as a move or something more sinister like a disinherited family member's access to the will after the death of the testator.

When a will is last seen in the testator's possession and the original will cannot be found at death, a presumption arises that the will was revoked. In re Wall's Will, 223 N.C. 591 (1943). This includes if a will was executed in duplicate (i.e. two originals were executed) and the original in the possession of a third-party, such as an attorney, is found but the original in the possession of the testator cannot be found. *Id.*

The presumption of revocation is a *rebuttable presumption* and may be overcome by submitting facts into evidence that show the loss or destruction was not or could not have been by the testator or by any other person by the testator's direction or consent. In re Wall's Will, 223 N.C. 591, 592 (1943). In at least one instance, the NC Court of Appeals found sufficient evidence to overcome this presumption where there was testimony regarding the testator's close relationship with and dependence on the propounder of and beneficiary under the will. *See* In re Will of Jolly, 89 N.C. App. 576, 577 (1988). The testimony showed that the propounder served as the testator's caretaker without compensation until her death and the testator told others about the existence of her will leaving property to the propounder. These facts together with evidence that the testatrix gave a copy of the will to the propounder along with other personal papers prior to her death were sufficient to rebut the presumption of revocation. *Id.*

Note, the lost or destroyed will is *not* presumed to have been revoked if there is evidence that it was last seen in custody of a third-party. In re Hedgepeth's Will, 150 N.C. 245 (1909). If the will was last seen in the custody of a third-party and not the testator, the propounder should provide evidence to the court of the third-party's possession of the will and along with evidence that the will was lost or destroyed.

5. ***There was a diligent search for the will in the places it would most likely be found.***

Finally, the court must find competent evidence that a diligent search of the areas where the will would most likely be found was conducted. In re Will of McCauley, 356 NC 91 (2002); Byrd v. Collins, 159 N.C. 641 (2012) (describing the nature of the search that must be conducted, including that the party is expected to show that he or she has in good faith exhausted in a reasonable degree all the sources of information and means of discovery). It is advisable for the propounder to include a description of the search, including the areas searched, in the application or through an affidavit or live testimony.

How is the evidence presented to the clerk?

1. ***Probate in Common Form***

If applying for probate in common form, it is likely that the necessary evidence will be in the application for probate and supporting affidavits filed with the application. The clerk will likely review the application and affidavits in a more informal setting with only the propounder present. However, in practice, many clerks notice and schedule a hearing on the issue of probate in common form of a lost or destroyed will. Clerks who hold a hearing on probate in common form should be cautious that the proceeding does not devolve into a de facto caveat proceeding (a proceeding challenging the validity of the will). If the propounder of the will submits sufficient competent evidence, the clerk then admits the will to probate. A person who seeks to challenge the validity of the will may do so through a caveat at the time of application for probate of the will and probate thereof in common form or within three years after it is admitted to probate. G.S. 31-32. The caveat proceeding falls within the jurisdiction of the superior court.

2. *Probate in Solemn Form*

In contrast, if the propounder petitions for probate in solemn form, an estate proceeding is initiated by the filing of the petition and a hearing is held. G.S. 28A-2-7(a). The clerk issues a summons to all interested persons in the estate. *Id.* Evidence is typically submitted at the hearing through sworn testimony, exhibits, or other acceptable means pursuant to the N.C. Rules of Evidence. If an interested party wants to challenge the will submitted for probate in solemn form, he or she may do so by filing a caveat before the hearing or challenging the validity at the hearing. G.S. 28A-2-7(b). If either occurs, the clerk then transfers the matter to superior court to determine the validity of the lost or destroyed will in a caveat proceeding. G.S. 28A-2-7(c).

What if the will is not lost or destroyed but someone refuses to turn the will over to allow it to be probated?

If a will exists and someone refuses to turn the will over, the clerk must compel the production of the will. G.S. 28A-2A-4. The clerk may enter an order to compel the will after an affidavit is filed before the clerk establishing the facts related to the failure of a person to turn over the will. There is no filing fee associated with the filing of this affidavit. If the person in possession of the will refuses to comply with the court's order to compel the will, a contempt proceeding may be initiated against the person that results in imprisonment until the will is produced. G.S. 28A-2A-4.