Six Minute Estates Lawyer 2022

Too Ill to Make a Will: Three Practical Tips for Navigating a Deathbed Retainer

Justin W. de VRIES and Tyler Lin
de VRIES LITIGATION LLP
Toronto and Oakville Offices

Tel: (416) 640-2754
Fax: (416) 640-2753

Email: jdevries@devrieslitigation.com
Website: devrieslitigation.com

Follow: allaboutestates.ca and devrieslitigation.com/blog

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Introduction[1]

Deathbed wills are the original will. In medieval Europe, will-making was synonymous with efforts right before death[2]. Unfortunately for estate planning solicitors, this meant that deathbed wills have been prone to challenge since as early as the 1300's[3]. Luckily, this type of estate planning is no longer the status quo. However, deathbed wills have persisted as a reality of life.

While advanced estate planning is always preferable, deathbed situations cannot always be avoided. This paper is organized around three general practical tips to help solicitors navigate this thorny situation through best practices. Each section focuses on one general tip, and contains an in-depth exploration of the law and specific recommendations. **Section I** focuses on the initial consultation, with **Sections II** and **III** focusing on the initial retainer and post-retainer stages.

I - When in Doubt, Walk Away

It is not always easy to recognize a deathbed will situation. Arguably, these situations exist on a continuum[4]. On one end, testators may not exhibit any signs of ill health. On the other, a testator's health may be quickly deteriorating with mere hours to live. In between are testators who may pass days, weeks, or months from the initial interview. Factors such as age, fitness, prior diagnoses of terminal illness, and even luck will determine the unique facts of each case.

To illustrate, the testator in *McCullough v. Riffert*[5] presented no health concerns during the initial (and only) in-person meeting with the solicitor. However, he died 10 days later of undiagnosed

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[1] This paper was co-authored by Justin de Vries and Tyler Lin of de VRIES LITIGATION LLP.

[2] This was the case for all but the upper reaches of society, who had the privilege and means for advanced estate planning. Jonathan Rose, "Medieval Estate Planning: The Wills and Testamentary Trials of Sir John Fastolf" in Susanna Jenks, Jonathan Rose and Christopher Whittick, eds, *Laws, Lawyers and Texts* (Boston: Brill, 2012) 300.

[3] For those interested, Jonathan Rose's paper deals with the historical case of Sir John Fastolf, a wealthy knight who lived from 1380-1459. Fastolf made a series of wills throughout his life with the last one being made two days before his death. As a result of a "deathbed bargain" he made with Sir John Paston (another knight of means), in which he enfeoffed to Paston several properties in exchange for a promise by Paston to carry out Fastolf's wish of founding a religious college, a substantial controversy erupted over the validity of his will. The subsequent will challenge dealt with issues such as testamentary capacity, but not solicitor's negligence.

[4] As Justice Mulligan identified at para. 62 of *McCullough v. Riffert*, 2010 ONSC 3891 ["*McCullough*"], the urgency associated with a deathbed situation exists on a continuum. As a logical corollary of that observation, deathbed situations also exist on a continuum.

[5] *McCullough*, *supra* note 4. The testator died just ten days after visiting his lawyer to give instructions for a will. The testator had an estranged wife and two sons whom he did not want to benefit by way of intestacy. Instead, he wanted

cancer. In *White v. Jones*[6], the testator died months after contacting the solicitor when he fell and hit his head.

No one can accurately predict when one will shake hands with Elvis. That uncertainty is partly what makes a deathbed situation hard to navigate. In **Appendix A**, we list 18 helpful indicia compiled from case law to identify a deathbed retainer situation.

Recognizing a deathbed situation is the first step in navigating it correctly. The next step is to choose whether to proceed and draft a will. At first glance, the choice is between a rock and a hard place. By taking on the client in this volatile situation, a solicitor opens herself up to a potential negligence claim or will challenge down the line[7]. By rejecting the retainer, it is popularly believed that a solicitor may be liable to disappointed beneficiaries if the testator passes without a will as a result.

However, this framing of the dilemma is the product of misconceptions. Prior to the 2003 leading Court of Appeal case, *Hall v. Bennett*[8], solicitors were rarely held accountable, even in situations

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to leave his entire estate to his niece who cared for him. His niece arranged to have the testator complete a will kit before reaching out to the solicitor. On the initial and only meeting between the solicitor and testator, the solicitor did not note any issues with the testator's health. After the meeting, the testator was given a diagnosis of terminal illness, but no one alerted the solicitor of this. A draft will was prepared within 3 days of the meeting, with some notes to draft suggesting certain information was still required before the will could be finalized. Seven days after the draft will was prepared, before the solicitor obtained the additional information requested, the testator died. His niece unsuccessfully brought a negligence claim against the solicitor. In his reasons, Justice Mulligan relied on the fact that the solicitor was never made aware of the testator's rate of deterioration.

[6] [1995] 2 AC 207, [1995] UKHL 5 ["*White*"]. In this disappointed beneficiary case, the testator wished to revoke a prior will which had cut out his two daughters, and make a new will which would benefit them. The change was prompted due to a reconciliation after a prior family disagreement. The testator reached out to a solicitor by letter explaining his wishes. However, the solicitor canceled three appointments in the course of three weeks, and subsequently went on holidays. A meeting was finally scheduled two months later. A few days before the meeting, the testator fell while on holiday, hit his head, and died of a heart attack. A new will was never executed, and the daughters became disappointed beneficiaries. The majority of the House of Lords held that the solicitor was liable in negligence to the daughters.

