TAB 12

The Standard of Care and Will Drafting – The Nature of the Retainer and its Impact on the Duty of Care in Estate Matters

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INTRODUCTION

Too often, solicitors' negligence matters in estates arise out of an omission on the part of the solicitor when taking instructions for an estate plan. For instance, the client may come in to amend her Will, a new Will is drafted and no consideration is given to assets which may flow outside of the estate. One such example might be where a spouse separates from her husband and comes to see the lawyer to finalize a separation agreement and a new Will. At the first meeting with the lawyer she expressly states that she wants to exclude the spouse from her estate and include only their children. It may be that she forgets the fact that she has RRSPs designated to her former spouse, and unless the solicitor asks the right questions, this issue may not come to her mind. The result is, of course, that those RRSP assets may in fact flow outside of the estate, notwithstanding the provisions of the Will, and in direct contradiction to the obvious intention of the client.

(A) STANDARD OF CARE AND THE PRINCIPLES OF NEGLIGENCE

Not every error of judgment will result in a finding of negligence. In the case of solicitors, the defendant will be judged according to the standard of a reasonably competent solicitor.[1]

The standard of care expected of an estate solicitor has been described as follows:

> At the outset estate practitioners should recognize that by accepting employment to render legal advice or other such services, they impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly

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[1] *Bolam* v. *Friern Hospital Management Committee*, [1957] 1 W.L.R. 582, see also the recent decision of Justice Stinson in *Ristimaki* v. *C.*, [2004] O.J. 2699 (Ont.Sup.Ct.) where he carefully and comprehensively reviews the law of solicitor's negligence.

> possess and exercise in the performance of the tasks they undertake. If they fail to meet the standards of fellow practitioners in the same area of law, they may be held liable.[2]

In instances of estate planning, the case law imposes an obligation on a solicitor to satisfy himself of certain factors, such as the capacity of the testator, that the testator has knowledge and approval of the contents of documents being signed, and that there is no apparent undue influence or fraud. This duty is particularly significant if the prospective testator is elderly, or infirm, or is apparently suffering from lack of capacity, if the instructions differ substantially from a previous Will, and especially if the instructions are not received from the testator himself.

When drafting testamentary documents, there are recurring circumstances relating to testators that must raise the attention of the solicitor. These circumstances require that measures be taken to ensure, to the extent practicable, that the client's interests are protected and true wishes are being expressed, and that these wishes will be protected and upheld upon the testator's death.

Such circumstances include:

- An elderly testator;
- A testator who has suffered significant ill health;
- A testator who is unwilling to provide the solicitor with full information relating to the assets, liabilities, or family condition circumstances;

[2] Bonnie Leigh Rawlins, "Liability of a Lawyer for Negligence in the Drafting and Execution of a Will" (1983), 6 E.T.Q. 117. See also M.M. Litman and G.B. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" [1984] 62 C.B.R. 457, *Ross v. Caunters*, [1980] Ch. 297, [1979] 3 All. E.R. 580, *White v. Jones*, [1995] 1 All E.R. 691, see also Rodney Hull "*A Current File with an Unsigned Will: A loose Cannon in the Solicitor's Office*" 17 E.T.P.J. 31. See also Frost, M., *Negligence in Will Preparation*, Legalease Limited (London) 2000 for an excellent review of the recent developments in a solicitor's negligence in Will preparation. See also the recent Alberta Court of Appeal Decision in *Graham* v. *Bonnycastle*, [2004] A.J. No. 940 (Alta.C.A.) where the Court dealt with the duty of care owed by a solicitor to disappointed beneficiaries.

- The disposition of the estate is one that would generally be viewed as being unusual in the context of the objective circumstances of the testator;

- A beneficiary of the Will has been particularly involved in assisting the testator with the preparation of the Will; and

- The disposition set out in the Will represents a drastic departure from the terms of the former Will.

The existence of any one or more of these factors does not necessarily mean that the testamentary document is vulnerable to attack. However, since the presence of any one of these factors could reasonably provide a route by which someone could attack the Will and Power of Attorney, the draftsperson must consider what steps can be taken to ensure that the true intention of the testator is being communicated.

With respect to the solicitor's duty *vis-à-vis inter vivos* transfers, one can look at the comments in an article written by Johanne L. Amonson, interpreting the majority decision in *Brosseau v. Brosseau* (1989), 63 DLR 4th 111 (Alta. CA), that a solicitor purporting to advise a client about relinquishing or transferring property rights must clarify the written agreement or document, and ensure that the client appreciates the nature and effect of those documents. In addition, that solicitor must also be in a position, by inquiry of the client and otherwise, to know and appreciate the client's personal circumstances, including the client's state of health, both mental and physical, the client's relationships with parties affected by the terms of the agreement, including the nature and extent of those relationships, the client's current and future financial prospects, the client's expectations arising from life in general and from the agreement or documents in particular, and all other matters relevant to the effect the transaction will or could produce on the client. The advice, including possible reasonable alternatives, can be provided to the client in the light of that information. The failure to make proper and full inquiry of the

client, and any other source which may provide relevant information, may reduce or vitiate the ultimate evidentiary value of the advice provided.

Furthermore, where the presumption of undue influence may arise, it will be insufficient to prove that the transaction was made freely, voluntarily, and with the informed consent and understanding of the client, without full inquiry having been made.

In respect of solicitors, the more specialized the area of practice, the more likely it is that a client will accept and act upon the advice of specialized counsel.[3] Whether as a result of solicitor's advice or other, once a breach of duty is established, to succeed in a negligence claim, the claimant bears the burden of establishing on the balance of probabilities that the negligence caused the alleged loss.

