The Advocates' Quarterly

OFFPRINT

A LAWYER'S DUTIES AND OBLIGATIONS WHERE CAPACITY, UNDUE INFLUENCE, AND VULNERABILITY ARE AT ISSUE IN A RETAINER

*Kimberly A. Whaley and Kate Stephens**

INTRODUCTION

A client's capacity, vulnerability, and susceptibility to undue influence should always be live issues in the work of trusts and estates professionals. Lawyers, for their part, are obligated to ensure in any retainer that their client has the requisite capacity to: (1) retain counsel, and (2) give instructions to counsel and execute any documents necessary to resolve the specific matter for which counsel is retained. As such, matters such as granting powers of attorney, making testamentary dispositions, and effecting real property transfers each have discrete tests for capacity. Lawyers must therefore make time- and task-specific determinations of a client's capacity.

It goes without saying that in the course of retainers where a client's capacity, vulnerability, and susceptibility to undue influence are at issue, lawyers must be especially careful in their initial and ongoing assessment of their client's ability to retain and instruct counsel. This paper will explore the duties and obligations owed by lawyers to clients in such situations: Part I will examine the sources of duties and obligations owed by lawyers to clients; Part II will define capacity, undue influence, and vulnerability in the context of legal retainers; Part III will examine solicitor's negligence in retainers where vulnerability capacity, and undue influence are at issue; and Part IV will examine jurisprudence related to a lawyer's duties where incapacity, undue influence, and vulnerability were found to be present in a retainer.

PART I: SOURCES OF OBLIGATIONS AND DUTIES OF COUNSEL

A lawyer's duties and obligations to his or her client are manifold in any retainer, but are especially relevant in cases where vulnerability, capacity and undue influence are at issue. As Cullity J. stated in *Banton v. Banton*,[1] "A very high degree of professionalism

* Kimberly A. Whaley, Partner, WEL Partners; and Kate Stephens, Student-at-Law, WEL Partners.

1. (1998), 164 D.L.R. (4th) 176, 1998 CarswellOnt 3423, [1998] O.J. No. 3528

may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court." The duties and obligations owed to a client arise from professional rules, statutes, and jurisprudence – in addition to a lawyer's own professional and ethical judgments – and should serve as guidance for lawyers in navigating issues of capacity, undue influence, and vulnerability.

Professional Duties

Each province and territory's law society has rules or codes of professional conduct that outline the practice standards for lawyers. The rules and codes differ by varying degrees between each province and territory, and so for the sake of simplicity, this paper will focus on the Law Society of Ontario's *Rules of Professional Conduct.*

One of the most fundamental duties of a lawyer is duty of loyalty, which encompasses many obligations that arise in a lawyer-client relationship. As outlined in Rule 3.4-1[2] of the *Rules of Professional Conduct*:

> In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty.

This duty of loyalty can be difficult to navigate, especially where a lawyer is concerned about the presence of undue influence or incapacity. In Ontario, the *Rules of Professional Conduct* provide, at Rule 3.2-9, guidance for lawyers acting for clients with diminished capacity:

> **3.2-9** When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.
>
> **Commentary**
>
> [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not

(Ont. Gen. Div.) at para. 121, additional reasons (1998), 164 D.L.R. (4th) 176, 1998 CarswellOnt 4688.

others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

It is therefore incumbent on lawyers to investigate the capacity of clients and potential clients, and to decline to act where the lawyer does not believe that the client has the capacity to retain and instruct counsel with respect to a given issue. If, however, the lawyer is satisfied that the client does have the requisite capacity, that lawyer should strive to make the lawyer-client relationship as normal as possible, keeping in mind the requirement for a "very high degree of professionalism" referenced in *Banton*.

Independent Legal Advice

Another important concept outlined in the *Rules of Professional Conduct* is that of independent legal advice. Independent legal advice is defined in Rule 1.1-1 as a retainer where:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
(b) the client's transaction involves doing business with
    (i) another lawyer,
    (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
    (iii) a client of the other lawyer,
(c) the retained lawyer has advised the client that the client has the right to independent legal representation,
(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

The Rules suggest that a lawyer should consider requiring that the client obtain independent legal advice: before the client consents to have the lawyer represent him or her despite a conflict of interest; before the lawyer accepts a joint retainer; and if the lawyer will receive payment for legal services by the transfer of a share, or of an interest in a property or enterprise, from a client. A lawyer must require the client to obtain independent legal advice if the lawyer gives a loan to a client who is a related person, and a lawyer must advise the client to get a different lawyer to represent them if the lawyer gives a loan to a client who is not a related person.

Independent legal advice can be an effective tool for mitigating the possibility of undue influence where one party to a transaction may be vulnerable or dependent on the other party. Lawyers should strongly consider requiring independent legal advice where they have concerns that undue influence could be a factor in a transaction. Several additional rules contained in the *Rules of Professional Conduct*, including rules regarding confidentiality and joint retainers, may require special attention where vulnerability, capacity, and undue influence are at issue.

Statutory Duties

Statutes are an additional source of duties for lawyers. In some instances, these statutory duties are formalizations of the duties or tests developed in the common law. The tests and duties created by statute often vary between provinces, as different provincial legislatures choose different language for their statutes and adopt different amendments over time.

In terms of the subject matter of this paper, one statute in particular, the *Substitute Decisions Act, 1992*[2] (the "*SDA*") is relevant to the issue of capacity. The *SDA* outlines the requisite tests for capacity with respect to granting or revoking powers of attorney, and the capacity to manage property and personal care.

Section 3 Counsel

The *SDA* also creates a special type of retainer between a lawyer and a client where that client's capacity is at issue in a proceeding. A lawyer in these cases is appointed under s. 3 of the *SDA* and so is referred to as Section 3 counsel. While all of the regular duties owed by a lawyer to his or her client apply to Section 3 counsel, there is no standard "retainer" between Section 3 counsel and their client; instead, the court orders the retention of Section 3 counsel to fulfill a specific statutory role.

That role is to determine the wishes of the client whose capacity is at issue, and importantly, per s. 3(1)(b) of the *SDA*, that client is deemed to have the capacity to retain and instruct counsel. This means that a lawyer acting as Section 3 counsel must take special care in the fulfillment of his or her duties, as there is a strong probability that the client has some cognitive deficits that may make it difficult to obtain consistent or clear instructions. Section 3 counsel must therefore take care not to provide the wishes of the client only to the

2. S.O. 1992, c. 30.

extent that they can be obtained, and not substitute the lawyer's own opinion of what is in the best interests of the client for the client's actual wishes.

Common Law Duties

The Canadian law of wills and estates has developed from the more than 1,000-year-old tradition of British common law; needless to say, many centuries of jurisprudence have created a myriad of legal tests and imposed a variety of duties on lawyers. These tests and duties have changed over time in accordance with new social norms and technological advancement, meaning that one of the fundamental characteristics of the common law is that it is always subject to change at the discretion of judges. This is one reason why, to come full circle, one of the standard professional duties of lawyers is to engage in continuing legal education.

For example, the legal test for testamentary capacity arises out of the common law, and it is the duty of a drafting solicitor, prior to drafting a will on behalf of the client, to investigate the issue of testamentary capacity as it is defined in the common law.

The specific duties and obligations owed by lawyers where vulnerability, capacity, and undue influence are at issue are discussed in context and in greater detail below.

PART II: CAPACITY, UNDUE INFLUENCE, AND VULNERABILITY

Capacity, undue influence, and vulnerability are separate but interrelated concepts that all lawyers working in trusts and estates will have to address in the course of their careers. Capacity and undue influence have specific legal meanings, while vulnerability is a broad term used to refer to situations where a lawyer should take greater care in assessing a client's legal needs and instructions in order to effectively advocate for a client's interests.

