ESTATE PLANNING

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I N D E X

Introduction 3

At-Home Storage by Clients 3

Storage by Estate Trustees and/or Attorneys 4

Safety Deposit Boxes 5

Safekeeping by the Court 6

Retention of Original Documents by Drafting Solicitors 7

1. Confirm retention of the original documents in writing 7

2. Provide clients with a copy of the original documents 8

3. Advise clients that they are entitled to the return of the documents at any time 8

5. Rule 2.07 and retention of client documents to the standard of a "prudent owner" 10

Other Considerations for Drafting Solicitors: Contingency Planning 11

Other Considerations for Drafting Solicitors: File Retention 11

Conclusion 13

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INTRODUCTION

Wills and powers of attorneys are important documents that are often prepared years, or even decades, before they may need to be produced. In an estate litigation practice, lawyers too frequently encounter the problem of original wills that have not properly been retained.

It is important that planning documents are easily accessible. It is never known when an individual may become ill or die and a document will be required to allow an attorney for property or personal care or an estate trustee to produce a record of their authority to make decisions pursuant to the incapable grantor or testator's wishes.

However, accessibility must be balanced with the competing priority of keeping the original documents safe. If an original estate planning document is lost or inadvertently destroyed, the estate plan may be partially or completely ineffective.

Original wills are required for probate.[1] Missing original wills can, at minimum, cause significant delays and additional costs in the administration of an estate.

Clients often understand the significance of keeping original wills and powers of attorney somewhere safe and ensuring that their attorneys for property or personal care and estate trustees are aware of where such documents are located. However, no storage option for the retention of a will or power of attorney is perfect. Clients should be made aware of the advantages and disadvantages of the different storage options before they make a decision with respect to the safekeeping of original estate planning documents.

At-Home Storage by Clients

When original estate planning documents are stored by the testator him or herself at home, it is likely that the testator will be able to easily and quickly find the document if he or she wishes to do so. However, it is rarely the testator or grantor who is required to urgently locate the original

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[1] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 74.04(1)(a).

document. Absent prior discussion with respect to such documents, appointed individuals may not be aware of where the documents are located or that the documents exist to begin with.

The storage of original estate planning documents at one's home may be unnecessarily risky. If a will that was last in the possession of the testator cannot be found after the testator's death, it may be presumed that the testator destroyed the will and that he or she intended to revoke the document by this physical act of destruction.[2]

A will that has been lost or destroyed can be proved by way of an application under Rule 75.02 of the *Rules of Civil Procedure*. Affidavit evidence can be produced to establish the validity of the lost will and its contents, so long as all individuals with a financial interest consent.[3] Nevertheless, this remedy presumes the existence of a copy of the missing will or clear evidence of its provisions. The court requires "very clear and convincing" evidence in support of what is asserted to be the valid last will of the deceased.[4]

Even if documents are stored within a waterproof and fireproof safe, it is still important that an attorney or estate trustee is made aware of the existence and location of these important original documents. Further, the testator should ensure that, if there is a combination to a safe, that it is disclosed to the individuals appointed pursuant to the planning documents.

Where a testator stores original estate planning documents in a secure location, such as within a fireproof and waterproof safe, and provides attorneys and estate trustees with the information necessary for the prompt retrieval of the documents, at-home storage by a testator or grantor may be a viable option.

<u>Storage by Estate Trustees and/or Attorneys</u>

Keeping estate planning documents with individuals appointed pursuant to them but before they come into effect may be practical, but can also represent a privacy concern. Testators may not want estate trustees to be made immediately aware of the contents of their wills.

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[2] *Thierman Estate v. Thurman*, 2013 BCSC 503.
[3] *Supra* note 1, r 75.02(a).
[4] *Sigurdson v. Sigurdson* [1935] 2 DLR 445 (SCC) at para 49.

Providing original wills and powers of attorney with others may also complicate the process of revocation, should the testator or grantor choose to revoke documents, amend an existing plan, and execute new documents.

Further, the safekeeping of original documents with an estate trustee or attorney carries with it many of the safe risks common to the storage of wills or powers of attorneys oneself at home.

Safety Deposit Boxes

Keeping wills and powers of attorney in a safety deposit box is a popular way to keep these original documents secure. However, it often means that the very document that gives the designated individual the authority to access the contents of the safety deposit box is not readily available. Denied or delayed access to the documents contained within a safety deposit box can impinge upon the ability of an attorney or estate trustee to honour the wishes of the testator or grantor.

If a will is being stored in a safety deposit box for which an estate trustee does not have signing authority, the financial institution may require a court order to retrieve the box's contents.

