

## Beware of Lost Wills

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One of the many complexities that can arise in the probate process is what to do when a decedent's original will cannot be found. Although it may be tempting to simply file a copy of the will and seek to admit that to probate, beware! Copies of wills may not be admitted to informal probate. Instead, even if a challenge to the document is not expected, copies of wills must be submitted for formal probate.

C.R.S. § 15-12-402(3) provides for the formal probate of a will that "has been lost or destroyed, or for any other reason is unavailable." Under this section, the will may be admitted to probate if (1) the fact of execution is established as provided in the Colorado Probate Code, (2) the contents of the will are established to the satisfaction of the court, and (3) the court is satisfied that the will has not actually been revoked by the decedent (remember that, when a will last seen in the decedent's possession cannot be found, there is a rebuttal presumption that the decedent destroyed and revoked the will).

While this author is unaware of any recent decisions construing Colorado's lost will statute (the most recent reported Colorado decision is *In re Estate of Perry*, 33 P.3d 1235 (Colo. App. 2001)), the Pennsylvania Supreme Court recently addressed the admission of lost wills in that state in *In re Estate of Wilner*, 142 A.3d 796 (Pa. 2016). The court in *Wilner* construed a Pennsylvania statute requiring that "all wills" be proved by two witnesses. The court determined that this requirement also applied to lost wills and considered what was needed to "prove" the will. The court found that proof of the will under the statute meant that the two witnesses were required only to prove the will's validity as a testamentary document, they were not also required to prove the contents of the will. Instead of prescribing the particular manner of proof of the contents, the court considered the standard of proof and held that the contents of a lost will must be proved by clear and convincing evidence.

*Wilner* may be instructive to Colorado practitioners faced with attempting to probate a lost will. The Pennsylvania requirement of proof of validity by two witnesses is similar to § 15-12-402's requirement that execution be proved as provided in the Colorado Probate Code (§ 15-11-504 requires that, among other things, self-proved wills must be signed by two witnesses, and § 15-11-502 provides that a will is duly executed if it is, among other things, signed by two witnesses). While the Colorado statute is not clear on what standard of proof is required for the contents of the will – I think we can all agree that "to the satisfaction of the court" is somewhat ambiguous – the Pennsylvania requirement of clear and convincing evidence is consistent with other evidentiary

requirements in Colorado probate matters (for example, § 15-11-806 provides that a governing instrument may be reformed if it is proved by clear and convincing evidence that the transferor's intent and the terms of the instrument were affected by a mistake of fact or law).

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