



ALAN WILSON
ATTORNEY GENERAL

January 31, 2014

The Honorable Deirdre W. Edmonds
Horry County Judge of Probate
P. O. Box 288
Conway, South Carolina 29528-0288

Dear Judge Edmonds:

Attorney General Alan Wilson has referred your letter dated October 9, 2013 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: Must a South Carolina Probate Court continue to maintain tangible paper index books in addition to electronic records or will an electronic system of record keeping suffice under the current law?¹

Short Answer: Based on the current law and rules at this time, it is this Office's opinion that a court could likely find that a Probate Court may maintain an electronic index book as long as the index records are properly stored electronically with the ability to print a hard paper copy at any time with the caveat that electronic storage should have a backup copy stored with and that otherwise complies with standards of the South Carolina Department of Archives and History.² This Office will qualify our opinion that until South Carolina Court Administration or the legislature says otherwise concerning this issue, this opinion is how we believe a court will interpret the current law.³

¹ The question, as this Office understands it, is about paper index books of the records of the Probate Court, not the actual records.

² Please note this Office issued an opinion in 2005 concerning paper indices of real property pursuant to S.C. Code § 30-9-75 (*Op. S.C. Atty. Gen.*, 2005 WL 1609291 (June 23, 2005)), which is distinguishable from your question. However, it should be noted that S.C. Code § 30-9-75 requires a second or backup copy of indices of real property be available to the public at the same office where the original is kept. We are aware of no such equivalent statute that currently exists specifically for Probate Courts, which would seem to imply currently only a backup copy available at the S.C. Department of Archives and History is required. It is this Office's understanding that there are Probate Courts in South Carolina already implementing electronic filing of both indices and records that print a hard paper copy of the electronic index annually from their computer and keep the paper copy of the index as a backup.

³ As stated throughout this opinion, the South Carolina Department of Archives and History and South Carolina Court Administration have the authority to determine record keeping standards for a South Carolina Probate Court within the statutory parameters based on legislative intent. S.C. Const. Art. V, Section 4; S.C. R. Civ.P. 78; et al..

Law/Analysis:

While this Office is prepared to opine on the current law regarding your question, we would be remiss if we did not remind you that the South Carolina Constitution grants the South Carolina Supreme Court the authority over the administration of the courts in this State subject to statutory law. It states, in part:

The Supreme Court shall make rules governing the administration of all the courts of the State. **Subject to the statutory law**, the Supreme Court shall make rules governing the practice and procedure in all such courts. ...

S.C. Const. Art. V, Section 4. Please also refer to S.C. Code § 14-23-1140 (1976 Code, as amended) which states that “[t]he Supreme Court shall have the power by rule to regulate the practice, procedure, and conduct of business in the courts of probate....” In addition to the State Constitution, the South Carolina Rules of Civil Procedure address record keeping. Rule 78 states:

(a) Records to Be Kept; Penalties. Subject to the approval of the Supreme Court, the Office of Court Administration shall establish procedures for creating, maintaining, removing, and destroying all records and other court documents by the clerks of court, probate courts, municipal courts, magistrate's courts, court administrators, and other officers and employees of the courts, and for the furnishing of information and statistical data relative to the work of the courts and to the expenditure of public moneys for their maintenance and operation. Failure to comply with the requirements of this rule, or any procedures established pursuant hereto, shall subject the party so failing to penalties as for contempt of court.

(b) Abstracts of Civil Judgments and Orders. The clerk shall enter an abstract of every final judgment or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be entered in the “Abstracts of Judgments” book. Suitable indices of every such civil judgment or order shall be kept by the clerk.

(c) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required, and shall produce the Code of Laws, the rules, the calendars and the file book upon request of the court.

S.C. R. Civ.P. 78. Moreover, Rule 3 of the Probate Court Rules also states that Court Administration is charged with establishing procedures for maintaining records, subject to the approval of the Chief Justice of the S.C. Supreme Court. Hence, we begin by reviewing a 2009 administrative order issued by the State Supreme Court revising the records retention policy for Probate Courts in South Carolina.⁴ That order references compliance with the South Carolina Department of Archives and History for record keeping. While this Office would suggest reading the entire order, we want to specifically mention number 5 of the 2009 order, which states:

5. a. If [the Probate Court’s] records are microfilmed, the film must meet microfilming and certification requirements issued by the South Carolina Department of Archives & History as “Standards for the Microfilming of Public Records.” **Records may be microfilmed while administratively active provided that the microfilm used is one which can be updated, such as microfilm jackets or**

⁴ At the time of this opinion the 2009 order is the most recent one issued by the Supreme Court directly concerning this issue.

microfiche. Erasable microfilm is not acceptable. **Probate Courts microfilming records covered by the provisions of this policy shall deposit security microfilm copies of the filmed records with the South Carolina Department of Archives & History for safekeeping. Security copies (a) must meet the “Standards for the Microfilming of Public Records” and (b) remain the property of the Probate Court.**

b. A Probate Court may choose to have its records imaged so that they can be viewed on a computer or other device, provided the standards set forth by the South Carolina Department of Archives and History are met (see Public Records Information Leaflet No 13 and any subsequent policy statements for details). **Each county shall ensure that all imaged records are adequately protected and that back-up copies are created and stored safely.**

c. If a Probate Court chooses to microfilm or image its records and make those images available in the Probate Court or from remote locations, then once the imaged or microfilmed file is available, the Probate Court will not be required to keep paper records on the shelf after administrative activity on the file has ceased.

d. In accordance with specific timelines set forth in this policy, records and/or film may be removed or transferred from the Probate Court only to a storage facility acceptable to the South Carolina Department of Archives & History or at that department’s discretion to its own custody for appropriate retention or disposition.

Sup. Ct. of S.C. Admin. Order No. 2009-04-28-02 (April 28, 2009).⁵ Pursuant to this Order, it appears microfilm records in accordance with policies established by the S.C. Department of Archives and History are allowed as long as back-up copies are made, and presumptively the “security microfilm copies” required to be filed with the S.C. Department of Archives and History would suffice as back-ups.⁶ Id.

As you reference in your letter, S.C. Code § 62-1-305⁷ says:

The court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this Code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the probate court, **and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information.** Upon payment of the fees required by law, the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to letters must show the date of appointment.

REPORTER'S COMMENT

This section requires that the probate court keep a record of all matters filed with the court and **that records be so indexed and filed as to make them useful to those**

⁵ This order may be accessed online at <http://sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-04-28-02>.

⁶ For further statutes concerning the South Carolina Department of Archives and History see S.C. Code § 30-1-80, § 30-1-90, § 30-1-100, et al., as it is charged with the duty of assisting in creating, filing and preserving records. Please also see footnote 3 above.

⁷ Please note that this is the version of S.C. Code § 62-1-305 effective January 1, 2014 in 2013 Act No. 100, § 1.

examining them. Further, the court is required to issue certified copies of documents on file.

This section does not go into the detail of Sections 14-23-1100 and 14-23-1130 of the 1976 Code which list in some detail the records which must be kept by the probate court. These sections are not incompatible with Section 62-1-305. Probate Court Rule 1, pertaining to a calendar and to books denoting titles of all cases and transactions therein, is not disturbed by this section.

S.C. Code § 62-1-305 (1976 Code, as amended, with comments) (emphasis added). Therefore, let us examine the statutes referenced in the comments. S.C. Code § 14-23-1100 states:

The clerk shall keep a true and fair record of each order, sentence, decree and license issued by the court, and of all other things proper to be recorded. He shall also give true and attested copies of instruments, documents and records of the court. He may execute and issue in the name of the judge of probate the following: certificates of the appointment and qualification of administrators, executors, guardians, committees and testamentary trustees; certifications pertaining to, and certified copies of wills, all probate court records, and statements or stipulations pertaining thereto; warrants of appraisements in decedents' estates including appointment of appraisers; and marriage licenses. He shall provide for the publication of the citation required by law prior to the appointment of an administrator, and for the issuance and filing in the office of the clerk of the court of common pleas or of the register of mesne conveyance and the office of the county auditor the index forms required by law pertaining to the devise or descent of real property. He shall prepare and execute all forms necessary to obtain payment of insurance benefits in connection with intestate estate being administered by the probate court as provided by law. He may examine, vouch, and approve uncontested accountings, and may execute and submit requisitions and claim warrants for supplies and material needed for the operation of the court. He may take acknowledgments and administer oaths, and, subject to the control of the judge, may issue notices and make all necessary orders for the hearing of any matter to be heard in the court. If a matter is not contested, he may hear and determine it and make all orders, judgments and decrees in connection therewith which the judge could make, subject to the same being set aside or modified by the judge at any time within thirty days thereafter; and if not so set aside or modified such orders, judgments and decrees made by the clerk shall have the same effect as if made by the judge. No person shall practice as an attorney or counselor at law in the court of which he is clerk.