British Columbia has very recently enacted new legislation that addresses the problem of storing original wills within safety deposit boxes. Under the new *Wills, Estates and Succession Act*[5], which came into effect on March 31, 2014, a procedure has been established to allow an estate trustee access to an original will stored within a safety deposit box. The deceased's personal representative is permitted to attend the bank and prepare an inventory of the box's contents, together with an employee of the bank. The inventory must be signed and dated by both individuals, with a copy of the inventory left at the bank.[6] Once this process is completed, if there is an original will in the safety deposit box, it can be removed and provided to the estate trustee named within the document.[7]

Ontario's estate legislation does not feature any similar provisions that relate to the contents of safety deposit boxes.

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[5] Bill 4, *Wills, Estates and Succession Act*, 1st Sess, British Columbia, 39th Parl, 2009, cl 183.
[6] *Ibid*, cl 183(2).
[7] *Ibid*, cl 183(3).

Safekeeping by the Court

Why greater numbers of individuals choose not to store original estate planning documents at the office of the Local Registrar of the Superior Court of Justice is surprising.

Individuals permitted to deposit a will for safekeeping with the court include the testator, a person who the testator authorizes in writing, a person who is authorized by the court to deposit the will, a solicitor who is retiring and is in possession of the will, the estate trustee of the deceased solicitor who was in possession of the will, or the representative of a trust company that is in possession of the will at the time when it ceases operations in Ontario.[8] Valid identification is required when the will is being deposited with the court.

An Affidavit of Execution may be required for deposit with the original will, unless the whereabouts of the witnesses are unknown and cannot be determined.[9] The fee for storing one's original will at the court is currently $20.00.[10]

During the lifetime of the testator, there are certain restrictions with respect to individuals who are authorized to access a will in the court's possession. Only the testator, a person with a court order, or the testator's guardian for property or attorney appointed under a continuing power of attorney for property can remove the original will from safekeeping with the court.[11]

Wills deposited at the court are stored in a fireproof vault or cabinet. Upon deposit or removal of the will, the Estate Registrar for Ontario is notified and records are updated accordingly.[12] A copy, which the court retains, is made of any deposited will that is subsequently removed.[13]

Before a Certificate of Appointment of Estate Trustee With a Will is issued, the Estate Registrar must confirm that the court is not in possession of a will or codicil of a later date.[14] Similarly, a

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[8] *Supra* note 1, r 74.02(1).
[9] The Estates Procedure Manual (2005) *Government of Ontario*: Ministry of the Attorney General, Court Services Division, at 3.
[10] Regulation 293/92, *Administration of Justice Act*, RSO 1990, c A.6, s 2(1)7.
[11] *Supra* note 1, r 74.02(5); *supra* note 9 at 10.
[12] *Ibid* at 5.
[13] *Ibid*.
[14] *Supra* note 1, r 74.12(1).

Certificate of Appointment of an Estate Trustee Without a Will is not issued when the Estate Registrar has record of an original will in storage.[15]

The safekeeping of estate planning documents with the court effectively eliminates uncertainty with respect to the presence of an unknown later will or, in the case of an intestacy, that a will, unbeknownst to the probate applicant, may exist.

Retention of Original Documents by Drafting Solicitors

The demand for storage of original estate planning documents by drafting solicitors is high.[16]

The Law Society of Upper Canada recognizes that retaining custody of original estate planning documents has the potential of imposing onerous obligations upon lawyers and recommends that a careful risk analysis be performed before they undertake to do so.[17]

In British Columbia, the storage of wills at law firms is recognized as unnecessarily burdensome and it is suggested that original wills instead be returned to clients to themselves arrange for safekeeping.[18]

The American College of Trust and Estate Counsel makes the following recommendations with respect to retention of original estate planning documents by lawyers, should they choose to do so despite the above cautions[19]:

1. Confirm retention of the original documents in writing

a) Indicate which documents are being stored and that they are being retained pursuant to the client's request
b) Ask the client to keep the storing lawyer informed of his or her current address and contact information

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[15] *Ibid*.
[16] Jan Goddard, "Powers of Attorney – Safekeeping & Other Practical Considerations" (2013) The Six-Minute Estates Lawyer 2013, *Law Society of Upper Canada*, at 10.
[17] Guide to Retention and Destruction of Closed Client Files (2012) *Law Society of Upper Canada*, available at: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491048, at 33.
[18] Closed Files – Retention and Disposition (2013) *Law Society of British Columbia*, available at: http://www.lawsociety.bc.ca/docs/resources/ClosedFiles.pdf, at 13.
[19] Jennifer A. Kosteva, "Where there's a Will, There's a…Duty?: A closer look at the safekeeping of clients' original estate planning documents" (2009) *American Bar Association*, available at: http://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2009/april/te_kosteva.authcheckdam.pdf, at 6-7.

