

PROPER CUSTODIAN OF AN ORIGINAL WILL

In our electronic age, copies of documents are commonly used and accepted as substitutes for originals. This acceptance does not apply, however, in the probate context. As a rule, only an original will can be submitted to the court for probate. If the original will cannot be found, a legal presumption arises that the decedent destroyed the will, thereby revoking it. To avoid potential mischief, therefore, it is important for the original will (and other estate planning documents) to be kept in safe custody.

Determining the proper custodian and storage place of the original will is an important task, so that the will may be readily found after the testator's death. Many testators elect to keep the will at home or in a safe deposit box. Attorneys typically prefer not to retain the original will because the original is then less accessible to the testator. In addition, the testator may feel pressured to hire the same attorney to change the will, and the executor or beneficiaries may feel compelled to hire the same attorney to probate the will.

The attorney should retain a photocopy of the executed will so that the attorney may review it on a periodic basis, to determine whether revisions are needed due to a change in the law or testator's circumstances. The copy of the executed will is also useful evidence of the will's contents if the original cannot be produced after death and there is sufficient evidence to overcome the presumption of revocation.

An attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but where the will may be found and probated, while taking care not to urge that the attorney act as the will's custodian. The executor named in the will, especially if the executor is a non-family member/non-beneficiary or a corporate fiduciary, may be able to provide such a safe haven for the will.

This information is not intended to be a substitute for the legal advice of a licensed attorney. If you have any questions regarding a particular issue or topic we suggest you seek legal counsel.