

What happens if the original Will is missing or lost?

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In most cases, if a Will-maker has died and their original Will is lost or unable to be located, there is a strong presumption that the Will-maker destroyed it and did not want it to be relied on. While it is possible for this presumption to be rebutted, it is usually a difficult and often costly exercise. So, let's look at your options if you're the executor of an estate and the original Will is missing or lost.

Locating a lost Will

After a Will-maker dies, the executor of their Will is required to obtain a Grant of Probate of the Will from the Supreme Court of Victoria. This enables them to collect and distribute the Will-maker's assets in accordance with the terms of the Will. You can read more about Grants of Probate and Representation here.

In some instances, an executor may be having trouble locating the deceased's Will.

Before accepting that the original Will is totally lost, executors should take some simple steps to see whether there is any chance of finding the original:

- Thoroughly search through the deceased's possessions for the original Will, or a letter from a lawyer;
- Contact the deceased's lawyer, financial advisors, banks, accountants, funeral home or any other professional who may have had access to the original Will (if known);
- Contact the deceased's family and friends to see if they have an idea where the original Will may be located;
- Contact the lawyers located in the area where the deceased worked or lived to see if they hold the original Will; and

- Place an advertisement in a local newspaper.

If the original Will can be found by taking some of the above steps, it makes the process of administering the deceased's estate in accordance with their wishes, much easier.

Original Will vs a copy of a Will

An original Will is different from a copy of a Will in that there can only ever be one original Will. This is the actual document that the Will-maker and the witnesses to the Will have signed.

An original Will, in most cases, will have all pages stapled and permanently bound, usually with tape down the spine that is very difficult to be undone. If the binding has been tampered with, it will often raise questions as to the validity of the document and whether it has been altered with or without the knowledge of the deceased.

Applying for a Grant of Probate when the Will is missing

In most cases, where the Will was last in the possession of the deceased Will-maker and it is not found or able to be produced on their death, there is a presumption that it was destroyed by the Will-maker with the intention of revoking (cancelling) it.

It is possible for this presumption to be rebutted by the person applying to the Supreme Court of Victoria (usually the executor of the missing Will) providing clear evidence is available and submitted. For example, showing that there was an extremely low likelihood that the deceased would have destroyed their Will with the intention to revoke it or that the original Will was last in someone other than the Will-maker's possession and that person may have lost it.

Such an application requires the applicant to successfully show the following:

- That there was a Will;
- That the Will revoked all previous Wills;
- There is evidence of the lost Will's terms (for example, providing a copy of the Will or overwhelming witness evidence detailing how the Will-maker would speak about the terms and existence of their Will); and
- Sufficient evidence to demonstrate that the deceased intended the document to constitute their Will. This could be a number of different things and will depend entirely on the circumstances of each individual matter.

The burden of proof required to show all of the above criteria is extremely high. The type of evidence to show these factors will be unique to the circumstances of each matter. Ultimately, the success of such an application will be entirely dependent on the evidence produced to the Court.

Before making such an application to the Court, we recommend that you seek legal advice on the likelihood your application will be successful and to discuss any other steps that may be able to be taken before applying to the Court.

Speak with an estate planning lawyer for advice and assistance: 03 8625 8957

Can a copy of a Will be used for a Grant of Probate?

In some circumstances, it may make sense for the executor to make an application to prove a copy Will. This is an unusual application which also requires a high burden of proof.

When an original Will has been lost (or destroyed without the intention of revoking it), the executor of the Will can be made to 'prove a copy of the Will' (provide evidence that the copy is valid and intended by the deceased to be their last Will).

This approach may not be suitable for all cases. We recommend that you seek legal advice before making any application to the Court so that you have the necessary information to make an informed decision about your next steps.

Letters of Administration rather than a Grant of Probate

If a person dies without a valid Will or the presumption that a lost Will was intended by the Will-maker to be revoked (and that intention is not rebutted), the Court can issue Letters of Administration rather than a Grant of Probate.

Under a Grant of Probate, the executor as named in the Will is given the authority to distribute the deceased's estate in accordance with the Will.

Under Letters of Administration, the deceased's estate will be dealt with according to the laws of 'intestacy'. This formula is contained in the *Administration and Probate Act (1958)* (Vic). Generally, the person who stands to receive the majority of the deceased's estate will be the person entitled to apply for a grant of Letters of Administration.

Ensuring your Will does not get lost

If your Will is drafted by a lawyer, usually they will offer to store the original for you, at no charge, so you do not need to worry about losing your original Will.

We recommend that if you do not have your lawyer hold onto your original Will, that you store it in a fireproof and waterproof safe and let your executor/s know where it is stored. Having your lawyer store your Will can also help to avoid any extra complications, such as the Will being stolen, purposefully destroyed or read by others.

Contacting a Wills and Estates lawyer

03 8625 8957

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