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Safeguarding a Will: Will Deposit Statutes

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Executing a will creates an immediate issue for each and every testator – where should one store a newly minted will? Demographic studies of will-making repeatedly demonstrate that older individuals are more likely to have wills than younger people; therefore, the issue of will storage is more prevalent, and pressing, among older generations.[1] For many testators, probably most, the answer to the question about where to store a will is to keep it at home, place it in a safe deposit box, or leave it with the attorney who helped craft the plan for distribution. While those strategies may be time-tested, none of those common options is without hazard. People might store important papers at home in unexpected places, such as freezers, that increase the likelihood that they will not be recovered.[2] Similarly, individuals searching for a decedent's will might not know that a decedent had a safe deposit box at a bank or that the instrument is stored with an attorney.[3] An individual spends time, money, and mental energy executing a valid will during life, but the failure to find that will after death, in effect, nullifies that effort and increases the probability of intestacy.

As an alternative to home or attorney storage, some states permit testators to deposit wills with courts until retrieved by a testator, the

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1 *See 2020 Estate Planning and Wills Study*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey [https://perma.cc/5H9N-GJYV]; *see also* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 52 (2009) ("The subjects showed a marked increase in the likelihood of testacy as they aged.").

2 Lee Borden, *Storing Your Will in a Freezer*, DIVORCEINFO.COM, http://divorceinfo.com/willinthefreezer.htm [https://perma.cc/K3M6-YSU4]; Daul v. Goff, 754 So. 2d 847, 849 (Fla. Dist. Ct. App. 2000) (observing that a decedent "kept her important papers" in a jar). In other cases, a will may not be found even if individuals know where it was stored. *See In re* Estate of Keiser, 560 A.2d 148, 149 (Pa. Super. Ct. 1989) (ruling that the will was not discovered even though individuals knew that a will had been executed and where decedent had stored it).

3 Storing a client's will may be problematic for an attorney. *See* State v. Gulbankian, 196 N.W.2d 730, 731 (Wis. 1972) (suggesting that safeguarding a client's will may create an ethical problem for the attorney). *Cf.* Am. Coll. of Tr. & Est. Couns., *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 170 (5th ed. 2016), http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf ("A lawyer who has drawn a will may offer to retain the executed originals of the documents subject to the client's instructions.").

testator's agent, or offered for probate. At present, a little over 50% of states authorize courts to serve as repositories of wills.[4] Predictably, will deposit statutes vary in their requirements. Some require that a testator deposit a will with the court in the county of testator's residence while others permit a testator to leave a will with "any court."[5] Most statutes require that a person deliver a will to be deposited with a court in a "sealed envelope," or a similar wrapper, that includes identifying information about the testator like the name of the testator and the name of the individual who delivered the will to the court.[6] Michigan goes a step further by requiring a will to be "enclosed in a sealed wrapper, on which is endorsed the testator's name, place of residence, and social security number or state of Michigan driver's license number, if any, and the day on which and the name of the person by whom is delivered."[7] After the testator or her agent pays a fee for depositing the will,[8] the court is to retain the will until retrieved by the testator or deliver it to a person designated by the testator.[9] While a testator might retrieve a deposited will during life to amend or revoke it, the deposited will should be retrieved, at least in theory, after the testator's death to begin the process of probating that estate.

While statutes that permit courts to store wills presumably prevent them from being lost and protect against unwanted alteration, storing a will with a court has costs that mirror those associated with attorney retention. Survivors searching for a decedent's will may not know which attorney to contact about the will and that attorney, if discovered, may not have any idea what a testator did with it after the representation ended. Similarly, most of the decedent's survivors are likely to be unaware of the possibility that an individual could deposit a will with a court

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4 *See, e.g.*, COLO. REV. STAT. § 15-11-515 (2020); MASS. GEN. LAWS ch. 190B, § 2-515 (2020); WIS. STAT. § 853.09 (2020). For a dated list of will deposit statutes, see *May I File or Deposit my Will with the Court Before I Die*?, USLEGAL (Dec. 28, 2016), https://answers.uslegal.com/wills-and-estates/filing-will-before-death [https://perma.cc/NWY9-8NFX].

5 IND. CODE § 29-1-7-3.1(d) (2020) ("A person may deposit a will with the circuit court clerk of the county in which the testator resided when the testator executed the will."); MINN. STAT. § 524.2-515 (2020) ("A will may be deposited by the testator or the testator's agent with any court for safekeeping[.]").

6 *See, e.g.*, OHIO REV. CODE ANN. § 2107.07 (West 2019).

7 MICH. COMP. LAWS § 700.2515(1) (2020).

8 ARK. CODE ANN. § 28-25-108(a) (2020) (charging a fee of $2.00 to deposit a will with a court); OHIO REV. CODE ANN. § 2107.07 (requiring a fee of $25 be paid to the court for will deposit).

9 ARK. CODE ANN. § 28-25-108(c).

for safekeeping.[10] And even if survivors know that testators may store wills with courts, they may not know which court to contact if the relevant will deposit statute permits a testator to store a will with "any court."[11] A testator may have deposited a valid will with a court, but court storage may yet result in intestacy without specific information regarding where that will was deposited.

