Update on Solicitors' Negligence Issues

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Overview

There are unique challenges faced by estates and trust practitioners when taking estate planning instructions. Estate planning is something that most folks are reticent to do in the first place – for many, it languishes on a list of "should do's" for some time before something – a pending divorce, a scheduled plane trip, a pregnancy – forces it to the surface. It can be a very personal and sensitive exercise, touching as it does on a testator's relationships, duties and obligations in the context of often complex family dynamics and troubled family histories.

The duty of a lawyer, according to the Supreme Court in *Central Guarantee v. Refuse*[1] is "to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken." To whom does the lawyer owe this duty? Estates law is complicated by the fact that while the testator is the only client, the very point of drafting a will is to benefit persons other than the testator. And, in most cases, an error will not be discovered until after the client's death. The first part of this paper will examine recent developments in the case law regarding a lawyer's duty to persons other than the lawyer's own client when drafting a will or power of attorney.

The requisite standard of care, according to *Refuse*, is variously referred to as "the reasonably competent solicitor", the "ordinary competent solicitor" and the "ordinary prudent solicitor". While a full review of the case law interpreting the standard of care is beyond the scope of this paper, the second part of this paper will review some of the most recent decisions which have considered whether a lawyer's actions met the requisite standard of care.

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Part 1 - Duty of Care: The Law Since *Graham v. Bonnycastle*

Intended Beneficiaries of Last Will versus Beneficiaries Named in a Previous Will

Since the Saskatchewan Court of Appeal's decision in *Earl v. Wilhelm ("Wilhelm")*[2], Canadian Courts have adopted the reasoning of the English courts in *Ross v. Caunters*[3] and *White v. Jones*[4] and have expanded the duty of care to disappointed beneficiaries. Disappointed beneficiaries are those who would have benefitted under a will but for the negligence of a solicitor. Since *Wilhelm*, a number of attempts have been made to extend the duty of care even further to include not only the beneficiaries named in the will that the solicitor was retained to draft, but also the beneficiaries under the testator's previous will. Beneficiaries under prior wills have argued that when a lawyer negligently drafts a new will in circumstances in which the lawyer should not have done so, the lawyer should be liable to the disappointed beneficiaries under the testator's previous will for any damages they suffer as a result.

To date, Canadian courts have declined to extend the duty of care to beneficiaries under a previous will. The pivotal case addressing whether to extend a duty of care to beneficiaries under a previous will is the Alberta Court of Appeal decision in *Graham v. Bonnycastle (*"*Bonnycastle*").[5] In *Bonnycastle*, the testator, Archie Graham, sought out the services of lawyer Heather Bonnycastle to discuss the preparation of a new will. Graham's accountant contacted Ms. Bonnycastle on August 16, 1994. To Ms. Bonnycastle's knowledge, Graham had been diagnosed with Alzheimer's Disease, dementia, a degenerative lung disease and Korzakoff's disease (an organic brain disorder).

On or about August 18, 1994, Graham's daughter, Linda, was appointed as his interim guardian and trustee pursuant to the *Dependent Adults Act*.[6] That same day, Graham married Elsie Fawkes.

Because of the information she had received suggesting that there were potential capacity issues, Bonnycastle arranged to meet Graham with another solicitor, Ms. Lein, to take will instructions. The meeting took place on August 23, 1994. Both Ms. Lein and Bonnycastle opined that Graham had the requisite capacity to make a will and proceeded to draft a new will based on his instructions. It was signed on August 26, 1994. Under Graham's prior will, his two

children, Linda and Gary, were named joint executors and equal beneficiaries of his estate. Under his new will, Graham left legacies of $30,000.00 each to Linda and Gary, $10,000.00 to each of his grandchildren, and the residue to his sister and his new bride, Ms. Fawkes.

On September 21, 1994, his children commenced an application challenging the validity of his marriage.

On September 30, 1994, Graham died. His children launched proceedings to challenge the validity of the August 26, 1994 will. Both proceedings (the application challenging the marriage and the will challenge) were settled, with the result that the issues of testamentary capacity and capacity to marry were never adjudicated.

The children then commenced a negligence action against Bonnycastle and Lein, claiming in damages the difference between what they would have received under the previous will and what they actually received under the settlement agreement, plus their own legal fees and the fees charged to the estate as a result of the will challenge litigation.