c) Lawyers should remind clients that the attorneys or estate trustees named within the document are not required to retain the lawyer for assistance related to the planning documents

In the United States, lawyers are often recommended against retaining original wills and powers of attorney, absent the client's insistence that he or she do so, in part due to the recognition that the storage of wills by drafting solicitors has historically been tied to improperly soliciting future business.[20] Clients and their estate trustees may feel pressured to retain the same lawyer to assist with will amendments or estate administration after the testator's death.[21] The Model Code of Professional Conduct, currently being implemented by Canadian law societies within their respective professional codes of conduct, addresses this issue in part. The Model Code includes a clause that prohibits the inclusion of provisions within wills that direct the estate trustee to retain a specific lawyer or law firm.[22] Ontario has not adopted the language of the Model Code, but has clarified that such provisions included within Ontario wills are of no force or effect. When such a clause is included within a will, the amended *Rules of Professional Conduct*, which come into force in October of 2014, direct the drafting solicitor to write to the estate trustees to disclose that the clause is not binding.[23]

2. Provide clients with a copy of the original documents

a) Ensure that the copy is clearly labelled as a "copy" and is not mistaken for the original

3. Advise clients that they are entitled to the return of the documents at any time

a) Original documents can be returned promptly, subject to limitations imposed by clients who appear to lack mental capacity or are being unduly influenced

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[20] *Ibid* at 5.
[21] *Ibid*.
[22] Model Code of Professional Conduct (2012) *Federation of Law Societies of Canada*, available at: http://www.flsc.ca/_documents/ModelcodeWTCrevdec2012FI.pdf.
[23] Proposed Amended Rules Implementing the Federation of Law Societies of Canada's Model Code of Professional Conduct, *Law Society of Upper Canada*, available at: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convoct13_prcrulesclean.pdf.

If the client does not request the return of the original estate planning document prior to mental incapacity or death, the lawyer may be in a position to release the document to an attorney for property or personal care, or to an estate trustee.

There is relative difficulty in knowing when to release a power of attorney to an attorney, usually at the incapacity of the grantor, versus the release of a will to an estate trustee, which is more obviously after the death of the testator. The terms of release should be discussed by solicitors and their clients before entering into an agreement to retain original estate planning documents. Generally, however, the lawyer should release an original power of attorney upon the grantor's incapacity.[24]

If it is suspected that a client may object to the release of the power of attorney at a time when it is requested by an attorney, solicitors should remember that they have an ongoing relationship with, and corresponding obligations to, clients.[25] When faced with the alleged onset of incapacity, a lawyer should not neglect his or her duties owed to a client, including the duty of loyalty and the duty of confidentiality.[26]

4. Define the lawyer's role in retention

a) The lawyer should not undertake to review the client's estate plan or learn of the client's death, unless he or she intends to be bound by the obligation to do so
b) The lawyer may wish to advise clients to inform individuals appointed as attorneys or estate trustees of where the documents are being stored

In certain American states, there is legislation that specifically addresses the duties imposed on a drafting solicitor who undertakes to store original documents, such as wills or powers of attorney, for clients.[27] Like in Canada, the bar associations of other states have issued recommendations with respect to the storage of original estate planning documents.[28]

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[24] *Supra* note 16 at 4.
[25] *Ibid* at 6.
[26] Ibid at 5; Rules of Professional Conduct (2000) *Law Society of Upper Canada*, available at: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159, r 2.02(1), 2.03.
[27] *Supra* note 19 at 1.
[28] *Ibid*.

Generally, retaining a client's original will in itself does not impose any obligations upon the lawyer, other than the duties directly related to the storage and release of the document.[29] The retention of the original will does not mean that the testator remains an active client of the solicitor or that duties that would not normally extend beyond the scope of the retainer unrelated to the will storage are preserved. In the United States at least, courts will hold a lawyer to his or her undertakings with respect to the storage of the original documents.[30] While lawyers will not ordinarily be expected to make the death of testators known to them, this positive duty may exist where it is a term to an express or implied agreement.[31]

After the release of an original will by the drafting solicitor who has received notice of the testator's death, further obligations vary state-by-state. In Pennsylvania, for example, a lawyer who has stored an original will has an obligation to ensure that the probate process is initiated.[32]

In Ontario, lawyers who are storing original estate planning documents should also consider the following requirements under our *Rules of Professional Conduct*:

5. Rule 2.07 and retention of client documents to the standard of a "prudent owner"[33]

a) 2.07(1): Lawyers are required to take into account the nature of the property when storing client documents
b) When original estate planning documents are concerned, the expectations may be higher because of the significance of these original documents
c) Lawyers are generally expected to store original estate planning documents within waterproof, fireproof, and well-organized safes or cabinets
d) 2.07(3),(4): The lawyer's records should allow the client property to be easily distinguished from other property and records should be maintained to facilitate identification
e) 2.07(5): A lawyer is to verify possession of the client documents and to the deliver same upon the client's request
f) The terms of release of original estate planning documents should be identified

