

The Law of Lost Wills, Safekeeping Wills, Electronic Wills, and Writings Intended as Wills

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New Jersey Recognizes Three Types of Wills

1. Formal Will -- N.J.S.A. 3B:3-2(a)(1)-(3)
 - in writing
 - signed by the testator
 - signed by 2 witnesses
 - (self-proved; compliance with N.J.S.A. 3B:3-4)
2. Holographic Will -- N.J.S.A. 3B:3-2(b)
3. Writing Intended as a Will -- N.J.S.A. 3B:3-3

Intent to make a Will

- Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting. N.J.S.A. 3B:3-2(c)
- *Matter of Estate of Heffley*, N.J. App. Div., unpublished, 2018 WL 2406320 (Decided May 29, 2018)
- *Matter of Estate of Malsberger*, N.J. App. Div., unpublished, 2017 WL 2991773 (Decided July 14, 2017)

Heffley's "Last" Letter

Considering my place was just appraised at \$60,000 I'll need to go somewhere much cheaper. Not moving immediately, but maybe [i]n the next two years or so.... I'd like it very much if I could leave my home, crappy car [and] personal effects to you except for a few I have promised out. And, of course I wish—like if suddenly [sic] I died or something without the will that you folks could have my house even. But, as I said, I need to get \$60,000 cash for it, in order to pay for my new place.

Malsberger's "Last" Letter

I'm Alice Malsberger—I wish to be cremated upon my death—along with my husband Joe—our ashes placed in a similar (illegible) and placed in mausoleum. I wish my estate be sold & divide in three and 1/3 granted to Fr. Emmanuel, one third to Patricia White, and one third to Dionysis & Anna Nicholaou. I want Pat White to be executrix. I intend to see a lawyer & to validate everything.

Writing Intended as a Will – *Macool*

- *In re Probate of Will and Codicil of Macool*, 416 N.J.Super. 298 (App. Div. 2010)
- This case interpreted N.J.S.A. 3B:3-3 and held:
 - First, a writing offered for probate does not need to be signed
 - Second, created a two-part test for determining intent, where the proponent of the writing intended to constitute such a will must prove, by clear and convincing evidence, that:
 1. the decedent actually reviewed the document in question; and
 2. thereafter gave his or her final assent to it

Writing Intended as a Will – *Ehrlich*

- *In re Estate of Ehrlich*, 427 N.J.Super. 64 (App. Div. 2012)
- Applies the test set out in *Macool* with different facts:
 - Here we have an experienced trusts and estates attorney,
 - Who mails his original will to his named executor
 - He keeps a copy of the original, which he marks: “Original mailed to H.W. Van Sciver, 5/20/2000”
- There was no doubt that the decedent viewed this writing, and the handwritten note was evidence of his “final assent”.

Is it a Writing or Copy of a Writing?

- In *Ehrlich*, the court admitted an unsigned copy of the decedent's will to probate
- “The fact that the document is only a copy of the original sent to decedent's executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in Section 3 that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged.”

I've Lost the Will

- In New Jersey a parallel track exists for admitting lost wills to probate.
- Can you always probate a photocopy like the court did in Ehrlich?
- What facts are important and how does the analysis work?

How to Revoke a Will

N.J.S.A. 3B:3-13

- 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 Act

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

Lost or Destroyed Wills

- The law is well settled in New Jersey that the Chancery Division has jurisdiction to establish a will which has been lost, stolen or destroyed without knowledge of the testator.

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

- “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)

Lost or Destroyed Wills – Cont.

- 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)

Lost or Destroyed Wills – Cont.

- 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)

Lost or Destroyed Wills – Cont.

- 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)

Lost or Destroyed Wills – Cont.

- 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
 1. the execution of the alleged lost will,
 2. the contents of said will, and
 3. 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)

Lost or Destroyed Wills – Cont.

- *Matter of Estate of Becker*, unreported, 2017 WL 745748 (Decided February 27, 2017)

Lost or Destroyed Wills – Cont.

- Proving the circumstances under which the will was lost or destroyed is not always required.
- the key issue in a case such as this is whether the testator had the intent to revoke the missing will, even assuming he or she may have had the opportunity to do so.
- *In re Estate of Schenecker*, Unpublished Opinion, 2011 WL 812815 (Decided March 10, 2011)

Ehrlich Revisited

- Was *Ehrlich* a lost will case or a writing intended as a will case?
- What's the difference?
- Does it matter?

Who Should Keep the Original Will?

- Should the will be given to the client?

or

- Should the will be kept by the attorney?

Ethics of Safekeeping Client Property

- 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.

Electronic Wills

- What is an Electronic Will?
- New Jersey does not have an electronic wills statute, though an electronic will might be considered a writing intended as a will under N.J.S.A. 3B:3-3
- *In re Estate of Horton*, 925 N.W. 2d 207 (Mich. 2018)
- *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013)

Uniform Electronic Transactions Act

- NJS 12A:12-1 – 26 (Adopted June 26, 2001)
- “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record
- NJS 12A:12-3(b)(1) states explicitly that the law does not apply to the creation of wills and trusts

Uniform Electronic Wills Act

Goals:

- To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

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