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Near Death Decisions & Deathbed Wills

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Introduction[1]

This paper is set out in two parts. Part I is geared towards professionals dealing with clients who are facing near-death decisions regarding wealth transfers. The focus of Part II is narrower. It is geared towards estate planning lawyers who are faced with a deathbed will scenario.

Part I covers the three most common scenarios of near-death decisions regarding wealth transfers. It examines the requisite legal capacities required for each, and the applicable law of undue influence. Lastly, best practices are provided.

Part II is organized around three best practices an estate planning lawyer should observe in a deathbed will scenario. Under the heading of each best practice, further practice tips and an exegesis on the law is offered.

Part I – Near Death Decisions

The choice of the term "near-death decision" is a necessary misnomer. It is used to capture a wide range of circumstances and decisions. "Near death" is not used literally. Instead, it represents a continuum of persons, ranging from a healthy youth contemplating a deathbed gift[2], to an elderly person facing a life-threatening medical situation, and everything in between[3]. It is well exemplified by a grey-zone of situations where a client may or may not have capacity, and may be subject to undue influence. These situations must be assessed on a case-by-case basis.

In this paper, the "decision" of a "near-death decision" refers specifically to the transfer of wealth or assets[4]. Outside of testamentary dispositions[5], three common scenarios (the "**Three**

[1] This paper was co-authored by Justin W. de Vries and Tyler Lin of de VRIES LITIGATION LLP.
[2] A "deathbed gift" or *donatio mortis causa* is a specific type of semi-*inter vivos* gift where the donor is in contemplation of death but is not literally or figuratively on their deathbed. As this type of gift only vests on the death of the donor, it is both *inter vivos* but also testamentary.
[3] The scope of this paper is about near-death decisions. As such, it does not cover situations where a loss of decision-making ability has already occurred, such as the activation of an enduring power of attorney.
[4] Non-financial based decisions such as those regarding health, e.g., regarding the capacity to consent to treatment under the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A ["*HCCA*"], or to consent to Medical Assistance in Dying are outside the scope of this paper.
[5] Testamentary dispositions are addressed at Part II.II of this paper.

Scenarios") of near-death decisions covered in this paper are *inter vivos* gifts, *inter vivos* real property transfers, and the changing of beneficial designations[6].

For professionals dealing with clients in near-death decision scenarios, understanding the shifting standards of capacity and the law of undue influence is crucial to applying best practices which protects clients and minimizes the risk for future liability.

All About Capacity

There is no single, universal legal definition of the term "capacity"[7], nor a single, universal legal test. The definition or requisite test for "capacity" or "diminished capacity" depends entirely on the corresponding type of decision or transaction under consideration, and the applicable legal jurisdiction[8].

In Ontario, capacity is a decision, time and situation specific concept[9]. It is possible for a person to be capable with respect to some decisions, but not others, or, be capable with respect to the same decision at one point in time and incapable at another. Even a medical diagnosis of dementia, an illness that adversely affects cognition, does not vitiate capacity wholesale[10]. Capacity is a legal conclusion, and cannot be derived from a solely medical analysis[11].

In Ontario, there is a general presumption of capacity. All persons are deemed capable of making decisions until this presumption is legally rebutted by clear evidence[12].

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[6] There is some overlap between these Three Scenarios. For instance, a real property transfer could be done as an *inter vivos* gift, and an *inter vivos* gift could be of real property. However, the applicable laws on capacity are different enough to warrant conceptual segregation.

[7] For instance, when we look at the definition for "capacity" or "capable" provided by section 1(1) of the *Substitute Decisions Act, 1992,* S.O. 1992, c. 30 ["*SDA*"], the meaning is entirely circular: "capable" simply means mentally capable, and "capacity" has a corresponding meaning.

[8] American Bar Association & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (ABA Commission on Law and Aging and APA, 2008) [ABA & APA, "A Handbook for Psychologists"] at 16.

[9] *Ibid* at 16.

[10] *Johnson v. Huchkewich,* 2010 ONSC 6002 at para 46 – however, the Court did find that the natural progression of such a disease to an advanced stage may lead to a loss of all types of capacity.

[11] *Birtzu v McCron*, 2017 ONSC 1420; *Starson v. Swayzee,* 2003 SCC 32 ["*Starson*"] at para. 77.

[12] *Starson, supra* note 11 at para 77.

The Supreme Court in *Starson v. Swayze*[13] sets out guidance applicable to the analysis of capacity generally. First, a person must have the "cognitive ability to process, retain and understand […] relevant information" relating to the decision at hand[14]. Then, that same person must be able to "apply the relevant information" to their own circumstances, and be able to weigh the associated pros and cons of the decision[15].

As our legal system recognizes the importance of autonomy, it also recognizes the freedom to make unwise decisions. The correctness or reasonableness of a decision does not affect a determination of capacity. A person only needs the ability to weigh the pros and cons of a decision. They do not need to have actually done so[16].

Two Standards of Capacity

When it comes to the Three Scenarios, there are two relevant legal standards of capacity: the higher standard of capacity to make a will or "testamentary capacity"[17], and the lower standard of capacity to enter into a contract or make a gift. Both standards are established by common law[18].

The more stringent testamentary capacity requires the testator to have: (a) the ability to understand the nature and effect of making a will, (b) the ability to understand the extent of the property in question, and (c) the ability to understand the claims of persons who would normally expect to benefit under the will[19].

The capacity to enter into a contract or to make a gift are very similar. They require the contractor or donor to have: (a) the ability to understand the nature of the gift or contract, and (b)

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[13] *Starson, supra* note 11 – while this case addresses the question of capacity to consent under the *HCCA, supra* note 4, the Supreme Court's commentary on legal capacity is applicable broadly.
[14] *Starson, supra* note 11 at para 78.
[15] *Starson, supra* note 11 at para 78.
[16] *Starson, supra* note 11 at paras 80 to 81.
[17] For an in-depth discussion of testamentary capacity, see Part II.II of this paper below.
[18] Unlike the capacity to manage property, make personal care decisions, or grant or revoke a power of attorney for property or personal care, the two standards of capacity for the Three Scenarios outlined in this paper are rooted in the common law and not the *SDA, supra* note 7. See sections 6, 45, 8 and 47 of the *SDA*.
[19] *Hall v Bennett Estate* (2003), 64 OR (3d) 191, 2003 CanLII 7157 (ON CA) ["*Hall*"] at para 14.

the ability to understand the specific effect of the gift or contract in the contractor or donor's circumstances[20].