The solicitors brought a proceeding under the summary trial procedure to dismiss the children's claim on the basis that they owed no duty of care to the beneficiaries of Graham's previous will. The Chambers judge agreed with the solicitors and dismissed the claim. On appeal, the Alberta Court of Appeal upheld the dismissal of the claim and agreed that a solicitor owes no duty of care to beneficiaries under a previous will. Berger, J.A. concurred in the result, but delivered thoughtful dissenting reasons as to why he would have left the door open to the possibility of claims against solicitors by beneficiaries under a previous will.

The majority decision analyzed the early British cases *of Ross v. Caunters* and *White v. Jones*. Writing for the majority, McFayden, J.A. observed that the two decisions were based on different rationales for extending the duty of care to disappointed beneficiaries. The *Ross* decision was founded on close proximity between the parties and the resultant foreseeability of harm to a beneficiary under a previous will.

By contrast, the Court of Appeal observed, the House of Lords in *White v. Jones* rejected the "ordinary principles of the tort of negligence" approach taken by the court in *Ross*. Instead, the House of Lords crafted a remedy on the basis that "the only person who may have a valid claim

has suffered no loss and the only person who has suffered a loss has no claim". The Court in *White v. Jones* therefore extended a lawyer's duty of care to disappointed beneficiaries in order to remedy a gap in the law.

The majority in *Bonnycastle* held:

> As found by the chambers judge, there is no need to extend the solicitor's duty of care to include the beneficiaries under the Original Will. Those beneficiaries have a right to challenge the New Will on the ground of lack of testamentary capacity. If the testator had testamentary capacity at the time of the New Will, the testator was entitled to do what he did and no loss is caused by any negligence of the solicitor. If the testator did not have testamentary capacity, the New Will is not admitted to probate and, in the absence of other objections, the Original Will takes effect. Costs properly incurred to challenge probate of the New Will should be paid for by the estate. If the estate thereby suffers a loss, it has its own remedy against the negligent solicitor. Here, the beneficiaries commenced such an action, but chose to settle the matter rather than having the issue decided. That was their choice.[7]

Further, the Court of Appeal found, there are strong policy reasons not to extend the duty of care to beneficiaries under a previous will. To do so, the Court reasoned, would create "inevitable conflicts of interests"[8] because the solicitor would owe a duty to the testator to follow the testator's instructions and, at the same time, have a duty to beneficiaries to under a previous will. Since the testator in all likelihood wishes to make changes to the scheme of distribution, the interests of the beneficiaries of the previous will are likely to be affected by the drafting of a new will.[9] Citing *White v. Jones*, the majority emphasized that a solicitor could never owe an intended beneficiary a duty which is inconsistent with his duty to his client.[10]

In any event, pointed out the majority, even if the solicitors owed a duty to Graham's children as beneficiaries under the previous will, the previous will had been revoked Graham's marriage.

Berger, J.A. wrote a separate decision in which he concurred with the result, but found that he could not endorse the proposition that in no circumstances can a wills solicitor owe a duty of care to a former beneficiary.[11]

Berger, J.A. noted that for the purpose of the summary trial, the court was required to assume that all of the allegations of negligence were made out, including the allegation that the deceased lacked testamentary capacity. He therefore found that the trial judge was acting

without jurisdiction in concluding that the deceased had the testamentary capacity to provide instructions.

He reasoned that there are two traditional methods by which the courts have imposed a duty of care on a solicitor to an intended beneficiary. One was to impose a duty using the principles set out in *Hedley Byrne & Co. v. Heller & Partner ltd*[12], and the other is to apply the principle from *McAlister (Dononghue) v. Stevenson*. Negligence of a solicitor resulting in damage to an intended beneficiary does not neatly fit within either principle. That is why, Berger, J.A. reasoned, the House of Lords in *White v. Jones* strove to achieve practical justice by filling a lacuna in the law which existed in such circumstances. He went on:

> Accordingly, the relevant inquiry is whether there are any circumstances under which a beneficiary under a previous will may bring a claim in negligence or otherwise against the solicitor who prepared the subsequent will. Absent a "lacuna", no remedy will be found to exist. My colleague says that in the instant case there is no such remedial vacuum. I agree. But it is quite another matter to say that under no circumstances can a remedy exist to fill the void. With respect, that position goes too far.[13]

Addressing the conflict of interest issue, Berger, J.A. disagreed with the majority that the interests of a testator and beneficiaries under the testator's former will would "inevitably" conflict. In Berger, J.A.'s view, the testator's interests are best served by ensuring that only his or her *capable* instructions are carried out. In other words, an incapable client's interests may actually be served by NOT accepting his or her incapable instructions. If the client is incapable or subject to undue influence, the client's interests would be aligned with those of the beneficiaries under the prior will and in conflict with the interests of proposed beneficiaries of a proposed new will.