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[29] *Ibid* at 2.
[30] *Ibid*.
[31] *Ibid* at 3.
[32] *Ibid* at 4.
[33] *Supra* note 26, r 2.07.

g) 2.07(6): If there is any uncertainty regarding to whom the lawyer is to release the documents, the lawyer should apply to tribunal of proper jurisdiction

When the lawyer who is in possession of original client documents prepares to retire, the lawyer should request that clients provide instructions with respect to future storage or return of the original documents. If a lawyer is not able to reach a client for which estate planning documents have been retained when retiring or closing his or her practice, the lawyer is supposed to notify the Law Society of the location of the documents.[34]

There are circumstances, however, in which a lawyer will not have an opportunity to obtain client instructions or to attempt client contact prior to retirement or closing his or her practice, such as in the case of sudden incapacity or death.

Other Considerations for Drafting Solicitors: Contingency Planning

A contingency plan takes effect when a lawyer is unexpectedly absent from practice, usually by reason of incapacity or death. The Law Society of Upper Canada has recommended that lawyers use separate wills or powers of attorney to allow a replacement lawyer to manage his or her practice, should the planning lawyer suddenly become unable to do so.[35] For drafting solicitors, a contingency plan can authorize another lawyer to make arrangements with the absent lawyer's clients for continued retention or the return of original estate planning documents. Alternatively, the estate trustee of a deceased lawyer who had retained wills is able to deposit these original documents at the court for safekeeping.

Other Considerations for Drafting Solicitors: File Retention

It is important that lawyers remember that documents that are prepared by a solicitor for the benefit of, and paid for by, a client properly belong to that client.[36] It is usually in the best interests of the lawyer to return the original document that he or she has prepared for a client, and for the lawyer to retain a copy of the document, as well as the related file, which may include drafts and client instructions.[37]

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[34] *Supra* note 17 at 33.
[35] The Contingency Planning Guide for Lawyers (2013) *Law Society of Upper Canada*, available at: http://www.lsuc.on.ca/ContingencyPlanningGuideLawyer/.
[36] *Supra* note 17 at 21.
[37] *Ibid* at 25.

The Lawyers' Professional Indemnity Corporation (LAWPRO) has released statistics relating to when a claim is most likely to emerge within different practice areas. Within the context of wills and estates, more than ninety percent of claims against lawyers are made within ten years of the work produced by a lawyer, with approximately five percent arising between ten and fifteen years, and four percent of claims commenced more than fifteen years after the completion of the lawyer's work.[38] The oldest claim with respect to wills for the period reported by LAWPRO was thirty-nine years after the will was drafted.[39]

Evidence included within a lawyer's file may be relevant, either to the estate dispute or to a lawyer's own defence, many years after the file has been closed or after the testator's death. A will file may contain specific evidence with respect to testamentary capacity or intention.[40] The Law Society of Upper Canada recommends retaining the file related to drafting a will or the administration of the estate for at least fifteen years after the final distribution of estate assets.[41]

The Law Society of British Columbia recommends that original wills and related files be retained for a period of one hundred years, or until ten years after the completion of the administration of the estate.[42] While retaining original wills and powers of attorney is not recommended, the file related to the preparation of the will, however, should be retained. Documents such as a copy of the will, drafts, notes, copies of earlier wills, and correspondence, may be important in the future, should the validity of the original will be questioned.[43] The B.C. Law Society similarly recommends that these documents be retained for a period of ten years following the final distribution of estate assets.[44]

The Law Society of Upper Canada and LAWPRO encourage lawyers to retain well-documented files. If a dispute involving an estate arises, the absence or incompleteness of records may complicate the matter and has the potential to give rise to professional liability.[45] If there is a claim against the drafting solicitor, the lawyer's file may be vital evidence in his or her defence.

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[38] *Ibid* at 31.
[39] *Ibid*.
[40] *Ibid* at 32.
[41] *Ibid*.
[42] *Supra* note 18 at 32.
[43] *Ibid*.
[44] *Ibid*.
[45] *Supra* note 17 at 3.

CONCLUSION

Issues involved with the storage of original estate planning documents and related files are worthwhile considerations for drafting solicitors. Provincial law societies generally recommend against storing original wills and powers of attorney, absent a client's insistence to do so. However, maintenance of detailed records and instructions to clients with respect to the safekeeping of original wills are practice management policies that can be effective in providing clarification within the context of an estate dispute and preventing claims against lawyers themselves.