

# Probate In Common Form

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## LOST WILL

By Alonna Warns



### Informal

If an individual dies and had a will but it can not be located, the matter must be probated formally. See Lost Will, **Minn. Stat. §524.3-402 (a) (3)**

A copy of a will cannot be probated informally. No exceptions.

### Formal

The aforementioned statute talks about a formal proceeding in the absence of the original will.

“. . . the petition also shall state the contents of the will, and indicate that it is lost, destroyed or otherwise unavailable.”

The formal petition should include the word “Lost” in the caption and wherever else in the petition the “will” is referred to.

Caption: **Petition for Formal Probate of Lost Will and for Formal Appointment of Executor.** The same is true for the Notice and Order for Hearing. Without the word “Lost” in the notice the assumption is that the original will is being probated.

Within the body of the petition there is a statement that begins: “That the original of decedent’s last will duly executed on (date)”, usually this goes on to say “*is in the possession of the Court or accompanies the petition.*”

Replace the last part of this statement in italics with the following: “*is lost and cannot be found. A copy of said will together with a Statement of Contents of Lost Will accompanies this petition.*” Or, you may have a form with check boxes that has the same statement. Either way, the petition should show a connection with the



### Lost Will

Statement of Contents of Lost Will form.

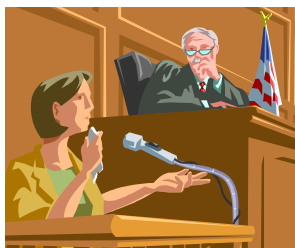
The Statement of Contents of Lost Will form must be notarized. A copy of the lost or destroyed document must also be attached to the notarized statement.

The Wherefore Clause in the petition should be altered to ask for the probate of the **copy** of the will.

Such as: Determining the **Lost** Will is valid and unrevoked . . . ., or

Probating the **copy** as the valid and unrevoked last will . . .

### Testimony of Subscribing Witness



Hint: Check the court's website for an original will filed with the court.

#### Sample language

**Informal probate:** No testimony of subscribing witness is needed for an informal probate if the **attestation clause** appears at the end of the will.

An attestation clause is a couple of sentences that tells the circumstances surrounding the execution of the will.

*This instrument, consisting of \_\_\_ pages each bearing the signature of the above named, \_\_\_, was by him on the date hereof signed, published and declared by him to be his Last Will and Testament, in our presence, who at his request and in his presence and in the presence of each other, we believing him to be of sound and disposing mind and memory, have hereunto subscribed our names as witnesses.*

### Objections Cost Money

Objections filed in probate court generate a fee. If the objector is making his/her first appearance in the case the regular filing fee of \$252 will be assessed rather than the \$55 motion fee.

If this is not the first appearance, the party will pay a \$55 motion fee.

An objection that comes to the court in the form of a letter rather than on a standard form still pays the \$55 fee.

Rule of thumb to apply to question of fee or no fee?

**NO** motion fee will be charged for petition/motions that are required to be brought on a routine basis by statute or rule.

## Testimony of Subscribing Witness

**Formal probate:** Hennepin County's policy is to require testimony of one of the subscribing witnesses to every will and codicil to prove the due execution of these documents, unless:

- A self-proved affidavit is a part of the will/codicil, or
- The will/codicil has been previously probated in a foreign state

A self-proved affidavit acts as a substitute for finding a witness and obtaining a testimony of that subscribing witness at the time of the testator's death. **Minn. Stat. §524.2-504** has a sample self-proved affidavit that you can copy for your wills.

An interesting fact about a self-proved affidavit is that it does NOT have to be completed at the time the will is executed. **Minn. Stat. §524.2-504 (b)** "An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, . . ."



### Document Preparation

A testimony of subscribing witness may be filed along with the petition or at any time prior to the hearing.

Review the testimony of subscribing witness form for completeness.

- Compare the signature on the testimony with the witness signature on the will
- Check that the date of execution is the same as on the will
- Make sure the notary is complete
- Does the testimony of subscribing witness have an original signature?

### Secondary evidence:

Let's say there is an old will, no self-proved affidavit and the witnesses cannot be located. How do you go about proving the validity of the will?

The Court will accept secondary evidence on the proof of the will. In the old forms

there was a document entitled: **Affidavit Re: Signature of Testator Attesting Witness Not Available.** You can make up your own affidavit with a notarized signature.