[7] No matter who drafts the will, and how careful a solicitor is, a will challenge may be inevitable due to pre-existing family conflict.

[8] [2003] 64 OR (3d) 191, 2003 CanLII 7157 (ON CA) ["*Hall*"]. The testator was a patient at Hamilton General Hospital. The solicitor received a call from the testator's social worker informing him that the testator was terminally ill, and needed to have a will done. The solicitor agreed to meet in-hospital at 10 AM, and attended in a room with a nurse and the same social worker. The testator had no prior relationship with the solicitor. When he arrived in hospital, the testator was heavily sedated. The nurse testified that his vital signs were nearly incompatible with life and he was foregoing pain medication to be as lucid as possible. During the interview, the testator could only remain conscious for 5 to 6 minutes at a time. While the solicitor was able to get a lot of information, he could not get directions regarding the residue. The testator was estranged from his daughter and her son, and had no will. He did not want to benefit them on intestacy and instead wanted to benefit others, including a friend, Peter Hall. Sixty-five minutes into

where capacity was in doubt[9]. Following this decision, there are four reasons why it is safer to walk away from a retainer when in doubt about capacity.

First, the right to decline representation belongs to the lawyer[10]. However, once retained, the right to terminate belongs exclusively to the client (subject to limited exceptions in circumstances of good cause and reasonable notice[11]): retainers are easy to enter, but hard to leave. A lawyer can fulfill his fiduciary duty to a potential client when declining representation by exercising the discretion to reject a retainer prudently, and taking steps to minimize resulting prejudice. This means considering whether declining would make it difficult for a person to obtain legal advice or representation elsewhere[12] and helping that person to secure the services of another qualified licensee.

Secondly, there is no civil liability without a retainer agreement[13]. An unretained lawyer is neither liable to the testator, his estate, nor disappointed beneficiaries. If the lawyer failed in his fiduciary duty to a potential client by rejecting representation without exercising prudent discretion, she may face disciplinary proceedings by the Law Society but cannot be sued civilly. The *Rules of Professional Conduct* do not create a basis for civil liability[14].

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the interview, the testator was drifting in and out of consciousness too frequently, was in great pain and eager to resume his medication. The nurse felt it was inhumane to deny him medication any longer. The solicitor left and the testator died at 7 PM that day. The testator's friend, Peter Hall, brought a negligence action against the solicitor. The Ontario Superior Court found in favour of Peter Hall, focusing on whether the testator had testamentary capacity and whether the solicitor fulfilled his duty of care. The Ontario Court of Appeal overturned the lower court's decision, finding that the trial judge wrongly focused on an objective finding of whether there was capacity, whereas the analysis should have been on whether it was reasonable in the circumstances for the solicitor to determine the capacity of the testator. Further, absent a retainer agreement between the solicitor and testator, a solicitor owes no duty to a disappointed beneficiary.

[9] Alexandra Mayeski, "Deathbed Retainers", Law Society of Ontario Six-Minute Estates Lawyer 2018 (3 May 2018) at 9-10, citing Scott v. Cousins (2001), 37 ETR (2d) 113, 2001 CarswellOnt 50 (ON SC) ("*Scott*") at para. 70.

[10] Law Society of Ontario, *Rules of Professional Conduct* (22 June 2000; amendments current to 24 February 2022) ("*LSO Rules*"), r 4.1-1 commentary [4].

[11] See *LSO Rules,* r 3.1-1 commentary [1].

[12] This means it will be harder to fulfill this fiduciary duty for the sole lawyer of a small town, versus one of many lawyers in a metropolis.

[13] *Hall, supra* note 8 at paras. 61 and 62.

[14] *Hall, supra* note 8 at para. 62.

Thirdly, a lawyer may be required to decline representation if they are not competent to act in a particular case[15]. Competency depends on expertise in estate planning and the lawyer's workload/existing clients, all of which dictate whether the lawyer can perform her work conscientiously, diligently and in a timely manner. It is one thing to draft a simple will in a condensed time frame, but quite another to implement an estate freeze through complex business re-organization, created multiple trusts, or deal with prior marital contracts[16].

Lastly, in circumstances where the drafting solicitor is of the strong opinion that the testator has lost testamentary capacity, the Court of Appeal in *Hall* found that solicitors have a positive duty to decline the retainer[17].

1.1 – Ask Extensive Questions on the Initial Call Regarding Retainer

In order to make a prudent decision, the drafting solicitor needs information. In addition to the complexity of the planning and target deadline, questions should be asked about the potential client's health and rate of deterioration. Pose questions which will probe for indications of diminished capacity, and any other mental or physical limitations (e.g., can they see, speak, or physically sign their name)[18]. For example, in *Calderaro v. Meyer*[19], the testator deteriorated so

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[15] See *LSO Rules,* r 3.1-2 commentary [12].

[16] As an added bonus, a careful assessment of the facts and the conclusion that one is not competent to take on such a challenging scenario can work to protect the lawyer in the event of a disciplinary proceeding.

[17] *Hall, supra* note 8 at para. 58.

[18] John E. S. Poyser, "Estate Planning for Clients with Diminished Capacity: Deathbed Wills" (2010) Est Tr & Pensions J 244 at 281; Alexandra Mayeski, *supra* note 9 at 8.

[19] 2011 ONSC 5395 ["*Calderaro*"]. The testator died May 2009 at the age of 47. Prior to death, his physical and mental health were deteriorating as a result of a seizure and HIV. The testator and the plaintiff were in a common law relationship for two years and lived together in a property that the testator had purchased. After they separated, they signed an agreement providing that the property would belong to the plaintiff in the event the testator died. After separating, the testator married the defendant. The testator's physical and mental condition deteriorated after suffering from a seizure in February of 2009. By March of 2009, he was hospitalized. Prior to this hospitalization, he filled out a will questionnaire in which he suggested he wanted to appoint the defendant as sole estate trustee. He instructed the plaintiff (with whom he was still in contact) to forward the form to a solicitor to have a will prepared. While on holiday, the plaintiff faxed the questionnaire to a solicitor who had never met the testator or plaintiff before. On April 21, 2009, the plaintiff returned from holiday and requested that the solicitor attend at the hospital to have the testator execute the will. By that time, the testator's health had deteriorated to such a point he could no longer speak or sign the will. He could only communicate by blinking and squeezing his mother's hand. Therefore, the solicitor improvised and read the will back to the testator, having him squeeze his mother's hand to confirm understanding. Then, the solicitor gave instructions to a neighbour who was also in the hospital room to sign on behalf of the testator. The terms of this new will made the plaintiff the sole beneficiary of the testator's property, leaving the defendant (the testator's wife) the residue of the estate. The plaintiff brought an action seeking, among other relief, a declaration that the testator's will was valid. Justice Sosna found the will was invalid as it was not duly executed. Crucially, it was the

quickly that by the time the solicitor met with him, he could no longer speak or sign the will, and had to communicate by blinking and squeezing his mother's hand.

Based on the urgency of a situation, a solicitor may be contacted by family members and not the testator herself. Resist the urge to accept a retainer on the basis of the urgency of the situation: insist on speaking with the testator.

1.2 – Explain and Insist on the Conditions of Retainer

Make it clear that an initial consultation does not mean you have been retained as the will drafting solicitor. Neither does booking an appointment or meeting the testator in person for the first time[20]. A retainer to draft a will should be conditional on meeting the testator in person, having sufficient time alone to interview the testator, performing a capacity assessment and/or assessing for undue influence as appropriate, then deciding to take on the client based on the results of your information gathering process. Make it clear you are not retained until these conditions are fulfilled[21]. Virtual meetings are problematic and should be avoided if possible[22]. For example, it is difficult to confirm whether there are other persons in the room with the potential client over Zoom.

Explain to the client's family and friends that if you accept a retainer agreement, the testator is the client, not them[23]. This is true even when the testator relies heavily on friends and family for support and assistance. It may be necessary to explain the duty of confidentiality you owe to your client to the testator's friends and family.

In the event it is necessary or prudent to obtain a capacity assessment in advance of accepting the retainer to draft a will, prepare a separate retainer agreement and negotiate a fee for the capacity assessment, payable by family members or friends of the testator. This will ensure you will receive

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solicitor, not the testator who gave instructions for the neighbour to sign on his behalf. Further, there was insufficient evidence that the testator had knowledge or approval of the will's contents, or sufficient testamentary capacity.

[20] John E.S. Poyser, *supra* note 18 at 281.

[21] Alexandra Mayeski, *supra* note 9 at 8.

[22] Virtual meetings should be avoided at the best of times as it is difficult for the lawyer to check for undue influence – Ian Hull, "Deathbed Estate Planning", online (blog): *Hull & Hull LLP* https://hullandhull.com/2017/05/the-tricky-business-of-deathbed-estate-planning/.

[23] John E.S. Poyser, *supra* note 18 at 281.

a fee for your work regardless of whether the would-be testator is ultimately determined to lack testamentary capacity[24].

1.3 – If the Conditions of the Retainer are Refused, Decline to Move Forward

If the person reaching out to you refuses to meet your conditions, you may exercise your discretion and decline to move forward. As set out in Law Society Rule 4.1-1 and associated commentary [4][25], make sure your refusal is clear so that there is no misunderstanding. Confirm that you are not retained in writing, either through an e-mail or letter[26]. Request confirmation of receipt.

Furthermore, you should communicate your refusal to move forward with the retainer at the first possible opportunity[27]. This will minimize the prejudice caused to the potential client by ensuring the testator has sufficient time to find another lawyer. If necessary or appropriate, refer the potential client to another lawyer who may be willing to take on this matter.

Remember that a retainer agreement can be created through action as well as in writing. Accordingly, be careful not to take any actions that suggest you have been retained. In *Hall*[28], the drafting solicitor confirmed his refusal to move forward with a retainer by not finishing the in-person interview, not acting on the testator's directions, and not drafting or sending over a draft will.

II – On Accepting a Retainer, Act Quickly and Effectively

Once retained, a drafting solicitor must meet a minimum standard of care, which includes acting quickly and effectively.