Nothing in this section may be construed to preclude use of a computer system or related equipment by a clerk of court in performance of the duties prescribed in this section.

S.C. Code § 14-23-1100 (1976 Code, as amended) (emphasis added). Continuing on in that article, S.C. Code § 14-23-1130 states:

The governing body of each county shall provide and the judge of probate shall keep the seal of the probate court, the necessary office equipment of the probate court, and

those books as are necessary for keeping the records of the probate court and for reference to these records, including index books, appropriately labeled, referring to the records of the probate court pertaining to:

1. wills;
2. intestate estates;
3. estates of minors and incompetents;
4. bonds;
5. inventories and appraisements;
6. returns or accountings;
7. liens;
8. admissions and commitments to facilities for the care and treatment of mentally ill, persons with intellectual disability, alcoholics, and drug addicts;
9. marriage licenses and marriages;
10. decrees;
11. general or miscellaneous matters.

In addition, the governing body of each county shall provide office space and additional support personnel necessary for the orderly conduct of the business of the probate court.

If the probate court maintains the original of a document in the master file of a matter and a copy of that document on microfilm, a computer system, or on another similar system, it is not necessary for the probate court to maintain a second separate record with copies of those types of documents, provided a general index or an index for those types of documents is maintained.

S.C. Code § 14-23-1130 (1976 Code, as amended) (emphasis added). The root of the issue is whether a plain reading of S.C. Code § 14-23-1130 requires an actual paper index book, or would an electronic index record (able to be printed, copied, etc.) suffice? Thus, let us examine the legislative intent of the statute. As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)). The comments in S.C. Code § 62-1-305 make it clear that the legislature intended for S.C. Code § 62-1-305, S.C. Code § 14-23-1100 and S.C. Code § 14-23-1130 to be compatible, which includes using computer records. Additionally, the S.C. Probate Code [Title 62] makes it clear in stating: "[u]nless

displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.” S.C. Code § 62-1-103 (1976 Code, as amended). However, whatever the means of storing and maintaining the records, the records must be available for inspection by the public “at all times.” S.C. Code § 14-23-1120 (1976 Code, as amended). Therefore, this Office presumes as long as the electronic indices are able to be printed at any time and comply with the S.C. Department of Archives and History’s standards and the relevant statutes, they would suffice.

Nevertheless, there are many other noteworthy statutes and authorities concerning the issue of electronic records.⁸ To name a few, let us review some statutes regarding public record keepers. One such statute states:

The legal custodian of public records shall protect them against deterioration, mutilation, theft, loss, or destruction and shall keep them secure in vaults or rooms having proper ventilation and fire protection in such arrangement as to be easily accessible for convenient use. They must be kept in the buildings in which they are ordinarily used except in cases where they may be transferred for retention or disposal in accord with Sections 30-1-10 to 30-1-140 or for special public display by the appropriate authority. The director may order the removal of public records from any facility which does not meet records storage standards approved by regulations promulgated by the Archives. If public records of long term or archival value are in danger of loss due to negligence, deterioration, theft, or unauthorized disposal or destruction, the director may order that the records be transferred to suitable storage for the purpose of security microfilming or other necessary preservation measures. Records must be maintained, copied, or repaired, renovated, rebound, or restored in accordance with standards required by regulation and approved by the department if they are worn, mutilated, damaged, difficult to read, or in danger of loss at the expense of the public body having custody or responsibility if these records are of long term or archival value as determined under the provisions of this chapter.

S.C. Code § 30-1-70 (1976 Code, as amended). Another applicable statute reads:

Any custodian of public records as defined by Sections 30-1-10 through 30-1-140 is authorized to photocopy, microfilm, or reproduce on film or by electrostatic method any part of the records kept by the office concerned unless otherwise prohibited by law or withheld from reproduction in the public interest. These copies may be used only in equipment or systems which accurately reproduce and preserve the original record in all details in a durable form. Each agency or subdivision shall preserve these photocopies, electrostatic copies, or films in conveniently accessible files and shall provide for preserving, examining, and using them. If the records are of permanent

