

The Antiquated Practice of Lodging Wills in Virginia Circuit Court Clerk's offices and the need for a statewide index

Introduction

Virginia law permits individuals to deposit, or “lodge,” an original last will and testament with the clerk of the circuit court for safekeeping during the testator's lifetime. This practice is authorized under Virginia Code § 64.2-409, which allows a will to be filed with the clerk in a sealed envelope and retained until the testator's death or request for withdrawal. While the statute was enacted with the intention of protecting important testamentary documents from loss or destruction, the modern realities of mobility, family communication gaps, and decentralized recordkeeping have rendered the practice increasingly antiquated.

This report examines the practical problems associated with lodging wills in individual Virginia circuit court clerk's offices, particularly the inability of families to locate these wills after death and the likelihood of later drafted wills revoking the lodged will. It further discusses how population movement within Virginia and across state lines exacerbates the issue, resulting in a lodged will remaining undiscovered for decades—often until their authorized destruction. Finally, the report advocates for the creation of a statewide searchable index of lodged wills, modeled on existing public search systems maintained by the Office of the Executive Secretary of the Supreme Court of Virginia.

It is important to note that only an original will can be probated by a clerk of court, thus increasing the significance of knowing where the original wills are stored or lodged. In preparing this report, the Virginia Supreme Court Office of the Executive Secretary advised that they do not currently have a receipt code for lodged wills in a courthouse.

The Clerk of Rockingham County created this report in working with local members of the Harrisonburg-Rockingham Bar Associations who primarily focus on probate and estate matters. The Clerk of the same court can produce examples, and it is likely similar examples exist in the other 119 Circuit Court Clerk's office, of many estates that were handled intestate, even though a will was lodged, since there is no search ability. This outcome directly conflicts with the actual will's directives leading to what could be significant civil actions and legal matters before a court that could have been avoided.

The Rockingham Circuit Court Clerk's office created an electronic index of wills within the land records system which allows any person the ability to review filings as with any other type of document. While this is a sealed record, if the person meets the legal authority to view or act upon that will, the lodged will then can be taken from storage and provided. In requesting the process used in other courts, it was discovered that the process often includes clerk's offices maintaining index paper card catalogs or similar burdening the search outcomes and possibly leading to overlook or other search errors. Additionally, thought should be given to the fact that this current retention is 100 years for lodged wills. So the paper items of today will likely become brittle, discolored or illegible during that time if left in this medium.

Overview of Lodging Wills Under Virginia Code § 64.2-409

Virginia Code § 64.2-409 authorizes any person to deposit their will with the clerk of the circuit court for safekeeping. The clerk is required to keep the will sealed and indexed, and the will may only be released to the testator during their lifetime or to an authorized person upon proof of death. The statute further allows clerks to retain lodged wills for extended periods, with many offices maintaining them for up to 100 years before authorized destruction if no claim is made.

Importantly, the statute does not require the testator to notify family members, fiduciaries, or beneficiaries that a will has been lodged. Nor does it require the clerk to indicate the existence of the will to any centralized database. As a result, the knowledge that a will exists—and where it is located—often resides solely with the testator. This doesn't even address the obvious issue of later updates to the estate plan by the testator, which can negate the said will. If a statewide search was possible, at least there would be one place to check for any previous wills and make sure that the most up to date will is being probated.

Lack of Family Awareness and the Consequences After Death

A significant and recurring problem with lodged wills is that individuals frequently do not inform their families or personal representatives that the will has been deposited with a circuit court clerk. In some cases, this may be due to privacy concerns, family conflict, or simple oversight. In others, the lodging may have occurred decades earlier, and the testator may later forget the precise location of the will or assume it is no longer relevant, particularly if they draft a new will.

After death, surviving family members often search personal files, safe deposit boxes, and attorney offices, unaware that the original will was lodged with a clerk—sometimes in a different county or city than where the decedent last resided. When no will is found, estates may be administered as intestate, contrary to the deceased person's actual intentions. This undermines the fundamental purpose of testamentary planning and can result in unintended distributions, family disputes, and increased court involvement.

