

---

**To:** Members of the House of Delegates Judiciary Committee

**From:** MSBA Estate & Trust Law Section

**Date:** February 18, 2021

**Subject:** **HB1266** – Estates and Trusts – Wills – Custodianship

**Position:** **Support**

---

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports House Bill 1266 – Estates and Trusts – Wills – Custodianship**. HB1266 provides essential guidance with respect to how, when and where original wills may or must be deposited with the registers of wills in Maryland, and where those searching for wills may find them. This proposed bill provides Marylanders with greater access to justice by increasing the likelihood that wills are safeguarded and appropriately administered so that testators’ last wishes may be honored. HB1266 also provides a responsible manner for disposing of very old wills that are unlikely to ever be probated so long as an electronic copy is maintained.

### **Description of Current Law**

The current law in Maryland relating to the disposition of original wills is extremely limited and outdated. For example, it provides no guidance with respect to the disposition of an original will by any person other than the testator or testator’s agent while the testator is alive. Sections 4-201 through 4-203 of the Estates and Trusts Article of the Maryland Code allow testators and their agents to deposit an original will with the register of wills in the county where the testator resides. Because people frequently lose their wills, it is customary for original wills to be stored with the attorneys who prepared the wills. However, current law does not provide guidance with respect to what a holder of an original will may or must do with the original document when the holder does not know where the testator lives or whether the testator is still alive. Further, current law provides no guidance with respect to the disposition of extremely old wills that are unlikely to ever be probated.

### **Problem with the Current Law**

Under current Maryland law, when an attorney or other person holding an original will cannot find the testator, the holder can neither return the will to the testator nor deposit the will with the appropriate register. Because the law does not specify or prohibit other methods for disposing of a will when the testator cannot be located, attorneys looking to dispose of stored wills find their own solutions, which may not adequately safeguard these documents. This lack of guidance leads to

many instances where valid wills simply cannot be found and families are forced to go through inefficient and costly intestate administrations. Worst of all, the testators' last wishes cannot be honored.

Further, there are wills in the custody of the register of wills or held by attorneys that are so old that they are unlikely to ever be admitted to probate. However, without permission to dispose of these wills by the testators, these documents must be held indefinitely in paper form.

### **How the Legislation Solves the Problem**

HB1266 seeks to revise §§ 4-201 through 4-203 and create new §§ 4-204 and 4-205 of the Estates and Trusts Article in order to provide the exclusive manner for depositing original wills with the registers and disposing of wills. The procedure for depositing wills with the register under existing law is generally preserved but also expanded to allow any person who is holding an original will to deposit it with the appropriate register before or after the testator's death.

Revised § 4-201 makes it clear that an original will may not be delivered or destroyed by anyone other than the testator unless specifically permitted in this legislation. Proposed § 4-202 provides that the testator, the testator's agent or any other individual holding an original will may deposit the will at any time with the register of the county where the testator resides or the register of the county where the testator resided when the will was executed. The holder may also deliver the will to the testator or the testator's agent. Further, proposed § 4-202 preserves existing law regarding the specific protocols and procedures for depositing original wills with the registers, with the exception that only the last four numbers of the testator's social security number are recorded rather than the entire social security number. This change was intended to limit the register's need to collect sensitive information.

Proposed § 4-203 provides that a Maryland attorney who (i) has custody of a will that is at least 25 years old, (ii) cannot locate the testator, and (iii) has no knowledge that the will is subject to a contract to make or not to revoke a will, may dispose of the will as provided in proposed § 4-204. Newly proposed § 4-204 provides that if a Maryland attorney deposits an original will with the appropriate register along with a certification that the conditions set forth in proposed § 4-203 have been met, the register may destroy the will so long as an electronic copy is maintained. This proposed bill offers the registers a responsible option for reducing their overwhelming inventory of original wills that are not likely to be probated.

Because the legislation permits a holder to deliver an original will to the agent of the testator under a durable power of attorney, the Maryland Statutory Form Limited Power of Attorney in § 17-203 is proposed to be revised to include an option to allow the principle to grant authority to an agent to request an original will from a holder. This authority would not be included in the standard form but would instead be presented as an option.



In sum, the primary purpose of HB1266 is to provide essential guidance with respect to the disposition of original wills and eliminate the guess work for those trying to locate wills. We believe that this proposed law will provide greater access to justice for Marylanders by helping to ensure that original wills are safeguarded and testators' last wishes are honored.

For the reasons stated above, the MSBA **supports HB1266 and urges a favorable committee report.**

**For Further Information, Please Contact:**

<p><b>Anne W. Coventry</b> (301) 656-8850 acoventry@pasternakfidis.com</p>	<p><b>Michaela C. Muffoletto</b> (410) 332-8534 mcm@nqgrg.com</p>	<p><b>Christine W. Hubbard</b> (410) 798-4533 christine@chubbardlaw.com</p>
--	---	---