A number of decisions have followed *Bonnycastle* and refused to impose a duty of care to beneficiaries under a previous will.

In *Haljan v. Mercer*[14], Master Breitkreuz reviewed the Court of Appeal's reasons in *Bonnycastle* and struck a statement claim on the basis that it did not disclose a cause of action recognized in law. Master Breitkreuz succinctly summarized the case law regarding disappointed beneficiaries and concluded that the court may grant a remedy to a disappointed beneficiary where the interests of the testator and the disappointed beneficiary are in harmony and there is

no possibility of conflict. While it is not clear from the decision what allegations of negligence were alleged against the solicitor, the master found that it would be a drastic change to require solicitors to canvas the possibility that previously designated beneficiaries or executors might not be in agreement with the proposed changes in the new will. To do so, the master found, would confuse the law of wills with the law of contracts. This does not seem to be a controversial proposition.

In *Harrison v. Fallis ("Harrison")*[15], the Ontario Superior Court of Justice had the opportunity to consider the issue of a solicitor's duty, if any, to beneficiaries under a previous will. In *Harrison*, Eberhard, J. granted a motion to strike a negligence claim for disclosing no cause of action on the basis that the solicitor did not owe a duty of care to beneficiaries under a previous will.

The defendant solicitor had drafted a will in 2003. The will was challenged, and the solicitor who drafted the will also represented the proponent of the will on the will challenge. The 2003 will ultimately failed as a result of the "capitulation" of the will proponent in litigation over the testator's capacity.[16] The parties reached a settlement by which the 2003 will was set aside and the plaintiffs took their share under the prior will executed in 1994. There was a hearing on the issue of costs with the result that the 2003 will proponent was ordered to pay the challenger's costs. However, the costs judge declined to order costs on a substantial indemnity basis due to excess on all sides. Eberhard, J. also noted that the judge at the costs hearing was not asked to order costs against the solicitor who had drafted the will, even though the lawyer had participated in the will challenge litigation.

The will challengers then sued the solicitor who drafted the 2003 will to recover the costs not covered by the costs order, the costs of administration during litigation, damages for delay and punitive damages. The Court found that the portion of the claim seeking reimbursement of legal costs improperly sought to re-litigate the costs determination already made.

What comes through in the *Harrison* reasons is a judicial impatience with lawsuits which appear to be a "second kick at the can" after the loss or settlement of a first action. Eberhard, J. observed:

> Of late, it has seemed to be a growing trend, particularly in disputes involving issues of personal bitterness, that the end of a claim by settlement or decision

> does not end the litigation. Where there is error, correction by appeal is proper and necessary but revival by focus on some additional aspect or complaint of slights and strategies by opponent or opposing counsel must be firmly discouraged. Not only must the court protect its scarce resource but it is no kindness to permit disgruntled litigants who obsessively persist in the expensive pursuit of a finding already denied, often joining an ever-widening circle of Defendants by whom they feel wronged because their view of the dispute has been rejected.[17]

The Court went on to consider the applicability of *Bonnycastle* and concluded that although it was not binding authority, it was persuasive and its authority was strengthened by the fact that leave to appeal to the Supreme Court of Canada was refused. Eberhard, J. relied on the reasoning of the majority in *Bonnycastle* to conclude that a solicitor owes no duty of care to disappointed beneficiaries under a former will.

To extend a duty of care to beneficiaries under previous wills, the Court found, would be to extend a duty of care to a group "without sensible limitation."[18] Eberhard, J. reasoned that while the 'disappointed beneficiary exception' extended to a group defined by the testator's intention, the 'former beneficiary group' "may include any number of prior wills and long forgotten loyalties."[19] One might counter this by arguing that the former beneficiary group *could* also be sensibly limited to only those beneficiaries named in the deceased's will immediately preceding the negligently drafted one. There would be no need to go back any further because the immediately preceding will would generally operate to revoke all previous wills, either expressly or by implication.

