

The Law of Lost Wills, the Safe-Keeping of Documents, the Ethical Requirements Regarding Client Files, and Related Issues

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Requirements of a Will – N.J.S.A. 3B:3-1 *et seq.*

- ▶ Any individual 18 years or older who is of sound mind may make a will.
 - ▶ Making a will therefore is not a right but a privilege granted by the legislature to those who follow the rules
- ▶ The will must be in writing;
- ▶ The will must be signed by the testator;
- ▶ The will must be signed by two witnesses.
- ▶ A writing intended as a will is valid if the signature and material portions are in the testator's handwriting.

How to Revoke a Will – N.J.S.A. 3B:3-13

Revocation by writing or by act

- ▶ Execution of a subsequent will; or
- ▶ Performing a “revocatory act on the will” with the intent to revoke the will or any part of it.

Revocatory Acts

- ▶ A “revocatory act on the will” includes:
 - ▶ Burning;
 - ▶ Tearing;
 - ▶ Obliterating or destroying.
- ▶ See *In re White’s Will*, 25 N.J. Eq. 501 (Prerog. 1874) [acts of tearing and pencil marks were sufficient to revoke the will]
- ▶ Is theft of a will a revocatory act?

The Law of Lost or Destroyed Wills

- ▶ What happens if a will is lost or destroyed?
 - ▶ What about a will that is lost or destroyed while the testator is alive?
 - ▶ What about a will that is lost or destroyed by an occurrence after the testator's death?
- ▶ Can a copy of the lost will be admitted to probate?
- ▶ Can evidence other than a copy be used to establish a will?

The Law of Lost or Destroyed Wills

- ▶ If the will is lost or destroyed, the law in New Jersey states that:
- ▶ “the will may be established upon satisfactory proof of the destruction of the instrument, and of its contents or substance. Whether the proof be by one witness, or by many, it must be clear, satisfactory, and convincing.”
 - Wyckoff v. Wyckoff, 16 N.J. Eq. 401, 405-406 (Ch. 1863)
 - In re Calef’s Will, 109 N.J. Eq. 181, 184 (Ch. 1931)

The Law of Lost or Destroyed Wills

- ▶ The law is well settled that the Superior Court, Chancery Division, has jurisdiction to establish a will which has been lost, stolen or destroyed.

—In re Schultz's Will, 102 N.J. Eq. 14 (Prerog. 1923)

—In re Calef's Will, 109 N.J. Eq. 181 (Ch. 1931)

—In re Roman's Will, 80 N.J. Super., 481 (Hudson Co. Ct. 1963)

The Law of Lost or Destroyed Wills

- ▶ The burden of proof “is upon the proponent to prove the lost, stolen or destroyed will by clear and convincing evidence. This clear and convincing evidence must be shown with reference to the execution of the alleged lost will, the contents of said will, and the circumstances under which the will was lost, stolen or destroyed.”

—In re Roman’s Will, 80 N.J. Super., 481, 483 (Hudson Co. Ct. 1963)

The Law of Lost or Destroyed Wills

- ▶ First, the proponent must prove that the will existed.
- ▶ Second, the proponent must prove the contents of the will.
- ▶ Lastly, the proponent must prove the circumstances under which the will was lost or destroyed.
 - ▶ Note that proving the circumstances under which the will was lost or destroyed is not always required.
 - ▶ See *In re Estate of Schenecker*, Unpublished Opinion, 2011 WL 812815 (Decided March 10, 2011)

The Law of Lost or Destroyed Wills

- ▶ If the will was in the testator's custody, or if the testator had ready access to it, at the time it was lost, a presumption exists that the testator destroyed the will.
- ▶ The presumption is rebuttable.
 - In re Calef's Will, 109 N.J. Eq. 181, 184 (Ch. 1931)
 - Campbell v. Cavanaugh, 96 N.J. Eq. 724, 727 (Ch. 1923)

The Law of Lost or Destroyed Wills

- ▶ When the will is given to another for safe keeping, the law “does not require an *actual tracing* of the will back into possession of the testatrix, but is satisfied by a showing of access; that is, opportunity of repossession, and upon such showing the presumption of revocation remains until rebutted by evidence which is clear, convincing, and satisfactory”.

