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Necessary requirements to successfully probate a lost will

Under New York law, there is a presumption that a testator has destroyed and therefore revoked a lost will where that will is "shown to have existed" at an earlier time and to have "been in the testator's possession."[1] That presumption is, however, rebuttable, and can be defeated in certain circumstances.[2] This article addresses the requirements for probating a lost will and discusses recent cases where surrogate's courts have admitted lost wills to probate.

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In order to probate a lost will, the proponent of the will must satisfy the requirements of Surrogate's Court Procedure Act section 1407 ("Section 1407").[3] Section 1407 provides for the admission of a lost will to probate where the following three conditions are met: "(1) It is established that the will has not been revoked, and (2) Execution of the will is proved in the manner required for the probate of an existing will, and (3) All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.[4]

Over the past five years, there have been a number of cases where surrogate's courts have admitted lost wills to probate based upon Section 1407. *In re DeFrisco*[5] is illustrative. There, according to the attorney draftsman of the decedent's will, the decedent executed his last will and testament in March 1975. Although the draftsman did not recall whether he or the decedent took possession of the original will, the draftsman did confirm that the decedent executed the will in compliance with New York's due execution requirements and that the terms of the decedent's will mirrored those of his wife's will. After the decedent's wife died in 1999, the decedent met with the draftsman about probating his wife's will, but never indicated that he had revoked his will or otherwise altered his March 1975 testamentary scheme.

Following the decedent's death, his daughter petitioned the Surrogate's Court, Suffolk County, to admit his will to probate, despite her failure to locate the original will. Recognizing that copies of the decedent's will were found among his financial records and that his post-mortem plans with respect to his wife's estate were consistent with the terms of his own will, the court concluded that there was no evidence of revocation. It also concluded that the due execution requirement had been satisfied by virtue of the draftsman's representations and the testimony of the draftsman's secretary that the decedent properly executed his will. Accordingly, noting that the petitioner's copy of the will sufficiently established its terms, the court elected in favor of probating the decedent's will.

Another example is *In re Castiglione*,[6] where the attorney draftsman of the decedent's will lost the original will when he moved to a new office. The petitioner sought to have a copy of the will admitted to probate, but the respondent objected on a number of grounds, including the petitioner's failure to present the original will for probate. Despite this, the Surrogate's Court, Fulton County, admitted the decedent's will to probate, and the Appellate Division, Third Department, affirmed the surrogate's determination. The Third Department premised its decision on the affidavit of the draftsman, and on the sworn statement of an attorney who prepared the codicil to the decedent's will. In that sworn statement, the attorney indicated that the decedent still believed that his will would govern the disposition of his assets when he met with her to discuss the codicil. Accordingly, the court, noting that the copies provided by the petitioner and draftsman sufficiently established the terms of the will, concluded that the petitioner had met the requirements of Section 1407, and admitted the decedent's lost will to probate.

Subsequently, in *In re Nathan*,[7] the nominated co-executors of the decedent's estate petitioned the Surrogate's Court, New York County, for the probate of the decedent's lost will. There, the attorney draftsman of the decedent's will affirmed that the 90-year-old decedent had a practice

of retaining her original will until she executed a superseding will, at which time she would return the original will to the draftsman for safekeeping. Apparently, after following that course of conduct on three occasions, the decedent mistakenly retained only a photocopy of her last will, and the nominated co-executors were unable to locate the original document.

Notwithstanding the loss of the original will, the court admitted the decedent's will to probate. The underlying basis for the court's decision was the notion that the petitioners rebutted the presumption in favor of revocation by producing a photocopy of the decedent's will, which included a reproduction of the decedent's signature as well as the terms of the will. In further support of its decision, the court also referenced its satisfaction as to the decedent's compliance with New York's due execution requirements.

More recently, in *In re Gillen*,[8] the decedent executed her last will and testament slightly more than a month before she died in April 1981, leaving her only asset, a house, to her son, David Gillen. At some point thereafter, David advised his wife, petitioner Diane Gillen, that the decedent left the house to him in her will. Following David's death in April 2005, Diane attempted to sell the subject house and learned, for the first time, that the will had yet to be probated. Diane commenced an uncontested proceeding to probate the decedent's will and effectuate the transfer of title to the house to David's estate. The problem, of course, was that Diane did not have the original will and could only locate a copy of said document.

Nevertheless, the Surrogate's Court, Nassau County, admitted the decedent's will to probate. As to revocation, the court noted that the decedent executed the will approximately one month before her death and likely would not have expended her time and money having her will prepared and executed if she intended to revoke the document so quickly. The court also opined that the original will was likely lost or destroyed by accident during the quarter of a century after it was executed. With respect to due execution, the court noted that an attorney supervised the decedent's execution of her original will, and therefore inferred that the statutory requirements for due execution were satisfied. In further support of its decree, the court explained that Diane's copy of the will sufficed for the purpose of establishing the terms memorialized in the original will.

Estate planning attorneys should note the Section 1407 factors, and take the appropriate steps to ensure that they are fulfilled in the event that a client's will is lost. As demonstrated by the foregoing case law, leaving the original with the attorney is not always enough to protect the document. Perhaps it would be good practice for attorney draftsmen to create a log of wills with updates indicating whether clients have revised their testamentary instruments. In addition, attorney draftsmen should maintain a summary of the provisions of each client's will, together with copious notes, including the circumstances surrounding the will's execution and, where applicable, the client's patterns and habits with regard to revising his or her estate plan.

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1. *In re Evans*, 264 A.D.2d 482, 482, 692 N.Y.S.2d 453 (2d Dept. 1999).
2. *In re Demetriou*, 48 A.D.3d 463, 464, 851 N.Y.S.2d 636 (2d Dept. 2008).
3. N.Y. S.C.P.A. § 1407 (1983).
4. *Id*.
5. *In re DeFrisco*, N.Y.L.J., April 24, 2003, at 26, col. 6 (Sur. Ct., Suffolk County).
6. *In re Castiglione*, 40 A.D.3d 1227, 1227-29, 837 N.Y.S.2d 360 (3d Dept. 2007).
7. *In re Nathan*, N.Y.L.J., July 23, 2007, at 27, col. 1 (Sur. Ct., New York County).
8. *In re Gillen*, 19 Misc.3d 1129(A), at *1-2 (Sur. Ct., Nassau County 2008).