

# Lost Will – Lost Inheritance?

On the death of a person known to have made a Will, it's pretty rare that the Will can't be found.

The original Will is usually, (in order of likelihood):

- in the strong-room of the law firm that prepared it; or
- at home; or
- at the bank

Most people lodge the Will with their solicitors keeping a copy of the Will amongst their papers at home. After they've died, the executors will contact the solicitors and secure the release of the original Will.

If neither original Will nor copy can be found, then the likelihood is that no Will was made. A surprisingly large number of people share their intention to make a Will with their family – or imply that a Will has already been made – but never get around to it. In that case, before making an assumption that there's no Will and that the "intestacy rules" thus govern the distribution of the estate the family might sensibly:

- Check with the deceased's regular solicitors to see if any Will was made;
- Check with other law firms in the area to see if they were ever instructed;
- Insert an advert in the "Wills and Whereabouts" section of the Law Society Gazette;
- Contact the Probate Service in case they hold

it (although you would normally expect to see a trace to the will being there such as a dated certificate of deposit); or;

- Consider paying a small fee to a search organisation to handle the search steps.

Where a copy of the Will can be found but no original, then the question is whether the original has been merely lost or was "revoked".

If it is assumed that the original Will has simply been mislaid, then it is possible to admit the copy of the Will to probate provided the Probate Registry is satisfied there is sufficient evidence to rebut the "presumption of revocation". The law assumes that if an original Will, previously in the possession of the deceased, cannot be found, then it has been revoked. Although compliance with strict legal formalities is required to create a valid Will, there are next to no formalities for revoking one. Tearing up the Will or otherwise destroying it "with the intention" of revoking it will suffice.

Generally, it should be noted:

- Revocation of a Will does not revive an earlier Will; and;
- Revocation of a Will on the assumption that an earlier Will revives means the revocation is ineffective.



- The presumption of revocation does not arise if the Will was not in the possession of the deceased but a third party- for example the firm of solicitors with whom the Will was lodged.

From experience, very few Wills are simply revoked with the intention that the terms of the Will would be replaced with the intestacy rules. In almost every case, a Will is revoked only because a new Will is being signed. Thus, where only a copy Will can be found, and that Will is made within a few years of death and reflects what the deceased might be expected to have wanted, while the law might "presume" revocation, the family might sensibly presume instead that the original has merely been lost.

Whether or not a "lost" Will was revoked may not be a problem, in practice, and in the family context, if:

- the Will merely reflected the intestacy distribution (e.g. on the death of a surviving party to a marriage, a Will that left everything to the children equally); or;
- the family members who inherit on intestacy are entirely willing to enter into a deed of variation to meet any legacies contained in the lost Will.

Problems arise where the contents of the lost Will are wholly at odds with the distribution on intestacy. An elderly person who has never married may well, for example, have executed a Will leaving everything to charity or to beloved godchildren. It is unlikely that they would have revoked that Will shortly before death so that the estate passed on intestacy, perhaps, to a whole raft of distant relatives with whom there was

no contact. But, clearly, those distant relatives have a vested interest in the application of the presumption of revocation rather than see the copy Will admit to probate.

In a recent matter we handled, the copy Will of an elderly lady provided that her entire estate pass to her late husband's children (i.e. her step-children) save for a few small legacies to charity and friends. The affidavit that supported the successful application to admit the copy Will to probate confirmed:

- That the contents of copy Will followed a pattern of similar Wills made over the years (the legacies to friends and charity changed slightly with each successive Will but the gift of residue to step children was a constant).
- That there was no change in the warm relationship with the step children.
- That there was no contact with the grandchildren of her late brother who would take on intestacy and no challenge by them to admission of the copy Will to probate.

The essential message of this article is that it is important to keep your original Will in a safe place where your executors can find it. A law firm's strong-room might well be the safest option; the Will is less likely to be lost and there is no risk of the will being dishonestly destroyed by a person who would otherwise take on intestacy (one assumes this occasionally happens!). Even if the law firm holding the Will loses it (which, although rare, has occasionally happened), at least the "presumption of revocation" does not arise meaning the copy Will should be accepted under the law without drama.



**Joseph Austin TEP**  
HEAD OF PROBATE

jaustin@kingsleynapley.co.uk  
+44 (0)20 7369 3799



**Diva Shah**  
ASSOCIATE | PRIVATE CLIENT

dshah@kingsleynapley.co.uk  
+44 (0)20 7566 2932

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+44 (0)20 7814 1200 | [www.kingsleynapley.co.uk](http://www.kingsleynapley.co.uk) | [info@kingsleynapley.co.uk](mailto:info@kingsleynapley.co.uk)

Kingsley Napley LLP, 20 Bonhill Street, London, EC2A 4DN

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