Acting quickly means appropriately assessing the urgency of a situation and ensuring there is no inappropriate delay. The fact that the client dies after the first meeting does not necessarily mean that the solicitor did not act quickly enough: there is always a possibility that a client will die

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[24] John E.S. Poyser, *supra* note 18 at 281.

[25] *LSO Rules,* r 4.1-1 commentary [4].

[26] John E.S. Poyser, *supra* note 18 at 281.

[27] Alexandra Mayeski, *supra* note 9 at 8.

[28] *Hall, supra* note 8.

unexpectedly. Rather, whether the amount of delay was reasonable depends on whether urgency, and likelihood of death, are foreseeable. Furthermore, urgency and reasonable delay exist on a continuum[29]. There is little urgency in drafting a will for a young, healthy client who presents without health concerns[30]. In that case, a longer delay in drafting a will may be reasonable. In contrast, if the client is elderly with a terminal and rapidly progressing illness, any delay will be found unreasonable[31]. The analysis of whether a lawyer has fallen below the requisite standard of care is factually dependant[32].

Acting effectively means performing all of the steps necessary to give effect to the testator's wishes[33]. This may mean that the solicitor must take the time to investigate the ownership of the assets the testator intends to gift (to avoid any gifts lapsing); properly paper her file with legible and detailed notes of her meetings with the testator and obtain a capacity assessment, if necessary (to withstand a will challenge); and thoroughly canvas the testator's familial history (to ensure all dependants are provided for and any family law agreements/orders are respected).

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[29] *McCullough, supra* note 4 at para 62. In this continuum, urgency increases in relation to factors such as age, fitness level, health, and prior diagnoses of terminal illnesses.

[30] *McCullough, supra* note 4 at para 41. Brian Schnurr, the noted estate litigator, was called as an expert witness in *McCullough.* Brian Schnurr opined in that case that the standard of care for a reasonably competent solicitor is informed by the state of health of the testator.

[31] *McCullough, supra* note 4 at para 62. An example of unreasonable delay is found in *White, supra* note 6. In that case, the solicitor did nothing for three months and went on holidays. Even though the testator's health was not an issue, he was elderly and subsequently died of an unforeseeable accident. Still, the House of Lords found that the solicitor was negligent. For examples where the court found that the delay was reasonable, see *Rosenberg Estate v. Black,* 2001 CarswellOnt 4504 (ON SC) ["*Rosenberg*"] and *McCullough, supra* note 4 at paras. 60 and 64.

[32] *McCullough, supra* note 4 at para 62.

[33] An example of acting ineffectively can be found in *Meier v. Rose,* 2012 ABQB 82 ["*Rose*"]. In that case, Douglas Meier was the brother of the testator, Gary Meier. Douglas brought a claim against the drafting solicitor as a disappointed beneficiary of Gary's estate. Gary had retained solicitor Alex Rose to draft his will, intending to leave certain real property to Douglas. Alex drafted a simple will without investigating what steps would be necessary to give effect to Gary's instructions about the real estate. For example, Alex did not perform a title search or investigate who owned the land. The intended gifts of land in Gary's will could not be carried out because the property was held in the name of Gary's corporation, not Gary personally. Justice Goss found that Alex had a duty to his client, Gary, to prepare his will using proper care in carrying out his instructions. Since the interests of the testator and the disappointed beneficiary were in line, Alex owed the same duty to Douglas as he did to Gary. The court found that a reasonably competent solicitor would have inquired as to ownership of the land and, by failing to do so, Alex fell below the standard of care. Having found that Alex acted negligently, and that his negligence caused Douglas' loss, Douglas was awarded damages in the amount of $482,200.00.

The requisite standard of care for drafting solicitors in a deathbed situation does not differ from the usual test: the solicitor must demonstrate the "skill of a reasonably prudent solicitor"[34]. As stated in the Canadian Estate Administration Guide, "it should not be concluded that the slightest delay in preparing a will will render a solicitor liable"[35]. As set out above, whether a lawyer has acted reasonably is situation-specific. In analyzing a claim against a solicitor, the following factors are considered:

1. The terms of the lawyer's retainer – for example, whether a precise timetable was agreed upon.
2. Whether there was any delay caused by the client.
3. The importance of the will to the testator.
4. The complexity of the estate plans – for example, the more complex the job the more time required.
5. Any indications of elevated risk of death or onset of incapacity in the testator.
6. Whether there has been a reasonable ordering of the lawyer's priorities.

Writing for the Alberta Supreme Court in *Millican v. Tiffin Holdings Ltd*, Justice Riley qualified that in general "it is extremely difficult to define the limits by which the skills and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking"[36]. However, the tips set out in sub-sections 2.1-2.11 below are consistent with case law regarding "best practices" and should be observed in a deathbed will drafting scenario[37].

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[34] *Black, supra* note 32 at para 53, citing *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 SCR 147 (SCC) at para. 208.

[35] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity*, at ¶8170.

[36] 1964 CarswellAlta 88 (AB SC) at para 8. ["*Millican*"], this decision was later affirmed by our Supreme Court in [1967] SCR 183 (SCC).