Eberhard, J. also expressed the concern that "former wills might include any number of beneficiaries about whom the solicitor would have no knowledge or reason to question."[20] However, it could be argued that a prudent solicitor would likely know the identity of beneficiaries under a prior will. It would not be uncommon for a prudent drafting solicitor to ask about the testator's previous will and/or review a copy of it in order to ask probing questions about any dramatic departures from the previous will.

The claim in *Harrison* was struck on the basis that it disclosed no reasonable cause of action because there was no duty of care between drafting lawyer and beneficiaries of the testator's prior will. Eberhard, J. found that there was no reason to impose a duty of care because there was no lacuna left in the law. She reasoned that if a lawyer drafting a new will is negligent and

by that reason, the will fails, the beneficiaries of a former will have lost nothing as they will inherit under the former will. The *estate* (as opposed to the estate beneficiaries) could sustain a claim against the solicitor for costs paid by the estate to set aside a will produced by a solicitor's negligence.

Summary – Duty of Care to Disappointed Beneficiaries Under a Prior Will

To date, our courts have not extended the duty of care owed by lawyers to beneficiaries under a previous will. This does not mean, however, that a lawyer who negligently drafts a will cannot be liable for damages caused by his negligence (typically consisting of the legal costs of the will challenge litigation and/or increased costs of administration). The rationale for dismissing negligence actions by beneficiaries named in prior wills is that the *estate* can sustain a negligence action against the lawyer. There is therefore no need, the reasoning goes, to extend the duty of care to beneficiaries under a former will.

It appears, however, that a beneficiary under a prior will who succeeds on a will challenge, would have no avenue to recover the difference, if any, between costs recovered out of the estate and his or her actual legal costs.

No Duty of Care Owed to An Attorney Named in a Power of Attorney

Most recently, in *Barbulov v. Huston ("Barbulov")*[21], the Ontario Superior Court of Justice determined that a lawyer does not owe a duty of care to an attorney named in a power of attorney. Rather, the lawyer's duty is to the donor only.

In *Barbulov* the plaintiff alleged that even though his father wished to leave all medical decision making solely to the discretion of his attorneys for personal care, the lawyer improperly drafted a document containing some of the typical directions to withdraw specific forms of artificial life supports in circumstances where such interventions served primarily to prolong death. The document named the plaintiff and the plaintiff's mother as co-attorneys for personal care.

Unfortunately, thirteen years after the power of attorney was signed, the donor father suffered brain damage due to lack of oxygen to the brain. Doctors opined that there was no medical cure for the loss of cognitive function which had been suffered by the father, and asked the

plaintiff about whether there was a power of attorney for personal care. The plaintiff said that he then realized for the first time that the power of attorney signed by his father did not actually reflect his father's wishes. Fearing that the doctors would rely on it to terminate life support, he told the doctors that there was no power of attorney.

The doctors brought an application under the *Health Care Consent Act, 1996* to determine the father's best interests, and proposed a plan of treatment. At the outset of the hearing, the plaintiff produced the power of attorney. Based on the directions contained in the power of attorney, the doctors proposed a revised treatment plan. The revised treatment plan was approved by the Consent and Capacity Board ("Board") on the basis that the power of attorney reflected the father's prior expressed wishes.

The son appealed the decision of the Board to the Superior Court of Justice.[22] One of his grounds of appeal was that the Board erred in concluding that the power of attorney reflected his father's wishes. The son argued that his father had only a very basic understanding of written English such that he could not have read and understood the directives contained in the power of attorney document. The son testified that the contents of the power of attorney were not translated or explained to his father and that the drafting lawyer explained only that the son and the mother would have the authority to decide what was in the father's best interests. Given these facts, Brown, J. agreed that there was insufficient evidence to ground the Board's conclusion that the contents of the power of attorney reflected the father's prior expressed wishes. The Court nevertheless upheld the Board's finding that the son was not making decisions in accordance with his father's best interests.

The son then sued his father's lawyer for his legal costs to appeal the Board decision. He claimed that the lawyer had negligently drafted a document that did not reflect his father's wishes. As plaintiff, he brought a motion for summary judgment. The lawyer responded with a request that the action be dismissed.

As a threshold issue, Newbould, J. considered whether a lawyer owes a duty of care to the attorney named in a power of attorney document drafted by the lawyer. Because there was apparently no case in Canada or the UK dealing with the issue of a solicitor's duty of care to an

attorney named in a power of attorney drafted by the solicitor, he applied the test in *Anns v. Merton London Borough Council*[23] to determine whether such a duty should be imposed.

With reference to the guidance provided by the Supreme Court of Canada's decision in *Cooper v. Hobart*[24] regarding the recognition of novel duties of care, Newbould, J. first considered whether any analogous categories of proximity had already been identified. He examined the cases in which Courts had held solicitors for one party liable to another party who is not the solicitor's client and found that they were not analogous to the current case because the lawyer in *Barbulov* had not undertaken to do anything in the interests of the attorney/son. Newbould, J. went on to examine those cases where solicitors had been found liable to a named beneficiary in a will in circumstances where the solicitor's negligence caused the beneficiary's gift to fail. He concluded that these cases were also not analogous because while a named beneficiary would be known to the solicitor as someone who was to receive a benefit, "there is no benefit or interest accorded to an attorney in a power of attorney."[25]

Considering whether the duty of care should be extended to a situation not previously recognized, the Court found that there was not sufficient proximity to impose a duty of care. Newbould, J. reasoned that on the facts in *Barbulov,* the lawyer had not undertaken to act in the attorney's interests; rather, he was concerned solely with the interests of the father. As such, the lawyer could not have expected that he was being looked to by the son to look after the son's interests. Furthermore, there is a very real possibility that the interests of donor and attorney could conflict. This is a further reason why it could not be expected that the solicitor would owe a duty to the named attorney. Moreover, the Court concluded that there is no lacuna or gap to be filled in the law as it currently stands because an attorney is normally entitled to be indemnified for all acts reasonably taken in the course of the attorney's duties. As such:

> The estate or the person on whose behalf an executor or attorney acted would normally have a negligence action against the negligent solicitor for expenses incurred by the executor or attorney caused by the negligence of the solicitor. In these circumstances, there would be no need to create a separate duty of care on the part of the solicitor to the executor or attorney to protect them against expenses properly incurred by them.[26]

In case one is left wondering whether the result would have been different if the son had commenced the negligence action on behalf of his father (to whom the lawyer clearly did owe a duty of care), rather than in his own capacity as attorney, Justice Newbould also found that on

the record before him (conflicting affidavit evidence from two individuals who each claimed to remember events that were 15 years old), the son had not made out a case of negligence against the lawyer.

Part 2: Recent Decisions Interpreting the Standard of Care

The Latest Word on How Quickly a Solicitor Must Prepare a Will

The recent decision in *McCullough v. Riffert ("McCullough")*[27] provides some assurance to wills and estates practitioners that they will not be held to a standard of perfection in the unfortunate circumstance where a client for whom they have been retained to prepare a will dies before the will is executed.

In *McCullough*, a disappointed beneficiary sued a solicitor when her uncle died 10 days after meeting with the lawyer without having executed his will. The solicitor met with the client on February 11, 2008. The lawyer noticed that the deceased appeared older and thinner than when she had last seen him (she had a general practice and had been engaged to do other work for him in the past). The lawyer's notes indicated that she asked whether he had been seeing a doctor and he answered, 'no'. Her notes also indicated that he explained his weight loss by reference to the fact that he was no longer working and did not feel like eating. The lawyer also made a note that he was planning a trip to Texas with his niece and that the will should be completed before the Texas trip (apparently planned for April). The client otherwise expressed no urgency about having the will completed. The lawyer had no knowledge of a terminal illness. At the conclusion of the meeting, the client was to give some thought to an alternate executor and get back to the lawyer.

The lawyer prepared a draft will within three days and sent it to the client for review by mail on February 14, 2008. The lawyer then diarized a deadline to execute the will (approximately 2 ½ weeks from the date of the initial meeting with the client). Neither the niece (the intended beneficiary who had arranged and attended the appointment with the lawyer) nor the client called the lawyer to try to arrange for execution. Nor did the client get back to the lawyer with respect to the outstanding issue of an alternate estate trustee.

In these circumstances, the Court found that the solicitor met the standard of care. The Court recognized that to hold a lawyer to a 'best practices' standard would be too high:

> While best practices may have indicated that the lawyer should have prepared a Will on the day of the visit or instructed on a holograph Will there are many more factors indicating such a standard would impose too high a burden on a careful and competent lawyer[28]

How long is too long to prepare a will? The decision in *McCullough* confirms that the answer is, "it depends". The surrounding circumstances will dictate what steps should be taken in the circumstances. It may be that in some circumstances (where doctors have advised that death is imminent, and the lawyer is summoned to the hospital bed), anything short of drafting a will on the spot or instructing on a holograph will would be negligent. In *McCullough*, the Court confirmed that:

> there is a continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly increase as factors mount.[29]

The Latest on the Lawyer's Duty to Ascertain Capacity and Independence

Since the Ontario Court of Appeal's important decision in *Hall v. Bennett Estate*[30], the law has been clear that a lawyer's duty is to take appropriate steps to ascertain testamentary capacity and to decline a retainer to prepare a will if the client lacks testamentary capacity.[31] In a recent decision by the Nova Scotia Supreme Court, *Kerfront v. Fraser ("Kerfront")*[32], the Court considered the procedures employed by a lawyer who drafted a will for a woman who was dying in hospital. In particular, the Court examined the steps taken by the lawyer to satisfy himself that the testator was capable and not subject to undue influence by her intended beneficiaries, who had provided the lawyer with will instructions on the testator's behalf.

In *Kerfront*, the testator had a modest estate which consisted primarily of some property. She had three natural children, one adopted child and two grandchildren whom she raised as her own children. She had a particularly close relationship with her two grandchildren, who had cared for her as she aged. When she was hospitalized for the last time, her doctor advised her two grandchildren that she should get her affairs in order.

The testator instructed her grandchildren to have a lawyer prepare deeds transferring lots on her real property to her grandchildren and great-granddaughter. The grandchildren contacted a lawyer, who prepared the deeds on the instructions of the grandchildren and suggested a simple will to deal with the balance of the testator's modest estate. The lawyer telephoned the testator's doctor and confirmed by telephone the doctor's opinion that she was mentally fit and capable of understanding legal documents. The lawyer then attended at the hospital with the documents he had prepared, and arranged to meet with the testator alone. Without showing her the documents he had prepared, he asked her about her testamentary intentions. Confident that her instructions conformed to the documents he had drafted, he had her execute the documents in accordance with the provisions of the *Wills Act*[33]

The next day, the testator died. Two of her children challenged the deeds and will alleging undue influence and lack of testamentary capacity. Reviewing the actions of the lawyer who drafted the documents, the Court found that the lawyer had satisfied himself of testamentary capacity first by speaking with the doctor and then by asking questions of his client. He then confirmed her independence by meeting with her privately and, before revealing the documents he had drafted, confirming her wishes. In so doing, the Court concluded that "his procedures did not fall below the standards of practice one would expect of a lawyer engaged to follow the instructions of a dying woman."[34]

In *Randall v. Hare ("Randall")*[35], the Court declined to admit a will to probate because the testator lacked testamentary capacity. The decision also reviewed the actions of the solicitor, who, despite obvious red flags, took virtually no steps to satisfy himself of the testator's capacity in circumstances which cried out for further inquiry.

In May 2003, the testator, Mr. Burns, first met with his lawyer. Curiously, in the initial meeting, Mr. Burns refused to discuss the particulars of his estate with his lawyer. When the lawyer met with his client again, Mr. Burns simply uttered two names. The lawyer assumed that these were the individuals Mr. Burns wanted in his will and proceeded to draft a will based on this assumption. The lawyer made no inquiries about his client's assets, family relations, or medical conditions.

In *Randall*, the Court found that a lawyer's duties will vary with the situation and condition of the testator:

> When a person is greatly enfeebled by old age or presents with faculties impaired by disease and more importantly where he is enfeebled by both, the solicitor cannot discharge his duty by simply taking instructions and giving legal expression to the words of the client. He has to be satisfied by all available means that the testator is competent and is disposing of his estate on his own initiative and volition. The solicitor's purpose is to ascertain the mind and will of the testator as to his knowledge, his approval of its contents, ensuring that it represents the intelligent act of a free and competent person.[36]

In other words, while advisable to utilize some standard procedures and checklists, a lawyer should not use a one-size-fits-all approach to estate planning and will drafting. Rather, the approach taken must be customized to meet the needs of the particular client. When engaged to prepare a will for a sophisticated client with no obvious health concerns, a lawyer's duties will be quite different than when engaged to assist a frail client who presents as confused and/or very sick.

The recent British case of *Thorpe v. Fellowes Solicitors LLP ("Thorpe")*[37] confirms that although the lawyer remains obligated to take steps to ascertain testamentary capacity, this does not mean that it is necessary to obtain medical evidence to substantiate the capacity of an elderly client unless such inquiry is warranted by the circumstances.

In *Thorpe*, Mrs. Hill, 78, retained Fellowes Solicitors to assist her with the private sale of her home. The lawyer met with Mrs. Hill alone and confirmed that she wished to sell her own house and move in with her daughter. Mrs. Hill asked that the sale proceeds from her own home be remitted to her daughter. The plan was for the daughter to use the proceeds towards the purchase of a new home where Mrs. Hill planned to reside with her daughter. The sale did not initially go through as scheduled and the circumstances later changed somewhat, but in each instance, it appeared that the lawyer confirmed instructions directly with Mrs. Hill.

The Court held that the standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession.[38]

Mrs. Hill's son sued the solicitor on behalf of his mother and alleged that the solicitor should have:

- known that Mrs. Hill suffered from dementia
- appreciated that Mrs. Hill was vulnerable and that her daughter exerted considerable influence over her
- advised Mrs. Hill that the sale was price was too low, and
- recognized that remitting the proceeds from the sale of Mrs. Hill's home to the daughter was highly suspicious (on this point, the Court found that the son's true motives for bringing the litigation – his personal disappointment that the sale proceeds went to his sister instead of being shared with him - were unfortunate and transparent[39]).

It was agreed that Mrs. Hill suffered from a progressive form of dementia throughout 2003. However, that did not mean that Mrs. Hill lacked capacity to instruct her lawyers on the sale of her home. Medical expert evidence confirmed that dementia is not an all or nothing condition. The Court confirmed that a lawyer need only make inquiries as to a person's capacity to contract if there are circumstances that would raise a doubt as to capacity in the mind of a reasonably competent practitioner.[40] The Court went on to confirm that a lawyer is not required to gather medical evidence in order to substantiate a client's capacity:

> I should add (since at least part of the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in generally to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary.[41]

Since the medical evidence demonstrated that the lawyer would not have been able to tell that Mrs. Hill had dementia, and since the claim disclosed no damages suffered by the mother, the claim was dismissed.

The Latest Word on Defensive Practices

In a recent decision of the Ontario Superior Court of Justice, *Hall v. Watson ("Hall")*[42], the Court commented on how important it is for lawyers to protect themselves by confirming instructions in writing and taking and keeping detailed contemporaneous notes. Mr. Watson, a lawyer, was retained by Ms. Hall. He drafted the necessary documents to effect a transfer of her residential property to the St. Joseph's Villa Foundation, subject to a prior life interest to her husband and a reservation of her own life interest in the property. Ms. Hall later complained that she did not

understand what she had signed, and that Mr. Watson failed to explain it to her. She testified that she intended only to make a testamentary gift of her property to the Villa and that she had instructed Mr. Watson as such.

In the end, Ms. Hall was not found to be a credible witness and her evidence was rejected by the Court. By contrast, the Court found Mr. Watson to be a conscientious and competent solicitor. The following observations are made at paragraphs 26 to 28:

> The only fault I find with Mr. Watson's conduct in this case, if indeed it is a fault, is that he did not protect himself during his dealings with Ms. Hall against her subsequent change of mind…
>
> It is clear (by hindsight) that Mr. Watson ought to have insisted that Ms. Hall sign written instructions to him…..
>
> The lesson however, for practicing lawyers is that they must always be prepared to defend their competence and integrity with contemporaneous documentation, including personally written memoranda, signed acknowledgements and instructions and directions from their client.[43]

Conclusion

A lawyer's duty is to his or her own client. However, in recognition of the lacuna left in the law when a lawyer's negligence deprives a beneficiary of the gift (s)he was to receive, Courts have recognized an exception to this rule by extending the duty of care to disappointed beneficiaries. By narrowly confining the 'disappointed beneficiary' exception, the Courts have, at the same time, provided predictability to lawyers by constraining the group to whom they owe a duty to only those named in the will the lawyer was retained to draft.

The case law interpreting the standard of care suggests that each situation will turn on its unique facts and that the lawyer's duty will be informed by the context. Recent cases suggest that the law is flexible enough to recognize that what is required of a reasonably competent lawyer will depend on a number of circumstances – the size and complexity of the estate, the health, age and capabilities of the testator, and the relative urgency of the situation. A will drafter must adjust his or her procedures to adapt to the unique circumstances of the testator – whether sophisticated or not, English-speaking or not, mentally fit or compromised in some way,

the picture of health or on death's door. What is required will depend on all of these factors and a good estates practitioner will adapt to what the situation requires.

[1] Central Guaranty v. Rafuse, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.) at 523 ("Rafuse")
[2] Earl v. Wilhelm, 183 D.L.R. (4th) 45, [2000] 4 W.W.R. 363, 189 Sask. R. 71, 216 W.A.C. 71, 31 E.T.R. (2d) 193 ("Wilhelm")
[3] Ross v. Caunters (1979), [1980] 1 Ch. 297, [1979] 3 All E.R. 580, [1979] 3 W.L.R. 605 (Eng. Ch. Div)
[4] White v. Jones, [1995] 1 All E.R. 691 (U.K. H.L.)
[5] Graham v. Bonnycastle (2004), 10 E.T.R. (3d) 167, 50 C.P.C. (5th) 233, 243 D.L.R. (4th) 617 (Alta. C.A.), leave to appeal to SCC refused (April 14, 2005), Doc. 30626, 2005 CarswellAlta 493, 2005 CarwellAlta 494 (S.C.C.) ("Bonnycastle")
[6] R.S.A. 1980, c. D-32 [now R.S.A. 2000, c. D-11]
[7] Bonnycastle, supra note 5, at paragraph 27
[8] *Ibid*. at paragraph 29
[9] *Ibid*. at paragraph 29
[10] *Ibid*. at paragraph 29
[11] *Ibid*. at paragraph 35
[12] Hedley Byrne Partners Ltd. , [1963] 2 All E.R. 575 (U.K. H.L.) ("Hedley Byrne")
[13] Bonnycastle, supra note 5 at paragraph 53
[14] Hajlan v. Mercer (2004), 2004 ABQB 670, 11 E.T.R. (3d) 172, 1 C.P.C. (6th) 132 (Alta Master)
[15] Harrison v. Fallis 2006 CarswellOnt 3545 ("Harrison")
[16] *Ibid*., at paragraph 3
[17] *Ibid*., at paragraph 13
[18] *Ibid*., at paragraph 19
[19] *Ibid*., at paragraph 19
[20] Ibid., at paragraph 24
[21] Barbulov v. Huston (2010), 319 D.L.R. (4th) 543, 57 E.T.R. (3d) 134, 75 C.C.L.T. (3d) 285 (Ont. S.C.J.) ("Barbulov")
[22] Barbulov v. Cirone (2009), 2009 CarswellONt. 1877 (Ont. S.C.J.)
[23] The test being:

(i) Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person,? If so,
(ii) Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise

[24] Cooper v. Hobart, [2001] 3 S.C.R. 537 (S.C.C.) ("Cooper")
[25] Barbulov, supra note 21 at paragraph 17.
[26] Barbulov, supra note 21 at paragraph 22.
[27] 76 C.C.L.T. (3d) 71, 59 E.T.R. (3d) 235 ("McCullough")
[28] *Ibid*. at paragraph 57.
[29] *Ibid*. at paragraph 62
[30] Hall v. Bennett Estate (2003), 15 C.C.L.T. (3d) 315, 171 O.A.C. 182, 64 O.R. (3d) 191, 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72 (Ont. C.A.) ("Hall")
[31] *Ibid*., at paragraph 58
[32] Kerfront v. Fraser (2010), 61 E.T.R. (3d) 309 (N.S.S.C.) 2010 NSSC 293 ("Kerfront")
[33] R.S.N.S. 1989, c. 505
[34] *Kerfront*, supra note 32 at paragraph 51

[35] Randall v. Hare, 2010 NBQB 85, 919 APR 263, 356 NBR (2d) 263 (N.B.Q.B.) ("Randall")
[36] *Ibid*., at paragraph 125.
[37] Rudyard Kipling Thorpe (as Litigation Friend to Mrs. Leonie Leanthie Hill) v. Fellowes Solicitors LLP, [2011] EWHC 61 (Queen's Bench) ("Thorpe")
[38] *Ibid*, at paragraph 76
[39] *Ibid*., at paragraph 114
[40] *Ibid*., at paragraph 75
[41] *Ibid*., at paragraph 77
[42] Hall v. Watson Canlii 64807 (ON SC)(Ont. S.C.J.) ("Watson")
[43] *Ibid*., at paragraph 26 through 28.