Population Mobility and the Displacement of Lodged Wills

Virginia has experienced substantial internal migration as well as interstate relocation over the past several decades. Individuals commonly move for employment, retirement, military service, or family reasons. A person may lodge a will in a circuit court clerk's office early in life, then later relocate to another region of Virginia—or to another state entirely—without updating the location of the lodged will or informing their family.

When death occurs outside the jurisdiction where the will was lodged, the likelihood of discovery diminishes significantly. Family members typically begin their search in the locality where the decedent last lived, not in a county or city associated with an earlier residence. Over

time, this leads to a growing number of original wills remaining unclaimed in clerk's offices across the Commonwealth.

Because clerks are required to retain these documents for up to a century, lodged wills may remain sealed and undiscovered for generations, only to be destroyed at the end of the mandatory retention period. In such cases, the decedent's final wishes are never known or honored, despite the existence of a valid, properly executed will.

Administrative Burden and Inefficiency

The continued storage of thousands of unclaimed lodged wills also creates an administrative burden for circuit court clerk's offices. These documents require secure storage, indexing, and eventual review for destruction eligibility. Yet, the lack of a centralized system means that clerks have no efficient way to determine whether a will lodged in their office pertains to a decedent whose estate has already been administered elsewhere.

From a public policy perspective, the current system expends resources to preserve documents that are could be assumed to never be retrieved, while failing to serve the very individuals and families it was designed to protect.

The Case for a Statewide Searchable Index of Lodged Wills

The most effective solution to these longstanding issues is the creation of a statewide searchable index of all wills lodged in Virginia circuit court clerk's offices. Such an index would not require public access to the contents of the wills themselves, nor would it compromise privacy as directed by §17.1-293 which limits the "posting and availability of certain information on the Internet". Rather, it could be limited to basic identifying information, such as:

- Name of the testator
- Date of birth (or approximate year)
- Date the will was lodged
- Circuit court where the will is held

This would allow surviving family members, personal representatives, and attorneys to determine whether a will exists and where it is located, enabling timely retrieval and proper probate.

Recognizing that the full information would be difficult for wills lodged in the past, the date of lodging, name of testator and the Circuit Court where lodges could be determined and extremely beneficial to the public.

Feasibility Based on Existing Systems

The Commonwealth of Virginia already maintains successful statewide public search systems, most notably the statewide criminal record and case information search administered through the Office of the Executive Secretary of the Supreme Court of Virginia. This demonstrates that the

technical infrastructure, administrative authority, and institutional experience already exist to support a similar system for lodged wills.

Adding lodged will indexing to an existing or parallel platform would not require reinventing state technology systems. Instead, it would represent a logical extension of current capabilities, tailored to civil and probate matters. Clerks would continue to maintain physical custody of the wills, while contributing limited indexing data to a centralized system.

Benefits of a Statewide Index

The creation of a statewide index would produce multiple benefits:

- **Protection of testamentary intent** by ensuring wills can be located after death
- **Reduction in intestate estates** where valid wills actually exist
- **Decreased family conflict and litigation** arising from uncertainty, or inaccurate probate
- **Improved administrative efficiency** for clerks and courts
- **Greater public confidence** in estate planning and judicial recordkeeping

Most importantly, it would honor the final wishes of Virginians who took deliberate steps to prepare and safeguard their wills, but whose efforts are currently undermined by an outdated and fragmented system.

Conclusion and Recommendation

While Virginia Code § 64.2-409 was enacted with good intentions, the practice of lodging wills exclusively within individual circuit court clerk's offices no longer aligns with modern patterns of mobility, longevity, and family dynamics. The result is a system in which valid wills are far too often lost to the paper files of a courthouse—not through destruction or negligence, but through inaccessibility and lack of awareness.

Establishing a statewide searchable index of lodged wills is a practical, achievable, and necessary reform. Given the existing capabilities of the Office of the Executive Secretary of the Supreme Court of Virginia, such a system could be implemented without compromising privacy or imposing unreasonable burdens on clerks. This lodged will search tool could mirror the already created and utilized state criminal record check. Doing so would modernize the Commonwealth's approach to will safekeeping and ensure that the final wishes of the deceased are discoverable, respected, and fulfilled.