Capacity

Capacity in essence refers to a person's ability to make a certain decision at a certain time. There is no single test for capacity: a client may be able to make one type of decision, but not another, and may be able to make a decision in the morning, but not in the afternoon. As the courts have long held:

> [Mental incapacity] is a matter of degree, and the degree of weakness differs in the same individual under different circumstances, and according to the different habits existing and the different situations in which he is placed, at one time or another of his life.[3]

It follows that there is no capacity "hierarchy". As Cullity J. stated in *Banton v. Banton*:

> It is clear that capacity or incapacity for one . . . purpose does not necessarily determine the question for other purposes. Although in each case the question may depend, at least, in part, upon the individual's cognitive powers, the nature of understanding required is not the same.[4]

Therefore, in many files, many types of capacity may be relevant, including: the capacity to retain and instruct counsel, the capacity to marry or divorce, the capacity to manage property, the capacity to manage personal care, the capacity to grant a power of attorney for property, the capacity to grant a power of attorney for personal care, and the capacity to make a will. Practically speaking, if, for example, an individual is found to be capable of making complex decisions related to the use and disposition of their assets, they are likely also capable of making basic decisions related to their personal care. However, a lawyer must always satisfy himself or herself that an individual is capable of making *each decision* relevant to a retainer, and capacity to make one decision does not necessarily preclude incapacity to make another.

A Note on Capacity Assessments

If a lawyer is uncertain about the capacity of his or her client to make a decision, then the lawyer may wish to advise his or her client that they will not act until the client undergoes a capacity assessment that demonstrates that the client is capable with respect to that decision. In Ontario, capacity assessments are completed by an assessor certified by the Ministry of the Attorney General, and a list of qualified capacity assessors is available on the Ministry's website.

A lawyer should be careful to ensure that such an assessment is actually required in order to take on or fulfill a given retainer, as a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider, and requiring a capacity assessment must be reasonable in the circumstances. As the court held in *Weldon McInnis v. John Doe*,[5] discussed further below,

3. *Portsmouth (Countess) v. Portsmouth (Earl)* (1828), [1824-34] All E.R. Rep. 673, 162 E.R. 611, 1 Hagg. Ecc. 355 at 362-363 (Eng. Ct. Arches).
4. *Banton*, *supra*, footnote 1, at 33.

lawyers are allowed a reasonable degree of deference in making such a decision:

> In this particular case, [the lawyer] was facing a client who had, comparatively speaking, some complicated issues. The issue of his competence to effect a new Power of Attorney was, in my view, a predictable concern which a competent lawyer would have in mind. Whereas all persons are presumed to be competent, the circumstances of [the client] certainly created, at the very least, a doubt. Whether every lawyer would have undertaken the retaining of an expert at that particular time, is not the test. Allowance must be made for the individual opinions of solicitors who are ultimately responsible for their legal work.

Testamentary Capacity

In order to satisfy himself or herself that his or her client has the requisite capacity to make a will, a drafting solicitor should turn to the test outlined in *Banks v. Goodfellow*:[6]

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not been made.

To translate the above into less antiquated language: a testator must be aware of the nature and effects of a will; of the nature and extent of the assets he or she owns; and of the moral claims that may exist against his or her estate. This awareness should not be eroded to the extent that the testator is incapable of giving effect to his or her actual wishes in a will. To that end, the final sentence of the test in *Banks v. Goodfellow* also incorporates, to an extent, the concept of undue influence, which is often used to "poison" the mind of a testator against certain objects of his or her affection.

The "moral claims" against an estate generally refer to individuals that the testator has a duty to support or would ordinarily support. A testator must be able to identify those individuals, and assess the claims that they might have against his or her estate. It is therefore

5. 2014 NSSC 437, 247 A.C.W.S. (3d) 952, 2014 CarswellNS 952 (N.S. S.C.) at para. 42.
6. (1870), [1861-73] All E.R. Rep. 47, 39 L.J.Q.B. 237, L.R. 5 Q.B. 549 at 565 (Eng. Q.B.).

important that a lawyer fulfill their duty to investigate a client's testamentary capacity by asking questions not only about the testator's assets and how he or she would like to dispose of them, but about the family situation of the testator. The age, relationships, education, financial status, and (dis)ability of the testator's close friends and family may be relevant to the issue of moral claims against the estate, whether the testator would have those individuals be beneficiaries or not.

The principles set out in *Friesen v. Friesen Estate*,[7] and summarized in *Wiseman v. Perrey*,[8] set a high bar for lawyers to investigate the testamentary capacity of their clients:

> (a) neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity; (b) 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; and (c) a solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers and then simply recording in legal form the words expressed by the client. He must first satisfy himself by a personal inquiry that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood.

Given the finality of testamentary dispositions, and the important policy considerations attached, the "high degree of professionalism" referenced by Cullity J. is especially important for a drafting solicitor in the course of a will drafting retainer.

Capacity to Grant or Revoke a Power of Attorney

The capacity required to give or revoke a power of attorney is outlined in the *SDA*. As always, a lawyer should investigate the issue of capacity before preparing Power of Attorney for Personal Care ("POAPC") or Continuing Power of Attorney for Property ("CPOAP") for his or her client.

The requisite capacity to give a POAPC is found at s. 47 of the *SDA*, which provides that a person is capable or granting or revoking a POAPC if the person has:

---

7. (1985), 24 E.T.R. 191, 33 Man. R. (2d) 98, 1985 CarswellMan 84 (Man. Q.B.) at 83-89.
8. 2012 BCSC 1681, 83 E.T.R. (3d) 3, 223 A.C.W.S. (3d) 909 (B.C. S.C.) at para. 112, additional reasons 2013 BCSC 904, 41 C.P.C. (7th) 82, 89 E.T.R. (3d) 199.

(a) the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
(b) appreciates that the person may need to have the proposed attorney make decisions for the person.

Meanwhile, s. 8 of the *SDA* provides that a person is capable of granting or revoking a CPOAP if he or she:

(a) knows what kind of property he or she has and its approximate value;
(b) is aware of obligations owed to his or her dependants;
(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
(d) knows that the attorney must account for his or her dealings with the person's property;
(e) knows that he or she may, if capable, revoke the continuing power of attorney;
(f) appreciates that unless the attorney manages the property prudently its value may decline; and
(g) appreciates the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a POAPC if they are able to give one, and equally, a person is capable of revoking a CPOAP if they can grant one.

Capacity to Manage Property

The incapacity to manage property is also defined in the *SDA*. Section 6 of the *SDA* provides that:

> A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Lawyers should keep this test in mind not only when they are drafting a CPOAP, but in any retainer where there is a transfer or agreement to transfer rights or assets, and especially real property, to or from the client. Vulnerable clients, particularly those with cognitive difficulties, are generally more susceptible to fraudulent scams which can deprive them of assets that will be required for their future care. Lawyers should be sensitive to their duty to ensure their clients capacity in any contract or transaction.

Capacity to Manage Personal Care

Incapacity to manage one's person care is defined in s. 45 of the *SDA*, which provides that:

> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

If a client comes to a lawyer and is unhappy that someone else is making decisions about his or her personal care, the lawyer should keep in mind that there may not be a need to seek an assessment of the client's capacity to manage his or her personal care if the client is capable of granting or revoking a POAPC.

Capacity to Marry and Divorce

The capacity required to marry, in Ontario, is problematically minimal. In the leading English case of *Durham v. Durham*,[9] the English court ruled that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend". The court proceeded to compare capacity to marry to capacity to enter into a contract. This analysis, the court continues, would require the person in question to possess the:

> (a) Ability to understand the nature of the contract of marriage; and
> (b) Ability to understand the effect of the contract of marriage.[10]

In *Calvert (Litigation Guardian of) v. Calvert*,[11] the court equated the capacity to divorce with the capacity to marry.

