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Medical Assistance in Dying and Mental Illness: A Cautionary Tale

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Introduction

Throughout most of Canada's history, Medical Assistance in Dying ("**MAiD**") – more commonly known as euthanasia or physician-assisted death in other countries – was criminally prohibited. This changed in June 2016 when the Canadian federal government passed Bill C-14, which amended the *Criminal Code* to make physician-assisted death (i.e., MAiD) legal in certain circumstances. Since 2016, the number of Canadians who choose to die by MAiD has gradually increased. In 2023, 15,343 Canadians received MAiD (i.e., 4.7% of all deaths in Canada in 2023, representing a 15.8% increase from 2022).[1] One recent study suggests that MAiD deaths in Canada may increase to upwards of 10.5% of all deaths per year.[2]

Given MAiD's growing prevalence in Canda, it is important for estate lawyers to understand how MAiD impacts their practice. While estate lawyers should not expect to play a direct role in a client's decision to seek MAiD (determining MAiD eligibility is the responsibility of qualified medical professionals), lawyers may be asked to draft a will for a client who is considering or has already elected to receive MAiD. Longstanding clients may also seek out the advice of a trusted advisor. Clients or prospective clients who are seeking MAiD are likely suffering from grievous and irremediable medical conditions and may therefore be highly vulnerable. For this reason, lawyers should be vigilant and take extra precautions when agreeing to act for a client seeking MAiD.

This paper is geared towards providing estate lawyers with some general guidance for navigating retainers with clients seeking MAiD. The paper is divided into four sections. The first section provides a brief history of MAiD in Canada. The second section explains the Canadian federal government's reasons for delaying MAiD eligibility to those whose sole underlying medical condition is a mental illness or mental disorder. The third section sets out the current

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[1] Health Canada, "Fifth Annual Report on Medical Assistance in Dying in Canada, 2023."
[2] Adrian C. Bryam & Peter B. Riner, "Disparities in public awareness, practitioner availability, and institutional support contribute to differential rates of MAiD utilization: a natural experiment comparing California and Canada."

MAiD framework in Canada. The fourth section consists of practical tips to keep in mind when considering a retainer to draft a will for a client seeking MAiD.

1 – A Brief History of Medical Assistance in Dying in Canada

MAiD was, throughout most of Canada's history, criminally prohibited. In the 1993 case, *Rodriguez v British Columbia (Attorney General)*, the Supreme Court of Canada ("**SCC**") considered the constitutionality of this criminal prohibition. In a divisive 5-4 split decision, the SCC upheld the longstanding criminal prohibition against physician-assisted death. Writing for the majority of judges, Justice Sopinka noted that the criminal prohibition against physician-assisted death reflected both "the policy of the state that human life should not be depreciated by allowing life to be taken" and Canadian society's "fundamental conception of the sanctity of human life."[3]

The tides shifted over the course of the next two decades. In the 2015 case, *Carter v Canada (Attorney General)*, the SCC unanimously struck down the blanket criminal prohibition against physician-assisted death. The SCC found that by denying an individual suffering from a grievous and irremediable medication condition the right to request a physician's assistance in dying, the criminal prohibition against physician-assisted death unjustifiably infringed Section 7 (the right to life, liberty and security of the person) of the *Charter of Rights and Freedoms* (the "***Charter***"). The SCC emphasized that how an individual chooses to respond to a grievous and irremediable medical condition is a matter critical to their dignity, autonomy, and liberty to make decisions concerning their bodily integrity and medical care.[4]

On June 17, 2016, eighteen months after *Carter*, Canada's federal government passed Bill C-14.[5] Bill C-14 amended the Criminal Code to allow for MAiD under certain circumstances. In particular, the individual requesting MAiD was required to have a grievous and irremediable medical condition such that their natural death was reasonably foreseeable. Bill C-14 also called for an independent review of issues relating to, among other things, MAiD requests where mental illness is the sole underlying medical condition. However, Bill C-14 did not otherwise include a provision allowing for MAiD solely on the basis of a mental illness.

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[3] *Rodriguez v British Columbia (Attorney General)*, 1993 CarswellBC 228, at para. 34.
[4] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para. 66.
[5] An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), SC 2016, c 3 ("**Bill C-14**").

The MAiD eligibility requirement that the individual's natural death be "reasonably foreseeable" was challenged and ultimately declared to be unconstitutional by the Superior Court of Québec in its 2019 decision, *Truchon c. Procureur général du Canada*.[6] The Superior Court of Québec gave the government until March 11, 2020 to develop new assisted dying legislation. While *Truchon* was not appealed by the Québec or federal governments, the federal government requested and received extensions to the original March 11, 2020 deadline, and eventually passed Bill C-7 on March 17, 2021.[7]

Bill C-7 amended the Criminal Code by, among other things, removing the MAiD eligibility requirement that the applicant's natural death be reasonably foreseeable. In its place, a 'two-track' approach to MAiD was established (as discussed below, this is the current MAiD framework). For MAiD eligible persons whose natural death is reasonably foreseeable, existing safeguards were maintained or eased ('Track 1'). For MAiD eligible persons whose natural death is not reasonably foreseeable, modified safeguards were introduced ('Track 2'). Notably, Bill C-7 introduced a mechanism for the waiver of final consent for MAiD eligible persons under Track 1 (but not Track 2) who are at risk of losing capacity to consent to MAiD before it can be provided.

Bill C-7 also implemented a temporary two-year exclusion of MAiD for those whose sole underlying medical condition is a mental disorder. This temporary exclusion was implemented to give the federal government additional time to study how MAiD can be safely provided to those suffering from mental illness.

On March 9, 2023, the federal government passed Bill C-39, which extended the temporary exclusion of MAiD for those whose sole underlying medical condition is a mental disorder by another year.[8] Then, on February 29, 2024, the federal government passed Bill C-62, which further extended the temporary exclusion by another three years.[9] As of today, persons whose sole underlying medical condition is a mental disorder will not be eligible for MAiD until March 17, 2027.

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[6] *Truchon c. Procureur général du Canada*, 2019 QCCS 3792 (CanLII).
[7] *An Act to amend the Criminal Code (medical assistance in dying)*, SC 2021, c 2 ("**Bill C-7**").
[8] *An Act to amend An Act to amend the Criminal Code (medical assistance in dying)*, SC 2023, c 1 ("**Bill C-39**").
[9] *An Act to amend An Act to amend the Criminal Code (medical assistance in dying), No. 2*, SC 2024, c 1 ("**Bill C-62**").

2 – Why the Federal Government Extended the Temporary Exclusion of MAiD for Individuals Whose Sole Underlying Medical Condition is a Mental Disorder

Bill C-62 was, in large part, the federal government's response to the January 29, 2024 Report of the Special Joint Committee on Medical Assistance in Dying: "MAID and Mental Disorders: The Road Ahead" (the "**Report**").[10] The Report lists a number of ongoing concerns which, according to the Special Joint Committee, must be addressed before MAiD eligibility can or should be expanded to those whose sole underlying medical condition is a mental disorder.

First, there is a concern relating to the ability of medical practitioners to assess the irremediability of mental disorders. Eligibility for MAiD is premised on the applicant having a "grievous and irremediable medical condition," which is defined as "a serious and incurable illness, disease or disability" that has led to an "advanced state of irreversible decline" and intolerable suffering. The concern is that it is difficult, if not impossible, to predict the longterm prognosis of someone with a mental disorder, including whether or not the person's condition is in fact incurable and irreversible.[11]

Second, some experts believe that it is difficult, if not impossible, to distinguish or differentiate between (a) individuals with suicidal ideation that is symptomatic of their mental disorder and (b) individuals making a reasoned request for MAiD on the sole basis of a mental disorder. In other words, there is a concern that those who would benefit from suicide prevention may end up receiving MAiD instead.[12]

Third, there is a lack of professional consensus about expanding MAiD eligibility to those whose sole underlying medical condition is a mental disorder. In particular, it appears that many (perhaps the majority) of psychiatrists in Canada are not in favour of the proposed MAiD expansion.[13] Relatedly, it is unclear whether Canada has enough properly trained practitioners – psychiatrists in particular – to safely and adequately provide MAiD to those whose sole underlying medical condition is a mental disorder. As of the date of the Report, only a little over 100 psychiatrists out of 5000 in Canada had signed up for the Canadian MAiD curriculum.[14]

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[10] *MAID and Mental Disorders: The Road Ahead*, Report of the Special Joint Committee on Medical Assistance in Dying, January 2024, 44th Parliament, 1st Session.
[11] *MAID and Mental Disorders: The Road Ahead*, pgs. 12-13.
[12] *MAID and Mental Disorders: The Road Ahead*, pgs. 13-14.
[13] *MAID and Mental Disorders: The Road Ahead*, pg. 14.
[14] *MAID and Mental Disorders: The Road Ahead*, pgs. 16-17.

Fourth, legal experts' opinions differ regarding the constitutional issues raised by MAiD for those whose sole underlying medical condition is a mental disorder. Some argue that the ongoing exclusion of MAiD for people suffering solely from a mental disorder risks violating the right to equality, liberty, and security of the person protected by the *Charter*. Others argue that the failure to afford *Criminal Code* protections against death to the most vulnerable, including people with disabilities and mental disorders, is itself discriminatory and unconstitutional.[15]

Finally, there is a concern about the potential impacts of the proposed MAiD expansion on vulnerable groups in society, including woman, Indigenous people, people with disabilities, people living in poverty, and people in geographically underserved areas. In particular, some are concerned that socio-economic or psychosocial vulnerabilities may overly contribute to request for MAiD.[16]

For these reasons, among others, the Joint Special Committee concluded in its Report that "the medical system in Canada is not prepared for medical assistance in dying where mental disorder is the sole underlying medical condition."[17]

3 – The Current MAiD Framework

The current MAiD framework is found in s. 241.2 of the *Criminal Code*.[18] S. 241.2(1) sets out five criteria that must be met before a person may be eligible for MAiD:

1. They are eligible – or, but for any applicable minimum period of residence or waiting period, would be eligible – for health services funded by a government in Canada;

2. They are at least 18 years of age and capable of making decisions with respect to their health;

3. They have a grievous and irremediable medical condition;

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[15] *MAID and Mental Disorders: The Road Ahead*, pg. 15.
[16] *MAID and Mental Disorders: The Road Ahead*, pgs. 14-15.
[17] *MAID and Mental Disorders: The Road Ahead*, pg. 17.
[18] *Criminal Code*, RSC, 1985, c C-46 ("***Criminal Code***"), s. 241.2.

4. They have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

5. They give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Under S. 241.2(2) of the *Criminal Code*, a person has a "grievous and irremediable medical condition" only if they meet all of the following criteria:[19]

1. They have a serious and incurable illness, disease or disability;

2. They are in an advanced state of irreversible decline in capability; and

3. That illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable.

As discussed, the *Criminal Code* establishes two categories of MAiD, both of which are subject to different criteria and safeguards against misuse. 'Track 1' applies to MAiD applicants whose natural death is reasonably foreseeable (i.e., relatively imminent). 'Track 2' applies to MAiD applicants whose natural death is not reasonably foreseeable (i.e., not soon).

S. 241.2(3.1) sets out the safeguards for 'Track 2' MAiD.[20] Those safeguards include that the medical practitioner or nurse practitioner who provides MAiD must, among other things: be of the opinion that the person seeking MAiD meets all of the criteria set out in s. 241.2(1) (discussed above); ensure that the person is informed that they may withdraw their request at anytime (there is no waiver of final consent for 'Track 2' MAiD); ensure that another medical practitioner has provided a written opinion confirming that all of the criteria set out in s. 241.2(1) have been met; be satisfied that they and the other medical practitioner are independent; and ensure that the person has been informed of the means available to relieve their suffering.

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[19] *Criminal Code*, s. 241.2(2).
[20] *Criminal Code*, s. 241.2(3.1).

S. 241.2(6) provides that a medical practitioner or nurse practitioner is independent if they:[21] are not a mentor to the other practitioner or responsible for supervising their work; do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; and do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

As discussed, the temporary exclusion of MAiD is set to expire on March 17, 2027. Once the temporary exclusion expires, 'Track 2' MAiD will become available to those whose sole underlying medical condition is a mental disorder (assuming the federal government does not further extend the temporary exclusion). However, this does not mean that those suffering from a mental illness cannot currently meet the eligibility requirements for MAiD. If an individual has a grievous and irremediable medical condition *other* than a mental disorder and otherwise satisfies all the criteria for MAiD, the individual should be able to access MAiD irrespective of their mental health.

4 – The Lawyer's Role in MAiD: Some Practical Considerations

Generally, a lawyer should not expect to play a direct role in a client's decision to access MAiD. As explained by Justice Bourgeois in *Sorenson v Swinemar*, "the determination of MAID eligibility should rest with authorized medical and nursing professionals."[22] Similarly, in *WV v MW*, Justice Feasby said: "it is the doctor or nurse practitioner's job to form an opinion as to whether the MAiD eligibility criteria have been met."[23]

However, a lawyer may be sought out for their advice generally or expect to be asked by a client or prospective client who is seeking MAiD to assist with their estate planning. If the client or prospective client is seeking MAiD, then the client or prospective client may be (highly) vulnerable because they may be suffering from a grievous and irremediable medical condition. As with any vulnerable client, a lawyer should be highly vigilant and on the lookout for red flags.

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[21] *Criminal Code*, s. 241.2(6).
[22] *Sorenson v Swinemar*, 2020 NSCA 62 (CanLII), at para. 63.
[23] *WV v MW*, 2024 ABKB 174 (CanLII), at para. 97.

4.1 – Client's Autonomy and Well-Being

It is trite to state that a lawyer's primary responsibility is to protect their client's autonomy and well-being. If there is a concern that a client's decision to pursue MAiD is not voluntary, the lawyer must act diligently to ensure that the client's rights are safeguarded, seeking additional support or intervention as necessary.

If a lawyer suspects that a vulnerable client seeking MAiD is being pressured by a family member or third party, and may not be acting voluntarily, the lawyer has a positive obligation and is dutybound to intervene appropriately. Among other things, the lawyer should:

- Carefully assess client capacity and voluntariness (i.e., question and probe). If there is any indication that the client's MAiD decision is influenced by coercion, the lawyer must act to ensure that the client's autonomy is protected.

- Ontario lawyers are bound by the Rules of Professional Conduct, which require them to, among other things: (a) maintain client confidentiality; and (b) act competently and diligently in the best interests of their clients. If a lawyer believes that a client is not acting voluntarily, they must carefully navigate these duties, possibly seeking guidance from the Law Society[24] or an ethics advisor.

- Take protective measures. To safeguard the client's interests, the lawyer might: (a) encourage the client to undergo an independent capacity assessment by a qualified medical professional; (b) meet with the client (more than once) to discuss the situation with the client to determine the extent of external pressure; (c) advise the client on their rights and the importance of making autonomous decisions free from coercion; (d) if necessary, involve appropriate authorities or support services to protect the client from undue influence; and (e) bring to the client's attention available resources and support groups.

[24] The LSO provides a Practice Management Helpline.

- Collaborate with healthcare professionals. If a lawyer has concerns about the client's capacity, they may, with the client's consent, communicate these concerns to the healthcare providers involved.

- Document all actions. Document all observations, discussions, and steps taken regarding the client's situation. Proper documentation can be vital if questions arise later about the client's decision-making process.

Below is some practical advice for navigating a retainer with a vulnerable client seeking MAiD.[25]

4.2 – When in Doubt, Walk Away

During the initial consultation, and prior to accepting a retainer, a lawyer should assess the degree, if any, to which the potential client is vulnerable. In particular, the lawyer should pose questions generally aimed towards getting a preliminary sense of the client's testamentary capacity. This is true even of a longstanding client if they present as vulnerable or the lawyer's suspicion is aroused. A lawyer should be prepared to probe and note responses and observed behaviours.

After learning that the prospective client seeking MAiD, the lawyer should ascertain, among other things: the potential client's age, health and rate of deterioration, identify any language barriers and what medications or courses of treatment they are on,[26] and any other mental or physical limitations (e.g., visual and/or hearing impairment).[27] The answers to these questions may also shed light on the potential client's susceptibility to undue influence.

The lawyer should also make inquiries concerning the prospective client's timeline for receiving MAiD. It is important to know whether or not the prospective client has already consulted with their medical provider(s) about receiving MAiD; whether or not the prospective client has

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[25] Depending on the client's MAiD timeline (i.e., if the date for receiving MAiD is fast approaching), the retainer may be akin to a "deathbed retainer." For practical tips on navigating deathbed retainers, see: Justin W. de Vries & Tyler Lin, "Too Ill to Make a Will: Three Practical Tips for Navigating a Deathbed Retainer," (2022) Law Society of Ontario, Six-Minute Estates Lawyer.
[26] *Bourne Estate v Bourne*, 2000 CarswellOnt 793 (ON CJ) at para. 25.
[27] de Vries & Lin, *supra* note 25, at p. 4.

undergone the required assessments to be found eligible for MAiD; and whether or not a date has been set for the prospective client to receive MAiD.

If, after the initial consultation, the lawyer is strongly of the opinion that the potential client lacks testamentary capacity, the lawyer has a positive duty to decline the retainer.[28]

However, if there are no immediate concerns, or only minor concerns, about testamentary capacity, it may be appropriate to accept the retainer, though it would be prudent to make the retainer conditional on: meeting the potential client in person, having an in-depth interview, performing a capacity assessment, and as appropriate, adequately assessing for undue influence. Depending on the results of these further inquiries, the lawyer can agree to act.[29]

4.3 – Accepting a Retainer with a Vulnerable Client Who Is Seeking MAiD

A. Assess for Testamentary Capacity First

After being retained to draft a will for a vulnerable client who is seeking MAiD, the lawyer has a legal obligation to ensure that the client has a sound and disposing mind. Where there are suspicious circumstances – which may include the mere fact that the client is suffering from a grievous and irremediable medical condition – the lawyer must make "searching" inquiries into the testator's capacity.[30] As noted by the Ontario Court of Appeal, a common basis for lawyer's liability in the preparation of wills is the failure to take steps to test for capacity.[31]

i. Interview the Client in Sufficient Depth

As a first step in probing for capacity, the lawyer should conduct a detailed interview with the client. The interview should be in person and more than one interview may be required. This will allow the lawyer to accurately assess the client's demeanor, which may be indicative of the client's mental state.

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[28] *Hall v Bennett Estate*, 2003 CanLII 7157 (ON CA) at para. 58.
[29] de Vries & Lin, *supra* note 25, at p. 5.
[30] MM Litman & GB Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity," (1984) 62:4 Can Bar Rev 457, at 471.
[31] *Bennett Estate*, *supra* note 28, at para. 26.

During the interview the lawyer should, among other things, ask extensive questions relating to each of the *Banks v Goodfellow* criteria (and, ideally, following along with a detailed checklist).[32] These criteria have been restated in "more contemporary" terms by Laskin J.A.:

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.[33]

When assessing for capacity, the lawyer should be sure to sufficiently test the client's knowledge of relationships,[34] especially where the client proposes to exclude previous beneficiaries and make a detailed note. Depending on the circumstances, the lawyer may have to conduct an even "more probing inquiry."[35]

It is also important to make a sufficiently detailed inquiry into the nature and extent of the client's property.[36] While the law requires only that the client have a general understanding and recollection of their property,[37] a lawyer must be careful not to be *too* general in their inquiries.[38]

ii. Obtain a Mental Status Examination

When dealing with a vulnerable client who is seeking MAiD, especially one whose capacity has been flagged, the lawyer should make a conscientious effort to obtain a mental status examination. The failure to do so may, depending on the circumstances, result in liability later down the road.[39] Ideally, the examination will be performed by an official capacity assessor, qualified medical doctor, or geriatric psychiatrist. However, this may not always be realistic. As succinctly stated by Justice Taliano:

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[32] *Popke v Bolt*, 2005 ABQB 214, at para. 288 ("***Bolt***").
[33] *Schwartz v Schwartz*, 1970 CarswellOnt 243 (ON CA), at para 44.
[34] *Bolt*, *supra* note 32, at para. 288.
[35] *Walman v Walman Estate*, 2015 ONSC 185 (CanLII) at para. 56.
[36] *Bolt*, *supra* note 32, at para. 288.
[37] *Nassim v Healey*, 2022 BCSC 402 (CanLII), at para. 58 ("***Nassim***").
[38] *Bolt*, *supra* note 32, at para. 288.
[39] *Bennett Estate*, *supra* note 28, at para. 26.

> to expect everyone who is suffering from ill health to have a full-blown mental capacity assessment before his or her will can be admitted to probate is not the law and if it were, it would disenfranchise many testators from being able to dispose of their property just before death.[40]

In lieu of an official capacity assessment, a lawyer should, with the client's consent, reach out to the client's doctors, request medical reports concerning the client's competence, and review the client's medical records. When engaging with the client's medical practitioners, it is important to inform them about the legal concept of testamentary capacity (i.e., what it means to have a sound and disposing mind) and the ability to understand and appreciate the solemn task of making a will.[41]

Notwithstanding the foregoing, it is important to remember that the duty to assess capacity ultimately belongs to the lawyer (not the healthcare provider) and is non-delegable.[42] Testamentary capacity is a legal construct. As such, scientific or medical evidence (while important and relevant) is neither essential nor conclusive in determining the presence or absence of testamentary capacity.[43]

B. Assess for Undue Influence Where Necessary

The lawyer also has an obligation to ascertain and react appropriately to the existence of suspicious circumstances and/or undue influence. The failure to do so may result in a finding that the lawyer fell below their standard of care in the preparation of a will.[44]

One of the classic indicia of undue influence is the client's dependence on another person (e.g., a friend, family member, or caregiver), especially where that other person stands to benefit under the client's new will. The lawyer must make a conscientious effort to limit any third party involvement in the will drafting process. Among other things, the lawyer should never take instructions from anyone other than the client directly. Where the client is seeking MAiD, the

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[40] *Duschl v Duschl Estate*, 2008 CanLII 15899 (ON SC), at para. 93 ("*Duschl*").
[41] de Vries & Lin, *supra* note 25, at p. 10.
[42] *Palahnuk v Kowaleski*, 2006 CarswellOnt 8526 (ON SC), at para. 71.
[43] *Nassim, supra* note 37, at para. 59.
[44] *Bennett*, *supra* note 28, at para. 26.

lawyer should make enquires to ensure to that the client's decision to seek MAiD is being made voluntarily and not because of external pressure.

It is also important for the lawyer to ensure that meetings with the client take place in a private environment, where only the client and lawyer are present. Where the client is accompanied by another person, the lawyer should ask the companion to excuse themselves, and better yet, remove themselves altogether from the situation.[45] A private meeting affords the client an opportunity to speak their mind freely and openly without fear or reprisals or recriminations.

C. Take Good Notes, Always

A lawyer has a duty to support their client's will if it is later challenged in court. It is therefore essential for the lawyer to take detailed notes on all circumstances surrounding the drawing and execution of the will, especially where the client is vulnerable.[46] Scrawled, point form, cursory notes are an estate litigator's dream. The drafting lawyer should therefore take their time and properly document the file anticipating a will challenge.

Although the court's determination of the validity of a will does not rest solely on the acts or omissions of the drafting lawyer, the evidence of a reasonably careful drafting lawyer may be "critical" during trial.[47] Where the drafting lawyer has not performed as one would expect of a competent estate planning lawyer, their evidence may be given little weight.[48]

When acting for a vulnerable client, including one who is seeking MAiD, the prudent lawyer should aim to take fulsome, copious, and contemporaneous notes on the following matters:[49]

- The lawyer's opinion on the degree to which the client is (or is not) vulnerable, especially if the client is seeking MAiD and therefore suffers from a grievous and irremediable medical condition;

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[45] *Krolewski v Moniz*, 2020 ONSC 53 (CanLII) at para. 34.
[46] *Maw v Dickey et al*, 1974 CanLII 628 (ON SC).
[47] *Rivard v Rivard*, 2016 ONSC 4436 (CanLII), at para. 6.
[48] *Halliday v Halliday Estate*, 2019 BCSC 554 (CanLII) at para. 135.
[49] This list is intended to be illustrative, not exhaustive.

- The lawyer's opinion on the client's testamentary capacity, and the well documented reasons for that opinion;

- Any conversations the lawyer had with the client's physicians, healthcare professionals, family or friends;

- The presence of any suspicious circumstances (or indicia or red flags of undue influence), and steps taken to address any concerns arising thereof;

- Who arranged and attended meetings between the client and lawyer;

- Who provided instructions to the lawyer and paid for legal services;

- Who was the lawyer's primary contact, received and reviewed draft wills, and communicated with the lawyer on behalf of the client;

- The client's demeanor, stamina, and ability to communicate effectively during meetings;

- The client's family background and history; and

- The client's explanations or reasons for disposing of their property in a particular way, especially where the client proposes to disinherit or reduce the inheritance of a beneficiary under a previous will.

TABLE OF AUTHORITIES

LEGISLATION

CASE LAW

Truchon c. Procureur général du Canada, 2019 QCCS 3792 (CanLII).

WV v MW, 2024 ABKB 174 (CanLII)

Walman v Walman Estate, 2015 ONSC 185 (CanLII)

Rivard v Rivard, 2016 ONSC 4436 (CanLII)

SECONDARY SOURCES

Adrian C. Bryam & Peter B. Riner, “Disparities in public awareness, practitioner availability, and institutional support contribute to differential rates of MAiD utilization: a natural experiment comparing California and Canada.”

Health Canada, “Fifth Annual Report on Medical Assistance in Dying in Canada, 2023.”

Justin W. de Vries & Tyler Lin, “Too Ill to Make a Will: Three Practical Tips for Navigating a Deathbed Retainer,” (2022) Law Society of Ontario, Six-Minute Estates Lawyer.

Report of the Special Joint Committee on Medical Assistance in Dying, “MAID and Mental Disorders: The Road Ahead,” January 2024, 44th Parliament, 1st Session.

MM Litman & GB Robertson, “Solicitor’s Liability for Failure to Substantiate Testamentary Capacity,” (1984) 62:4 Can Bar Rev 457.