

C-1-PB-11-031274

Administrative Order	§	In the Probate Court
2011-2	§	
[Amending Administrative Order Signed	§	Number One
February 2004]	§	
	§	Travis County, Texas

**Administrative Order Regarding Applications to Probate
a Copy of a Lost Will or a Lost Will without a Copy**

In February 2004, this Court found that there was need for an administrative order regarding notice to interested parties when an application is filed to probate a copy of a lost will or codicil, or to probate a lost will or codicil without a copy (hereafter “lost will”). It has come to the Court’s attention that the 2004 Administrative Order,¹ if read literally, required insufficient notice to some interested parties.

Therefore, the Probate Court Number One of Travis County, Texas, finds there is need for an amended administrative order to protect all parties interested in an estate when an application is filed to probate a lost will.

The Court finds as follows:

1. Texas Probate Code § 81(b) requires that an application for the probate of a lost will must include information concerning the reason the original instrument cannot be produced and must also include (among other things) the names of the devisees included in the lost will and the names of the individuals who would inherit if the copy of the lost will were not admitted to probate.

2. Texas Probate Code § 128(b) requires that when a will cannot be produced in Court, the Clerk shall issue citation to all parties interested in the estate, which citation shall contain substantially the statements made in the application for probate as well as the time when, place where, and the court before which such application will be acted upon. When there is an application to probate a lost will, “all parties interested in the estate” includes both the devisees included in the will and the individuals who would inherit by if the copy of the lost will were not admitted to probate.

3. The statutorily required citation is insufficient to advise heirs of their right to object to an application to probate a lost will. As authorized by Texas Probate Code § 33(d), explicit notice of their right to object should be given to all heirs, either attached to all citations prepared by the Clerk or included as part of all waivers of citation.

¹ *Order Requiring Specific Notice of Application to Probate a Copy of a Lost Will or a Lost Will without a Copy.*

4. For applications that would result in a full or partial intestacy if the lost will were not admitted to probate, an attorney ad litem should be appointed to ensure that all heirs are identified and noticed as well as to protect the interests of any heirs who cannot be located and any heirs with a legal disability. When there is a lost codicil to a valid original will, an attorney ad litem will not need to be appointed because of the lost codicil.

It is therefore ordered that, effective September 1, 2011, when an application is filed to probate a lost will:

1. The Court will appoint an attorney ad litem under Probate Code § 34A to represent the interests of testator's unknown heirs or heirs having a legal disability, if a full or partial intestacy will result if the lost will is not admitted to probate. If an attorney ad litem needs to be appointed:

- The applicant must deposit funds toward the services of the attorney ad litem as required by Administrative Order.
- The applicant must provide the Clerk with copies of the application and the will to be sent to the attorney ad litem.

2. The Clerk must attach to each citation issued under § 128(b) the "Notice of Application to Probate Copy of Lost Will or Codicil or Lost Will or Codicil without a Copy" that is attached to this Order, informing all persons interested in the estate of their right to object to the probate.

3. All persons who are named as devisees in the lost will must be personally served with citation under § 128(b) or must execute an affidavit waiving citation.

4. All persons who would inherit as an heir of the testator if the lost will is not admitted to probate must be personally served with citation under § 128(b) or must execute an affidavit waiving citation. If the lost will is a codicil to an original will, the beneficiaries of the testator's original will – instead of the testator's heirs – must be personally served with citation under § 128(b) or must execute an affidavit waiving citation.

5. When an heir or a devisee executes an affidavit waiving citation, the affidavit itself must explicitly include all of the points addressed in the attached "Notice of Application to Probate Copy of Lost Will or Codicil or Lost Will or Codicil without a Copy." *It is not sufficient for the affidavit to refer to an attached notice.*²

Signed on August 23, 2011.



Guy Herman, Presiding Judge

² A sample affidavit waiving citation is attached to this Order. The Court does not require the use of this specific form, but the Court prefers that attorneys adapt this form affidavit to ensure all necessary information is included.

Notice of Application to Probate Copy of Lost Will or Codicil or Lost Will or Codicil without a Copy

You are notified that an application has been filed in this Decedent's estate to probate a written will or codicil even though the applicant cannot produce the original will. The application filed in this estate seeks either to probate a copy of a lost will or codicil or to probate a lost will or codicil without a copy (all referred to below as "lost will").

When an original will cannot be produced, the law presumes that the testator (the person who wrote the will) revoked the will before the testator's death. The Court will not grant the application in this case unless the applicant offers sufficient evidence to rebut that presumption and proves to the Court that the will was not revoked, even though only a copy has been filed.

If no will is admitted to probate, Decedent's property will pass to Decedent's heirs. If a lost codicil to a valid original will is not admitted to probate, Decedent's property will pass to the devisees (beneficiaries) named in the valid will. Therefore, your rights to inherit property may be affected by the probate of the lost will either (1) as an heir of the Decedent, or (2) as someone who is named as a devisee in the lost will, or (3) as a devisee in a valid will when there is a lost codicil to that will.

If you want to object to the probate of the lost will, you must file a written objection with the Clerk. The Clerk's citation, which is attached to this notice, indicates the date by which you should file a written objection. Note that the citation does not indicate a specific hearing date.

If you sign an affidavit waiving citation, you are indicating to the Court that you do not object to the probate of the lost will.

You should consult an attorney if you have any questions about your rights in this probate matter.

No. C-1-PB-__ - _____

Estate of	§	In Probate Court No. 1
_____	§	of
Deceased	§	Travis County, Texas

**Affidavit Waiving Citation
for Probate of a Copy of a Lost Will or Codicil
or Probate of a Lost Will or Codicil without a Copy**

STATE OF _____

COUNTY OF _____

I, _____, am an heir or devisee (beneficiary) of _____, the “Decedent” in this case.

I have been given (1) a copy of the **Application for Probate a Copy of a Will** that has been filed in this case and (2) a copy of the lost will dated **[insert date of will]** that the applicant is seeking to have probated.

I understand that in this case, an application has been filed in Decedent’s estate to probate a written will even though the applicant cannot produce the original will.

I understand that when an original will cannot be produced, the law presumes the testator (the person who wrote the will) revoked the will before the testator’s death.

I understand that the Court will not grant the application to probate the lost will in this case unless the applicant offers enough evidence to rebut that presumption and prove to the Court that the will was not revoked even though only a copy of the will may exist.

I understand that as one of Decedent’s heirs – or as one of the people who is named as a devisee (beneficiary) in the lost will – my rights to inherit property may be affected if the lost will is probated. If no will is admitted to probate, Decedent’s property will pass to Decedent’s heirs.

Although I understand I have a right to object to the probate of a lost will, with or without a copy, I do not object to the probate of the lost will.

I know that the person who sent me this affidavit (along with a copy of the application and the will) is the applicant’s attorney. And I know that the

applicant's attorney does not represent me in this matter. I am aware that before I sign this affidavit waiving citation, I may consult my own attorney to advise me regarding this estate or the affidavit.

By signing this affidavit waiving citation, I enter my appearance in this case for all purposes, and I waive the issuance and service of process. I agree that the case may be considered by the Court without further notice to me.

I have signed this affidavit voluntarily, without fraud, duress, or threat by any person.

Signed and sworn to on _____, 201__.

Signed and sworn to under oath before me on _____, 201__
by _____.

Notary Public, State of _____

My commission expires: _____