As the law in Ontario provides that a previously executed will is automatically revoked upon marriage (unless it was specifically made in contemplation of marriage), the low threshold for capacity to marry opens vulnerable people up to predatory marriages. Essentially, a person may have the capacity to marry, but lack the capacity to make a new will, entitling the predatory spouse to a large portion of the vulnerable person's estate pursuant to the *Succession Law Reform Act*[12] and the *Family Law Act*.[13]

9. (1885), 10 P.D. 80 at 82, [1885] 1 T.L.R. 338 (Eng. P.D.A.).
10. *Supra.*
11. (1997), 27 R.F.L. (4th) 394, 32 O.R. (3d) 281, 69 A.C.W.S. (3d) 125 (Ont. Gen. Div.), affirmed (1998), 36 R.F.L. (4th) 169, 37 O.R. (3d) 221, 106 O.A.C. 299 (Ont. C.A.), leave to appeal refused (1998), 111 O.A.C. 197 (note), 228 N.R. 98 (note), [1998] S.C.C.A. No. 161 (S.C.C.).
12. R.S.O. 1990, c. S.26.

It is therefore incumbent on lawyers to fully investigate a client's capacity, and the presence of undue influence, when they are retained and where the retainer involves powers of attorney, contracts, wills, or property transfers arising out of a new marriage where one person appears to be more vulnerable or less sophisticated than the other.

Undue Influence

Undue influence is separate but related to the concept of capacity. Therefore, it is possible that an individual is capable with respect to a decision, but that the presence of undue influence renders that decision invalid. It is therefore important for lawyers to investigate the potential for both incapacity and undue influence in the course of a retainer.

Undue influence is more substantial than mere influence, and requires the application of coercion such that the person being unduly influenced is made to do something they do not want to do.[14] Persuasion is allowed, but the will of a person cannot be overborne or dominated to the extent that their decisions are not truly their own.[15]

There are several "red flags" that lawyers should be aware of related to undue influence, and that may also indicate diminished capacity, including: new relationships, sudden changes in old relationships, a change in caregiver, paranoia and suspicion, a change in residence, and an over-reliance on one individual. In a typical case of undue influence, someone – be they a relative, friends, neighbor, spouse or caregiver – will find ways to become increasingly involved in the affairs of a vulnerable person to the exclusion of other friends and family. They may transfer assets into joint names, or have the vulnerable person execute new wills and powers of attorney.

Often, the undue influencer will bring the vulnerable person to a lawyer and may wish to be present throughout the interview. This is one of the reasons why it is important for a lawyer to meet with his or her client alone in order to investigate the potential for undue influence, keeping in mind that, as per W.N. Renke J., "The most effective control works regardless of presence".[16]

---

13. R.S.O. 1990, c. F.3.
14. *Wingrove v. Wingrove* (1885), 11 P.D. 81 (Eng. Prob. Ct.) at p. 82.
15. *Dmyterko Estate v. Kulikowsky* (1992), 47 E.T.R. 66, 35 A.C.W.S. (3d) 755, 1992 CarswellOnt 543 (Ont. Gen. Div.).
16. *Kozak Estate (Re)*, 2018 ABQB 185, 2018 CarswellAlta 483 (Alta. Q.B.) at para. 76, additional reasons 2018 ABQB 272, 2018 CarswellAlta 680.

Vulnerability

Vulnerability lacks a specific legal meaning, but is closely intertwined with capacity and undue influence in the sense that vulnerabilities resulting from any source – such as age, infirmity, disability, language barriers, or involvement in abusive relationships – may impair cognitive function and/or make an individual more susceptible to coercion or fraud,

Onus

As vulnerability is not a legal doctrine, there is no onus on either party to litigation to prove or disprove vulnerability; instead, it is typically apparent on the facts, and if present, will be considered in the court's analysis of capacity and/or undue influence. Incapacity and undue influence, meanwhile, must generally be proven by the party seeking to attack the validity of a legal document, as capacity to make a certain decision is typically presumed at law. However, there are two situations in which the onus will shift to the party defending the validity of document: 1) when the court finds that there are suspicious circumstances surrounding the execution of a document; and 2) with respect to certain contracts or transactions, depending on the relationship between the parties. The presence or absence of incapacity and undue influence must be proved on the civil standard of a balance of probabilities.

For wills, there is a rebuttable presumption that the testator had the capacity to make a will. If suspicious circumstances are present, this rebuttable presumption is spent, and the party propounding the will must assume the burden of proving testamentary capacity and that the testator had knowledge and approval of the contents of the will.[17] As the Supreme Court held in *Vout v. Hay*:

> The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[18]

As for certain contracts or transactions – the common example for estates and trusts lawyers being *inter vivos* property transfers – there will be a presumption of undue influence that must be rebutted when the relationship between the parties calls for such a presumption.

17. *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431, 1995 CarswellOnt 186 (S.C.C.) at para. 27.
18. *Supra*, at para. 25.

The Supreme Court addressed the presumption of undue influence in *Goodman Estate v. Geffen*:[19]

> What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.
>
> Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction.

Therefore, while the burden of proving undue influence or incapacity will, for the most part, rest with the party alleging either (and they are generally argued in tandem) there are certain circumstances where the court will place the onus on the party seeking to propound a will or uphold contract or transaction to prove the validity of same.

Lawyers should be careful to avoid creating suspicious circumstances by, for example, taking instructions from a person who is not their client. Equally, lawyers should consider the relationship between parties to a contract or transaction, and the nature of the contract or transaction, to consider whether it is appropriate to draft a document as instructed, and whether each party should obtain independent legal advice.

PART III: SOLICITOR'S NEGLIGENCE

Unfortunately, and despite our best efforts, lawyers sometimes fail to adequately address issues of capacity and undue influence in a retainer. While not all mistakes amount to negligence, there are many instances where the conduct of a lawyer falls below the standard required by the law. In these instances, the appropriate party is likely to make a claim for solicitor's negligence.

A claim for solicitor's negligence, which falls under the broader category of professional negligence, turns on two factors: (1) the existence of a duty of care owed by the solicitor to the party claiming negligence, and (2) a finding that the solicitor's actions were a

19. [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 1991 CarswellAlta 91 (S.C.C.) at paras. 43-44.

departure from the applicable standard of care and so caused a loss to the plaintiff. A duty of care arises as a matter of course when a lawyer enters into a retainer with a client. As for the standard of care, per *1483677 Ontario Ltd. v. Crain*:[20]

> The applicable standard of care is that of a reasonably competent solicitor: *Ristimaki v. Cooper*. A lawyer who is retained must bring "reasonable care, skill and knowledge to the performance of the professional service which he [or she] has undertaken." As well, "a solicitor's conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client".

It is not enough to say that a solicitor made an error of judgment or showed ignorance of some particular point of law; instead, the plaintiff must prove that a reasonably competent solicitor would not have done so in order for the solicitor to be liable for damages.[21] *Per Alberta (Workers' Compensation Board) v. Riggins*,[22] "the measure of damages is the amount that would have been awarded but for the negligence of the lawyer, unless that amount is not collectible. If that amount would not be collectible from the original tortfeasor, then the plaintiff has no right to the damages in question."

Importantly, in the case of wills, the third party beneficiary rule extends the duty of care owed to the testator by the drafting solicitor to beneficiaries under a negligently drafted will. A classic example is the case of *Whittingham v. Crease & Co.*,[23] where a lawyer asked the wife of one of the beneficiaries to be a witness to the will, thereby voiding any gifts made to that beneficiary under the will. The plaintiff beneficiary in that case was successful in his negligence claim, and received as damages the difference between what he would have received under the will and what he did receive when the would-be gift was distributed under intestacy.

20. 2015 ONSC 6217, 50 B.L.R. (5th) 32, 2015 CarswellOnt 15736 (Ont. S.C.J.) at para. 155.
21. *Ibid.*
22. 1992 ABCA 263, 95 D.L.R. (4th) 279, 1992 CarswellAlta 140 (Alta. C.A.) at para. 17.
23. (1978), 88 D.L.R. (3d) 353, 6 C.C.L.T. 1, 1978 CarswellBC 456 (B.C. S.C.).

Case Law

Strong v. McCarron[24]

The *Strong v. McCarron* decision involves a claim against a solicitor, Ms. McCarron, by Larry Strong and Florence Strong, who received imperfect title to a property in which an unrelated party, Murray Steeves, retained a life interest pursuant (in part) to the Last Will and Testament of his wife, Dorothy Steeves. Dorothy's will required her estate trustee to seek Murray's consent before selling the matrimonial property.

