



HULL & HULL LLP
Barristers and Solicitors

Lost Will Applications

Ideally, original estate planning documents will be carefully stored and available to submit as part of an application for a Certificate of Appointment of Estate Trustee With a Will upon death. However, at times, an original Last Will and Testament and/or the Codicil(s) thereto will not be available, notwithstanding that our records indicate that they were duly executed by the testator. Where evidence suggests that the original documents went missing and were not physically destroyed by the testator with the intention of revoking them, the absence of original copies may not necessarily be fatal to the probate application.

The *Rules of Civil Procedure* set out a process for admitting a copy of a testamentary document to probate. Rule 75.02 provides as follows:

The validity and contents of a will that has been lost or destroyed may be proved on an application,

- (a) by affidavit evidence without appearance, where all persons who have a financial interest in the estate consent to the proof; or
- (b) in the manner provided by the court in an order giving directions made under rule 75.06.

In considering which individuals have a financial interest in the estate, it may be necessary to review prior wills and/or determine which individuals would benefit in the case of an intestacy.

Case law suggests that Ontario courts may take a number of factors into consideration in determining whether to accept a copy of the lost will in the place of an original. The evidence filed in support of the application should (1) establish that the will was duly executed, (2) trace the possession of the will to the testator's date of death (or later, if the will went missing following death), (3) rebut the presumption that the testator destroyed the will with the intention of revoking it, and (4) prove the contents of the lost will.

In light of the delay and costs associated with a lost will application, solicitors should advise clients of the significance of original estate planning documents and review with them the options in terms of storing original documents in a manner that ensures they are kept safe during the testator's lifetime and are accessible by the estate trustee(s) following death. For more information on the storage of original estate planning documents, see our [previous Solicitor's Tip](#) on this topic.

