

MAINE STATE LEGISLATURE

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STATE OF MAINE
DISTRICT ATTORNEY
PROSECUTORIAL DISTRICT
NUMBER TWO

142 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 772-2838

HENRY N. BERRY III
DISTRICT ATTORNEY

Peter G. Ballou, Deputy
James A. Connellan
Richard J. Kelly
Thomas L. Goodwin
Stephen W. Devine
Joanne S. Sataloff

June 26, 1978

ASSISTANTS

Mr. Francis R. Mulkern
Register of Probate
Cumberland County Courthouse
142 Federal Street
Portland, Maine 04112

Dear Mr. Mulkern:

This is in response to your letter of April 4, 1978, in which you asked for legal advice on possible changes in probate records to permit use of microfiche as a substitute for regular paper records. Your questions were as follows:

1) Would microfiche be considered a legal document without a statutory change?

2) Would the storing of probate records at another government facility be accepted as still being in the care and custody of the Register of Probate?

In response to your first question, most states have statutes authorizing the use of photography in making permanent county records; under such statutes, microfilming has been upheld as a method of recording documents (citations available if needed). In Maine, 16 M.R.S.A. §455 states that when any officer of any county, is required by law, to record or copy any document, "he may do such recording or copying by any photostatic, photographic, or other mechanical process which produces a clear, accurate and permanent copy or reproduction of the original document in writing."

However, there is also the concern about whether the microfiche recorded in the Registry of Probate (or a paper copy therefrom) would be admissible in evidence. The answer is yes, with an important qualification: a will must first be proved in Probate Court and cannot be recorded in the Registry of Deeds until after it is proved. Copies from the Registry cannot be used in evidence (either in later Probate Court proceedings or in other courts) until these two things have been done.

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There are two major evidentiary problems concerning such documents: the so-called best evidence rule and authenticity. The best evidence problem is governed by Maine Rule of Evidence 1005, which states that "the contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, may be proved by copy [from the Registry]. The authenticity problem is solved by the very similarly worded Maine Rule of Evidence 902(4), providing that such documents "authorized..to be recorded...and actually recorded" are "self-authenticating." A rationale for the self-authenticating rule is that the custodian of the records (the Registrar) has a legal duty to make sure that the documents offered for recording are genuine. See McCormick, Evidence (2d.Ed.) §224.

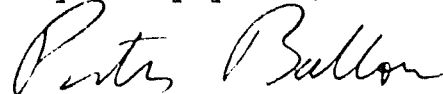
In this case, that rationale is correct: recording of a will cannot take place until it is proved in Probate Court. See 18 M.R.S.A. §§101 and 253.

Thus, the rules stated in Maine Rule of Evidence 902(4) and 1005 are not operative until after the will is proved (including proof of authenticity, for which an original is ordinarily essential) in Probate Court and is therefore eligible to be recorded in the Registry of Probate and actually recorded. Microfiche copies will not be admissible in evidence in Probate Court or any other court until after a will is proved and recorded. It is therefore essential that original wills be retained until they are actually proved and recorded.

After that stage, there would appear to be no legal requirement that the Registry retain an original will (or other original records) and it may retain copies instead. 16 M.R.S.A. §455. The State Archives may or may not take such documents at the discretion of the archivist 5 M.R.S.A. §95(10).

There also does not appear to be any legal requirement that the Registry maintain a duplicate set of records (either the originals or a second set of microfiche copies) at another place. Since the Registry does plan to maintain such a duplicate set in Windham, it is unnecessary to answer your question whether maintaining records only at another location would be lawful.

Very truly yours,



PETER G. BALLOU
Deputy District Attorney

PGB:rjf

cc: Don Alexander ✓