Dororthy passed away on July 27, 1996. Ms. McCarron was retained by Normand and Shari Daigle in March of 1997 with respect to a purchase of the Steeves' marital home from Dorothy's Estate. (The Strongs are the parents of the Shari Daigle and purchased the property from them in June of 1998.)

Ms. McCarron had knowledge of Murray's life interest in the property, but as he was ill in hospital around the closing date of the sale, never asked for or received his written consent to the sale as required by the will and by the *Statute of Frauds*. Instead, Ms. McCarron relied upon a Statutory Declaration by one of Murray's daughters that he consented to the sale of the property and that the sale would be used to pay Dorothy's debts. Ms. McCarron also relied on s. 9 of New Brunswick's *Devolution of Estates Act*,[25] which empowers a personal representative to sell the property of a deceased, without consent of the beneficiaries, if the sale is in whole or in part to pay the debts of an estate. Ms. McCarron certified that the Daigles held free and unencumbered title to the property after the sale (which was not in fact the case).

Another of Murray's daughters later swore an affidavit that her father had never consented to the sale of the property. As for s. 9 of the *Devolution of Estates Act*, the court held that it does not apply where, as in this case, a lawyer has notice of a life interest in the property. Further, s. 9 was not appropriate to rely on where the only evidence that the sale was being used to pay debts was the Statutory Declaration.

The court held that Ms. McCarron had not acted in a manner consistent with a reasonably competent solicitor in failing to obtain Murray's consent to the transfer, *inter alia*. The court held:

> 36 On the facts of this case, I conclude that the express grant of a life estate in a registered will would have caused a reasonably competent and

24. 2003 NBQB 206, 2003 NBBR 206, 1 E.T.R. (3d) 283 (N.B. Q.B.).
25. R.S.N.B. 1973, c. D-9.

> prudent lawyer to obtain a written release of the life interest prior to closing. The specific bequest of the testatrix giving the right to her spouse Murray Steeves to use the property "as a home for my spouse until his death or remarriage, whatever first occurs" and the restriction on the sale with the "consent of my spouse" were not, in my view, ambiguous terms. They were clear signs that should have alerted McCarron to the need for Steeves' consent as a condition precedent to closing.
>
> 37 Faced with the actual notice of Steeves' interest as devised in the will, I am satisfied that a reasonably competent lawyer would not have relied on the existing statutory declaration or on section 9 of the Devolution of Estates Act in certifying to the purchasers that they were obtaining a marketable title to the property

As a result of Ms. McCarron's negligence, the Strongs eventually learned, in the course of seeking mortgage financing, that Murray's life interest remained on title. Murray's life interest was held to be worth $18,000, and pursuant to an agreement made before trial, Ms. McCarron paid the Strongs approximately $30,000 in damages, interest and costs.

Baron v. Mamak[26]

This solicitor's negligence claim, *Baron v. Mamak*, arose from the case of *Juzumas v. Baron*,[27] but this claim was brought not by the victim, as you might expect, but by the perpetrator.

By way of brief background, a younger woman met an elderly gentleman, Mr. Juzumas, when she began providing him with housekeeping services. Mr. Juzumas was born in Lithuania and spoke very little English. He had no family in Canada. The housekeeper was also born in Lithuania and she had been married several times before. The two married on the understanding that the housekeeper would look after Mr. Juzumas and take care of the house until his death, as he did not want to live in a nursing home. The housekeeper did not hold up her end of the bargain and preyed on the elderly man for financial gain, including by taking steps to have title to his house transferred into the name of her son.

Eventually, through the assistance of a neighbor, the older man was able to bring a claim to have his home transferred back into his name and obtained a divorce, but not before suffering emotionally,

---

26. 2018 ONSC 2169, 290 A.C.W.S. (3d) 869, 2018 CarswellOnt 5378 (Ont. S.C.J.).
27. 2012 ONSC 7220, 225 A.C.W.S. (3d) 515, 2012 CarswellOnt 16785 (Ont. S.C.J.), additional reasons 2012 ONSC 7332, 225 A.C.W.S. (3d) 334, 2012 CarswellOnt 16786.

physically, and financially from the actions of the housekeeper. Justice Lang, who presided over the original action, dismissed *quantum meruit* claims brought by the housekeeper and her son against Mr. Juzumas with costs.

The day before their marriage, the housekeeper and Mr. Juzumas attended at a lawyer's office and prepared a will naming the housekeeper as the sole executor and beneficiary of Mr. Juzumas' estate. The lawyer did not meet with Mr. Juzumas separately. He did not arrange for an interpreter. There was no discussion with Mr. Juzumas as to the value of the house or whether a marriage contract might be appropriate.

Later Mr. Juzumas went to a different lawyer and executed a new will, leaving most of his estate to his niece in Lithuania. He left a bequest of $10,000 to the housekeeper.

When the housekeeper became aware of this new will she consulted with the original lawyer, and decided that Mr. Juzumas' house, which formed a significant part of his estate, would be transferred to the housekeeper's son, subject to a life interest in favour of Mr. Juzumas. The housekeeper, her son, and Mr. Juzumas then had a brief meeting at the lawyer's office. The lawyer did not explain the concept of a "life tenancy" to Mr. Juzumas; there was no discussion about the value of the property being transferred during the meeting; and there was no interpreter present. There was a suggestion that the housekeeper had drugged Mr. Juzumas prior to the meeting.

After receiving the lawyer's confirmation letter in the mail confirming the transfer of the house, Mr. Juzumas contacted the lawyer on three separate occasions asking to reverse the transfer. The lawyer consistently advised him that the transfer could not be undone because it was "in the computer".

With the assistance of his neighbor, Mr. Juzumas consulted another lawyer and ultimately brought an action to reverse the transfer. After failing in their claims, the housekeeper and her son brought a solicitor's negligence claim seeking damages from the lawyer who prepared the transfer of the house and various other documents.

The defendant lawyer conceded that his actions fell below the standard of care. Justice Gray noted that under the circumstances, the lawyer was clearly not in a position to represent both the housekeeper and her son on the one hand, and Mr. Juzumas on the other. He was obliged to obtain separate representation for Mr. Juzumas. Furthermore, Justice Gray stated that it clearly would

have been prudent to ensure that Mr. Juzumas understood what was going on, given his limited language skills.

However, despite the lawyer's failure to meet the requisite standard of care, Justice Gray concluded that it was impossible to find that the breach of care caused any of the damages claimed by the plaintiffs, the housekeeper and her son. The transfer of the property from Mr. Juzumas to the son was the product of a scheme perpetrated by the plaintiffs on an elderly and unwell man. It was the product of their undue influence. Even if the defendant lawyer had fulfilled his duty of securing separate representation for Mr. Juzumas, that would have simply prevented the transaction from occurring. Justice Gray dismissed the plaintiffs' negligence claim.

PART IV: CASE LAW

Several types of cases are outlined below, some of which include findings of negligence against a lawyer and some of which do not. In every instance, the lawyer failed, at least in part, to live up to their duties in instances where their clients were vulnerable.

Some are cases that arose on the basis of incapacity or undue influence where the court held that lawyers failed to meet their duties in the course of their retainer. Others are cases where the Law Society of Ontario, exercising its control over the professional licensing of lawyers in Ontario, determined that the lawyers had engaged in professional misconduct that was sufficiently egregious to merit suspension of the lawyers' licence to practise law. Finally, the last case will address the assessment of a lawyer's bill where her client was found to be incapable with respect to the management of his property and certain other decisions.

Vulnerability

Lizotte v. Lizotte[28]

This decision concerns a transfer deed executed in 1986 that conveyed all of the family farmlands to one brother, Léonil Lizotte, for no consideration. In this case, the vulnerability of the wronged party was the result of language barriers and a lack of legal sophistication.

