When the Will is Gone

ROBIN PETTY, J.D.

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There is a presumption under the law that when a Will is destroyed, the Testator (i.e., the person who created the Will) intended for it to be destroyed. But what happens when an original copy of a Will (or a Revocable Trust) is accidentally destroyed or lost?

In this paper, reference to estate documents means a Will and a Revocable Trust. Ancillary documents refer to living wills, health care proxies, HIPAA authorizations, and powers of attorney.

Safety Dance

Until recently, most states required a physical original copy of an executed estate document to begin the probate process. Over the last ten years, one trend that has emerged is that many Testators are no longer opting to have the law firms that created their estate documents retain those original executed documents for safekeeping. While some may still opt to retain their original documents in a bank safe deposit box, the emerging trend seems to be that Testators retain their original documents themselves. Sometimes, they are kept in lockboxes with other vital documents. Still, they are often kept in basic storage containers that offer little protection against water, fire, or other destructive agents.

So, what steps should be taken if estate documents are accidentally destroyed or lost and the Testator is still alive?

Alive and Kicking

The Testator should contact their attorney as soon as possible to recreate the estate documents and ancillary documents. The Testator will have to go through all of the formalities of executing the documents again, but the result will be that the Testator will have an estate plan reflecting their wishes. Most law firms will retain at least a draft copy in the client's file, and recreating the destroyed document should be a seamless process.

What if the Will is accidentally destroyed or lost, and the Testator is no longer living?

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Candle in the Wind

While the original hard copy of the estate documents may have been destroyed, Testators usually retain electronically executed copies of their documents, and about 15 states, including the District of Columbia, have adopted the Uniform Electronic Wills Act ("UEWA"). The primary purpose of this Act is to modernize the probate process and make it more accessible.

In situations like this, the first step should be to contact the drafting attorney (or another qualified trusts and estates attorney). The attorney will determine if the state in which the deceased person lived has adopted the UEWA or if the state has its own laws regarding electronic estate documents. Additionally, the UEWA has specific requirements regarding its application, so while a jurisdiction may have adopted the Act, the Testator may not have complied with the requirements of the UEWA.

Everything's Coming Up Roses

If the estate document appears to meet the requirements of the UEWA, the next step is to submit it to the probate court. The probate court will review the document and determine its validity. Additional evidence may need to be provided to prove the validity of the estate document. Evidence can take the form of testimony from witnesses, digital logs, and any communication from the Testator indicating their intent to create and sign an electronic will.

Ooh That Smell

If the electronic Will is not accepted, the next step should be to locate other documents, such as earlier versions of the most recent estate documents. A best practice is that once new estate documents are executed, prior executed copies should be destroyed. The presumption is that the most recently executed document is the one the Testator intended to distribute assets, so if a Testator loses his or her current Will. Still, if prior executed versions were not destroyed, those older documents may be submitted to probate.

Don't You Forget About Me

If no valid estate documents can be found, the estate will be subject to the laws of intestacy in the state where the Testator lived. Intestacy laws dictate how assets are distributed when there is no valid will or revocable trust in place. Typically, this means the Testator's assets will be distributed to their closest relatives—spouse, children, parents, or siblings—according to a predetermined legal formula. These laws vary by state, but they generally aim to follow what is presumed to be the natural order of inheritance.

The problem arises when the Testator's intent is different from what the state's intestacy laws prescribe. In such cases, the absence of an estate document can create conflict and lead to unwanted outcomes for surviving family members. This is why it is crucial to take steps to ensure that a valid will or trust is in place and adequately safeguarded.

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Never Let Me Down Again

In light of these potential issues, it is prudent for Testators to have contingency plans for their estate documents. For example, multiple copies of the original document can be made and stored in different secure locations—such as with a trusted family member or in a digital vault, if allowed by the state. Law firms specializing in estate planning can also offer digital solutions for storing documents. Even if the state does not yet accept electronic wills, having a scanned or electronically signed copy can help prove the Testator's intent in court.

Furthermore, keeping ancillary documents up to date and ensuring they are in a secure but accessible location is equally important. Powers of attorney, healthcare directives, and HIPAA authorizations are critical for deciding if the Testator becomes incapacitated. These documents should be periodically reviewed and stored with the same level of care as the Will or trust.

The End

While stressful, accidental destruction or loss of estate documents is not always irreversible. If the Testator is still alive, new documents can be executed to reflect their current wishes. If the Testator has passed, various strategies may be employed to settle the estate, including the use of electronic records, prior versions of documents, or intestacy laws.

Regardless of the situation, having proactive conversations with a qualified estate planning attorney, keeping documents in a secure location, and understanding the evolving legal landscape surrounding electronic wills can go a long way in ensuring that the Testator's wishes are honored. The best safeguard is still careful planning and frequent review of both primary estate documents and ancillary documents to minimize the risk of an undesired outcome.

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