[37] In *Millican, supra* note 36 at para. 10, Justice Riley sets out 6 obligations of a lawyer which can act as guidelines in determining whether they have upheld the requisite standard of care: (1) to be skillful and careful, (2) to advise clients on all matters relevant to the retainer, so far as may be reasonably necessary, (3) to protect the interests of the client, (4) to carry out instructions by all proper means, (5) to consult with clients on all questions of doubt which do not fall within the express or implied discretion left to the lawyer, and (6) to keep his client informed to such an extent as may

2.1 – Once Conditionally Retained, Attend to Bedside Promptly

Once retained, attend to the client's bedside promptly. If capacity is in issue, meeting the client promptly and in-person is especially important in order to probe for capacity; if doubts arise, the solicitor should decline to move forward with the retainer and advise the parties as much as soon as possible. Crucially, do not send an inexperienced associate or articling student to meet the client. Deathbed retainers are volatile situations which require experience, judgement and expertise[38].

Where a solicitor has been sued for negligence claim or brought into a will challenge following a deathbed retainer, courts have put great emphasis on the relative experience of the drafting solicitor. In *Krolewski v. Moniz*[39], even though the drafting solicitor failed to take notes at the client meeting, the Court gave a lot of weight to his evidence based on his 43 years in practice and found that he did not act negligently.

2.2 – Assess for Testamentary Capacity and Intention First

Any solicitor who undertakes to prepare a will has a duty to probe their client's testamentary capacity. A deathbed situation is no different[40]. In order to have a sound disposing mind, the testator must[41]:

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be reasonably necessary. Similar guidance tailored towards estate planning solicitors was provided by Justice Zarzeczny at para. 84 of *Earl v. Wilhelm* (1997), 160 Sask R 4, 1997 CarswellSask 483 (SK QB) ["*Earl*"].

[38] John E.S. Poyser, *supra* note 18 at 28.

[39] 2020 ONSC 53["*Krolewski*"]. The Ontario Superior Court confirmed the validity of a will that was executed by a testator just weeks prior to his death. The testator, Eduardo Medeiros, was diagnosed with terminal lung cancer on March 13, 2015 and died on June 30, 2015. He executed a new will on June 8, 2015, which named his common law spouse of 18 years, Maria Moniz, as the estate trustee and divided his estate between Maria and his adult children from a prior marriage. This was a departure from his prior will dated November 15, 2004, in which his daughter and Maria were named as co-estate trustees and the majority of the estate was gifted to his adult children. On June 8, 2015, Eduardo and Maria attended at the law office of Martin Goose, a lawyer with 18 years experience and the testator's long-time friend. Martin Goose had also drafted Eduardo's 2004 will. During that meeting, Martin Goose probed Eduardo's testamentary capacity and intention and looked for undue influence. After Eduardo's death, his adult children challenged the validity of the 2015 will. Justice Shaw preferred the evidence of Martin Goose to a psychologist's retrospective capacity assessment. The Court held that Maria had satisfied the legal burden of proving that Eduardo had capacity and that the applicants could not support their further claims of undue influence.

[40] *Calderaro, supra* note 19 at para. 63.

[41] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8162; *Hall, supra* note 8 at para. 14.

1. Understand the nature and effect of a will.

2. Recollect the nature and extent of their property.

3. Understand the extent of what she is gifting under the will.

4. Remember the persons that she might be expected to benefit under her will.

5. Where applicable, understand the nature of claims that may be made by persons being excluded from the will.

Time permitting, it is good practice to request a medical report regarding the client's competency, speak to the client's doctors, and review the client's medical records[42]. If necessary, explain the legal test set out in *Banks v. Goodfellow*[43] to the testator's medical professional(s) and ask them to confirm their opinion of the testator's capacity as soon as possible in writing (e.g., by e-mail)[44]. However, solicitors must still assess the testator's capacity for themselves[45]. Do not simply defer to the opinion of medical personnel[46].

In *Hall,* the Court of Appeal listed eight common errors made by solicitors with respect to assessment of mental capacity[47]:

1. The failure to obtain a mental status examination.

2. The failure to interview the client in sufficient depth.

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[42] *Calderaro, supra* note 19, is a cautionary tale of what occurs where these steps are not taken. In that case, the solicitor was found liable for failing to assess the client's testamentary capacity.

[43] (1870), LR 5 QB 549 (WL Can).

[44]Ian Hull, "Deathbed Estate Planning", online (blog): *Hull & Hull LLP* https://hullandhull.com/2017/05/the-tricky-business-of-deathbed-estate-planning/. As noted above in *Hall, supra* note 8 at para. 12, where there is a solicitor negligence claim or other issues of liability, the relevant test is not whether the testator actually had capacity, but whether a reasonable and prudent lawyer could draw such a conclusion in the circumstances. A corroborating opinion from a medical professional on capacity is priceless when the solicitor's own judgment is being questioned.

[45] John E.S. Poyser, *supra* note 18 at 285.

[46] While lawyers are not experts in medical knowledge, evaluating testamentary capacity is both an art and a science. At the present time, a clinician's opinion of financial capacity are based on subjective clinical judgment using interview information, relevant neuropsychological tests and functional assessments: American Bar Association Commission on Law and Aging & American Psychological Association, "Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists" (2008) at 75 – 77 and 81.

[47] *Hall, supra* note 8 at para. 26; Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8162.