Léonil's mother, Ida, sister Ella, and brother Rino, executed the transfer deed believing that one or more of them would be entitled to the lands on Léonil's death. Importantly, both Ida and Rino had matrimonial homes located on the property that was transferred by

28. 2002 NBCA 29, 648 A.P.R. 70, 2002 CarswellNB 108 (N.B. C.A.).

the deed. However, Léonil had a son, who he told the parties about in 1996 after the execution of the deed, and who would therefore have inherited the whole family property if Léonil died intestate, which he did on December 30, 2000. Such an outcome was not in line with Rino's intentions and expectations when signing the deed.

The New Brunswick Court of Appeal ultimately upheld the trial judge's decision to rescind the deed on the basis of mistake, and confirmed the judge's findings that the solicitor who prepared the deed was negligent. The court also upheld the trial judge's award of solicitor and client costs against the solicitor for the full amount required to compensate Rino for the legal fees incurred in asserting his legal rights.

The solicitor, Mr. McLaughlin, acted under a joint retainer between Rino and Léonil despite the fact that this was not an arm's length transaction, and without obtaining written permission from the parties or advising his clients that there were conflict of interest, in addition to marital property issues, with respect to the transfer. Additionally, the deed was prepared in English, a language which Rino could not speak or write in. The court therefore held that, on a number of bases, Mr. McLaughlin had failed to provide the services of a reasonably competent solicitor, and had failed to heed the rules of professional conduct with respect to joint retainers.

This case therefore highlights the duties and obligations of a solicitor where a client may be vulnerable as the result of language barriers, a lack of legal sophistication, and an over-reliance on the good intentions of family members. The red flags in this case – the lack of consideration, the language issue, the unresolved marital property issues – would have caused a reasonably competent solicitor to take the requisite steps to ensure that Rino, Ida and Ella had independent legal advice and understood the full consequences of the transfer and the significant renunciation of their inheritance rights that it represented.

Law Society of Upper Canada v. Aldo Tollis[29]

This Law Society Appeal Panel decision contains an egregious set of facts which demonstrate that the solicitor in question, Mr. Tollis, took advantage of clients whose capacity was at issue in Consent and Capacity Board hearings on several occasions.

In this case, Mr. Tollis moved for an order allowing him to file a late appeal to the decision in *Law Society of Upper Canada v. Aldo Tollis*,[30] which imposed a 14-month suspension on Mr. Tollis and

29. 2010 ONLSAP 20 (L.S.U.C. Appeal Panel).

precluded him from representing clients whose capacity was at issue. The Appeal Panel rejected Mr. Tollis' request for an extension of time.

The original Hearing Panel found that Mr. Tollis had:

> . . . charged fees that were not fair and reasonable, and had, in offering professional services to prospective clients, used means that amounted to coercion, duress, or harassment, or that he otherwise took advantage of his clients. Mr. Tollis admitted professional misconduct by way of an Agreed Statement of Facts.

Notably, the Hearing Panel stated that it would have imposed a more severe penalty on Mr. Tollis (likely disbarment) were it not for the joint submission.

Mr. Tollis, in the Agreed Statement of Facts ("ASF"), admitted to professional misconduct with respect to three clients: Mr. L, Mr. S, and Mr. W. In each case, Mr. Tollis rendered excessive accounts for his work on behalf of his clients, and included in his accounts time spent in securing and cashing funds from his clients. In Mr. L's case, Mr. Tollis refused Legal Aid on behalf of his client. In Mr. S's case, Mr. Tollis billed in excess of $11,000 (or 25.1 hours) for a three-day retainer. In Mr. W's case, Mr. Tollis billed over 55 hours *after* coming to the conclusion that his client's extensive psychiatric history rendered a capacity hearing with respect to his ability to consent to treatment untenable.

In his attempted appeal, Mr. Tollis resiled from the ASF and asserted that he was coerced by his counsel into signing it. In an ironic twist, Mr. Tollis claimed that his counsel failed to live up to the duty of loyalty and duty of care that they owed to him. He further alleged that his counsel colluded with the Law Society and preferred their own professional interests to his. He also suggested that the Law Society was out to get him.

Mr. Tollis argued that his mental state precluded him from appealing the Hearing Panel decision within the 30-day limit, but the Appeal Panel rejected his submissions. The Appeal Panel held that Mr. Tollis was capable of making the decision to submit the ASF, and that he was not entitled to an extension of time for an appeal because he now regretted it. The Appeal Panel therefore upheld Mr. Tollis' suspension and preclusion from working with clients whose capacity is at issue.

30. 2009 ONLSHP 33 (L.S.U.C. Hearing Panel).

Law Society of Upper Canada v. Farant[31]

This disciplinary decision concerns a lawyer who, *inter alia*, charged unreasonable fees, breached an order of the court, and misled his client and other members of the bar to conceal these activities.

The lawyer, Joseph Omer Jean-Michel Farant, acted for DP with respect to a tort and accident benefits claim related to a motor vehicle accident. DP was a highly vulnerable person: he attended school only until Grade 2; he was unable to read or write; and a capacity assessment undertaken in 2001 found that he could not understand when he was being exploited and could not defend himself from exploitation. Throughout DP's retainer with Mr. Farant, he was not represented by a litigation guardian, though the PGT was later appointed as DP had no close friends or family.

Over the course of his retainer, Mr. Farant improperly dealt with funds totaling approximately $154,000 from DP's trust account with his firm. For the tort an accident benefits claim, Mr. Farant billed approximately $190,000 more in legal fees than in work he actually completed on the file, and on several occasions never sent an account to DP. Further, Mr. Farant violated an order of the court by paying himself $35,000 in excess of what was ordered out of DP's settlement funds.

Mr. Farant refused to see DP due to his disruptive behaviour on several occasions, and misled him about the funds that were taken and the state of DP's claims. Mr. Farant also misled successor lawyers hired by DP.

The Hearing Panel found found:

> [84] The facts admitted by Mr. Farant raise matters which lie at the heart of a lawyer's obligations. The calling of a lawyer is to protect his client. The calling is highest where the client is vulnerable. Mr. Farant failed in this calling . . .
>
> . . . . .
>
> [86] As set out above, Mr. Farant failed in his highest duty to protect DP, a highly vulnerable client. Mr. Farant did so for personal gain. He breached the court order, misled his client and partners, and misrepresented the state of affairs to successor lawyers.

The Hearing Panel relied on joint submissions, and found that issues in Mr. Farant's personal life, his previously spotless discipline record, and the rehabilitation Mr. Farant had demonstrated since his misconduct served as mitigating factors. Ultimately, Mr. Farant

31. 2005 ONLSHP 31, 2005 CarswellOnt 12061 (L.S.U.C. Hearing Panel).

was suspended for 14 months, and was required to be supervised for two years following his return from suspension.

Incapacity and Undue Influence

Danchuk v. Calderwood[32]

This is a classic case involving the predatory marriage of a caregiver to an older adult, and includes the drafting of new wills, powers of attorney, and the creation of joint bank accounts and credit cards between the older adult and the caregiver. The older adult, George Danchuk, passed away on June 2, 1994, having been purportedly married on January 14, 1994, and having executed a new Last Will and Testament on February 3, 1994.

After George's separation from his second wife in 1986, his daughter from his first marriage, Sonja Calderwood, assisted him with the management of his day-to-day affairs. Her assistance became increasingly necessary as George began to suffer from the effects of dementia in the early 1990s. In the spring of 1993, Sonja hired Ida Ducolon, with whom she had been acquainted for several years, to assist with George's in-home care. After Ida began living with and assisting George, his friends and family report that he became increasingly isolated.

By the winter of 1994, George and Ida had "married" (though he was not actually divorced from his second wife), and George had executed a new will and powers of attorney in favor of Ida, completely unbeknownst to the rest of his family.

