The Case of the Lost Will: What to do if a Last Will & Testament Is Missing

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You can probably picture a situation in which a last will and testament gets lost. Perhaps the will was placed somewhere for "safekeeping" decades ago, soon after it was signed, and now you cannot seem to find it. Perhaps it was inadvertently mixed in, and then shredded, with a bunch of other documents. Perhaps it somehow found its way into the kindling pile and warmed someone's home during a long, cold winter. The testator (the person who made the will) is now deceased, and you discover—just a bit too late—that the will is nowhere to be found. This is a lost will situation.

There is a scarcity of Alaska caselaw regarding lost wills.[i] It was not until 2012 that the Alaska Supreme Court addressed an important issue regarding lost wills: the standard of proof required to prove the execution or contents of a lost will.[ii] Under *Dan v. Dan*, "a lost will ["lost will" meaning the fact that a will was signed and facts about what it contained] must be proved by clear and convincing evidence."[iii] And if there is reason to believe that a will existed, but that will is not found, "the law presumes that the testator destroyed the will with intent to revoke it . . . ."[iv] That presumption is rebuttable by a preponderance of evidence.[v] In other words, Alaska law on lost wills essentially requires someone trying to prove a lost will to complete two steps in the probate litigation process.

In Step 1, the person attempting to prove the lost will can do so by providing clear and convincing evidence that there was a will and clear and convincing evidence of what the will said. Clear and convincing evidence is more and better evidence than just "more likely than not," but can be less than incontrovertible evidence. In other words, there can be a bit of reasonable doubt as to whether the will was signed or what it said, but not much. The more evidence one has that there was a will and the more evidence one has of what it said, the better.

If clear and convincing evidence shows that there was a will and proves what it said, Alaska law automatically presumes that loss of the will means the decedent revoked the will by destroying it.[vi] Revoking a will means putting an end to its validity or operation such that it no longer determines what happens with the property of the testator. Therefore, if someone proves that there was a properly executed will and proves what it said, but cannot produce the will itself, the law will presume—even without any evidence about why the will is missing—that the testator revoked the will. The good news, for the person trying to convince a probate court to recognize and apply a lost will, is that this presumption is rebuttable. This brings us to Step 2 of the lost will process.

In Step 2, the person who showed that the will existed can try to prove that "the will was accidentally destroyed or lost" or that "the will was wrongfully destroyed or suppressed by someone dissatisfied with its terms."[vii] This must be proven by a preponderance of the evidence. If the person trying to raise the lost will proves that it was more likely than not that the will was accidentally destroyed or lost or that someone wrongfully destroyed or hid the will, then Alaska courts will have to apply the language of the will (which terms were already proven by clear and convincing evidence in Step 1) to the testator's estate and distribute the testator's property accordingly.[viii]

If you are involved in a probate matter, or if you are estate planning, you may want to hire an attorney to represent or assist you. The facts specific to your situation heavily impact whatever process you are attempting to undertake, and litigation related to lost wills and other probate can be costly and emotionally difficult for those involved, so you may benefit greatly from the help and guidance of a knowledgeable attorney. If you want assistance with lost wills litigation or any aspect of estate planning, please feel free to call CSG, Inc., Attorneys at Law, at (907) 452-1855, and set up a consultation to discuss your situation. We would be glad to help you.

Endnotes:

[i] A lost will is a last will and testament that cannot be found when it comes time to prove that it constitutes the and accomplishes the intent and final wishes of the dead.

[ii] *See Dan v. Dan*, 288 P.3d 480, 483 (Alaska 2012) (stating that "[w]e have never addressed the standard of proof required to prove the execution or contents of a lost will."). The facts of *Dan v. Dan* are not particularly important because the Alaska Supreme Court had to remand the case to the superior court for the superior court to complete its findings due to the superior court's initial failure to "determine whether the lost will's contents and execution were proved by clear and convincing evidence and whether the presumption of destruction was rebutted by the evidence presented at trial . . . ." Since deciding that 2012 case, *Dan v. Dan*, the Alaska Supreme Court has cited it only three times, and each time for a reason other than to decide a lost-will issue. The absence of other cases on the topic of lost wills makes *Dan v. Dan* especially noteworthy.

[iii] *Dan*, 288 P.3d at 483.

[iv] *Id.* at 484 (citing the Restatement (Third) of Property: Wills and Other Donative Transfers, § 4.1 cmt. j (1999)).

[v] *Id.*

[vi] Under Alaska law, a will can be revoked by what is called a "revocatory act," an act that the testator performed "with the intent and for the purpose of revoking the will or part of the will . . . ." AS § 13.12.507(a)(2). Imagine the following: John Doe signs his will bequeathing all of his cryptocurrency to his son and his watch collection to his daughter. Years later, the value of cryptocurrency skyrockets, making the value of his bequest to his son hundreds of times greater than the value of his bequest to his daughter—something that an experienced and intelligent estate planning attorney would have foreseen and warned John Doe about, but something that Mr. Doe's attorney failed to mention to him. John Doe looks at the language of his will, then looks at his crypto numbers on his laptop screen. He says to a friend sitting with him in his home library, "I love both my kids and this Will makes it seem like I dislike my daughter; I need a new will. I don't want this to be my Last Will and Testament any longer." Then he takes the will, tears it in half and in half again, throws it into the fire, researches law firms in the area to find a better estate planning attorney, and calls CSG, Inc. to request a new will as he watches the old one burn. Mr. Doe's tearing the will in pieces and then burning it would be considered a revocatory act, and his intent to revoke the will would be demonstrated by his statements about the old will and about needing a new one.

[vii] *Dan*, 288 P.3d at 484 (citing the Restatement (Third) of Property: Wills and Other Donative Transfers, § 4.1 cmt. j (1999)).

[viii] Returning to the hypothetical situation posed in footnote vi, above, if a court were to hear truthful testimony from John Doe's friend who was present in his library at the time of his revocatory act, the court would be effectively unable to reverse the presumption that the will was revoked because the person trying to prove the will would be unable to prove, even by a preponderance of evidence, that the will was accidentally or wrongfully destroyed.