

# Navigating Colorado's New Abandoned Wills Depository

BY CHARLES E. ROUNDS



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*This article offers a step-by-step guide for depositing abandoned original wills under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act and addresses the benefits and risks of retaining clients' original estate planning documents.*

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Attorneys who regularly serve as custodians of original wills know that it is common for the creators of the wills to move, change their telephone numbers, or become unresponsive. The creator's intent could be jeopardized if the custodian loses contact and is unable to update the original will if the creator wants to make changes. Loss of contact can also hinder the attorney's ability to take the necessary steps to administer the estate or transfer the will to a new custodian if necessary. Colorado now has a mechanism for estate planning attorneys, trust departments, and other fiduciaries who retain clients' original wills to dispose of abandoned wills when they have lost touch with these clients.

The Colorado Electronic Preservation of Abandoned Estate Planning Documents Act<sup>1</sup> (Act) was signed into law in 2019. It provides for the establishment of a depository to hold original abandoned will documents<sup>2</sup> to be administered by the Colorado State Court Administrator (SCA). However, the development of the administrative system for accepting and holding wills took time. The effective date of the Act was changed from January 1, 2021, to January 1, 2023, and the system was not fully operational for the public's use until the fall of 2023. This article is a practical guide for using the depository.

### **Overview of the Act**

In passing the Act, the legislature recognized that when professionals who are custodians for original wills are unable to locate the wills' creators, it is in the best interest of the custodians, the creators, and the creators' representatives to deposit the wills in a central place.<sup>3</sup> Under the Act, the SCA does not physically hold the original abandoned will but instead stores an electronic copy of the original.

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In instances where the creator of the document has become unresponsive, the state's process for submitting an abandoned will may be appealing. However, the submission of an abandoned will to the SCA is intended to be an option of last resort, and a practitioner can use the abandoned will depository created under the Act only when they cannot locate the creator after a diligent search. Moreover, nothing in the Act revokes the requirement to “lodge” an original will after the death of the will's creator. Under CRS § 15-11-516, the current custodian

of any original will is still required to deliver it to the appropriate court within 10 days of death, regardless of whether a probate will eventually be opened. Therefore, if during the search for the will's creator, a custodian discovers evidence of the creator's death, the use of the depository is inappropriate. Instead, the custodian should deliver the original physical will to the clerk's office of the probate court with the proper jurisdiction.

In cases where using the depository is appropriate, once will custodians have successfully transferred electronic copies of the wills to the SCA, they can physically destroy the originals in their possession. It should alleviate the practitioners' stress to know that there is now a systematic method for disposing of the “dusty” old original wills they have been holding for decades on behalf of now unresponsive clients. However, practitioners should be aware of the system's shortfalls.

First, it is time-consuming. There are a number of required steps to be taken before depositing the will and then destroying the original. Second, there is a fee. Each will deposit currently costs \$39.50, and there is likely no client to bill, so the firm absorbs the cost. If practitioners only have a few original wills at issue, the time and fees are not prohibitive; however, if they intend to rely on the system for disposing of a high volume of wills, time and fees could become excessive. Finally, although language in the Act references “estate planning documents,” the depository only accepts “will documents” at this time.<sup>4</sup> What does a practitioner do with abandoned original powers of attorney, living wills, and other forms of estate planning documents? There is currently no option for submitting these documents to the SCA, so the depository assists with the disposal of just one of multiple types of original estate

planning documents that practitioners routinely keep for clients. Despite these drawbacks, many practitioners will likely find the depository a useful tool that is relatively easy to use.

**Step-by-Step Procedure for Depositing Abandoned Original Wills**

Though it contains several steps, the process to submit abandoned wills is not terribly complex. Practitioners interested in using the depository should start by becoming familiar with the “Abandoned Estate Documents” page on the Colorado Judicial Branch website.<sup>5</sup> This page contains the specific steps and requirements for submitting a document, as well as the applicable JDF forms (975, 976, and 977), instructions (JDF 974), and Chief Justice Directive (23-01).<sup>6</sup> This is also the page where practitioners will submit the necessary documents and where any parties can search the database for names and last known addresses of any creators with uploaded wills.