Ms. Heidi Bellis, the solicitor who prepared these documents for George, never met with him alone and noted concerns about George's capacity and that Ida was speaking for George at their meetings. Nevertheless, Ms. Bellis felt satisfied that George had the requisite capacity to make a will and grant powers of attorney. At trial, however, Harvey J. held with respect to Ms. Bellis:

> 116 In keeping with what I understand to be the law applicable to the duty of a solicitor, in the circumstances here, I accept the submission of counsel for the defendants that she failed with respect to that duty.
>
> 117 In my view, in the particular circumstances here, at the outset:
> (1) she should have regarded the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to

32. (1996), 15 E.T.R. (2d) 193, 67 A.C.W.S. (3d) 418, 1996 CarswellBC 2555 (B.C. S.C.), additional reasons (1997), 1997 CarswellBC 1483, 71 A.C.W.S. (3d) 1047, [1997] B.C.J. No. 1439 (In Chambers).

that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;

(2) she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;

(3) the inquiry should have confirmed whether the deceased had a prior existing will and, if such a will existed, what were the reasons for any variations or changes therefrom prompting the disposition being put forward;

(4) the inquiry should have encompassed why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney, a new power of attorney was to be given by the deceased to the plaintiff; and,

(5) collateral to (4), *supra*, the inquiry should have included some investigation of the health of the deceased.

118 In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.

119 If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense, including the medical assessment of the ongoing progression and state of senile dementia, I am satisfied the said will would not have been prepared by her at that time.

120 For these reasons, I attach little weight to the testimony of the solicitor.

The trial judge held that the 1994 Will has invalid, and did not have to deal with the issue of the validity of the marriage, as George never divorced his second wife. Special costs were awarded to George's children and wife.

Kozak Estate (Re)[33]

This recent case from the Alberta Court of the Queen's Bench demonstrates the difficulties that drafting solicitors may face in identifying the presence of undue influence, even where they have taken steps to ensure that their client has testamentary capacity. In

33. 2018 ABQB 185, 2018 CarswellAlta 483 (Alta. Q.B.), additional reasons 2018 ABQB 272, 2018 CarswellAlta 680.

this case, two wills prepared by the deceased near the end of his life were set aside on the basis of undue influence.

In this case, the deceased, Ted Kozak, passed away in March of 2014 having executed a 2011 Will and subsequent 2012 Will that significantly benefitted his fiancée – or a "really good" friend, as she claimed – Maryann Seafoot. Ted met Maryann at a gun show when he was a 72-year-old bachelor living on a farm near Kingman, Alberta that had been in his family for more than a century, and she was 56 years old, unemployed, and considering a move to Daysland, Alberta. Only a few months later, Ted sold the family farm to a neighbor for $600,000 and purchased an acreage in Daysland where he invited Maryann to live with him.

Though Ted wanted to marry Maryann, and proposed to her early in their relationship, Maryann initially paid rent at the Daysland property and she and Ted slept in different bedrooms. Maryann gave contradicting evidence of her relationship with Ted, claiming both to have loved Ted dearly and that he was simply a good friend. Ted retained Mr. Andreassen, a lawyer, to assist in the preparation of the 2011 Will and the 2012 Will, the latter of which was made in contemplation of Ted's marriage to Maryann.

There is no record of the meeting where the 2011 Will was signed, however, Mr. Andreassen met with Ted alone to determine his testamentary capacity and execute the will. (Maryann may have been present in the outer office.) Mr. Andreassen asked Ted about the nature and extent of his assets, his health, any legal and moral claims that might exist against his estate, and his relationships with friends and family. Ted told Mr. Andreassen that he had fallen out with his sister, Yvonne, and was adamant that he loved Maryann and wanted to provide for her. Ted stated that he didn't want "a lecture from his lawyer" on the issue of a marital property agreement with Maryann. Mr. Andreasson was satisfied based on this conversation that Ted had testamentary capacity.

Ted was admitted to Viking Extendicare Centre, a care facility, in March of 2013. Mr. Andreassen met with Ted again in June of 2013 to change his Power of Attorney. Ted's attorney at that time was his cousin Rick, with whom he had a lifelong friendship; however, Rick did not want to be involved with Ted's estate if Maryann was. Maryann brought Ted to the office, but Mr. Andreassen met with Ted and Rick alone. At the meeting, Mr. Andreassen was satisfied that Ted had the requisite capacity to change his attorney. Ted executed a Power of Attorney and Personal Directive naming Maryann as his attorney and agent in June of 2013.

Ted's account with Viking Extendicare Centre quickly went into arrears under Maryann's attorneyship. An auction of Ted's personal property was conducted, in part, to pay his outstanding account. In October of 2013, as Ted's health continued to deteriorate, Yvonne contacted Mr. Andreassen, with a note from Ted giving her authority to discuss his legal matters, expressing concern about Maryann's management of Ted's affairs. Mr. Andreessen prepared new Power of Attorney documents ousting Maryann from the management of Ted's estate. When Maryann brought Ted in to Mr. Andreassen's office in November of 2013, Ted said that he did not want to change his attorney, and that he wanted to marry Maryann. Mr. Andreassen met with Ted alone and was satisfied as to his competency, however, concerned that Ted's loved ones were exerting influence over him, told Maryann after the meeting that, "It's not what you want or Yvonne wants or the family wants, it's what Ted wants."

In the decision, Justice Renke opined on the difficulty facing lawyers where capacity is present, but undue influence is part of a hidden narrative:

> 73 The difficulty any lawyer would have faced, not just Mr. Andreassen, was this: The client presents himself, meets alone with the lawyer, and capacity is established. Measures are taken to ensure that third parties do not interfere. No third party was present, the retainer is not by a third party, no communications affecting the will are received from a third party, no information is provided to a third party without the client's consent.
>
> 74 Mr. Andreassen accepted the narrative that was put to him by Ted. Ted was head over heels in love with Maryann. He wanted to provide for her. He therefore changed his mind about his estate arrangements. In January 2012, Mr. Andreassen was not on notice that there might be any difficulties with this narrative.
>
> 75 Further, a lawyer taking instructions for a will is structurally limited in terms of information access. The client comes to him or her. What the lawyer knows is what the client reveals in answer to questions as well as any historical knowledge the lawyer may have from other dealings with the client (in this case respecting the earlier real estate transaction). Taking instructions for a will does not involve an independent factual investigation into the life of the client. In this case, as Mr. Shipley emphasized, Mr. Andreassen did not know Ted or his family. He did not have a baseline against which to assess Ted's relationship with Maryann.
>
> 76 And, unless there were obvious signs that something was amiss, as there was not in this case, the lawyer is not in a position to go beyond his

> or her capacity examination to test the information the client brings. The lawyer doesn't know how it is or why it is that the client has adopted his or her understanding that produces the instructions. The lawyer doesn't know and can't know what influences have been working on the client. Those influences may be operative, hard at work, while the meeting progresses. A third party who has controlled and manipulated a client can continue to control and manipulate that client while not being physically present. Contrary to a suggestion of Mr. Mohr's, control does not depend on presence. The most effective control works regardless of presence. Further, the mere presence of counsel does not by itself counter manipulation. Again, the presence of counsel is not an inoculation against undue influence.

What Mr. Andreassen did not know was the extent to which Ted's assets has been depleted in the two year since he had met Maryann, and the true nature of their relationship.

While she claimed otherwise, it was clear from Maryann's actions and testimony that she was not particularly devoted to Ted. She did not know when, how often or why he was in hospital; she could not recall what happened to the proceeds from the sale of his family farm; despite being his attorney, she did not know the cost of his care at Viking Extendicare Centre; and she did not know how often she visited him, refusing to give a serious answer when asked. She admitted to using Ted's money on gambling all over Alberta – in Fort McMurray, Boyle, Camrose, Viking, Stettler, Edmonton, Daysland, and Red Deer – while she was Ted's attorney, and yet claimed distance and expense were barriers to visiting him. She lied to hospital officials and others about the nature of her relationship with Ted and the extent of his assets. She could not recall if Ted proposed to her six weeks or six months into their relationship. She tried to sell the Daysland property using her authority as Ted's Power of Attorney, and the property was ultimately sold in March of 2014.

In the few years he knew Maryann before his passing, Ted went from being a frugal bachelor with hundreds of thousands of dollars in assets, to owing extensive debts on a line of credit and in unpaid bills. Ultimately, the court found that the 2011 and 2012 wills were the product of undue influence by Maryann and declared the wills to be invalid.