Two Types of Undue Influence

In near death decision-making, incapacity and undue influence are concepts which go hand in hand[21]. Undue influence is an equitable doctrine which can cause a transfer to be set aside, if the transfer was obtained through the domination of one person by another via manipulation, coercion, or subtle abuse of power[22]. Where a person's mental capacity is diminished, they become more vulnerable to undue influence[23].

There are two relevant types of undue influence: actual and presumed. From an evidentiary standpoint, actual undue influence is more difficult to establish. Here, the party claiming undue influence must prove, on a balance of probabilities, that this type of influence was actually exerted by the other party in the situation at hand[24]. No analysis of the type of relationship between the donor and recipient is required. The onus will never shift from the party alleging undue influence.

Presumed undue influence requires the party alleging undue influence to establish that the presumed influencer is or was in a prescribed category of relationship with the donor which would give rise to that presumption[25]. These non-exhaustive relationships include those with a fiduciary power dynamic or the potential for dominance, such as solicitor and client, parent and child, adult child and elderly dependant parent, doctor and patient, guardian and ward, and more[26]. Once this category of relationship is established, the onus shifts to the alleged

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[20] As set out in *Bank of Nova Scotia v. Kelly* (1973), 41 DLR (3d) 273, 1973 CanLII 1289 (PEI SC).
[21] For a discussion of the doctrine of undue influence as it is uniquely applied to the context of estate law, as opposed to contract law/*inter vivos* transfers, see my colleague Gillian Fournie's excellent paper titled "The Herculean Task of Proving Undue Influence", online: http://devries.wpengine.com/wp-content/uploads/2014/01/The-Herculean-Task-Of-Proving-Undue-Influence-by-Justin-de-Vries-and-Gillian-Fournie.pdf.
[22] CED 4th (online), *Contracts,* "Duress, Undue Influence and Unconscionability: Undue Influence" (IX.2) ["CED Undue Influence"] at §575.
[23] *Gironda v. Gironda,* 2013 ONSC 4133 ["*Gironda*"] at para. 56.
[24] *Vout v. Hay,* [1995] 2 SCR 876, 1995 CanLII 105 ["*Vout v Hay*"]; CED Undue Influence, *supra* note 22 at §576.
[25] CED Undue Influence, *supra* note 22 at §576.
[26] Kim Whaley, "Undue Influence in Inter Vivos Transactions and Transfers" (Paper delivered at the Estates and Trusts Summit, 10 October 2018) at 13.

influencer/receiver to rebut this presumption by showing the donor entered into the transaction as a result of their own "full, free and informed thought"[27].

However, this doctrine is not meant to protect a transferor from regret. Donors cannot simply claim undue influence in order to take back a gift. Equity will only intervene to protect transferors from victimization by another, not their own folly[28]. For a non-exhaustive list of indicia for undue influence gathered from case law, see Appendix "A" of this paper.

Inter Vivos Gifts

An *inter vivos* gift is a gift that the donor intends to take effect during his or her lifetime. By definition, it is a voluntary transfer of an asset from the true possessor to another, with the intention that the transferred asset will be retained by the receiver as their own[29].

The three requirements necessary to constitute a valid *inter vivos* gfit are: (1) an intention to donate, (2) a sufficient act of delivery, and (3) acceptance of the gift[30].

An *inter vivos* gift can be any type of asset, such as money, heirloom chattels, a vehicle, or even a gift of real estate. As long as the donor is eighteen years or older, they are presumed by law to be capable of making a gift, unless there are reasonable grounds to believe they are incapable of doing so[31].

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[27] *Goodman Estate v. Geffen,* [1991] 2 SCR 353, 1991 CanLII 69 ["*Goodman*"] at para 46; this can mean that the donor: (a) was not actually influenced in the particular transaction, (b) the donor had independent legal advice or the opportunity to receive the same, (c) the donor had the ability to resist any such influence, (d) the donor knew and appreciated what they were doing; and (e) there was acquiescence by the donor, also see *Stewart v. McLean,* 2010 BCSC 64 at para 97.

[28] *Goodman, supra* note 27 at para 24.

[29] Halsbury's Laws of Canada, *Gifts,* "Introduction: Gifts *Inter Vivos*: General: Requirements for valid *inter vivos* gift" at HGF-1.

[30] Halsbury's Laws of Canada, *Gifts,* "Introduction: Gifts *Inter Vivos*: General: Requirements for valid *inter vivos* gift" at HGF-1.

[31] WEL Partners, "Guardianship Weekly – Week 13: Capacity to Contract, Make a Gift and Enter Into Real Estate Transactions" (29 December 2020), *WEL Blog* (blog), online: https://welpartners.com/blog/2020/12/guardianship-weekly-week-13-capacity-to-contract-make-a-giftand-enter-into-real-estate-transactions/#_ftnref4 [WEL Partners "Guardianship Weekly"], citing *SDA, supra* note 7, s 2(1).

Typically, the standard of capacity required of the donor is the capacity to make a gift. If this capacity is challenged, in assessing for capacity, courts will consider the context for the gift, including the intention and nature of the gift[32].

However, as set out by the Supreme Court in *Mathieu v. St. Michel*, when the gift is of "significant" value relative to the entirety of the donor's assets (i.e., their potential estate) or is made as part of the donor's testamentary planning, the higher standard of testamentary capacity may apply[33]. This shifting standard for capacity is exemplified in the Ontario case of *Gironda v. Gironda*, where the capacity of the testatrix to give away her home, a significant asset, was assessed by the higher standard of testamentary capacity[34].