—In re Calef’s Will, 109 N.J. Eq. 181, 186 (Ch. 1931)

The Law of Lost or Destroyed Wills

- ▶ Where the will is “lost or destroyed while in the possession of the testator, the loss or destruction must be without his knowledge, or the presumption of revocation is not overcome”.

—Campbell v. Cavanaugh, 96 N.J. Eq. 724, 727 (Ch. 1923)

- ▶ In addition, several courts have gone further to hold that the proof offered to rebut the presumption must be sufficient to exclude every possibility of a destruction of the will by the testator.

—In re Lawrence’s Will, 138 N.J. Eq. 134, 134-135 (Prerog. 1946)

—In re Estate of Jensen, 141 N.J. Eq. 222, 225 (Prerog. 1947), aff’d, 142 N.J. Eq. 242 (E. & A. 1948)

The Law of Lost or Destroyed Wills

- ▶ However, where the will is lost, destroyed or stolen, with the knowledge of the testator, but without his consent, the facts and circumstances of how the will was lost, destroyed or stolen are relevant.
- ▶ For example, in a case in which the testator's home was burglarized and the safe containing his will was stolen, the presumption of revocation was overcome because the court found that the testator still had hope that the contents in the safe would be returned.

—In re Roman's Will, 80 N.J. Super., 481 (Hudson Co. Ct. 1963)

The Law of Lost or Destroyed Wills

- ▶ Where the will “was in existence, unrevoked, at the death of the testator, and was afterwards lost or destroyed, its contents may be proved by parol, and the will, as thus reproduced, may be admitted to probate”.

—Campbell, 96 N.J. Eq. at 727 citing to the Pennsylvania case of *In re Deaves*, 140 Pa. 242, 21 Atl. 395

—*Wyckoff v. Wyckoff*, 16 N.J. Eq. 401, 405-406 (Ch. 1863)

Who Should Keep the Original?

Should the will be given to the client?

or

Should the will be kept by the attorney?

RPC 1.15 Safekeeping Property

- ▶ A lawyer shall hold client property separate from the lawyer's own property.
- ▶ “Client property such as original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property.”

— NJ Eth. Op. 692 (January 15, 2001)

- ▶ Complete records of such property shall be kept by the lawyer and shall be preserved for a period of seven (7) years after the event that they record.

RPC 1.6 Confidentiality of Information

- ▶ A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.
- ▶ Cornerstone of this duty is exercising reasonable care in protecting the client's information.
- ▶ Reasonable care, however, “does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access.”

—NJ Eth. Op. 701

Electronic Storage

- ▶ NJ Ethics Opinion 701:
- ▶ “The touchstone in using “reasonable care” against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then “reasonable care” will have been exercised”.
- ▶ Password protect whenever possible!

RPC 1.16 Terminating Representation

- ▶ Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Storing & Protecting Client Property

- ▶ RPC 1.6 demands that an attorney exercise reasonable care against the possibility of unauthorized access to client information.
- ▶ RPC 1.15 addresses the attorney's duty to protect client property.
- ▶ RPC 1.16 obligates an attorney to look out for a client's best interests when terminating representation.

ACTEC Commentary on MRPC 1.8

- ▶ **Retention of Original Documents.** A lawyer who has drawn a will or other estate planning documents for a client may offer to retain the executed originals of the documents subject to the client's instructions. However, a lawyer who retains a client's documents for safekeeping should provide the client with a written receipt, which may be in the form of a letter, acknowledging that the documents are held subject to the client's order. The receipt may, but need not, also indicate that the fiduciary designated in the documents is not required to retain as counsel the lawyer with whom the documents were left for safekeeping. The documents should be held by the lawyer in a manner consistent with the requirements of MRPC 1.15 (Safekeeping Property) regarding the duties of a lawyer who receives and holds property on behalf of a client. In particular, the documents should be properly identified and appropriately safeguarded. Subject to otherwise applicable law, the lawyer should comply with the client's written directions regarding disposition of the documents.
- ▶ The retention of the client's original estate planning documents does not itself make the client an “active” client or impose any obligation on the lawyer to take steps to remain informed regarding the client's management of property and family status. Similarly, sending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client.

Destroying Client Documents

- ▶ A closed file may be destroyed after 7 years: “[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties.”

— NJ Eth. Op. 692 (January 15, 2001)