This decision in its result appears to depart significantly from *Danchuk v. Calderwood*, *supra*, which suggests that where the circumstances appear to call for it, lawyers have an obligation to investigate the information given to them by their clients. However, the facts are distinct: in this case, the lawyer met with his client alone,

asked probing questions about his relationships and assets, and there was no medical evidence of Ted's declining capacity. Ted was, to borrow a phrase form Justice Cullity's decision in *Banton v. Banton*, a "willing victim" of Maryann.

Mayer v. Rubin[34]

In his Endorsement in this matter, Justice Myers strongly condemns the actions of a lawyer, Mr. Henry Juroviesky, in purporting to act for the mother in this case. The Endorsement appoints a litigation guardian, Mr. Pernica, for the mother with respect to the ongoing family litigation involving a family trust. Myers J. appointed the litigation guardian for his following reasons:

> [3] I have yet to hear an independent voice for the mother. Mr. Juroviesky was duty-bound to protect her and yet took instructions from the other respondents knowing that the mother was incapacitated, could not retain him, and, as a litigator, deemed to know that she could not participate in the litigation without a properly appointed litigation guardian. He even continued to purport to express her personal wishes after the capacity assessment removed any remaining vestige of plausible deniability. (There really was none given that Mr. Juroviesky's 2014 memo makes his knowledge clear throughout.) His threat to Deloitte, ignoring the terms of my prior order, and purportedly on the mother's behalf, has superficially aided only Morris Rubin and Sarah Werner by impeding production of documents required for their accounting. One can question if obstructive delay of an accounting by trustees actually serves their overall interests. But that is for another day. It is beyond dispute that the accounting is distinctly in the interests of the mother on whose behalf Mr. Juroviesky was purporting to act.
>
> [4] These are issues best left to another forum, and, perhaps, for costs. I raise them to highlight that on the merits, despite Mr. Juroviesky purporting to represent the mother, I have yet to hear an independent voice for her.

This Endorsement therefore demonstrates the vulnerable position of a party who lack capacity where someone, and especially a lawyer, purports to act for them or have their interests at heart. In the case of divisive litigation between family members, a party under disability must be represented by an independent litigation guardian.

---

34. 2017 ONSC 3498, 30 E.T.R. (4th) 239, 280 A.C.W.S. (3d) 448 (Ont. S.C.J.[Estates List]), additional reasons 2017 ONSC 4121, 30 E.T.R. (4th) 250, 280 A.C.W.S. (3d) 712.

Stevenson Estate v. Siewert[35]

This case concerns the release of a bank draft by a law firm to a dependent adult, who then endorsed the bank draft, which was payable to herself.

Mrs. Stevenson, the 99-year-old dependent adult, and Mr. Salvino, approached the lawyer in this case, Wulf Siewert, about a potential joint business venture. After learning that Mrs. Stevenson was a party under disability, Mr. Siewert advised that he could not represent her, though he later billed her for time spent on her matter to that point.

Mrs. Stevenson's trusteeship was only with respect to her Albertan assets, and in early July of 1990, she asked a Bahamian bank to send a $100,000 bank draft to Mr. Siewert's office. Mr. Siewert left for vacation without knowledge of the bank draft, and while he was away, his legal secretary released it to Mr. Salvino, who was eventually convicted of theft with respect to the bank draft. The trial judge concluded that Mrs. Stevenson and Mr. Salvino had arranged for the bank draft to arrive while Mr. Siewert was away in order to avoid the scrutiny of her trustee.

Mrs. Stevenson endorsed the draft, and the amounts were deposited and transferred pursuant to Mr. Salvino's instructions. Mrs. Stevenson, by mid-July, had already tried to retain counsel to get the funds back from Mr. Salvino. By October, only $100 remained in an account over which Mrs. Stevenson had any control.

The Court of Appeal held that Mrs. Stevenson had not had the capacity to endorse the bank draft, and that the law firm owed duties to Mrs. Stevenson when it came in possession of the draft. The Court of Appeal held that the bank, the lawyer, and the legal secretary were liable in conversion and granted judgment against them, jointly and severally, for the $100,000. Because of the finding of liability in conversion, the court did not address the standard of care owed by the lawyer and legal secretary to Mrs. Stevenson.

Walman v. Walman Estate[36]

In this case, the deceased, Murray Walman, married his second wife, Estelle, in 1991, and made three wills, in 2003, 2005, and 2007, as well as several dispositions of capital property that benefitted Estelle. Murray had three sons from a previous marriage. The net

35. 2000 ABCA 222, 191 D.L.R. (4th) 151, 2000 CarswellAlta 817 (Alta. C.A.), add'l reasons 2001 ABCA 180, 202 D.L.R. (4th) 295, [2001] 10 W.W.R. 401.

36. 2015 ONSC 185, 4 E.T.R. (4th) 82, 2015 CarswellOnt 350 (Ont. S.C.J.), add'l reasons 2015 ONSC 653, 4 E.T.R. (4th) 119, 248 A.C.W.S. (3d) 783.

effect of the 2007 will and property transfers was to leave the entirety of Murray's estate to Estelle – save $5,000 to $10,000 to be divided between Murray's sons.

After his death in 2009, Murray's sons sought orders to invalidate the 2007 will and set aside the capital dispositions in favor of Estelle. Corbett J. held that Murray lacked testamentary capacity during the period in question, and that in any event, Estelle had exerted undue influence over Murray with respect to the 2007 will and property transfers.

The court found that the solicitor, Mr. Clapperton, though experienced, should have inferred from the ample medical evidence available that Murray lacked testamentary capacity as the result of Parkinson's Disease and Lewy Body Dementia, both diagnosed several years prior to the execution of the 2007 will. In fact, Murray's previous counsel, Jules Kronis, had advised Murray and Estelle that Murray should have his capacity assessed before preparing any new will. Instead, Estelle brought Murray to Mr. Clapperton. In the context, Corbett J. held that the "strength of Mr. Clapperton's testimony is significantly undermined in this context: it is self-serving to the extent that it (a) justifies his decision to proceed without a capacity assessment, and (b) explains his failure to recommend an assessment" (para. 9).

However, the court also held that:

> 55 Mr Clapperton did several things "right" in connection with this interview. He interviewed Murray in Estelle's absence. He kept good notes. And he asked questions that, facially, comport with the requirement of determining whether the testator understood the extent of his assets. However, in the circumstances of this case, he needed to go further than he did. Murray was proposing to cut his children out of meaningful inheritance in favor of his second wife. To have a financial basis for such a change, Murray had to understand not only what his assets were, but also what Estelle's assets were. This was not explored appropriately. Murray also had to understand what dispositions he had made to Estelle already. This too was not explored appropriately. Had these issues been explored, Mr. Clapperton would have discovered what the case law refers to as "suspicious circumstances": recent transfers of substantial wealth from Murray to Estelle that had the effect of significantly denuding Murray's financial position to the benefit of Estelle.
>
> 56 On the issue of filial estrangement, the circumstances were such as to require a more probing inquiry than Mr. Clapperton conducted. Murray described his disappointment as arising from relatively recent disregard of his needs by his sons. The cases are replete with judicial decisions that relatively minor slights at the very end of life – whether

> real or imagined – that result in a change in a will – may be more evidence of loss of capacity than of any significant failure by a beneficiary. Here there was good reason to be concerned that Murray's expressed disappointment was a product of his diminished capacity, or the influence of his wife, than of any material failure on the part of his children. Of course, Mr. Clapperton did not have the benefit of the record before me of the decades-long close relationship between Murray and his boys, and Murray's statements that he felt well supported by his family. I am not satisfied that Mr. Clapperton conducted this part of the interview in sufficient depth. I conclude that what he did learn was sufficient to give rise to concerns about Murray's stated concerns. This should have been questioned more thoroughly.