Curiously, Canadian case law does not clarify what is meant by a "significant" asset. There is no bright-line test nor percentage indicator. The adoption of the "significant" asset standard appears to be a Canadian departure from the leading English decision of *Re Beaney*[35], where this higher standard would only activate if the gift is the "sole asset" of value for the estate.

As Justice Barrow of the British Columbia Supreme Court explains in *Miller v. Turney*[36], the more that a gift resembles a testamentary disposition, the greater the likelihood that the higher standard would apply. This policy rationale makes sense. It would be overly onerous to impose the higher standard for capacity if an elderly testatrix wished to give away something trivial, such as some chattels of little market value. However, it is another matter if she wished to give away a significant portion of her estate.

Interestingly, while our legal system recognizes the autonomy and the freedom for individuals to make unwise decisions, the rationale behind an elevated standard of capacity seems to be donor protection[37].

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[32] Ibid; *Pecore v Pecore,* 2007 SCC 17.
[33] *Mathieu v. St. Michel*, [1956] SCR 477, 3 DLR (2d) 428 at para. 20; see also *Kalanj v Kalanj Estate,* 2022 BCSC 427 at para 56.
[34] *Gironda, supra* note 23.
[35] *Re Beaney,* [1978] 2 All ER 595 (Ch.D.).
[36] *Miller v. Turney,* 2010 BCSC 101 ["*Miller*"] at para. 32.
[37] *Geluch v. Geluch Estate,* 2019 BCSC 2203 at para 105, citing *Miller, supra* note 36.

In the context of *inter vivos* gifts, both actual and presumed undue influence are applicable. This is in contrast to undue influence in the estate law and testamentary context, where only actual undue influence applies[38].

Readers should also be aware of the "deathbed gift" or *donatio mortis causa*, which straddles the line between *inter vivos* and testamentary gifts. It is a unique type of gift with three components: (a) the gift must be made in contemplation of death, (b) there must be a transfer (delivery) of the subject matter of the gift, or some means for the recipient to secure control of it, and (c) the gift is only to take full effect upon death of the donor[39]. This type of gift does not apply to real property.

Changing Beneficial Designations

Similar to the *donatio mortis causa*, a change of beneficial designation is another type of transfer that straddles testamentary and *inter vivos* transfers. In this case, donors may make "gifts" to recipients by designating them as beneficiaries of life insurance or non-insurance plans, such as Registered Retirement Savings Plans[40]. The insurance proceeds or benefits of the plans would then flow to the designated individuals directly from the insurer or pension plan, when the donor dies, circumventing that donor's estate[41].

In many cases, a policy-holder or insured may have designated one person as the beneficiary to a policy, but now wishes to change this designation to another. In order to do so, they must comply with the relevant provincial legislation[42].

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[38] *Goodman, supra* note 27 at para 39. As both types of undue influence are applicable, situations where there is a relationship with the potential for dominance between donor and recipient, and situations where there is not, are covered. For instance, an *inter vivos* transfer between an elderly parent and adult child may be covered by presumed undue influence, but such a transfer between the elderly parent and an acquaintance may be covered by actual undue influence.

[39] Halsbury's Laws of Canada, *Wills and Estates,* "Nature of a Will: Alternatives to Wills: *Donatio Mortis Causa*" at HWE-13

[40] Halsbury's Laws of Canada, *Wills and Estates,* "Nature of a Will: Alternatives to Wills: Beneficiary Designations" at HWE-16

[41] The reason that these payments would flow outside of the estate is because the payments are not assets of the deceased. In the case of a life insurance contract, the insurance company enters into an agreement with the insured to pay out proceeds to the beneficiary. These proceeds never belonged to the deceased or donor to begin with, so it cannot be said that they are transfers from the donor in a traditional sense. For a recent discussion on the interaction between the doctrine of resulting trusts and beneficial designations, see my blog at *allaboutestates.ca*.

[42] For insurance related policies, see sections 190-196 of the *Insurance Act,* R.S.O. 1990, c. I.8. For non-insurance plans, see sections 50-54 of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 ["*SLRA*].

In Ontario, testamentary capacity is required to change a beneficial designation, since the correlated payouts are triggered by the insured or policy-holder's death[43]. Similarly, there is no presumption of undue influence for changing beneficiary designations. Actual undue influence must be established[44].

Inter Vivos Real Property Transfers

By definition, there is overlap between the category of *inter vivos* gifts and real property transfers. An *inter vivos* gift can be, but is not always, a gift of property. Likewise, a real property transfer can be, but is not always a gift.

The capacity required for a real property transfer will shift depending on the nature of the transaction. Where the transaction is the purchase or sale of real property (typically at fair market value), courts will generally consider whether the individual has the capacity to contract. This means that the buyer or seller must have the ability to understand the nature of the transaction, and the ability to appreciate the impact of that transaction on their interests[45].

Where the transaction of real property is a gift, including instances of nominal consideration in exchange, or where the owner of the real property puts another person on title for nominal consideration, the relevant capacity is that of making a gift. However, where that gift is a significant portion of the donor's assets, the higher testamentary capacity standard may apply[46].

In most cases, for the average Canadian, a gift of real property will form a significant portion of their asset and thus be subject to the higher testamentary capacity standard[47].

Where the real property transaction is an *inter vivos* gift, both actual and presumed undue influence are applicable.

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[43] *Stewart v Nash*, 1988 ONSC 4742 at para 16
[44] *Ibid* at para 19; *Mak (Estate) v Mak*, 2021 ONSC 4415 at para 39.
[45] WEL Partners "Guardianship Weekly"], *supra* note 31.
[46] See *inter vivos* gift section above.
[47] There are exceptions to the general rule that testamentary capacity will apply to gifts of real property. For instance, where the donor in question is ultra-wealthy and the real property gift in question makes up a negligible percentage of their wealth or where the gift of real property has minimal fair market value.

Best Practices for Near Death Decisions

Informed by the above, the best practices for each of the Three Scenarios are as follows.

