

The Dreaded After-Discovered Will

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The Estate Administration Curveball that can Change Everything

The case of Zappos owner Tony Hsieh, the late billionaire who was initially believed to have died intestate, without a valid will, took an unexpected turn when an apparent original will surfaced years later, halfway around the world, under highly unusual circumstances. This development highlights the complexities that can arise when a previously unknown will appears after a period of presumed intestacy. While many of the legal and factual issues in Hsieh's case are unique, the story provides a valuable lens for understanding what can happen when an unexpected will emerges and the broader implications for estate planning and estate administration.

To understand the impact of an after-discovered will coming to light only after a probate has already begun, or even concluded, taking a quick step back may be in order. This can be equally problematic whether the case had been proceeding under the assumption of intestacy as in the Hsieh (aka Zappos) case, or under a commonly held misperception that *the* will was the decedent's "last will."

Probate is the legal process of administering a deceased person's estate. When someone dies without a will, the state steps in with its own rules — called intestacy statutes — to determine who inherits what. But if a valid will is found after the fact, things can get complicated. Similarly, the discovery of a more recent will after probate has proceeded based on a prior will (believed and understood at the time to be the latest such testamentary document of the decedent disposing of the decedent's estate assets), raises obvious questions about the voidability of past proceedings and decision making relating thereto.

Several key issues that might arise when a will surfaces after the fact include the following.

Impact on ongoing probate proceedings. How, if at all, does an after-discovered will impact an ongoing probate process?

If an estate is still open and being administered when a will is discovered, Virginia law allows for a significant course correction. Assuming the newly-found will is offered, and, if recognized and accepted by the court as a valid will of the deceased, admitted for probate, the terms of the new will supersede the intestacy-based administration. Because the circuit court has jurisdiction over probate matters, the will should be submitted to the circuit court in the locality where the decedent resided or held property, i.e., the same jurisdiction where an intestate administration ought to have been properly initiated in the first instance. (See Virginia Code § 64.2-443).

If the estate has already been closed, reopening the probate may be necessary. Interested parties — such as heirs, beneficiaries, or the original executor — can petition the court to reopen the estate to administer the will properly. While Virginia doesn't have a specific statute conveniently titled "reopening probate" or the like, courts generally allow it under their inherent authority when new evidence (like a valid will) emerges.

Impact on a closed probate estate. How, if at all, does an after-discovered will impact any already-administered or distributed assets?

If assets have already been distributed under a presumed intestacy, the discovery of a valid will could trigger efforts to try to recover and redistribute assets to the extent the will calls for an outcome other than the default intestate division. This right to a "redo" is not without limitations, however. Recognizing that it might be appropriate but difficult to near impossible to simply reverse any transactions, the general assembly saw fit to afford an aggrieved would-be beneficiary a window in which to be able to make good.

For instance, in Virginia, Section 64.2-457 of the Code of Virginia provides that assets distributed under a presumed intestacy may be subject to recovery if a will is later discovered and admitted to probate. However, this recovery is limited both in scope and time. The statute generally allows for asset recovery only if the will is discovered and probated within **one year** of the original probate or administration. After that, asset distributions are typically deemed final, and the recipients may not be required to return the assets. In other words, whether property already transferred might be subject to being clawed back into the estate for the benefit of a devisee under a later-discovered will, will be determined by whether the after-discovered will is filed within that one-year period. See also Virginia Code Sections 64.2-456 for further details. Such a limitation is most

commonly referred to as a “statute of repose.”

Who's in charge now? What happens, if anything, to prior probate procedural decisions (e.g., executor qualifications; administrator appointments; related fee awards) made based on a previously presumed or later-occurring intestacy?

Some prior decisions — such as the appointment of a personal representative or the approval of accountings — may be revisited, especially if they conflict with the terms of a newly discovered will (or the impeachment of a will previously relied upon). However, Virginia courts may uphold actions taken in good faith under the original probate, particularly if the will's existence was unknown (as opposed to known but undiscovered) and could not reasonably have been discovered.

The court has discretion to issue protective orders or modify prior probate orders of the clerk, or deputy, to reflect the actual or new reality, as outlined in **Section 64.2-445**, which allows appeals and adjustments to probate orders by the circuit court within six months of entry by the clerk. More generally, however, the circuit court is vested with equitable authority to do what is right and just to the circumstances. If a court approved the appointment of an administrator on the presumed non-existence of a will, even after hotly-contested proceedings, only to learn later to the contrary, the court will not be compelled to abide by its prior order and shall, instead, be empowered to make whatever changes the court determines are appropriate to the newly understood situation. Just as the timely discovery of new evidence might justify vacating a prior final judgment in either civil or criminal proceedings, so too would we expect that a circuit court judge to be empowered to do what's right, regardless of any stated rationale for the prior decision.

The Bottom Line

When it comes to discovery of a loved one's estate planning documents, “better late than never” does not always hold true. Certain rights are preserved or upheld by appealing a clerk's order admitting a will to probate within six months from entry of such an order. When it comes to reversing actions taken prior to the discovery of a valid and/or more recent will of the decedent, the one-year anniversary of a decedent's date of death is the key differentiator.

A will discovered late in the probate process can up-end the entire legal and financial structure of an estate and its administration and completely change the probate narrative. If discovered too late, it may, for all intents and purposes, not have any effect at all – insofar as the probate narrative may, by that time, have been completely and irrevocably rewritten in a manner contrary to the decedent's intentions.

After the one-year anniversary, the decedent's testamentary intentions may very well have been rendered moot as having been “OBE,” or “overtaken by events,” to the extent that the probate proceeded in the absence of the unknown or missing will. A would-be financier or purchaser from a legal heir, devisee, or personal representative with power to sell, mortgage, or otherwise dispose of an interest in real property, should be mindful of the one-year anniversary and very wary of taking action in advance of that deadline or else risk potential divestment of whatever interest in the property they believed they were acquiring.

The Hsieh (aka Zappos) case serves as a stark reminder that document safekeeping and communication about the whereabouts of important testamentary documents matter as much or more as proper planning in the first instance.