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ESTATE PLANNING LAW REPORT

FREQUENTLY ASKED QUESTIONS ABOUT WILLS

By Nathan Hannah

Here are some frequently asked questions (FAQs) about wills. The rules discussed below are specific to Arizona, but most states probably have similar rules.

- **Why is it important to preserve an original will?**

Putting aside for the moment the possibility of an electronic will (discussed in my November 2019, Report) the answer to question of why it's important to preserve an original will is right in the Arizona probate code:

> If an original will that was last seen in the possession of the testator cannot be found after the testator's death, the testator is presumed to have destroyed the will with the intention of revoking it. This presumption may be rebutted by a preponderance of the evidence. If this presumption arises and is not rebutted the will is revoked.

Here's how I describe that rule in layman's terms: if your will was last seen in your possession and it can't be found after you die, the law is going to presume that you tore it up and died without a will. That's why preserving the original of your will is so important.

- **If the original of a will can't be found, is a copy good enough?**

That question of what can be done if the original of your will can't be found, but there is a copy available, is also answered right in the probate code. The application of this rule is a little more complicated than the first rule, however. Here's what the probate code says about this situation:

> If a will is found to be valid and unrevoked and the original will is not available, its contents can be proved by a copy of the will and the testimony of at least one credible witness that the copy is a true copy of the original. It is not necessary for this person to be an attesting witness to the will.

To apply this rule, you first have to get past the first rule, that is, you have to establish that the will is valid and unrevoked even though you don't have the original. If you get past that rule, then you have to have both a copy of the will and a witness who can testify that the copy is a true copy of the original.

- **What if a will refers to a personal property list, but that list can't be found?**

The section of the probate code that says you can make a separate list for distribution of your tangible personal property doesn't say what happens if that list can't be found when it's time to submit the will for probate. I think it's clear, however, that the lack of a personal property list doesn't invalidate the will. If no personal property list can be found, I think the presumption is that such a list doesn't exist, similar to the presumption discussed above when the original of the will can't be found.

- **What if we can't even find a copy of the will, but we know what it said?**

Practically speaking, I think you are likely to be relegated to intestacy (meaning that you died without a will) if you find yourself in the situation where there isn't even a copy of the will available, but there is a rule in the probate code for this scenario as well:

> If a will is found to be valid and unrevoked and a copy of the will is not available, its contents can be proved only by clear and convincing evidence. For this purpose it is not necessary for a witness to be an attesting witness to the will. On a finding of clear and convincing evidence of the contents of such a will, the court, by order, shall set forth the contents of the will in reasonable detail.

I don't think I have ever seen this rule applied in real life. The reason for that seems pretty obvious to me: it's probably going to be pretty hard to come up with clear and convincing evidence of what the will said if there isn't a copy of it available. I suppose the person who prepared the will could testify as to what it said (but of course that situation wouldn't happen if I prepared your will, because I would have a copy). Again, you still have to get past the first rule that presumes the will was revoked if it was last seen in the testator's possession and can't be found after the testator has died. Maybe if the testator's house burned down, killing the testator and destroying the will, you could get past the first rule and take advantage of the rule about proving what the will said.

But if you have followed my standard instructions, your will is kept in a receptacle that will preserve it if the house burns down, and in a location known to someone other than you, so your will won't get destroyed or lost, right?

QUOTE OF THE MONTH

When griping grief the heart doth wound,
and doleful dumps the mind oppresses,
then music, with her silver sound,
with speedy help doth lend redress.

William Shakespeare
English dramatist & poet (1564 - 1616)