

WILLS:
PROBATE COURT:

The Probate Court must keep the original will permanently in its files.

OPINION No. 105.

July 10, 1962



Honorable T. E. Lauer
Prosecuting Attorney
County of Callaway
Fulton, Missouri

Dear Mr. Lauer:

This is in reply to your opinion request of January 29, 1962, wherein you ask:

"Probate Judge John Yates of Callaway County has requested that I obtain from your office an opinion as to the power of the Probate Judge to replace original copies of probate instruments in the court files with photographic copies thereof. The files of the Probate Court here contain many very old wills and other documents, some going back into the 1830s. Many of these wills and other documents are in very poor shape, and are rapidly falling to pieces. The court records themselves are, of course, in a number of bound books and are in reasonably good shape; the question here involves the original instruments and documents themselves, which are now contained in numerous old probate files and wrappers.

"A further question arises, if the original wills and other documents can be replaced, as to what disposition should be made of the originals. In Callaway County, there are a number

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of living descendants of the long-deceased testators who would like to obtain the old wills in order to preserve them. Would it be within the power of the Probate Judge, after replacing the original will or other document with a photograph, to turn over the original document to either the descendants of the decedents involved, or to an educational institution, public library, or historical society?"

Section 468.550, RSMo 1949, specifically provided for the retention by the clerk of the probate court of the original will filed for probate. Said section stated:

"All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

This section, however, was repealed by the Laws of 1955, and replaced by Section 472.280, RSMo 1959, which specifies the records that must be maintained by the probate court. Said section states, in part, as follows:

"1. The court shall keep the following:

(4) A record of wills exhibited to be proven properly indexed, in which shall be recorded such wills.
- - -"

It is noted that this section of the statute does not contain any language requiring the clerk of the probate court to retain the original wills. Said section merely requires that the will be "recorded."

However, a review of our statutes as a whole indicates a clear intent that the will be presented to the Probate

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Court and retained in the permanent files of said Court.

Section 473.043, RSMo 1959, provides that upon the death of the testator, the person having custody of the will "shall deliver it to the probate court," and if he so refuses, the court may, by legal powers, compel him to produce the will.

Section 473.047, RSMo 1959, holds that when any will is "exhibited to be proven" proof may be taken and a certificate of probate or rejection be granted.

Section 473.050, RSMo 1959, provides that no proof of any will shall be taken nor any certificate of probate issued unless the will "has been presented" to the probate judge or clerk within nine months of the date of notice of letters.

In *Keys v. Keys' Estate*, 217 Mo. 48, 116 S. W. 537, 541, the Court held that a claim was "exhibited and presented" to the Probate Court for allowance when it was deposited in court and filed by the clerk.

Furthermore, Section 473.073, RSMo 1959, provides that "the will shall be admitted to probate," if certain findings are made by the Court (underlining supplied).

Section 473.080, RSMo 1959, provides that the certificate of probate or rejection "shall be attached to each written will which is in the custody of the Court" (underlining supplied).

Section 473.087, RSMo 1959, provides that no will is effectual for the purpose of proving title to, or the right to the possession of, any real or personal property, disposed of by the will, "until it has been admitted to probate" (underlining supplied).

In *Missouri Practice*, Vol. 3 (Probate Law and Practice) Section 498, Records of the Probate Court, it is stated at page 451:

"The clerk must maintain a separate

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roll or file of the original papers and documents filed in each estate . . . In addition to the record maintained by keeping the original documents, it is required that several of the more important documents be recorded at length in records maintained for each of the types of the documents to be recorded." (Underlining supplied)

In *Vorhees v. Denny*, 372 Ill. 78, 22 N. E. 2d 677, the court interpreted the word "probate" when used as a noun. In doing so, the court quoted from 2 Blackstone's Commentaries, wherein it was stated that when a will is proved "the original must be deposited in the registry of the ordinary and a copy thereof in parchment is made out under the seal of the ordinary and delivered to the executor or administrator, together with a certificate of its having been proved before him, all of which together is usually styled the probate." The Court further stated at pages 678-679:

"This definition indicates that the term 'probate' when used as a noun, as distinguished from various portions of the procedure wherein the word is occasionally used as a verb, broadly contemplates the combined result of all the procedural acts necessary to the establishment of the will as a title instrument. The probate is not complete when the will is filed nor when the petition to admit it to probate is deposited with the clerk. Neither is it complete when the testimony of the subscribing witnesses has been taken and reduced to writing, nor even when the court has ordered that it be admitted to probate. . It is only when all of these things combined have been done, and the will with its proofs and the order admitting it to probate have all actually become a part of the records of the county

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court, that it can be said the will has actually been 'admitted to probate'." (Underlining supplied)

In view of the foregoing, it is concluded that the requirement of Section 472.280(4) is not to be deemed as authority for removing the original will from the court file, but rather is a requirement that a recorded copy of such original will be maintained in the court file in addition to and not in substitution for said original will.

CONCLUSION

It is the opinion of this office that the Probate Court must keep the original will permanently in its files.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc