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Between a Rock and a Hard Place: The Dilemma of the Deathbed Will

Claudia A. Sgro
and
Margaret R. O'Sullivan

O'SULLIVAN
ESTATE LAWYERS

Ernst & Young Tower
Toronto-Dominion Centre
222 Bay Street, Suite 1410
Toronto, Ontario
M5K 1E7

Tel: (416) 363-3336
Fax: (416) 363-9570
Website: www.osullivanlaw.com

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1. Introduction

Imagine the following scenario: a prospective client telephones you from the hospital. She has just had a sharp decline in an ongoing medical condition. Now, she may only have days to live. She had contemplated her estate planning but had not taken steps to put it in place. However, she is now concerned what will happen to her assets on intestacy. In particular, she wants to provide for a smooth transition of her business interests, and ensure her family is provided for, including appointing executors and a guardian for her two young children. Will you write her will?

Alternately, the brother of an existing estate planning client contacts you, for whom you have previously drawn a will. Your client is in hospital, in serious condition, and will soon be undergoing major surgery. The brother informs you that your client would like to ensure that he has updated his will to exclude a certain major residual beneficiary with whom he, and other family members, had a recent altercation. Will you attend at the hospital?

Deathbed wills, or wills written *in extremis*, in contrast to wills done in the ordinary course, are part of a continuum involving varying levels of urgency which place high demands on the lawyer's time and attention and, once approached, put significant stress on a lawyer's professional duties, including preparation of the will to the standard of a reasonably competent solicitor. We will use the term "deathbed wills" broadly to refer to wills to be prepared under various urgent and possibly life-threatening circumstances. The term "wills" refers to wills and codicils, and contemplates both major and minor changes to any existing estate planning.

This paper discusses deathbed wills from a practical perspective, and considers:

(a) When is the lawyer retained?

(b) What duties and liabilities arise from either accepting or declining the retainer to draft a deathbed will?

(c) Once the lawyer is retained, what does the standard of care require?, and

(d) Which special practice considerations arise when drafting a deathbed will?

2. The Lawyer's Professional Duties

When a prospective or existing client or perhaps a family member on his or her behalf contacts you and the client is in an extreme medical situation, and death may be very near, you may feel a sincere desire and automatic reflex to help. You may feel compassion and that you have a moral duty owed to the prospective or existing client to ensure their affairs are put in order. Lawyers enjoy solving problems, and find career satisfaction in being able to assist others with the benefit of their specialized knowledge. The extreme nature of the situation presses the lawyer towards a prompt decision. If you do not help, you reason, who will?

The Commentary to Rule 3.01(1) of the Law Society of Upper Canada's *Rules of Professional Conduct* (the "Rules") speaks to this motivation, describing the lawyer's professional duty to take on representation except in limited circumstances:

> **A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. ... A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act.**

At the same time, you may have serious concerns about acting: Is there time to do competently what the prospective or existing client requests? How do I ensure that he or she has the capacity to write a will and is free of undue influence? Do I have adequate disclosure of his or her assets? Will I do the client and the intended beneficiaries a disservice and consequently put myself in jeopardy if I draft a will which later cannot be upheld? The conundrum one squarely faces requires a clear understanding of what are a lawyer's duties and liabilities in these circumstances.

The Rules in the Commentary to Rule 2.01(1) assist in responding to this conundrum by stating that a lawyer should not take on work where he or she is not competent to act:

> **A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.**
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> **A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to**

> **the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.**

As noted in *Hall v. Bennett Estate* from the Ontario Court of Appeal, a leading case dealing with deathbed wills, the Rules guide professional conduct and may form the basis for disciplinary proceedings, but are not in themselves the law applicable to deathbed wills, nor do they form a foundation for civil liability.[1] In encoding the lawyer's professional duties, they advert to the competing moral imperatives that the lawyer faces in choosing whether to accept a retainer to draft a deathbed will.