Best practices for *inter vivos* gift scenarios:

1. Assess the client for age, and whether they are over 18 years old.
2. Assess the reasons why the client may not have been able to form an intention to gift, e.g. a medical issue or disability affecting their cognitive function.
3. Assess the value of the proposed gift relative to the client's overall assets, and whether it is "significant", i.e., whether it is more of a mere chattel or more of a testamentary disposition.
4. If the value of the proposed gift is not significant, assess for whether the client is able to: (a) understand the nature of this gift, and (b) understand the specific effects of this gift on their own circumstances.
5. If the value of the proposed gift is significant, assess for whether the client is able to: (a) understand the nature and effect of making such a disposition as it may impact their estate, (b) understand the nature of the gift, and (c) understand the legal claims of persons who may be expected to benefit under the client's will.
6. Assess for actual and presumed undue influence, e.g. a relationship with the potential for dominance (see Appendix "A" for a list of undue influence indicia), in a one-on-one setting with the client.
7. Assess if the gift is a *donatio mortis causa*, and whether the requirements for this type of gift would be fulfilled.

Best practices for changing beneficial designation scenarios are:

1. Assess the specific plan or insurance policy, and the corresponding legislative requirements for changing beneficial designations.
2. Assess for reasons why the client may not be able to form a testamentary intention, e.g. a medical condition or disability affecting cognitive function (keeping in mind that the existence of such a condition alone may not be wholly indicative).
3. Assess for whether the client is able to: (a) understand the nature and effect of making such a disposition as it may impact their estate, (b) understand the nature of the

designation, and (c) understand the legal claims of persons who may be expected to benefit under the client's will.

4. Assess for actual undue influence in a one-on-one setting with the client (see Appendix "A").

Best practices for *inter vivos* real property transfer scenarios:

1. Assess the nature and purpose of the transfer, i.e., whether it is a sale, purchase, or a gift.
2. Assess for reasons why the client may not be able to form an intention to gift, contract or make a will, e.g. a medical condition or disability affecting cognitive function (keeping in mind that the existence of such a condition alone may not be wholly indicative).
3. If the transfer is a sale or purchase, assess for whether the client is able to: (a) understand the nature of the contract, and (b) understand how the specific transaction impacts their unique circumstances.
4. If the transfer is a gift, assess the value of the proposed gift relative to the donor's assets, and whether it is "significant".
5. If the value of the proposed gift is not significant, assess for whether the client is able to: (a) understand the nature of this gift, and (b) understand the specific effects of this gift on their own circumstances.
6. If the value of the proposed gift is significant, assess for whether the client is able to: (a) understand the nature and effect of making such a disposition as it may impact their estate, (b) understand the nature of the gift, and (c) understand the legal claims of persons who may be expected to benefit under the client's will.
7. Assess the client for both actual and presumed undue influence in a one-on-one setting (see Appendix "A").

If having performed the above initial assessments, there are outstanding concerns regarding capacity or undue influence, err on the side of caution and retain a lawyer or capacity assessor for an additional opinion. In any event, careful notes should always be kept in case of future litigation (as further discussed in Part II.III of this paper below).

Part II – Deathbed Wills

Deathbed wills are the original will. In medieval Europe, will-making was synonymous with efforts right before death[48]. Unfortunately for estate planning solicitors, this meant that deathbed wills have been prone to challenge since as early as the 1300's[49]. 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. Below are three general practical tips to help solicitors navigate this thorny situation through best practices.

II.I - When in Doubt, Walk Away

It is not always easy to recognize a deathbed will situation. Arguably, these situations exist on a continuum[50]. On one end, testators may not exhibit any signs of ill health. On the other, a testator may be heavily 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 where each unique case falls on the facts.

[48] 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.

[49] 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. This will challenge dealt with issues such as testamentary capacity, but not solicitor's negligence.

[50] Just as Justice Mulligan identified in 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.

To illustrate, the testator in *McCullough v. Riffert*[51] presented no health concerns to the solicitor at the initial and only in-person meeting. He died 10 days later of undiagnosed cancer. In *White v. Jones*[52], 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 themselves up to a potential negligence claim and will challenge down the line[53]. 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 of the rejection.

However, this framing of the dilemma is the product of misconceptions. It is true that prior to the leading case of *Hall v. Bennett*[54] in 2003, case law favoured the solicitor drafting a will even for

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[51] In *McCullough*, *supra* note 50. 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 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. Before the solicitor obtained that information, 7 days after the draft will was prepared, the testator died suddenly. His niece unsuccessfully brought a negligence claim against the solicitor. In his reasons, Justice Mulligan focused on the fact that the solicitor was never made aware of the testator's rate of deterioration.

[52] [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, again benefitting them. This was due to a prior family disagreement and subsequent reconciliation. He reached out to a solicitor by letter explaining his wishes. However, the solicitor canceled three appointments to discuss the letter over 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 subsequent 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.

[53] No matter who drafts the will, and how careful a solicitor is, a will challenge may be inevitable due to the high conflict nature of deathbed circumstances.

[54] *Hall*, *supra* note 19. 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 by pain medication. 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.

situations where capacity was in doubt[55]. However, based on current case law, when in doubt, it is safer to walk away from a retainer for four reasons.

First, the right to decline representation belongs to the lawyer[56]. However, once retained, the right to terminate belongs exclusively to the client, except in circumstances of good cause and reasonable notice[57]. A lawyer can fulfill his fiduciary duty to a potential client even through declining representation, as long as he exercises the discretion to reject a retainer prudently, and takes steps to minimize resulting prejudice. This means considering the probability of whether declining would make it difficult for a person to obtain other legal advice or representation[58], and helping that person secure the services of another qualified licensee. Retainers are easy to enter, and hard to leave.

Secondly, there can be no civil liability without a retainer agreement[59]. An unretained lawyer is neither liable to disappointed beneficiaries nor the testator and his estate. Even if the lawyer failed in his fiduciary duty to a potential client by rejecting representation without exercising prudent discretion, they may face disciplinary proceedings by the Law Society but cannot be sued civilly. The *Rules of Professional Conduct* simply do not create a basis for civil liability[60].

