



Retention of Estate Planning Files

by

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Retention of Estate Planning Files

The importance of creating and retaining an adequate solicitor's file in the context of estate planning is shown quite graphically in the 1996 Ontario decision of *Sloven v. Ball*, (1996) 14 E.T.R. (2d) 309 (Ont. Gen. Div.). In that case, the Court was considering a 1983 will to determine whether the testatrix had capacity to make such a will, particularly in the following circumstances:

- (a) the will of the deceased, Anne Ball, was drafted by Ms. Ball's niece, Ms. Korzen;
- (b) Ms. Korzen was a practicing solicitor at the relevant time;
- (c) Ms. Ball had a husband (from whom she was separated) and two children. Her sister was Ms. Korzen's mother;
- (d) Ms. Ball's 1983 will revoked a 1969 will, which made certain bequests to Mr. Ball, and then left the residue equally to their two children;
- (e) the 1983 will essentially disinherited Ms. Ball's daughter, and did disinherit her son;
- (f) Ms. Ball had separated from her husband in 1975 due, at least in part, to her mental condition. The couple's children remained with Mr. Ball; and
- (g) the 1983 will bequeathed personal possessions to Ms. Ball's daughter, and the residue to Ms. Korzen's mother. Should Ms. Korzen's mother pre-decease Ms. Ball, then the residue would be shared 20% to Ms. Korzen and 80% to Ms. Korzen's brother.

In the reasons, the Court indicated a number of times that Ms. Korzen's lack of any supporting documentary evidence surrounding the 1983 will was unacceptable. The types of documents that the Court listed as those which it had expected to see included:

- (a) copy of the earlier (1969) will;
- (b) either written instructions from Ms. Ball as to the required changes to the 1969 will, or written notes made by the solicitor as to those changes;
- (c) a true copy of the will as executed;
- (d) correspondence to the deceased forwarding a copy of the draft will for her review;
- (e) a copy of the letter sent to the deceased enclosing the newly executed 1983 will;

- (f) confirmation that the will was being kept in the law firm's vault for safekeeping (or as the case may be);
- (g) notes with respect to the size of the estate; and
- (h) notes with respect to the detailed reasons for disinheriting the children (paras. 6, 14, 31).

The Court expressly stated:

Korzen had not one scrap of paper, other than the Will itself, to prove that there were no suspicious circumstances at the time the instructions were given for the Will, or when the Will was drafted and later executed. She had no file, no notes, no correspondence, no instructions and only shortly before the Trial began, she found a copy of the deceased's previous Will which was not even kept with the original Will. *A solicitor has a duty, when taking instructions for a Will, to keep a file and properly document the instructions for a new Will, noting why such changes are being made. This is especially so when the very persons who would normally take, such as children, are cut out of the new Will or where there is a question as to the deceased's capacity.* (para 31) [emphasis added]

While these facts give rise to concern on a number of fronts, such as that Ms. Korzen drafted a will under which she was a contingent beneficiary, and her mother was the main beneficiary, the Court was critical of her lack of estate file to substantiate the reasons behind the 1983 will's creation. The types of documents listed by the Court are those which a prudent solicitor ought to retain in his or her estate files.

I. Creation of a File Retention Policy

Once the above-noted filed materials are created, and the file is sufficiently documented, how long must a solicitor retain that file? In developing a closed file policy, a solicitor should obviously consider the types of files at hand. Estate planning files are obviously an exception to the general rule that a file can be destroyed after applicable statutory periods have passed. Given their nature, estate planning files should not be destroyed until the solicitor knows that 10 years have passed since a will of the testator was probated, or until after the trust is fully administered, if applicable.

Given the above, retention of estate planning files can be costly, since files may have to be stored for decades. This leads to the question: given the duty of the solicitor to retain sufficient documentation on file to assist a court in determining whether the testator had capacity at the time the will was created, what may safely be discarded?¹

¹ The Law Society of British Columbia has produced a guideline for file retention generally, entitled "Closed Files Retention and Disposition", from which much material was drawn for this paper.

A. Client Documents

Those documents which belong to the client may be returned to him or her. Ensure that the letter returning the documents sufficiently describes the documents in case an issue later arises as to which documents were provided to you for review.

B. Public Records

If your estate planning file contains documents such as searches of a Land Title Office, pleadings, or documents from another public registry, they may be removed from the file, and either sent to the client or simply destroyed.

C. Original Will

There is a practice of some solicitors and firms to retain the original will for the client, stored in a vault. However, the Law Society “strongly suggest[s]” that the original wills are returned to the client for safekeeping. If your policy is to retain the original will, you should advise the client you are going to file a wills notice. You should also create a comprehensive and reliable filing index in order that any wills stored are easily retrieved when required.

D. Documents to Keep

In terms of a list of documents to keep, the key documents are set out above, in *Sloven v. Ball*. While that is not an exhaustive list, it certainly is a minimum list of documents which ought to be retained. Additionally, all notes of meetings, telephone communications, and correspondence also ought to be retained.

II. Estate Litigation Files

Like estate planning files, lawyers will be required to retain closed estate litigation files. However, generally speaking, these may safely be destroyed earlier than estate planning files, due simply to their nature. That being said, often times estate litigation files will be bulkier than an estate planning file. What then must be stored, and what can be destroyed?

A. Client Documents

As in estate planning files, those documents which belong to the client may be returned to him or her. Ensure that the letter returning the documents sufficiently describes the documents in case an issue later arises as to which documents were provided to you for review. Note as well that in estate litigation files, you will often have copies of the documents of the opposing party or parties. These, too, can be returned to the client.

B. Public Records

Again, as in estate planning files, documents such as searches of a Land Title Office, pleadings, or documents from another public registry may be removed from the file, and either sent to the client or simply destroyed.

C. Records of Communications

These documents, evidencing telephone calls, meetings, and correspondence to the client or others, ought to be retained. On a practical note, these are especially important should a claim in negligence be brought against the solicitor, since it will evidence what steps were taken and when.

D. Pleadings

Those pleadings in your particular estate litigation file which have been filed at the Registry can be destroyed or returned to the client. Some firms create precedent libraries, and keep copies of pleadings to use in future estate litigation files.

E. Case Law and Research Memoranda

Copies of cases used in the conduct of the estate litigation file do not need to be stored with the file. This is true also for any memoranda created. It is recommended, however, that firms create precedent binders on various issues, and add the case law and memoranda from closing files in order that the knowledge gained during the file is not lost, particularly should the particular lawyer leave the firm after the completion of the file.

III. Conclusion

The above-noted areas are suggestions only. To date, the Law Society of British Columbia has not set any policy requirements or guidelines. Common sense ought to be the deciding factor in determining what materials to keep in a file, and for how long.

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