3. The Role of the Retainer

When deciding whether to draft a deathbed will, a lawyer must consider whether or not he or she has already been retained by an existing client for this purpose, and if not, when the retainer begins. This question is critical because whether or not a lawyer has been retained will determine many of the lawyer's duties to the client and to third party beneficiaries. Once retained, a lawyer may not withdraw except for a good cause and on contextually appropriate notice to the client.[2] In the context of deathbed wills, it may be unclear whether a lawyer has been retained or not.

Certain duties can also arise prior to any retainer, such as the duty of confidentiality and the duty to protect certain of the prospective client's interests.[3]

Generally speaking, the retainer is the basis for the lawyer-client relationship and the foundation of the lawyer's legal duties to the client.[4] Justice Charron in *Hall v. Bennett Estate* noted that generally, in the absence of a retainer, the solicitor owes no duty of care to the client in respect of the preparation of a will. There can be no liability in contract where there is no undertaking to perform services. Moreover, the solicitor's duty of care to third party beneficiaries is typically also based on the retainer, which creates the required proximity between the solicitor and the third party. However, in the absence of a retainer, Justice Charron noted a duty of care might arise if the principles which govern the tort of negligent misrepresentation could apply, for example if the solicitor negligently represents to a person that he or she will undertake certain duties

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[1] *Hall v. Bennett Estate*, 2003 CanLII 7157, 64 OR (3d) 191, Ont CA at para. 62. Unless otherwise specified, "*Hall v. Bennett Estate*" refers to the Court of Appeal decision.
[2] Rules, Rule 2.09.
[3] Regarding confidentiality, see Rules, Commentary to Rule 1, definition of "client".
[4] *Hall v. Bennett Estate* at para. 56.

and that person relies on the solicitor's representation to his or her detriment, where the reliance is foreseeable and reasonable.[5]

When is a retainer present? The Law Society of Upper Canada, in its Advisory entitled "Establishing the Retainer" sets out formalities to be observed in the establishment of the retainer including an executed Retainer Agreement and receipt of a monetary retainer together, without both of which the lawyer generally should not act, subject to protection of the client's interests.[6] The Advisory sets out the following steps in establishing the retainer: (1) conflicts check; (2) client screening; (3) initial consultation; and (4) engagement on behalf of the client.

The recommended steps for establishing a retainer as set out in the Advisory can blend together in the context of an urgent bedside visit to a prospective client, where the initial consultation, if one at all, and possible engagement may take place in quick succession at a hospital bedside and without opportunity for a conflicts check and proper client screening. A lack of capacity or insufficiency of instructions which would prevent the lawyer from acting may only become apparent as the prospective client attempts to instruct the lawyer. If the lawyer does not communicate clearly to the contrary, the prospective client might reasonably believe that the lawyer has undertaken to draft the will at the moment he or she begins to outline his or her wishes and to give instructions which might start at the outset of the meeting.

Case law is clear that a lawyer must decline a retainer to draft a will, even after the initial interview, should certain circumstances arise: in particular, should the lawyer find that the client lacks capacity to make a will. In *Hall v. Bennett Estate*, the court found the lawyer had a positive duty to decline the retainer although he had "undertaken to interview [the prospective client] with a view to obtaining instructions to prepare a will", because both the prospective client's capacity and his will-drafting instructions were clearly deficient.[7] Note how the court narrowly defines the task that the lawyer had taken on, that is, only to interview the client.

When anticipating and entering the retainer, the lawyer must be careful to define the nature and scope of the retainer appropriately, discuss this verbally (including the risks and limitations) while making notes of the discussion, and reconfirm it in writing as soon as possible.