Below are the general steps from start to finish for practitioners to successfully dispose of original abandoned will documents in their possession.

1. Identify candidates whose original wills you possess who have been unresponsive, unable to be located, or unable to be reached. Determine where to document efforts to search for the will’s creator (through client management software, spreadsheet, etc.).

2. Conduct a search for the will’s creator using at least two of the seven forms of contact listed on the Filing Statement for the Submission of Abandoned Estate Planning Documents to the State Court Administrator’s Office (JDF 975) (filing statement). Calling or emailing the creator using their last known contact information is usually the most practical, but other options include searching a telephone directory covering the geographic area of the last physical address; conducting a general Internet search for the creator or their relatives; or attempting to contact an heir. Specific websites that may be helpful with these efforts include Accurant (requires a LexisNexis login), Legacy (for obituaries), and Find a Grave. Sometimes county property records and district and Denver probate court records can also be helpful.

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3. Send a letter to the creator’s last known address stating that if the creator does not take possession of the original document within 90 days of the mailing date of the letter, then the custodian will file an electronic copy of the will with the SCA and destroy the original. The letter should be sent via first-class or certified mail to the last known address of the creator, or “in care of” the lessee(s) of a safety deposit box. The custodian should then calendar 90 days from when the letter is mailed. If the creator has not responded after the 90 days elapse (even if the letter was returned “undeliverable” to the custodian before the end of the 90-day period), then continue with the next steps.

4. Download and print the filing statement from the SCA’s webpage; it cannot be completed on the webpage. Fill out the filing statement and mark the boxes indicating the steps taken

to try to reach the creator. Mark the applicable box indicating that the creator was either unresponsive or unable to be reached after 90 days, and list the title, date, category, and number of pages of each document being submitted.

5. After completing the filing statement, submit it via the SCA’s webpage, along with a scanned copy of the original will(s). You should receive an email confirming the submission.

6. If the submission is accepted, the SCA will send another email with confirmation of its acceptance and a link to submit payment. The link will remain active for seven days, and once the link is activated you will have 30 minutes to submit payment. If payment is not received within that time frame, you will need to contact the SCA for a new link.

7. Once payment has been received, the SCA will email a final confirmation a few days later stating that the documents have been accepted into the system. At that time, the custodian can physically destroy the original will.

**Searching the Depository and Requesting Copies**

The SCA’s webpage also allows the public to electronically search the depository under a creator’s first name, last name, or last known address. This will be another useful tool for creators or their families, as well as attorneys, in circumstances in which they are attempting to locate missing wills. Someone searching the depository can identify persons whose wills are stored in the system; however, they do not have access to view or print the documents. To acquire a document, creators or their authorized fiduciaries or devisees<sup>7</sup> can request a certified copy by submitting JDF 976–Request for Certified Estate Planning Documents.<sup>8</sup> Creators can also remove their will documents from the depository by filing JDF 977–Request for Deletion.<sup>9</sup> There is no account or login required to use the SCA webpage to access or upload these forms.

**Benefits and Burdens of Retaining Original Wills**

Although it was standard practice for many decades,<sup>10</sup> in recent years some practitioners have shied away from retaining clients’ original wills, perhaps due in part to risks associated

with losing contact with clients over the years. Now that there is a mechanism for disposing of abandoned wills, perhaps practitioners who previously refused to retain wills on this basis might reconsider. Retaining wills for clients can provide several benefits to the clients and their representatives and beneficiaries, and there are multiple tools and best practices that can help reduce the associated risks.

### *Benefits to the Client*

Many clients feel more comfortable with their attorneys in possession of their original wills, particularly now that Colorado courts have discontinued their practice of accepting deposit of wills pre-mortem. Retaining the clients' original wills can protect against loss or fraud. Clients can easily misplace their original wills, especially if they experience deteriorating mental or physical health as they age. They may have to move out of their homes or from one care facility to another before their death. There is also frequently the risk that disgruntled family members might discover original wills among the clients' papers and clandestinely destroy or alter them.