To address the possibility that wills held by courts will not be probated, many will deposit statutes require a court to notify a testator's designees about a will that is stored among its records. The will deposit statute in Texas, for example, provides that

> A county clerk shall notify each person named on the endorsement of the will wrapper that the will is on deposit in the clerk's office if:
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> 1) an affidavit is submitted to the clerk stating that the testator has died; or
> 2) the clerk receives other notice or proof of the testator's death sufficient to convince the clerk that the testator has died.[12]

Furthermore, Texas statutory law permits a court to inspect a will and notify an executor or devisees under the will if the court does not receive a response after notifying the individual listed on the wrapper.[13] Similarly, Iowa's statute directs a court clerk to notify the individual designated on the wrapper containing the will after learning of a testator's death.[14] If no one files a petition to open probate within thirty days thereafter, the will may be opened and the executor named in the will is notified.[15] Regardless of the notification mechanism, requiring a court to notify an executor, a designee listed on the wrapper, or devisees of a testator's will reduces the costs of locating a will while increasing the probability of probating the will.

Despite the potential pitfalls of court storage, depositing a will with a court has one benefit that home or attorney storage does not generally offer — the court is likely to be in the same place at a testator's death as when the testator deposited the will. By comparison, aging individuals might relocate to take advantage of different housing options, which might cause important papers to be lost during moves. Given the ages of

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10 Those survivors, of course, may speak with an attorney who could inform them about the option to deposit a will with a court for safekeeping – if available. *See id.* § 28-25-108(a).

11 *See, e.g.*, COLO. REV. STAT. § 15-11-515 (2020).

12 TEX. EST. CODE ANN. § 252.101 (West 2020).

13 *Id.* §§ 252.103-.105.

14 IOWA CODE § 633.289 (2020).

15 *Id.*

the cohort most likely to execute wills, temporary stays in healthcare facilities may create circumstances where important papers like wills cannot be located after an individual's death.[16] Like testators who relocate for various reasons, attorneys might change offices or leave the practice of law altogether, which may make it difficult to track down a will stored with that attorney. If a known will cannot be located after a testator's death, litigation involving the application of the lost will presumption may consume time and estate resources,[17] which would not be a desired outcome for most, if not all, testators.

Depositing a will with a court lessens the challenge of locating a decedent's will, but retrieval of that will does not guarantee probate of that will.[18] Because testators may revoke or amend wills without providing notice to anyone,[19] for example, individuals managing a decedent's testate estate often cannot be entirely certain that any one specific instrument is the last and controlling instrument executed by a decedent. Indeed, some people execute a sizable number of wills and/or codicils,[20] which likely makes it difficult to locate all of the relevant instruments. Nonetheless, only a fraction of people seems likely to execute multiple testamentary plans given that most people are older when they execute their *first* wills. And if a later will is discovered after probating a deposited will, statutory law often permits a court to modify or vacate prior orders and reopen probate under certain circumstances.[21] In short, the risk that a deposited will is not a testator's final plan for property distribution is inherent in the process of piecing together the totality of a decedent's testamentary instruments and can be remedied, albeit not without cost, if a later will is discovered.

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16 *See, e.g.*, Spencer v. Spencer, 258 So. 3d 326, 329 (Ala. 2018).

17 For details regarding the lost will presumption, see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. L. INST. 1999). For a case analyzing the applicability of the lost will presumption, see, for example, *In re* Estate of Mecello, 633 N.W.2d 892, 901-02 (Neb. 2001) (refusing to apply presumption when person who would benefit from presumption of revocation had access to a testator's safe deposit box where testator was known to have stored will).

18 The deposited will may not have been executed with due formality, not admitted after a will contest, etc.

19 Statutory requirements for formal execution, of course, generally require witnesses so a form of notice is provided. However, witnesses may not know the testator or takers under the will; therefore, interested parties like family members may not know about a testamentary modification. In some places, one may author a holographic testamentary instrument without witnesses.

20 *See, e.g.*, Estate of Getty v. Getty, 149 Cal. Rptr. 656, 660 (Cal. Ct. App. 1978) (discussing a challenge to the 21st codicil to a will).

21 *See, e.g.*, UNIF. PROBATE CODE § 3-412(1) (amended 2019); N.M. STAT. ANN § 43-3-412 (2020); *In re* Estate of Lee, 26 P.3d 764, 766 (N.M. Ct. App. 2001) (construing New Mexico's statute to permit an estate to be reopened based upon the existence of a later-discovered will).

Whether a testator executes one or a dozen testamentary instruments, a testator's survivors must overcome the ever-present issue of locating the testator's will(s). The best mechanism to mitigate many of risks associated with finding and probating a will is to engage in one thing that estate planners recommend – communicating with the people interested in the estate. Testators should discuss the responsibilities of being an executor with the individuals who might serve in that capacity, talk with potential guardians of minor children, and inform people about the existence and contents of testamentary instruments. As part of those discussions, testators should inform executors and/or family members where a will is stored for safekeeping. To that end, storing a will with a court should be an attractive option for many testators because it reduces many of the costs/risks of locating a will. Finding a testator's will is essential because if a testator's will cannot be found, then the testator's plan for property distribution cannot be fulfilled – and effectuating a testator's intent is the fundamental goal of the law of wills.