3. The failure to properly record or maintain notes.
4. The failure to ascertain the existence of suspicious circumstances.
5. The failure to react properly to the existence of suspicious circumstances.
6. The failure to provide proper interview conditions (e.g., the failure to exclude the presence of an interested party).
7. The existence of an improper relationship between the solicitor and the client (e.g., preparing a will for a relative).
8. The failure to take steps to test for capacity.

2.3 – Record and (Possibly) Share Opinion on Capacity

In the event you are of the opinion that the testator lacks testamentary capacity, advise the client privately and immediately. If the client has family at the bedside and has released confidentiality, this opinion can be shared with the family as well[48].

If the testator does not lack testamentary capacity and you have chosen to move forward with the retainer, communicate this clearly. Have a simplified, one-page retainer agreement, in a fill-in-the-blanks style, for the testator to sign if time is of the essence[49].

2.4 – Be Prepared for an On-the-Spot Will

In an emergency, a simple will can be written by the lawyer by hand and signed with a pair of witnesses, following all necessary formalities. Lawyers without a precedent on hand should buy and bring a will kit. Better yet, have a junior lawyer or articling student bring a portable printer[50].

Attend at the client's bedside with two staff from your office (if possible) to serve as witnesses[51]. Family and friends who are beneficiaries are ineligible to act as witnesses, and there may be

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[48] John E.S. Poyser, *supra* note 18 at 282.

[49] John E.S. Poyser, *supra* note 18 at 282.

[50] John E.S. Poyser, *supra* note 18 at 283.

[51] John E.S. Poyser, *supra* note 18 at 283.

hospital-specific policies that prevent medical staff from accepting requests to act as witnesses without prior approval.

2.5 – Get the Client to Sign a Release of Information

The solicitor should prepare two releases: the first to allow the lawyer to secure medical and personal information from medical staff, and the second should apply to financial information. Not only will this help the lawyer to draft an effective will, it will also help the solicitor judge the testator's capacity by allowing the solicitor to corroboration the testator's understanding of their financial affairs[52].

2.6 – Identify Substitute Decision Makers for Later Contact

Question the client as to whether they are currently handling their own decision making for healthcare and if they have a proxy ready should they lose capacity. Get in touch with the Office of the Public Guardian and Trustee if the client is a ward of the court[53].

2.7 – Do Not Take Instructions From Anyone Except the Testator Directly

Re Worrell[54] is a cautionary tale. In that case, the solicitor was found to be negligent when he took instructions from a family member of the testator who hired him. He accepted the family member as a proxy for the testator, interviewing him instead of the testator and never meeting with the testator. The solicitor failed to note as a red flag that the family member directed him to create a will leaving the majority of the testator's estate to himself. After preparing the draft will, the solicitor did not attend at the will signing. Instead, he simply handed the final will to the proxy to pass on to the testator to execute.

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[52] John E.S. Poyser, *supra* note 18 at 283.

[53] John E.S. Poyser, *supra* note 18 at 284.

[54] *Worrell, Re*, [1970] 1 OR 184, 1969 CarswellOnt 248 (ON SC).

Resist taking directions from a family member or friend acting as proxy for the testator. This is especially true if that person is a beneficiary and the person who contacted you. This situation is a classic indicium of undue influence[55].

2.8 – Act Quickly to Address Suspicious Circumstances and Undue Influence

Given the faintest whiff of predatory behaviour, the lawyer should question the client to probe for undue influence. As John Poyser colourfully describes, "reduced capacity and vulnerability are an irresistible combination for shark-like family members. The person who invites the lawyer to the hospital is often the predator". The solicitor should always be on guard for foul play, especially if the new will is a significant change from a prior will or intestacy[56]. Take notes of questions asked and answered received so that your file is properly detailed.

Suspicious circumstances which need to be probed (and properly noted in your file) include[57]:

1. The extent of physical impairment around the time the will is signed.
2. Whether the will in question constitutes a significant change from the former will.
3. Whether the will in question generally seems to make testamentary sense.
4. The factual circumstances surrounding the execution of the will.
5. Whether a beneficiary was instrumental in the preparation of the will.

2.9 –Have Client Review Will Planning Instructions and Sign a Copy

If there is any reasonable prospect that the client may die in the short term, or may suffer from rapid deterioration rendering her incapable, read your notes to the client and have them sign a copy, initialling each page along with two witnesses.

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[55] C. Peisah et al, "Deathbed wills: assessing testamentary capacity in the dying patient" (2014) 26:2 Int Psychogeriatrics 209 at 212.

[56] John E.S. Poyser, *supra* note 18 at 285.

[57] These five factors, originally set out in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043 expands on *Vout v. Hay*, [1995] 2 SCR 876, 1995 CarswellOnt 186 (SCC), and were endorsed in *Graham v. Graham*, 2019 ONSC 3632 ("*Graham v Graham*") at para. 27 by Justice Sheard. In that case, a deathbed will and transfer of real property were set aside on the grounds of suspicious circumstances.

2.10 – Attend the Will's Final Execution Personally

The lawyer who conducted the interview to determine capacity should be the same one who attends at the final execution of the will[58]. Do not simply hand the will off to a beneficiary or family member to have the testator execute.

2.11 – Liability and Duty of Care: A Silver Lining

While deathbed will drafting presents multiple challenges for a drafting solicitor, there is a silver lining.