Therefore, this case in contrast to Kozak suggests that lawyers have a duty to not only determine whether a testator is aware of the extent of his assets, and has reasons for any major changes to their disposition, but to investigate same where the surrounding circumstances appear to demand a degree of skepticism.

Wedemire v. Wedemire[37]

The applicant, Charles Wedemire, is the husband of the respondent Myrtle Wedemire, and the adoptive father of the other respondent, Neallos Wedemire. Neallos had Myrtle sign Powers of Attorney naming him as her attorney for property and personal care after Myrtle's health declined significantly following the death of her sister, Bearon, in the spring of 2013.

Neallos became very close with Myrtle after Bearon's death. He was added to her bank accounts, after which large sums started to be withdrawn and transferred. Neallos had been explicitly left out of Myrtle's will because she had never been repaid for financing she provided Neallos so he could buy a house, despite requests for repayment. Myrtle felt that she had provided Neallos with enough assistance throughout his life.

Nevertheless, on June 18, 2013, title to Myrtle's home at 946 Danforth was transferred into Neallos' name. Myrtle had lived in the property with Charles since 1977, but the property had always been solely in her name. The transfer to Neallos claimed that Myrtle was legally separated from Charles and that the Danforth property was not their matrimonial home. Both Myrtle and Charles deny this fact. The transfer was registered as a gift.

37. 2017 ONSC 6891, 291 A.C.W.S. (3d) 681, 2017 CarswellOnt 21337 (Ont. S.C.J.).

Neallos claimed that Myrtle and Charles had been legally separated, though living in the same house, since the 1980s. A divorce order was obtained dated April 2, 2014, but Myrtle claims that Neallos had her sign papers and that she was not aware of what she was signing. Charles claims that he was never served with divorce papers. Charles claims that he did not know of the transfer or the purported divorce until October of 2014, when Neallos tried to sell the property. Charles subsequently brought an application for equalization related to the Danforth property.

By the time a CPL was registered on the Danforth property, Neallos had registered mortgages on the property totaling $105,000.

The lawyer who effected the transfer acted for both Myrtle and Neallos. There was no evidence that Myrtle was offered independent legal advice. Myrtle denied ever telling the lawyer – Mr. Lieberman – that she wanted to transfer the house; she claims that she was simply given papers to sign.

Ultimately, Young J. held that the transfer was invalid, and ordered Neallos to repay amounts related to the joint chequing account, Myrtle's line of credit, and was ordered to account for the mortgages on the Danforth property.

Weldon McInnis v. McGuire[38]

This case concerns an assessment of a solicitor's accounts where the capacity of her client was at issue. The assessments of a lawyer's account is conducted pursuant to the *Solicitor's Act*, R.S.O 1990, c. S.15, and is distinct from solicitor's negligence. Essentially, a lawyer is asked to prove the fees and disbursements incurred in the course of a retainer.

In this case, Ms. McGinty, a solicitor at Weldon McInnis, represented John Doe. John Doe's daughter, Jane Doe, gave evidence at the assessment hearing. The assessment concerned four accounts rendered by Ms. McGinty, totaling $9,116.89, for legal services performed with respect to John Doe's Powers of Attorney while he was living at an assisted living facility in Halifax. The second account was purely to pay a disbursement, namely the medico-legal report of Dr. Brunet, which ultimately found that while John Doe was capable of granting a Power of Attorney and instructing counsel, he was not capable of managing his assets/property.

38. 2014 NSSC 437, 247 A.C.W.S. (3d) 952, 2014 CarswellNS 952 (N.S. S.C.), reversing in part 2014 NSSM 13, 1095 A.P.R. 305, 346 N.S.R. (2d) 305 (N.S. Small Cl. Ct.).

John Doe contacted Ms. McGinty because he no longer wanted Jane Doe to act as his attorney due to concerns about her management of his finances; because his daughter, bank, and assisted living facility would not accept his letter revoking the Power of Attorney that appointed his daughter; and because he wanted the ability to look for a different place of residence.

Ms. McGinty gave evidence that she was satisfied that John Doe was competent and had the capacity to instruct counsel, and that he was in need of legal services. Ms. McGinty also gave evidence that she ignored the comments from staff at John Doe's facility that he was incapable because her focus was on her client. Despite a request from Jane Doe, Ms. McGinty did not speak to Dr. Couture, the physician who oversaw Mr. Doe's care, because John Doe told her that he was biased.

Ms. McGinty decided to have John Doe's competency assessed by Dr. Brunet, after consultations with John Doe, in lieu of simply preparing new Power of Attorney documents for him. After the report was delivered on August 23, 2013, Ms. McGinty was unable to get an answer from John Doe, after several attempts, about who he wanted to act as his attorney. Subsequently, Ms. McGinty received a report from Dr. MacKnight, dated August 26, 2013, finding that John Doe was not competent to make decisions about his living situation, care, and finances. The report was silent as to John Doe's capacity to instruct counsel. Ultimately, John Doe instructed Ms. McGinty to close his file.

Jane Doe assessed Ms. McGinty's accounts, claiming that none should be paid: (1) on the basis that Ms. McGinty failed to take the reasonable steps of speaking with doctors and staff at John Doe's residence to confirm certain facts and allegations he made, and (2) that John Doe lacked the capacity to retain and instruct counsel.

In the first paragraph of the initial decision, the assessment officer, Adjudicator Richardson, identified some difficult questions facing lawyers when the capacity of a client is at issue:

> The news is now replete with articles about the social impact of a growing population of older people. Many of these discuss the concurrent growth of people whose mental capacity is impaired in varying degrees by the aging process. Others discuss the problem of elder abuse. This context will on occasion raise difficult questions of client assessment for lawyers. Is an allegation made by a client that his or her children are abusing him or her real, or a figment of suspicions born of declining mental faculties? Can a solicitor accept and act on the instructions of a client when there is reason to be concerned about the capacity of the client to give those instructions? What steps – if any –

> must or should or can a solicitor take to determine the mental capacity of his or her client prior to acting on those instructions? Under what circumstances can a solicitor charge such a client for following instructions that later prove to have been based on the client's delusions? How is the value of services provided under such circumstances to be assessed?

Ultimately, Adjusdicator Richardson held that Ms. McGinty's fees were reasonable, with a reduction, as the evidence before him did not suggest that John Doe was incapable of retaining and instructing counsel, relying on the task-specific test for capacity and the presumption of capacity. However, Adjudicator Richardson held that the disbursement for the report of Dr. Brunet was unreasonable, because, *inter alia*, Ms. McGinty advised John Doe to obtain such a report shortly after meeting with him and without the benefit of a review of his full medical file. The account for the disbursement was disallowed in its entirety.

The assessment was appealed to the Nova Scotia Supreme Court of the case above. The court held that the adjudicator in Small Claims Court misapplied the test of reasonableness with respect to Ms. McGinty's conduct in obtaining the capacity report from Dr. Brunet by failing to consider whether counsel's approach was reasonable in and of itself and instead analyzed her actions in the context of an alternative approach. The court held that the disbursement incurred in obtaining the expert's report was reasonable, citing the ultimate responsibility of lawyers for the legal work they perform.

The court further held that the adjudicator's reasons for finding Ms. McGinty's fees unreasonable lacked specificity, and so allowed an appeal of the issue of the outstanding legal bills.

CONCLUDING REMARKS

It is easy to see the difficulty for lawyers to balance the various duties they owe to their client when vulnerability, capacity, and undue influence are at issue in retainer. In every case, a lawyer has the supreme duty of ensuring that his or client has the requisite capacity to retain and instruct counsel, as any defense or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of undue influence or incapacity, but a lawyer must always be satisfied that they can act for a given client and fulfill all of the duties and obligations owed to that client.

If you wish to subscribe or contribute to this publication, please contact us at:

THOMSON REUTERS

Thomson Reuters
One Corporate Plaza
2075 Kennedy Road
Toronto, ON M1T 3V4
Canada

Toronto: 1-416-609-3800
Elsewhere in Canada/U.S.: 1-800-387-5164

Fax: 1-416-298-5082

e-mail: www.carswell.com/email

Website: www.carswell.com