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

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Valid Execution of a Will

- A written will is validly executed if executed in compliance with N.J.S. 3B:3-2 or N.J.S. 3B:3-3 or its execution was in compliance with the law of the place where it was executed, or with the law of the place where at the time of execution or at the time of death the testator was domiciled, had a place of abode or was a national. § 3B:3-9
- N.J.S.A. 3B:3-2(a) – a will shall be:
  - (1) in writing;
  - (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and
  - (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.
  - ❖ *(4) should be self-proved in compliance with 3B:3-4*
- N.J.S.A. 3B:3-2(b) – Holographic Will
  - A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

Writings Intended as Wills

§ 3B:3-3. Writings intended as wills

Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

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 Div., unpublished, 2018 WL 2406320 (Decided May 29, 2018)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 Div., unpublished, 2017 WL 2991773 (Decided July 14, 2017)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 sudenly [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 setout 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."

Lost Wills

- 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 attorney offer to keep, store, and protect the original will, or should the will be given to the client?

Ethics of Safekeeping Client Property

- RPC 1.15 Safekeeping Property
- A lawyer shall hold client property separate from the lawyer's own property.
- "Original wills, trusts, deeds, executed contracts, corporate by laws 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

- Electronic wills are now available by statute in Nevada, Florida, Indiana, and Arizona.
- 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 Florida, electronic wills are effective as of July 1, 2020, (§§ 731.201 (40) and 732.522, Fla. Stat.). An electronic will is a will executed with an electronic signature in the same manner required by the Florida Probate Code. § 732.521 (4), Fla. Stat.
- "Electronic signature" means an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record. § 732.521 (3), Fla. Stat.

Electronic Will Caselaw

- *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 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.

On June 27, 2022 Bill S2923 was introduced in the Senate. If passed into law, the bill would allow for electronic wills in NJ. Introduced in the Assembly as A4492

Uniform Electronic Transactions Act

- N.J.S.A. 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. N.J.S.A. 12A:12-2
- This act does not apply to a transaction to the extent it is governed by a law governing the creation and execution of wills, codicils or testamentary trusts. N.J.S.A. 12A:12-3(b)
- What about non-testamentary trusts? This term is not defined.

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