As mentioned above, solicitors do not owe a duty of care to disappointed beneficiaries absent a retainer agreement[59]. Once a retainer has been accepted, the lawyer owes a duty of care only to the testator (the client) and the potential beneficiaries of the will to be executed[60]. Solicitors do not owe a duty of care to beneficiaries under a prior will[61]. Keep in mind, however, that beneficiaries under prior wills may challenge the validity of the later will on grounds of a lack of testamentary capacity, for example[62].

A disappointed beneficiary only has a claim against the retained solicitor where his or her interests are in harmony with the testator's, without possibility of conflict[63]. In other words, "a solicitor is

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[58] John E.S. Poyser, *supra* note 18 at 283; Amalia L. Todryk & Kathryn A. Muldoon, "Deathbed Planning: What You Can Do This Side of Paradise" (2013) 86 Wis. Law. 20 at 21.

[59] The Court of Appeal panel in *Hall, supra* note 8, sided with the position of the drafting solicitor's lawyer at para. 54. To impose a duty of care in favour of third parties in a case where the solicitor did not accept a retainer would put unretained solicitors in an untenable position. If the solicitor determined a testator lacked capacity and refused to draft the will, he could be sued by third party beneficiaries. If the solicitor drafted the will, he could be sued by personal representatives of the estate. The result is a no-win situation for unretained solicitors.

[60] The duty of care owed to disappointed beneficiaries was first established by the House of Lords in *White, supra* note 6, and subsequently became accepted in most common-law jurisdictions including Canada through *Earl, supra* note 37.

[61] The first time the issue of whether solicitors owe a duty of care to beneficiaries under a prior will was considered in Canada was by the Alberta Court of Appeal in *Graham v. Bonnycastle*, 2004 ABCA 270 ["*Bonnycastle*"].

[62] However, it should be noted that Berger J.A. in *Bonnycastle, supra* note 60, concurred in the result, but offered minority reasons. He suggested in *obiter* at para. 56 that the doors do remain open for solicitors to owe a duty of care to heirs of prior wills in rare circumstances, such as where an estate was distributed prior to a successful challenge on the will. This would leave beneficiaries of a prior will without recourse, unless they can bring an action against the solicitor.

[63] *Bonnycastle, supra* note 60 at para. 29. This was further exemplified in *Rose, supra* note 29, where both the testator and disappointed beneficiary wished for the latter to have a specific piece of land.

not liable to an unlimited class of individuals who might conceivably have received a gift from the testator"[64]. For there to be liability, three factors must be present[65]:

1. It must be foreseeable that the disappointed beneficiary would suffer financial loss.
2. There must be a sufficient degree of proximity between the solicitor and the intended beneficiary.
3. It is fair, just and reasonable that liability should be imposed in negligence on the solicitor to compensate the beneficiary in circumstances where the solicitor was in breach of his professional duty but there was no remedy in contract, and the client's estate had no effective remedy for the client's purpose being thwarted by the solicitor's failure to carry out the instructions properly.

III – Always Keep Meticulous Notes

Whether a retainer is accepted or rejected, and regardless of the stage at which it is rejected, the mantra is to "document, document and document"[66]. Deathbed will situations have a greater likelihood of being litigated. Therefore, the drafting solicitor's actions should be guided by the assumption that they will be a witness in litigation down the line. Practice defensively.

3.1 – Document, Document, Document

If a retainer is rejected, keep detailed notes on when and how this was communicated to the potential client. Retain a copy of the e-mail or rejection letter, and ask for acknowledgement of receipt[67].

Take fulsome, copious and contemporaneous notes, with details on what questions were asked, what responses were given, and any of the lawyer's own observations supporting the lawyer's assessment of capacity and undue influence[68]. Manuscript style notes are best, recording each

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[64] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8170.

[65] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8170

[66] Alexandra Mayeski, *supra* note 9 at 9.

[67] John E.S. Poyser, *supra* note 18 at 281.

[68] Alexandra Mayeski, *supra* note 9 at 9.

question and answer[69]. Note which steps were taken, and which steps were not, and the reasons for rejecting the retainer.

The Court in *Krolewski* explicitly recommended that solicitors should keep detailed notes in deathbed will situations[70]. Relying on memory is not recommended. Neither is a one-page memo[71]. In situations where there is any possible reason to suspect a will may be challenged, courts have instructed the drafting solicitor to prepare a memorandum or note of their observations and conclusions to be retained in the file[72].

Case law is replete with cautionary tales where wills were overturned and solicitors were found liable in negligence due in part to inadequate documentation[73]. However, there are also many cases where adequate documentation helped the solicitor defend against claims of negligence, especially where the solicitor's notes squarely showed that inquiries had been made into the testator's dire circumstances[74].

3.2 – Use Technology and Bring a Witness

Nowadays, smartphones are ubiquitous. Judicial commentary in case law suggests that electronic recordings, when available, are appreciated by the court[75].

Having a second junior lawyer or articling student attend the deathbed with you to record the meeting can also pay dividends. The junior lawyer can also form an independent opinion of the testator's capacity or take notes, while the more experienced solicitor focuses on questions. However, the person recording should frequently check to ensure the device is still recording and

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[69] Transcript style notes/recordings are best, recording each question and answer as posed. John E.S. Poyser, *supra* note 18 at 282.