Thirdly, a lawyer may be required to decline representation if they are not competent to act in a particular case[61]. Competency depends on expertise in estate planning, the lawyer's workload and current clients, all of which will dictate whether that lawyer can perform all functions of a lawyer

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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 some people including a friend, Peter Hall. 65 minutes into the interview, the testator was drifting in and out of consciousness too frequently, was in much 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, brought a negligence action against the solicitor. The Ontario Superior Court found in favour of the friend, focusing on the issues of whether the testator had testamentary capacity and whether the solicitor fulfilled his duty of care. However, on appeal, the Ontario Court of Appeal found that the trial judge wrongly focused on an objective finding of whether there was capacity, whereas the analysis should have been on if a finding of incapacity by the solicitor was a reasonable outcome in the circumstances. Further, absent a retainer agreement, a solicitor owes no duty to a disappointed beneficiary.

[55] 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.

[56] 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].

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

[58] 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.

[59] *Hall*, *supra* note 19 at paras. 61 and 62.

[60] *Hall, supra* note 19 at para. 62.

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

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 effect an estate freeze through complex business re-organization, create various trusts, and deal with prior marital contracts[62].

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[63].

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 about potential diminished capacity, and any other mental or physical limitations (e.g., can they see, speak, or physically sign their name)[64]. For example, in *Calderaro v. Meyer*[65], the testator deteriorated so 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.

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[62] 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.

[63] *Hall, supra* note 19 at para. 58.

[64] 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 55 at 8.

[65] 2011 ONSC 5395 ["*Calderaro*"] – In this case, 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 began to date and eventually marry the defendant over a period of two years. 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 to forward this to a solicitor to have it prepared. While on holiday, the plaintiff faxed the questionnaire to a solicitor who had never met the testator nor plaintiff before. On April 21, 2009, the plaintiff returned from holiday and contacted the solicitor to attend at the hospital to have the testator execute the will. By that time, the testator was so deteriorated he could not speak nor sign a will. He could only keep his eyes open or squeeze 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 property in which she and the testator lived at while together, and gave the defendant the residue of the estate. The plaintiff brought an action seeking a declaration that the testator's will was valid or in the alternate, the agreement was binding on his estate. Justice Sosna found the will was invalid as it was not duly executed. Crucially, it was the 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.

The goal of family members reaching out may be to secure a lawyer as quickly as possible. Resist the urge to accept a retainer on the basis of the urgency of the situation.

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, and neither does booking the appointment or meeting the testator in person for the first time[66]. Your retainer to draft the will is conditional on you meeting the testator in person, having sufficient time alone to interview the testator, performing a capacity assessment and assessing for undue influence, obtaining a positive outcome in the same, and then deciding to take on the client. Make it clear you are not retained until these conditions are fulfilled[67]. Eschew virtual meetings[68].

Explain to the client's family and friends that if you accept a retainer agreement, the client will be the testator directly, not them[69]. This is the case even for the people whom the testator heavily relies on. Explain the duty of confidentiality you would owe to your client.

Prepare a separate retainer agreement and negotiate a fee for the capacity assessment, payable by family members or friends requesting the will to be drafted. This will ensure you will receive a fee for your work regardless of whether the opinion you form on capacity is positive or negative[70].

If Conditions of Retainer are Refused, Decline to Move Forward

If the person reaching out to you declines your conditions, prudently exercise your discretion to refuse in accordance with Law Society Rule 4.1-1 and commentary [4][71]. Refuse clearly and at the first possible opportunity[72]. Then, quickly offer to help search for another lawyer who can take on this matter.

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[66] John E.S. Poyser, *supra* note 64 at 281.
[67] Alexandra Mayeski, *supra* note 55 at 8.
[68] 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/.
[69] John E.S. Poyser, *supra* note 64 at 281.
[70] John E.S. Poyser, *supra* note 64 at 281.
[71] *LSO Rules,* r 4.1-1 commentary [4].
[72] Alexandra Mayeski, *supra* note 55 at 8.

When refusing a retainer, send an e-mail or letter making it clear in some document and provable form that you were never retained[73]. Request confirmation of receipt.

Remember that a retainer can both be by writing or action. Do to not take actions to suggest you have been retained. In *Hall*[74], the drafting solicitor acted to effect an end to the retainer by not finishing the in-person interview, not completing notes on the testator's directions, and subsequently not drafting nor sending over a draft will.

II.II – On Accepting a Retainer, Act Quickly and Effectively

Ultimately, acting quickly and effectively goes to a standard of care analysis. Acting quickly means balancing urgency against delay in a set of given circumstances. Acting effectively means performing all of the steps necessary to effect the testator's wishes[75].

Both urgency and delay exist on a continuum[76]. There is little urgency in drafting a will for a young, healthy client who presents without health concerns[77]. Some delay in getting a draft to that client is reasonable. For a client who is clearly on their deathbed, any delay in this case is likely unreasonable[78]. However, there is always a possibility that any client could die unexpectedly after

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[73] John E.S. Poyser, *supra* note 64 at 281.
[74] *Hall, supra* note 19.
[75] 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 and a disappointed beneficiary under his last will. Gary retained solicitor Alex Rose to draft a will, intending to leave certain real property to Douglas. Alex drafted a simple will without effecting the necessary real estate work for the real property transfer. He did not perform a title search nor investigate who owned the land. The intended gifts of land lapsed, because it was not Gary but his corporation that owned this land. Justice Goss found that Alex had a duty to his client, Gary, to prepare his will using proper care in carrying out his instructions. As interests of the testator and disappointed beneficiary were in common, Alex also owed the same duty to Douglas. It was 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 a reasonably competent solicitor. As his negligence caused Meier's loss, damages were awarded in the sum of $482,200.00.
[76] *McCullough, supra* note 50 at para 62. In this continuum, urgency increases as factors such as age, fitness level, health, and prior diagnoses of terminal illnesses mount.
[77] *McCullough, supra* note 50 at para 41 - As stated by Brian Schnurr, expert witness in *McCullough* and estate litigator, the standard of care for a reasonably competent solicitor is informed by the state of health of the testator.
[78] *McCullough, supra* note 50 at para 62; an example of unreasonable delay is found in *White, supra* note 6. In that case, the solicitor did nothing for 3 months and went on holidays. Even though the testator's health was no issue, he was elderly and subsequently died of an unforeseeable accident. Still, the House of Lords held the solicitor responsible for negligence. For factual examples of reasonable delay, see both *Rosenberg Estate v. Black,* 2001 CarswellOnt 4504 (ON SC) ["*Rosenberg*"] and *McCullough, supra* note 50 at paras. 60 and 64.

the first solicitor meeting. Therefore, analysis of whether a lawyer has fallen below the requisite standard of care is factually dependent[79].

