



“your notes
say it all”

Preventing Will drafting errors

Ian Hull

There is little doubt that, with the onset of the significant transfer of wealth in Canada, we will see an increase in the number of negligence claims against lawyers doing Wills and Estates work.

That trend is already making itself felt: Wills and Estates claims now represent a significantly larger proportion of claims received by LAWPRO than in the past. In 2003, for example, Wills and Estates claims accounted for seven per cent of all claims reported, compared to less than three per cent in 2002. Approximately 22 per cent of all claims received by LAWPRO relate to circumstances where the solicitor fails to follow instructions from his or her client. Furthermore, poor communication on the part of lawyers results in approximately seven per cent of LAWPRO's claims. Interestingly, only six per cent of claims result from the failure of a solicitor to know or apply the law.

Fundamental to any failure to follow instructions is the timely completion of the client's instructions. Approximately 40 per cent of all claims received by LawPRO relate to issues directly linked to alleged procrastination on the part of the lawyer handling the matter.

In the area of Wills and Estates and Will drafting, the above-noted trends hold true. In my experience defending lawyers, perhaps the most significant source of solicitor's negligence claims results from slip-ups between the time the client leaves the office and the time the Will is executed. The notes a lawyer makes are usually accurate and comprehensive; but something happens along the path to executing the Will and mistakes are made. It may be as simple as the solicitor making a note, at the initial meeting with the client, that the family cottage is to be divided among “my children ‘A’, ‘B’ and ‘C’” and the Will ends up

being signed to include a gift of the cottage to “A” and “C”. Omitting “B” was not done purposely; when the Will was executed by the client, everyone in the drafting process, including the client, missed the fact that “B” was not included. But the mistake was made, and the consequences could be significant.

Many of the drafting errors that I have seen could have been avoided if the drafting solicitor simply used the notes made when receiving instructions, and then incorporated an extra checking mechanism along the path to signing a correctly drafted Will.

Practical suggestions

We are all familiar with the numerous helpful client information checklists that exist in regard to taking instructions for Will

drafting. However, these information gathering checklists are not always used and it is almost always the case that handwritten notes are made at the time that instructions are received from the client.

In my view, there are practical drafting steps that can be incorporated in the process of receiving instructions, reviewing the Will document, and attending to its execution.

While one always needs to be mindful of the economics of drafting Wills, the following is a summary of practical steps that may assist in ensuring that your handwritten Will notes make it onto the typewritten pages of the final Will.

1. INITIAL MEETING WITH CLIENT AND LEGIBLE NOTE TAKING

When we receive instructions for a Will, we are expected to take careful notes. Throughout the Will drafting process the notes that you make at this first interview need to be referred to time and time again. As such, it is essential that the notes are accurate, neat and as comprehensive as would be expected in the circumstances. For example, if you are drafting mirror Wills for a husband and wife with a gift-over to their children, your notes will be much less comprehensive than if you are meeting with an elderly client who wants to write one of her children out of her Will.

At the initial meeting with your client, it is often useful to work from an existing information checklist that you are most comfortable with, and to use it as your starting point when reviewing the various estate planning issues and the wishes of the client.

However, as an additional check, at the end of the meeting, I take five minutes with the client to review my notes taken during the meeting, to ensure that I have understood the instructions clearly. Furthermore, this gives me an opportunity to review my notes with the view to ensuring that they are both complete and readable for both my staff and I in the upcoming drafting process.

The next step in the Will drafting process is to meet with my assistant to review the instructions, and guide that individual through the actual drafting process. Once the Will is drafted, I check it over and send a draft copy of the Will to the client for careful review.

In my cover letter I include a short summary of the client's general instructions, including an overview as to the proposed disposition of the assets on death. I also include a glossary of terms so that the client can better understand the terminology in the review process. The glossary terms I use can be found in the Bar Admissions materials. After the client has reviewed the Will, if there are further changes, they are incorporated into the Will, and then I proceed to have my assistant arrange for a meeting at my office to review the Will with the client and have it executed.

2. WILL SIGNING DATE

Before the final meeting with the client, I always have my assistant set aside 15 minutes prior to the meeting for me to take one more look at the Will document. I then meet with the client and take

the opportunity to work from my original handwritten notes to ensure that I have followed the client's instructions. I take the opportunity to review the Will document in some detail to ensure that the client understands the Will provisions and that I have correctly identified and spelled the names of the beneficiaries, guardians and executors.

I also pull out my copy of the glossary of terms I have provided and ask if the client has any questions regarding the terms used in the Will.

It is at this stage that I have another opportunity to go back to my notes to ensure that what I wrote down at the initial meeting has indeed ended up in the Will itself.

I then attend to the execution of the Will and, to ensure that the formal validity of the document is preserved, I have my assistant (the second witness) remain in the room at all times with me during the execution ceremony so that there is no doubt as to the propriety of the execution. I use the same procedure of execution each time I have a Will signed. I complete the meeting by attending to the signing of the Affidavit of Execution.

3. REPORTING LETTER

After the Will has been executed and it has been determined as to whether or not my client wishes me to keep the original or take it with him or her, I prepare a comprehensive reporting letter.

In my reporting letter I review the issues discussed and the instructions received.

The Complex Will

In situations where the Will is more complex, I add a few steps along the drafting path.

After the initial instructions are obtained, I have my assistant review my notes and double-check with me that she understands the instructions received. When I send the Will to the client for initial review I set out in detail the instructions received and invite the client to advise me, at this review stage, if I have misunderstood the instructions.

I also add an additional internal review step before the client comes in to execute the Will. After the client has reviewed the Will document and arrangements have been made for a meeting to have the Will signed, I ask a colleague to read through the Will and I always provide him or her with a copy of my notes. This "second set of eyes" is a useful step in the review process and has produced great results in the past when errors are found prior to the client attending.

In summary, the first thing that a lawyer instinctively should do is to begin the whole Will drafting process with the taking of notes. Careful review of well-prepared, legible notes is the cornerstone to the Will drafting process.

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