### Contents of Affidavit

The affidavit included the following statements:

- Affiant knew the testator on the day the will was signed.
- Affiant said how old affiant was on the date of the will's execution.
- Affiant stated how long he knew the testator.
- Affiant stated he/she had examined the purported will of \_\_\_ date.
- Affiant stated he was acquainted with the signature of the testator.

Affiant closed with the statement that "I believe the signature on the will is decedent's signature."

**PRIVATE AGREEMENTS AND DECREES**

**PR APPOINTMENT TIME FRAMES**



**Minn. Stat. § 524.3-912** provides for private agreements to alter shares that distributees and heirs receive from a decedent’s estate. The agreement is binding on the personal representative. However, the court will not issue a decree that alters the distributees shares based on the **private agreement**. The Court will issue its decree based on the terms of the will admitted to probate or based on the laws of intestate succession. The personal representative “shall abide” by the terms of the “**private agreement**” at the time of distribution.

With respect to receipts in this type of situation the personal representative should file “full distributive share” receipts along with the petition and proposed order for discharge.

**Compromise**

In order for the court to alter

the decree of distribution there has to have been a controversy under **Minn. Stat. § 524.3-1101** that has been compromised.

The compromise of a controversy may concern any of the following:

- admission to probate of any instrument offered for formal probate as the will of the decedent,
- the construction of the will or codicil,
- validity of the will or codicil,
- effect of any probated will,
- the rights or interests in the estate of any successor, or
- the administration of the estate.

If the compromise is approved in a formal court proceeding, the agreement reached is binding on all the parties. The statute further states that the approved compromise is binding on a wide range of interested and potentially interested parties, including those who are . . . “unborn, unascertained or who could not be located.”



Every paragraph of a will is important, however, there is one section that the Registrar and the Court, in Hennepin County, will carefully scrutinize when checking priority for appointment. The paragraph that names the personal representative and any alternate may have a time frame for the named party to commence the probate estate. Look carefully for language such as, “if David Smith does not seek appointment as personal representative within 30 days of my death then I nominate Mary Jones as my personal representative.” Check the date of death and the date of the client meeting, if more time has elapsed than that given by the testator the nominated personal representative has lost their priority for appointment. The alternate is the party with priority. Approval of an application will be held up pending the filing of the appropriate renunciations and nominations.

## PR APPOINTMENT TIME FRAMES

In the absence of authority to nominate an alternate or a successor personal representative the statute may have to be consulted to determine who the applicant / personal representative should be. The statute may greatly expand the number of parties with priority for appointment creating the need for many nominations and/or renunciations. The Registrar will require the filing of all nominations and renunciations in order to proceed on an informal basis. If this is not possible, petitioning for a formal unsupervised administration is an option.



## PRACTICAL TIP

### DRAFTING TIP

Will drafting tip:

Ask the following question:

**Why does the testator want a specific time frame for appointment of the personal representative set out in the will?**



The Registrars have seen time frames as short as 7 days to as long as 6 months.

Whatever the answer is to the question, it is important to make sure that the testator knows what the practical application of setting a time frame is. The shorter the time frame the less likely it is that the will is located or the survivors ready to proceed. The result being the first choice for personal representative may have lost their priority for appointment.

**Is this really the testator's intent?**

Minnesota Statutes and Hennepin County policy do **not** require the filing of any documents **in an informal administration** once the letters have issued. You may notice a "closed" case status when searching for a case on the public access website. Not to worry. The court's practice is to "administratively close" the file as of the date of the issuance of the letters.

The personal representative has authority to act even though the case status is marked "closed". It is the filing of the **Unsupervised Personal Representative's Statement to Close Estate** that starts the clock running on termination of the informally appointed personal representative's authority.

**What does this mean for your informal probate practice?** You do not have to file any documents with the court once the letters have issued. **No Inventory, no final account, no receipts, no consents, etc.**

Note: Acceptance for filing is not to be construed as approval of the document preparation or personal representative's actions.

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TO:



Question—Will the Registrar appoint a U S Citizen living in a foreign country as a personal representative in a Minnesota probate?

Answer—Yes

**Minn. Stat. § 524.3-602** “By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person.” Notice of any proceeding is given by delivery or mailed by ordinary first class mail to the address on the application or to an address known by the petitioner.

Service of process on a non-resident personal representative is pursuant to **Minn. Stat. § 524.4-303.**