The requisite standard of care for drafting solicitors in a deathbed situation is not higher than the usual "skill of a reasonably prudent solicitor"[80]. 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"[81]. In analyzing whether a lawyer has acted reasonably, the following factors are considered:

1. the terms of the lawyer's retainer – for example, whether a precise timetable is 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 job – for example, the more complex the job the more time required;
5. the circumstances indicating the risk of death or onset of incapacity in the testator; and
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." [82]. However, the following best practice sub-tips are consistent with case law and should be observed in a deathbed will drafting scenario[83].

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[79] *McCullough, supra* note 50 at para 62.
[80] *Rosenberg, supra* note 78 at para 53, citing *Central & Eastern Trust Co. v. Rafuse,* [1986] 2 SCR 147 (SCC) at para. 208.
[81] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity*, at ¶8170.
[82] 1964 CarswellAlta 88 (AB SC) ["*Millican*"] at para 8, this decision was later affirmed by our Supreme Court in [1967] SCR 183 (SCC).
[83] In *Millican, supra* note 82 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 in general: (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, (6) to keep his client informed to such an extent as may 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*"].

Once Conditionally Retained, Attend to Bedside Promptly

Once retained on the condition of a positive capacity assessment result, attend to the client's bedside promptly in order to perform the test for capacity. Crucially, do not send an inexperienced associate or articling student in your place. Deathbed retainers are volatile situations which require experience, judgement and expertise[84].

In cases of a solicitor negligence claim or will challenge regarding a deathbed retainer, Courts have in the past put great emphasis on the relative experience of the drafting solicitor. In *Krolewski v. Moniz*[85], even though the drafting solicitor failed to take notes at the client meeting, the Court gave much credibility to his 43 years as a lawyer in accepting his capacity opinion and finding his conduct not negligent.

Assess for Testamentary Capacity and Intention First

Any solicitor who undertakes to prepare a will has a duty to inquire into their client's testamentary capacity. A deathbed situation is no different[86]. In order to have a sound disposing mind, the testator must[87]:

1. Understand the nature and effect of a will;
2. Recollect the nature and extent of their property;
3. Understand the extent of what he or she is giving under the will;

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[84] John E.S. Poyser, *supra* note 64 at 28.

[85] 2020 ONSC 53["*Krolewski*"]. In this case, the Ontario Superior Court confirmed the validity of a will that was executed by a testator just weeks prior to his death. Testator Eduardo Medeiros was diagnosed with terminal lung cancer on March 13, 2015 and died on June 30, 2015. Shortly before passing, 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 own adult children from a prior marriage. Both Eduardo and Maria had children from prior marriages, but none together. In a prior will dated November 15, 2004, he named his daughter and Maria as estate trustees but gifted the vast majority of the estate to his adult children. Maria was essentially disinherited under the 2004 will. On June 8, 2015, Eduardo and Maria attended at the law office of Martin Goose, the testator's long-time friend and lawyer of 18 years. This lawyer also drafted the 2004 will. During that meeting, testamentary capacity, intention and undue influence were assessed. After Eduardo's death, his adult children brought the application against Maria in order to declare the 2015 will invalid. Justice Shaw preferred the evidence of the drafting solicitor to a retroactive psychologist's report conducted by the expert witness of the applicants. His Honour held that the propounder of the will (Maria) had satisfied the legal burden of proving Eduardo had capacity, and gained the rebuttable presumption that there was requisite capacity due to valid execution of the 2015 will. The applicants could not rebut the presumption of requisite capacity, and for the most part, their accusations of undue influence were bald.

[86] *Calderaro, supra* note 65 at para. 63.

[87] Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8162; *Hall, supra* note 19 at para. 14.

4. Remember the persons that he or she might be expected to benefit under their will; and
5. Where applicable, understand the nature of claims that may be made by persons being excluded from the will.

It is always a good idea to seek help from knowledgeable medical staff for a second opinion (preferably, from an attending physician). However, solicitors must still perform their own capacity assessment[88]. Do not simply defer to the opinion of medical personnel[89]. If available personnel are not knowledgeable, explain to them the legal test set out in *Banks v. Goodfellow*[90] and ask them to confirm their opinion as soon as possible in writing (e.g., by e-mail)[91].

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[92].

In *Hall,* the Court of Appeal listed eight common errors by solicitors with respect to assessment of mental capacity[93]. Solicitors would do well to keep these in mind in a deathbed scenario:

1. the failure to obtain a mental status examination;
2. the failure to interview the client in sufficient depth;
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);

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[88] John E.S. Poyser, *supra* note 64 at 285.
[89] While lawyers are not experts in medical knowledge, evaluating testamentary capacity is both an art and a science. Unlike for treatment consent capacity, there are currently no published studies of clinician judgments of financial capacity (testamentary capacity is one type of financial capacity, albeit one that receives distinct legal attention). At the present time, judgements of financial capacity are based on subjective clinical judgment using interview information, relevant neuropsychological tests and functional assessments. – ABA & APA, "A Handbook for Psychologists", *supra* note 8 at 75 – 77 and 81.
[90] (1870), LR 5 QB 549 (WL Can).
[91] 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 19 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, in that drafting lawyer's specific circumstances, could draw such a conclusion. A second corroborating opinion from a medical professional on capacity is priceless in this regard.
[92] *Calderaro, supra* note 65 is a cautionary tale where these steps were not taken and the solicitor was found liable for failing to assess the client's testamentary capacity.
[93] *Hall, supra* note 19 at para. 26; Canadian Estate Administration Guide (online), *Formalities, Validity, and Capacity* at ¶8162.

7. the existence of an improper relationship between the solicitor and the client (e.g., preparing a will for a relative); and
8. the failure to take steps to test for capacity.

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[94].

If the testator does not lack testamentary capacity and you have chosen to move forward with the retainer on will drafting, communicate this clearly. Insist on a simplified one-page retainer agreement, in a fill-in-the-blanks style, for the testator to sign[95].

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[96].

Attend at the client's bedside with two staff from your office to serve as witnesses[97]. Family and friends who are beneficiaries are ineligible to act as witnesses, and there may be hospital-specific policies that prevent medical staff from accepting requests to act as witnesses without prior approval.

Get the Client to Sign a Release of Information

The release should allow the lawyer to both secure medical and personal information from medical staff, and should also extend to financial information. This can help increase accuracy of the

[94] John E.S. Poyser, *supra* note 64 at 282.
[95] John E.S. Poyser, *supra* note 64 at 282.
[96] John E.S. Poyser, *supra* note 64 at 283.
[97] John E.S. Poyser, *supra* note 64 at 283.

lawyer's capacity assessment by allowing for corroboration of the testator's understanding of their financial affairs[98].

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[99].

Do not Take Instructions on the Will from Anyone Except the Testator Directly

Re Worrell[100] is a cautionary tale. In that case, the solicitor was found to be negligent when he took instructions from the family member of the testator who hired him. He took that person as a proxy for the testator, whom he interviewed instead of the testator. He did not read the draft will back to the testator, never met the testator, left a substantial portion of the estate to the proxy, and 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.

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 one who contacted you. This situation is a classic indicium of undue influence[101].

Act Quickly to Address Potential Suspicious Circumstances and Undue Influence

Given the faintest whiff of predatory behaviour, the lawyer should question the client to test 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". As such, the solicitor should always be on guard for foul play,

[98] John E.S. Poyser, *supra* note 64 at 283.
[99] John E.S. Poyser, *supra* note 64 at 284.
[100] *Worrell, Re*, [1970] 1 OR 184, 1969 CarswellOnt 248 (ON SC).
[101] C. Peisah et al, "Deathbed wills: assessing testamentary capacity in the dying patient" (2014) 26:2 Int Psychogeriatrics 209 at 212.

especially if the new will to be effected changes beneficiary entitlements as compared to the prior will or intestacy[102].

When proceeding, keep in mind the five factors a court may consider in determining whether there are suspicious circumstances[103]:

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; and
5. Whether a beneficiary was instrumental in the preparation of the will.

After the Meeting, Have Client Review Will Planning Instructions and Sign a Copy

If there is any reasonable prospect that the client may die over the short term, or may suffer from rapid deterioration while the will is being prepared, read back to and have the client sign a copy of their instructions, initialling each page and with two witnesses present.

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[104]. Do not simply hand the will off to a beneficiary or family member to have the testator execute.

The Silver Lining on Liability and Duty of Care

While maintaining the standard of care in a deathbed situation is difficult, there are two silver linings to be found in limitations to a lawyer's duty of care.

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[102] John E.S. Poyser, *supra* note 64 at 285.

[103] These five factors, originally set out in *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043 expands on *Vout v Hay, supra* note 24 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.

[104] John E.S. Poyser, *supra* note 64 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.

First, once a retainer is accepted, the lawyer owes a duty of care only to the testator (the client) and the potential beneficiaries of the will to be executed[105]. Solicitors do not owe a duty of care to beneficiaries under a prior will[106]. Those beneficiaries have access to remedies through challenging a later will such as on grounds of a lack of testamentary capacity[107]. Solicitors also do not owe a duty of care to disappointed beneficiaries absent a retainer agreement[108].

Secondly, 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[109]. In other words, "a solicitor is not liable to an unlimited class of individuals who might conceivably have received a gift from the testator"[110]. For there to be liability, three factors must coalesce[111]:

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; and
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.

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[105] 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.

[106] 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*"].

[107] However, it should be noted that Berger J.A. in *Bonnycastle*, *supra* note 106 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.

[108] The Court of Appeal panel in *Hall, supra* note 19 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 circumstance. If the solicitor determines a testator lacks capacity and refuses to draw the will, he can be sued by third party beneficiaries. If that solicitor drafts the will, they could be sued by personal representatives of the estate. The result is a no-win situation for unretained solicitors.

[109] *Bonnycastle, supra* note 106 at para. 29; this is exemplified in *Rose*, *supra* note 75 where both the testator and disappointed beneficiary wished for the latter to have a specific piece of land.

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

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

II.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"[112]. At some point, deathbed will situations are likely to be litigious. Therefore, the drafting solicitor's mindset and actions should be guided by the assumption that they will be a witness in litigation down the line. Practice defensively.

Document, Document, Document

If a retainer is rejected, keep detailed notes on when and how this was communicated to the client or potential client. Retain a copy of the e-mail or letter written to effect the rejection, and ask for acknowledgement of receipt on the same[113].

Notes should be contemporaneous, and as "fulsome and copious" as possible, with details on what questions were asked, what responses were given, and any of the lawyer's own observations regarding capacity and undue influence[114]. Manuscript style notes are best, recording each question and answer[115]. 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[116]. Relying on memory is not recommended. Neither is a one-page memo[117]. 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[118].

Case law is replete with cautionary tales where wills were overturned and solicitors were found liable in negligence due in part to inadequate documentation[119]. However, there are also many

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[112] Alexandra Mayeski, *supra* note 55 at 9.
[113] John E.S. Poyser, *supra* note 64 at 281.
[114] Alexandra Mayeski, *supra* note 55 at 9.
[115] Transcript style notes/recordings are best, recording each question and answer as posed. John E.S. Poyser, *supra* note 64 at 282.
[116] *Krolewski, supra* note 85 at para. 77.
[117] *Graham v. Graham, supra* note 103 at para. 19.
[118] *Scott, supra* note 55 at para 70.
[119] See for example, *Graham v. Graham, supra* note 103 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 65 is another example.

cases where adequate documentation helped defend the solicitor from liability, especially documentation regarding their lack of knowledge of the testator's dire circumstances[120].

Use Technology and Extra Hands

Nowadays, smartphones are ubiquitous. Having a second junior lawyer or articling student attend the deathbed with you to record the meeting can pay dividends. Judicial commentary in case law suggests that electronic recordings, when available, are appreciated by the court[121].

With the help of a smartphone stand, the junior lawyer can also perform an independent capacity assessment 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 has not been turned off by, for example, receiving a phone call. Video recordings should supplement and not replace notes and memos.

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 uploaded, including any prior notes on the client's file (if the client is not new).

The Silver Lining on Deficiency in Notes

There is hope that deficiency in the lawyer's documentation on a will challenge is not always fatal. In *Krolewski*, the testator and the lawyer were long time acquaintances and had a professional relationship of 18 years. The lawyer had a strong recollection of his meeting, was an experienced will-drafter of 40 years, and had performed all the right steps regarding a capacity assessment.[122]

However, at the end of the day, the court still indicated its preference for copious and detailed notes[123]. To date, this is the only case which outlines this type of exception. Being a 2020 case on

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[120] Examples include *Zahn v. Taubner*, 2012 ABQB 504 at para. 33, *McCullough, supra* note 50 at para. 60, and *Rosenberg, supra* note 78 at para. 24.
[121] John E.S. Poyser, *supra* note 64 at 286
[122] *Krolewski, supra* note 85 at para. 33.
[123] *Krolewski, supra* note 85 at para. 77.

a relatively rare legal issue, the case has not yet been cited. It is unclear as of yet if other courts would be as forgiving.

Part III – Conclusion

For near death decisions, it is important to keep in mind the distinctions between different types of transfers. Different tests, different shifting standards of capacity and types of undue influence will determine one's approach in assessing a client's unique set of circumstances. Best practices should be followed whenever possible.

When it comes to deathbed wills, the two most common reasons for a retainer are: (1) the testator doesn't have a will and is worried about benefitting some family members under the rules of intestacy, or (2) the testator wants to change their will to reflect their most recent wishes[124]. However, sometimes intestacy or distribution from the prior will is unavoidable, especially in cases of a loss of capacity.

When in doubt about whether it is too late, the safest thing to do 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"[125]. There will always be gray area cases, scenarios in a "borderland within which it is difficult to say whether a breach of duty has or has not been committed"[126]. By following the above tips and keeping up to date on best practices, as well as new developments in estate planning[127], solicitors can maximize their chances of "surviving" a deathbed retainer. Happy drafting!

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[124] 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).
[125] *Millican, supra* note 82 at para 8.
[126] *Millican, supra* note 82 at para 8.
[127] An interesting thought experiment illustrating the need to keep abreast of the legal developments is found in the April 2021 updates to the *SLRA, supra* note 42. 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 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 harm the surviving spouses of genuine deathbed marriages. Solicitors would now have limited time to draft a deathbed will right after the deathbed marriage. Failing to do so, if the testator passed away after the marriage but before the will, the new spouse would have a strong disappointed beneficiary claim.

Appendix A – Indicia of Undue Influence

1. Conflict in the client's family regarding the client's plans for financial disposition of assets;
2. The client has experienced recent bereavement[128];
3. The client appears hesitant or confused, or has cognitive difficulty regarding the intended transaction;
4. The client lacks detailed knowledge regarding the intended transaction;
5. The presence or involvement of a third party, especially where that third party may benefit from the intended transaction;
6. The client's situation makes them a likely target of elder abuse, for example, advanced age, living alone, dependence on and fear of the suspected influencer[129];
7. The transaction's nature would cause a large pre-death wealth transfer from the testator to the respondent, such that the client themselves may not have enough assets to live off of;
8. The client falls within demographics which increase the risk of undue influence, such as being female over 75 years old, having been recently widowed or divorced, living in geographically isolating areas or having just moved to a new location;
9. The client has had recent significant and/or unexplained emotional and behavioural changes;
10. Sudden changes in the client's spending habits. For example, the sudden shift from spending and living modestly to doing so lavishly[130];
11. The client's intended transactions are a significant departure from prior testamentary dispositions[131];
12. The client is unable to provide a reason or explanation for significant wealth transfers.

[128] A non-exhaustive list is provided in *Gironda, supra* note 23.
[129] These were amongst the factual circumstances in *Kozak Estate (Re)*, 2018 ABQB 185, which the Court noted in determining undue influence.
[130] ABA & APA, "A Handbook for Psychologists", *supra* note 8 at 115-116
[131] A number of these indicia of undue influence are also indicia of suspicious circumstances, as set out in *Royal Trust Corp. of Canada v. Saunders*, [2006] OJ No. 2291 (ON SC) at para. 78.

Appendix B – Indicia of a Deathbed Retainer

1. The client or family member discloses a 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 resurgence (e.g., cancer);
5. The testator's family is reaching out for a will drafting lawyer instead of the testator themselves, as they are 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 their required medications in order to stay functional for the will-drafting interview (e.g., abstaining from strong pain killers);
11. Medical personnel at the hospital suggest that the client's vital signs may affect their 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[132];
13. The client is so weak they cannot speak, cannot give instructions for someone to execute the will in their place, or cannot confirm that they can understand the provisions of the will;
14. The testator appears unaware of why the lawyer was called or suggests they didn't intend to call the lawyer (perhaps they intended to die intestate), when that lawyer was called by other family members supposedly on behalf of the testator;
15. Certain family members who will benefit from a new will try to position themselves as intermediaries between the lawyer and testator (citing health concerns of the testator);

[132] 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 78 at para. 14.

16. There are large *inter vivos* transfers of gifts alongside the five factors which courts will look at when looking at suspicious circumstances;
17. The ill testator depends heavily on certain family members; and
18. There are large without consideration transfers of property contemporaneous to the period where the testator's health is failing.

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