⁸ This is a legal opinion on storing indices analyzing a number of references. However, there are many other sources and authorities you may want to refer to for a further analysis. See, e.g., the entire Public Records Act found in Title 30, Article 1 of the S.C. Code of Laws, S.C. Code § 26-6-70 et seq. concerning electronic contracts, records and signatures (S.C. Code § 26-6-70 states “[a] record or signature must not be denied legal effect or enforceability solely because it is in electronic form.”), *Op. S.C. Atty. Gen.*, 2012 WL 440546 (January 10, 2012) (concluding that a governmental entity may retain an electronic form of a signature as a record pursuant to the Uniform Electronic Transactions Act), the United States Code concerning electronic records and signatures (15 U.S.C.A. § 7001, etc.), et al..

value to the agency or subdivision concerned or are determined to be of archival value by the Archives, one master copy of each record filmed must meet standards approved by the Archives and be deposited there. Custodians of public records may destroy the original records from which the photographs, microphotographs, films, or electrostatic copies have been made, or any part of them if the records are of no value to the agency concerned, and the Archives certifies that the records may be destroyed through this procedure or retention schedules approved by the Archives. The records microfilmed or reproduced and approved for destruction must be reported to the Archives in such manner as it may direct.

S.C. Code § 30-1-130 (1976 Code, as amended). Some applicable statutes under the Uniform Electronic Transactions Act ("Act") give further insight. One such statute states:

(A) A law requiring a record to be retained is satisfied by retaining an electronic record of the information that:

- (1) accurately reflects the information in the record after it was first generated in its final form as an electronic record or otherwise; and
- (2) remains accessible for later reference.

...

(D) A law requiring a record to be presented or retained in its original form, or providing consequences if the record is not presented or retained in its original form, is satisfied by an electronic record retained in accordance with subsection (A).

...

(F) A record retained as an electronic record in accordance with subsection (A) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this chapter specifically prohibits the use of an electronic record for the specified purpose.

(G) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

S.C. Code § 26-6-120 (1976 Code, as amended). Continuing in the Act, it later states:

Each governmental agency of this State shall determine if, and the extent to which, it will create and retain electronic records and convert written records to electronic records.

S.C. Code § 26-6-170 (1976 Code, as amended). The Act further states:

(A) Each governmental agency of this State shall determine if, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(B) To the extent that a governmental agency uses electronic records and electronic signatures pursuant to subsection (A), the governmental agency, in consultation with the South Carolina State Budget and Control Board, giving due consideration to security, may specify:

- (1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;
- (2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, a third party used by a person filing a document to facilitate the process;
- (3) control processes and procedures appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
- (4) other attributes required for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(C) Except as otherwise provided in Section 26-6-120, this chapter does not require a governmental agency of this State to use or permit the use of electronic records or electronic signatures.

S.C. Code §26-6-180 (1976 Code, as amended). The chapter in the Act continues:

(A) The South Carolina State Budget and Control Board shall adopt standards to coordinate, create, implement, and facilitate the use of common approaches and technical infrastructure, as appropriate, to enhance the utilization of electronic records, electronic signatures, and security procedures by and for public entities of the State. Local political subdivisions may consent to be governed by these standards.

(B) The Secretary of State may develop, implement, and facilitate the use of model procedures for the use of electronic records, electronic signatures, and security procedures for all other purposes, including private commercial transactions and contracts. The Secretary of State also may promulgate regulations as to methods, means, and standards for secure electronic transactions including administration by the Secretary of State or the licensing of third parties to serve in that capacity, or both.

...

S.C. Code §26-6-190 (1976 Code, as amended). However, nothing in these statutes would seem to preclude an electronic index with a backup copy stored in accordance with standards set by the S.C. Department of Archives and History.

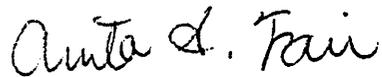
Conclusion: Therefore, this Office will qualify our opinion that until South Carolina Court Administration or the legislature says otherwise concerning this issue, this opinion is how we believe a court will interpret the current law. For the above reasons this Office believes based on the current law at this time a court would likely find a Probate Court may maintain an electronic index book of its records as long as the index records are properly stored electronically with the ability to print a hard paper copy at any time with the caveat that the electronic storage should have a backup copy stored with and that otherwise complies with standards of the South Carolina Department of Archives and History.⁹ Any further questions should be addressed with legislative

⁹ Please see footnotes 2 and 3 above.

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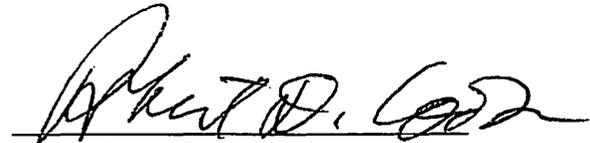
clarification or through Court Administration and the Department of Archives and History. This Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General