Another benefit is that in many cases, the estate administration process can be expedited because the law firm that drafted the will is often retained to assist with the administration of a deceased client's estate. If the law firm already possesses the original will, the process of lodging the will with the courts and opening probate is easier. This can reduce costs to the estate and leave more funds for the client's beneficiaries. The firm would also already have significant information on the decedent's assets, intentions, financial affairs, and other relevant information in their file, which makes notifications and transfers to beneficiaries more efficient. Even when the law firm is not retained post-mortem, the client has the protection of the custodial firm lodging the will and notifying the necessary parties at the appropriate time.

### *Reducing Risks of Retaining Wills*

There are a number of tools available for reducing some of the more significant concerns associated with retaining original wills. For example, risk of loss of documents due to fire,

flood, or theft can be mitigated by obtaining commercial liability insurance that covers the expenses to the firm of replacing these documents. Additionally, the firm can ensure an extra level of protection by storing clients' original wills in locked fireproof locations, establishing offices in secure buildings, and retaining electronic copies of all original wills. Electronic copies of original wills and other estate planning documents should be stored on the cloud and/or on discs that the firm updates and keeps off-site.

Concerns of not being notified of a client's death, relocation, or revocation or changes to the original will can be addressed through periodic communication with clients. This is even more important as the US population becomes increasingly mobile, partly due to more opportunities for people to work remotely. Regular mailings such as holiday cards, newsletters, or announcements of changes in the firm's location or attorneys can serve dual purposes by including address correction requests or forwarding instructions. For clients who have been discovered to have moved out of state, returning these clients' original documents and advising them to contact an attorney in the new location to review their documents is a best practice. Having staff monitor websites that publish obituaries is another possible precaution. The new SCA abandoned will depository can also ease practitioners' concerns about losing contact with a former client or being unable to locate a client's nominated personal representative or devisees. This depository will also help solo practitioners who are retiring and unable to reach clients to return their documents.

These tools make it reasonable for a law firm to offer to clients, in the right circumstances, the benefits of holding their original wills, as long as the firm is willing to assume the burden of undertaking precautions to reduce the associated risks.

### **Conclusion**

Estate planning attorneys are not mere scriveners. They are counselors and safeguards against incapacity, mistake, undue influence, and duress in the execution of wills. Holding

the original wills that they have prepared for clients allows attorneys to provide further assurances that the clients' testamentary intent will be honored. Numerous practical and legal solutions exist that can reduce the risks in doing so. <sup>CL</sup>



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### **NOTES**

1. CRS §§ 15-23-101 et seq.
2. The Act's name is a misnomer, as only original "will documents" can be submitted to the SCA. See CRS §15-23-103(13). "Will documents" include, but are not limited to, formally executed wills, holographic wills, codicils, will revocations, and memoranda for disposition of tangible personal property.
3. CRS § 15-23-102.
4. CRS § 15-23-103(13).
5. The page can be accessed from the Colorado Judicial Branch website by clicking on "Administration," then clicking "Court Services," then choosing "Abandoned Estate Documents" in the menu under "Units" on the lefthand side. The specific webpage is <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=estate-doc>.
6. Practitioners are advised to continually check the webpage for future updates, information, and forms.
7. The requestor must include with the submission proof of identification and, where applicable, proof of authority.
8. This form can be found at <https://www.courts.state.co.us/Forms/PDF/JDF976.pdf>.
9. This form can be found at <https://www.courts.state.co.us/Forms/PDF/JDF977.pdf>.
10. Recognizing the appropriateness of practitioners retaining original wills, the American College of Trust and Estate Counsel (ACTEC) has issued ethical commentaries and guidance on the process and best practices. See ACTEC Commentary to Model Rules of Professional Conduct 1.15 (Safekeeping Property).