Amendments to the Rules made in September 2011 contemplate a limited scope retainer, which is defined as "the provision of legal services by a lawyer for part, but not

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[5] For this paragraph, *Hall v. Bennett Estate* at paras. 56-57.
[6] The Law Society of Upper Canada, "Establishing the Retainer" (online: Law Society of Upper Canada, http://rc.lsuc.on.ca/pdf/pmg/advisory_estretainer.pdf , accessed March 27, 2012) at 3.
[7] *Hall v. Bennett Estate* at para. 58

all, of a client's legal matter by agreement between the lawyer and the client".[8] The lawyer must clearly communicate to the client the nature, extent and scope of the services, and should review their limitations, before performing legal services under such a retainer.[9] In addition, subject to rare exceptions, the lawyer must "confirm the services in writing and give the client a copy of the written document" when providing legal services under such a retainer.[10] It has been held that "[i]f a dispute arises as to the scope of the retainer, and it is not in writing, the onus of proof lies upon the lawyer:"[11]

For example, the retainer might contemplate will drafting rather than the broader category of estate planning which can include, among other things, planning for incapacity using powers of attorney, and, depending on the client's needs, may ideally entail detailed tax and trust planning. Practically speaking, a simple will may be more achievable in a short time than a complex will. Where appropriate, a prospective client might consider a codicil rather than a will.

The lawyer can exclude specific duties by a carefully worded retainer agreement; however, there appears to remain a core of professional responsibility which such an agreement may not exclude, for example, the duty to perform a capacity assessment[12]. In addition, despite a limited scope retainer, the lawyer has a practical obligation to discuss certain topics required for effective will drafting, such as the identity of the legal and beneficial ownership of property which the testator desires to dispose of by will.[13] To manage risk, the limited scope retainer agreement might specifically contemplate the exclusion of certain matters generally considered a part of estate planning (or: incidental to will drafting), such as beneficiary designations for registered plans.[14]

Even where no legal duty arises to prepare a will, a professional responsibility may still arise, so that the lawyer may not be able simply to walk away. The lawyer's professional responsibility may be more demanding than the legal duties, taken alone, would suggest. Consider, for example, the situation in which a lawyer receives a call on short notice, is not informed that the prospective client's situation is acute, attends at the hospital, and then decides he or she is reticent to prepare the will due to other pressing

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[8] Rules, Rule 1.02, as am. September 2011.
[9] Rules, Rule 2.02 (6.1), Commentary to Rules 2.01 and 2.02.
[10] Rules, Rule 2.02(6.2), Commentary to Rule 2.02.
[11] *Lenz v. Broadhurst Main*, 2006 CanLII 5059 (Ont. S.C.), at para. 53, citation omitted.
[12] John E.S. Poyser, "Estate Planning for Clients With Diminished Capacity: Deathbed Wills", (2010) 29 E.T.P.J. 244 at 265.
[13] *Wilhelm v. Hickson*, 2000 SKCA 1 (CanLII).
[14] See Sean Lawler, "Landmines for lawyers: Exercising judgment in the face of bad information or a lack of time", (Ontario Bar Association, Beyond Will and Estate Planning Essentials, Toronto, 10 May 2011) at 7.

personal or professional commitments. No contract has been entered, and the lawyer has not held out that he or she could draft the will. There may be little time for the person to find another lawyer. There would appear to be no basis for a legal duty to the prospective client. However, a professional responsibility may arise based on Rule 3.01 of the Rules.

To paraphrase the Commentary to that Rule, the lawyer must exercise his or her right to decline a particular representation prudently, especially if the likely effect is to make it more difficult for a person to obtain legal services. In *Hall v. Bennett Estate*, Justice Charron presented the following hypothetical:

> **If, for example, the facts had been otherwise and Frederick had been of the view that Bennett was able to make a will but nonetheless declined the retainer, the exigent circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on all the circumstances, could form the basis of disciplinary proceedings.**[15]

Note that the likely effects of the choice to decline the retainer will depend on the circumstances. For example, the Commentary to Rule 3.01 might be interpreted to hold a lawyer in a small town with few available lawyers to a higher standard than a lawyer in a large urban centre where there are numerous other lawyers. Query whether inquiring into the facts of a prospective client's situation can itself heighten one's professional responsibilities relating to Rule 3.01.

Practically speaking, if possible, you may wish to consider clarifying at the outset that your role is a consulting one only to interview the client and decide whether to take the retainer on and document this, and prepare a written form of retainer agreement and a basic confirmation letter and as well a non-retainer letter and bring these to the hospital.

If the lawyer declines to act, she or he should typically confirm this verbally to the would-be client, make a detailed note, and promptly issue a non-retainer letter. Have the non-retainer letter acknowledged in writing by the prospective client if that is possible and appropriate.[16] Issuing a non-retainer letter should be done promptly so that the would-be client has the opportunity to retain other counsel or find other ways to effect his or her testamentary intention (such as a holograph will or inter vivos gifts including gifts *donatio mortis causa*) and to ensure that the would-be client does not inadvertently rely on the lawyer to her detriment which could give rise to the tort of negligent misrepresentation.

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[15] *Hall v. Bennett Estate* at para. 61.
[16] Poyser, "Estate Planning for Clients With Diminished Capacity: Deathbed Wills".

4. The Duties and Liabilities of the Lawyer

In assessing whether to draft a will for a prospective client on his or her deathbed or *in extremis*, the lawyer should consider questions of duty and liability. What guidance is available from the courts where the lawyer has concerns about the client's or prospective client's capacity but where a deficiency is less than certain?

In the middle range of cases between the duty to decline the retainer for lack of capacity or to prepare the will where capacity is certain, case law once strongly advised erring on the side of drafting, reasoning that the lawyer should not assume the role of deciding whether the deceased's testamentary wishes might possibly be given effect. In *Scott v. Cousins*, Justice Cullity stated:

> **Some of the authorities ... state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God — or even judge — and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question.**[17]

Citing *Scott v. Cousins*, Justice Manton in *Hall v. Bennett Estate* (Sup. Ct.), which was overturned by the Court of Appeal, opined that if the lawyer had a doubt as to the prospective client's capacity he should have prepared the will and left it to the court to later decide capacity, if necessary.[18] The concern about what will happen if the solicitor declines the retainer raises an important moral and professional responsibility consideration for the lawyer, because there may be effectively no other way to give effect to a person's testamentary intentions. Capacity may be rapidly declining or fluctuating, and time running out.[19]

Lawyers now have broader judicial sanction to not prepare a will where capacity is doubtful. Based on *Hall v. Bennett Estate* (C.A.), in respect of solicitor's liability the test is, in part, whether a reasonable and prudent solicitor in the circumstances could have

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[17] *Scott v. Cousins*, 2001 CarswellOnt 50, 37 E.T.R. (2d) 113 (S.C.J.), Cullity J, at para. 70.
[18] *Hall v. Bennett Estate*, 2001 CarswellOnt 3783, 40 E.T.R. (2d) 65 (Sup. Ct.), Manton J.
[19] Regarding declining capacity, see Poyser, "Estate Planning for Clients With Diminished Capacity: Deathbed Wills".

concluded that the testator did not have capacity.[20] Justice Charron further remarked, although this is *obiter*:

> **I find it important to note, if only for guidance in future cases that, in my view, it is at least questionable whether Frederick, regardless of his opinion on Bennett's capacity, could be found to be under any *legal* obligation to accept the retainer to prepare Bennett's will.**
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> **...**
>
> **Hence, before a result such as that achieved at trial in this case is reached, [i.e., a finding of solicitor's negligence for failing to prepare a will] a court should address the important question whether in all the circumstances the solicitor was under a legal obligation to accept a retainer.**[21]

Arguably, the nature of the retainer as contract would appear to permit a lawyer, in appropriate cases, to decline the contract when in doubt.[22]

As adverted to earlier, the lawyer once he or she has accepted a retainer to draft a will owes a duty to the client both in contract and in tort (based on the ordinary negligence principles of *Donoghue (or McAlister) v. Stevenson*), and perhaps in tort outside the retainer agreement (based on the negligent misrepresentation principle in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*).[23] The liability in negligent misrepresentation may arise even in the absence of a contract. The elements of negligent misrepresentation include the following general requirements:

> **(1) there must be a duty of care based on a "special relationship" between the representor and the representee;**
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> **(2) the representation in question must be untrue, inaccurate, or misleading;**
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> **(3) the representor must have acted negligently in making said misrepresentation;**

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[20] *Hall v. Bennett Estate* (C.A.) at para. 12.
[21] *Hall v. Bennett Estate* (C.A.) at paras. 61, 62.
[22] See the appellant's argument referred to in *Hall v. Bennett Estate* at para. 60, without direct comment from the court.
[23] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575; *Donoghue (or McAlister) v. Stevenson*, [1932] All E.R. Rep I.

(4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted.[24]

For example, the following scenario might give rise to a claim in negligent misrepresentation. A prospective client telephones you from the hospital prior to high-risk surgery the next day, to ask about will drafting, and gives you an overview of his situation. Based on your understanding of the facts as stated by the prospective client, you assure him that you are willing and able to draft his will and have a lot of experience doing so. A few hours later, you attend at the hospital. However, upon meeting with the client you learn more information, including that the client has a second marriage, and children from a first marriage whom he wishes to have receive most of his estate. He has no will. The task is much more complicated, in fact, beyond your expertise since you do not draft a lot of trust wills, and will be more time consuming than you anticipated. In the time that the prospective client waited for you to arrive at the hospital, he may have lost the opportunity to seek alternate counsel who can complete the will before the surgery. What if the client does not survive the surgery?

To avoid this situation, before you leave your office, you may wish to ensure that you know enough about the prospective client's situation, and as well considered your other work commitments and competing priorities to make the best assessment you can on whether you can competently act. It may be unwise to make overly broad representations that you can undertake the requested work until you have sufficient information to make a proper evaluation. Once you have left your office, the person may already have relied upon your representation to his or her detriment. Depending on the surrounding circumstances, if you know you are not generally willing to do high-risk work on a short timeline, it may be best to acknowledge this and refer the client to someone who is, rather than to encourage the client to wait for you to attend and evaluate the situation.

The lawyer also owes a duty to third party intended beneficiaries under a will. In *Wilhelm v. Hickson*, the Saskatchewan Court of Appeal followed the reasoning of a majority of the House of Lords in *White v. Jones*[25], holding that "a lawyer, in drawing and executing a will, owes a duty of care to the beneficiaries named therein, breach of which may render him or her liable to pay damages suffered by the beneficiaries as a

[24] *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87, as cited in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (CanLII) at 121; formatting altered.
[25] *White v. Jones*, [1995] 1 All. E.R. 691 (H.L.).

result of the breach."[26] The lawyer's duty to third party beneficiaries occurs when their interests are harmonious with those of the testator.[27]

In *Wilhelm v. Hickson*, a lawyer had negligently drafted a will purporting to devise certain farm shares which were not the testator's to devise, because they were beneficially owned by a corporation which the lawyer had incorporated for tax purposes. Contrary to the testator's intention, the residual beneficiaries received the shares of the farm, while the intended beneficiaries did not receive anything under the will, and claimed against the lawyer. The Saskatchewan Court of Appeal upheld the trial judge's decision, based on *White v. Jones*, to pay damages to the disappointed beneficiaries compensating them for the value of the ineffective devises, varying the decision as to quantum.

Justice Sherstobitoff for the Court of Appeal reviewed the previous case law, which in common law jurisdictions had based recovery for third party intended beneficiaries on negligent misrepresentation or the tort of negligence.[28] and commented that the imposition of a duty of care to disappointed beneficiaries under a will was necessary to fill a lacuna in the law, because "if no such duty is imposed, the only persons with a valid claim, the testator and his estate, have suffered no loss, and the only person who has suffered a loss, the disappointed beneficiary, has no claim."[29] Contributory negligence appears not to apply to claims of third party beneficiaries.[30]

As yet, a solicitor appears to have no duty to third party beneficiaries under a previous will when taking instructions for a later will. In *Graham v. Bonnycastle*, a will was challenged on the ground of lack of capacity. The testator's marriage was also challenged. The Alberta Court of Appeal refused to extend the third-party duty of care to disappointed beneficiaries under a previous will. In the majority decision of Justice McFadyen, her rationales for the refusal included: the possibility of a conflict of interest between the client and the disappointed beneficiaries; the lack of proximity between the solicitor retained to draft a new will and the beneficiaries under a previous will; and for public policy reasons. Lawyers should be free to act according to their clients' best interests, and should not be discouraged from acting for clients with existing wills.

However, in concurring reasons, Justice Berger contemplated that there may be circumstances in which a solicitor might owe a duty of care to a beneficiary under a prior

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[26] *Wilhelm v. Hickson*, 2000 SKCA 1 (CanLII) at para 1.
[27] *Graham v. Bonnycastle*, 2004 ABCA 270 (CanLII) at para. 22.
[28] *White v. Jones*, *supra; Ross v. Caunters* [1979] 3 All E.R. 580 (Ch.D.).
[29] *Wilhelm v. Hickson* at para. 32.
[30] *Wilhelm v. Hickson*, *infra.* See comments of Sean Lawler anticipating a similar result under Ontario legislation in "Landmines for Lawyers: Exercising judgment in the face of bad information or a lack of time" (Ontario Bar Association, *Beyond Will and Estate Planning Essentials*, Toronto, 10 May 2011) at 6.

will pursuant to an extension of the *Hedley Byrne* principle, and in particular identified a lacuna in the law where the estate is distributed before the negligence is discovered.[31] He noted that the solicitor's duty to protect the client's best interests is not necessarily in conflict with a potential duty to a third party former beneficiary.[32]

5. Standard of Care – Timely, Correct and Complete[33]

The standard of care expected of the lawyer drafting a deathbed will is that of the reasonably competent solicitor: "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken."[34]

The standard of care of a reasonably competent solicitor, although contextual, would not appear to be diminished significantly, if at all, for a deathbed will.[35] In *Friesen v. Friesen*, in the context of a capacity challenge, the court described the standards which apply to the solicitor drafting a will in these terms: "The duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill, and particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous."[36]

To be valid, a will must always meet certain substantive requirements. The testator must have testamentary capacity, which requires him or her to appreciate various things - the nature and effects of the will, his or her assets and liabilities, and possible legal or moral claims to the estate.[37] The testator must also be free of any mental delusions which would influence the will.[38]

The testator must have knowledge and approval of the contents of the will at the time of execution. The will must be produced voluntarily rather than under undue influence from another person or persons.[39] In the initial interview and while taking instructions, the

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[31] *Graham v. Bonnycastle* at paras. 53, 60.
[32] *Graham v. Bonnycastle* at para. 58.
[33] The discussion of timing in this paper is adapted from Margaret R. O'Sullivan's paper, "A Review of Ethics and Defensive Practice Tools in an Estate Planning Context" (The Law Society of Upper Canada, 14th Annual Estates and Trusts Summit, Toronto, 10 November 2011).
[34] Justice Le Dain for the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147 (CanLII) at para. 58.
[35] But see *Lenz v. Broadhurst Main* at para. 54, in another context.
[36] *Friesen v. Friesen* (1985), 24 E.T.R. 191 (Man. Q.B.), Kroft J. at para. 77.
[37] See *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at 565.
[38] *Banks v. Goodfellow* at 565.
[39] *Mayrand v. Dusseault* (1907), 38 S.C.R. 460. The case law and secondary literature has fully canvassed the requirements with regard to testamentary capacity, knowledge and approval of the contents of a will, and undue influence. See e.g., The Law Society of Upper Canada, *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: LSUC, 2011). For a summary of defensive practice focussing on capacity and undue influence, see

lawyer should carefully review the situation for any possibly "red flags" with respect to capacity or undue influence which might indicate that a will challenge is likely.

When ascertaining capacity, it may be advisable to speak to the prospective client's doctors on this topic, with the prospective client's permission. The lawyer may explain to the doctors the legal test for capacity to make a will, and may ask the doctor to confirm his or her opinion in writing as soon as possible, including possibly on an interim basis an e-mail or written note. In addition, the lawyer may wish to bring along a copy of the Mini Mental State Examination commonly used to evaluate capacity. Although he or she may not be trained to administer the test, it can be a valuable aid as it provides reference to an accepted standard test for capacity. If the lawyer is not satisfied that a reasonable solicitor in the circumstances could conclude that the client has testamentary capacity, case law supports that he or she should decline to act, subject to possible re-evaluation at a later time with the prospective client's informed consent.

Red flags for undue influence include being contacted by a family member of the prospective client rather than the client, any indicators of strife in the prospective client's family or social network, and any indicators that the client is socially isolated. To minimize unsubstantiated allegations of undue influence, speak to the client alone when taking instructions. The lawyer has a duty to inquire behind circumstances suspicious of undue influence, and if the circumstances warrant should decline to act. By extension from the principle set out regarding capacity in *Hall v. Bennett Estate*, it is likely safe to reason that if a reasonable solicitor in the circumstances would conclude that the client was subject to undue influence in making the will, a lawyer should decline to act.

It is important for the lawyer to identify high-risk matters where the proposed will or estate plan if not completed will result in a "disappointed beneficiary". Where there is existing estate planning, there is a likelihood of disappointed beneficiaries under a previous will. A major change to existing estate planning tends to attract more criticism from such beneficiaries than a minor change.

With regard to timing, the failure to complete and execute a will or other estate planning documents prior to death or incapacity might put the professional in breach of his or her ethical responsibilities, and in some cases, attract liability for damages for failure to provide timely service. Where a client or prospective client is terminally-ill, there is a need to get full disclosure of the client's medical situation.

Andrew S. MacKay, "Protecting an Estate Plan from Charges of Undue Influence and Lack of Capacity"(Vancouver: The Continuing Education Society of British Columbia, 2001).

Two recent Ontario cases which analyzed the lawyer's duty of care with regard to timely preparation of a will are *McCullough* v. *Riffert* and *Rosenberg Estate* v. *Black*.[40] In *McCullough* v. *Riffert*, the deceased, Robert McCullough ("Mr. McCullough"), died ten days after giving instructions to a lawyer for his will, which was never executed. The deceased's niece would have received his entire estate under his new will. Instead, his three estranged children became entitled on an intestacy. The niece sued the lawyer in negligence, as the "disappointed beneficiary" for not attending to the preparation and execution of the will before Mr. McCullough died.

The lawyer, who had previously acted for Mr. McCullough on other matters, had noted that he was planning a visit to Texas with his niece, and the niece wanted the will prepared before they departed in April, approximately two months away, otherwise there was no particular hurry. The lawyer also inquired about Mr. McCullough's weight loss, for which he appeared to have a reasonable explanation. Within three days of her meeting with Mr. McCullough, the lawyer mailed a draft will for review, requiring further information and instructions. Neither Mr. McCullough nor his niece called back after Mr. McCullough's meeting with the lawyer. Mr. McCullough died ten days after the meeting. At trial, two expert witnesses tendered opinions on the standard of care for a reasonably competent solicitor, the second witness giving two opinions depending on the underlying facts.

In setting out considerations in evaluation of a solicitor's actions and whether he or she has acted as a reasonably competent solicitor where a testator dies before the will is executed, the court referred to the factors set out by one of the expert witnesses in *Rosenberg Estate v. Black* :

(a) The terms of the lawyer's retainer: for example whether a precise time table is agreed upon.

(b) Whether there was any delay caused by the client.

(c) The importance of the Will to the testator.

(d) The complexity of the job - for example the more complex the job the more time required.

(e) The circumstances indicating the risk of death or onset of incapacity in the testator; and

[40] *McCullough* v. *Riffert*, 2010 ONSC 3891 (Can LII); *Rosenberg Estate* v. *Black*, [2001] O.J. No 5051, 110 A.C.W.S. (30) 560 (Sup. Ct.).