[70] *Krolewski, supra* note 39 at para. 77.

[71] *Graham v. Graham, supra* note 57 at para. 19.

[72] *Scott, supra* note 9 at para 70.

[73] See for example, *Graham v. Graham, supra* note 57 at para. 19. where both deathbed wills and powers of attorney instruments were challenged and found to be invalid due to suspicious circumstances. The lawyer's lack of notes was a main evidentiary consideration of the court in coming to their reasons. *Calderaro, supra* note 19 is another example.

[74] Examples include *Zahn v. Taubner*, 2012 ABQB 504 at para. 33, *McCullough, supra* note 4 at para. 60, and *Rosenberg, supra* note 32 at para. 24.

[75] John E.S. Poyser, *supra* note 18 at 286

has not been turned off by, for example, receiving a phone call. Video recordings should supplement and not replace notes and memos.

3.3 – Carefully Preserve All Files Relating to Any Deathbed Wills

Consider using a cloud-based data storage service and uploading recordings there for safe keeping. This is insurance against loss or damage to the recording device. All physical documents should be scanned and kept in electronic form, including any prior notes on the client's file (if the client is not new).

3.4 – Deficient Notes: A Silver Lining

Deficient note-taking by the solicitor is not always fatal in a will challenge. In *Krolewski*, the testator and the lawyer were long time acquaintances and had a professional relationship of 18 years. The lawyer had strong recollections of his meetings with the testator, was an experienced will-drafter of 40 years, and had performed all the right steps to probe the testator's capacity.[76]

However, the finding in *Krolewski* is rare: in nearly every other circumstance, the court prefers copious and detailed notes[77].

IV – Conclusion

The two most common reasons for a deathbed retainer are: (1) the testator doesn't have a will and is worried about benefitting estranged family members under the rules of intestacy, or (2) the testator wants to change her will to reflect her most recent wishes[78]. However, sometimes intestacy or distribution from the prior will is unavoidable, especially where the testator has lost capacity.

When in doubt about the testator's capacity, the right choice is to walk away. When taking on such a complex case, it is good to keep in mind that the standard of care is not perfection[79]. There will

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[76] *Krolewski, supra* note 39 at para. 33.

[77] *Krolewski, supra* note 39 at para. 77.

[78] Eric Bennett, Brian Gillingham & Mary-Alice Thompson, "Estate Planning: Death Bed Wills, Estate Planning for Blended Families" (delivered as CPD in 2014, accessed online in 2022).

[79] *Millican, supra* note 36 at para 8.

always be gray areas, scenarios in a "borderland within which it is difficult to say whether a breach of duty has or has not been committed"[80]. By following the tips listed above and keeping up to date on new developments in estate planning[81], solicitors can maximize their chances of "surviving" a deathbed retainer. Happy drafting!

[80] *Millican, supra* note 36 at para 8.

[81] An interesting thought experiment illustrating the need to keep abreast of the legal developments is found in the April 2021 updates to the *Succession Law Reform Act*, RSO 1990, c S.26 ["*SLRA*"]. Query the interaction between a deathbed marriage and a deathbed will. Specifically, schedule 9 of Bill 245 repealed section 16 of the *SLRA* which provided for the automatic revocation of prior wills on marriage by the testator. This means that, as of April 2021, marriage no longer automatically revokes prior wills. While this is good for protecting testators against predatory second or third marriages, the flip side of the coin is that it may result in more dependant support claims.

Appendix A – Indicia of a Deathbed Retainer

1. The client or family member discloses terminal diagnosis due to illness or accident.

2. The testator's age is very advanced.

3. The testator's appearance is consistent with failing health.

4. The testator discloses a recent recovery from a terminal diagnosis which has a high chance of reoccurrence (e.g., cancer).

5. The testator's family has contacted the solicitor instead of the testator herself, as she is too weak to do this task.

6. The lawyer is asked to meet in a medical setting such as a hospital, or at their office on an urgent basis.

7. At the hospital, the client is in and out of consciousness and lucidity.

8. The client is on many prescription medications which may alter their state of consciousness.

9. The client is suicidal and has a history of substance abuse.

10. The client is not on her required medications in order to stay functional during the interview (e.g., abstaining from strong pain killers).

11. Medical personnel at the hospital suggest that the client's vital signs may affect her state of consciousness (e.g., low oxygen intake).

12. There are repeated hints of urgency after the retainer, though the reason for urgency is vague or not given[82].

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[82] Some family members may have undisclosed reasons to be secretive of their spouse or family member's prior illness. This was the case in *Rosenberg, supra* note 32 at para. 14.

13. The client is so weak she cannot speak, cannot instruct someone to sign the will in her place, or cannot confirm that she understands the provisions of the will.

14. The testator appears unaware of why the lawyer was called or suggests she didn't intend to call the lawyer (perhaps she intended to die intestate), especially when the meeting was arranged by a family member or friend of the testator.

15. Certain family members who will benefit from the new will try to position themselves as intermediaries between the lawyer and testator (citing health concerns of the testator).

16. In addition to other red flags of suspicious circumstances, there are large *inter vivos* transfers to the new beneficiaries.

17. The testator depends heavily on certain family members due to her illness.

18. The testator appears to have made large transfers of property without consideration while her health is failing.

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