Obviously, where loss depends on what a third party might have done, but for the negligence, the claimant must satisfy the court that there is a real chance that the third party would have acted in that way. The claimant must satisfy the court that there is a real or substantial, rather than a speculative, chance that a third party would have acted in the way that the claimant asserts.[4]

(B) DUTY OF CARE

In *Smolinski v. Mitchell (*1995), B.C.J. No. 1789, the British Columbia Supreme Court defined the solicitor's duty as follows:

> Generally speaking a solicitor owes a duty to his client, the testator, to draft a will in accordance with his or her instructions, provide all required advice and attend to the execution of the will expeditiously given the circumstances.

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[3] Locke v. Camverwell Health Authority, [1991] 2 Med LR 249, Ridehalgh v. Horsefield, [1994] Ch 205 (CA).
[4] Allied Maples Group Ltd. v. Simmons, [1995] 1 WLR 1602.

In respect of the solicitor's duties, the decisions of Murphy v. Lamphier[5] and Danchuk v. Calderwood[6] state that the solicitor does not discharge his or her duty by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the client if he understands the words:

> A solicitor is usually called in to prepare a will because he is a skilled professional man. He has duties to perform which vary with the situation and condition of the testator. In the case of a person greatly enfeebled by old age or with faculties impaired by disease the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property. (Murphy v. Lamphier, per Chancellor Boyd)

The extent of the duty of care was widened in White v. Jones,[7] where the court extended the duty to apply to acts of omission. As to the nature of the duty of care that a solicitor owes to the testator and the intended beneficiaries, the court stated that:

> The duty requires a solicitor to make the enquiries necessary to satisfy himself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the will. Unusual circumstances, if presented, must be inquired into to ensure that the will that is ultimately prepared meets the wishes of the client. It is not a sufficient discharge of a solicitor's duty in circumstances to simply inquire of the client what he wishes and then to record and thereafter prepare the documents.

THE NATURE OF THE RETAINER

As a starting point, the nature of the retainer itself is a fundamental consideration.

The retainer creates the contractual duties and the overall function of a solicitor to give advice on legal matters, and to act on behalf of clients in transactions of a legal nature. The retainer, of course, may be either oral or written, or inferred from the conduct of the solicitor. Restricting the

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[5] (1914), 20 DLR 906 (CA).
[6] (1996), 15 ETR (2d) 193 (BCSC).
[7] [1995] 1 All E.R. 691 (HL).

extent of the retainer is potentially more problematic given the nature of the duties of a retained solicitor.

In *Midland Bank* v. *Hett Stubbs & Kemp*[8], the claimants, as executors of the estate, sought damages against the defendant solicitors for failing to register an option granted to the deceased by his father. The options were granted on March 24, 1961, and on August 17, 1967, her father then conveyed the farm to his wife in order to defeat the option. The option was unregistered at the time and the farm was conveyed by the father to the mother.

Oliver J. analyzed the contractual duties of the defendant solicitors in this way[9]:

> The classical formulation of the claim in this sort of case as "damages for negligence in breach of professional duty" tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also exhaustive definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex series of rights and duties of which the duty to exercise reasonable care and skill is but one.
>
> ...if one were to seek to write out in longhand the obligations which Mr. Stubs, Sr. assumed when he engaged to act in the matter of the grant of the option, they were (1) to draw and have completed a proper and enforceable option agreement which would bind the parties; (2) to take such steps as were necessary and practicable to ensure that it was binding on the land into whosoever hand's it might come before any third party acquired a legal estate; and (3) to carry out his work with the skill and care which a normally competent practitioner would bring to it.

The decision of Oliver J. in *Midland Bank* v. *Hett Stubbs & Kemp*[10], has been somewhat criticized by the authors in the recent 2002 Fifth Edition of *Jackson & Powell on Professional Negligence*. The authors suggest that it is not easy to apply Oliver J.'s analysis of the solicitor's contractual duties where the solicitor is retained to do something more complex than merely

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[8][1979] Ch. 384.
[9]*Ibid.*, at 434 E–F and 435 A–B.
[10]*Supra* note 7.

effect an option. They go on to say that if one attempts to "write out in longhand" all of the duties assumed by a solicitor upon his retainer, the list in most cases is liable to run to a considerable length, unless it is confined to the most basic steps involved in the particular business which a solicitor is undertaking.[11] The authors go on to say that, in practice, the solicitor's failure to carry out some necessary steps is normally treated as a breach of the general duty to exercise skill and care (i.e. the standard of care) rather than a breach of some specific duty implied in the retainer itself, which in itself implies a number of general obligations.[12]

In the recent British case of *Credit Lyonnais* v. *Russell Jones & Walker*[13], at the outset, the court considered the nature and extent of the retainer in this solicitor's negligence claim. In considering the nature of the duties of the solicitor, the court held that, as a starting point, one must consider the express terms of the retainer itself. Laddie J. held that where there was uncertainty as to what the client had asked the solicitor to do, this should always be resolved in the client's favour, given that the solicitor's duty of care covers the width of the instructions given.[14]

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[11] Jackson & Powell, 5th ed., (London, 2002), p. 539-540.
[12] *Ibid*., p. 540.
[13] [2002] E.W.H.C. 1310, *The Times* 9, October 2002.
[14] Halpern, David, "The Duty to Answer Unasked Questions", 46 Trusts & Estates Law Journal, May 2003

DUTY TO ADVISE OUTSIDE THE EXPRESS TERMS OF THE RETAINER

The more difficult determination is the nature of the duty of care owed to your client in respect of advising on matters which may be expressly outside of the terms of the retainer agreement.

In *Estill* v. *Cowling*[15], the court held that a solicitor giving advice on a settlement was still liable for negligence in relation to its resultant and unfortunate tax consequences. The court held that it was no answer that the solicitor had relied on counsel, nor that he did not expressly agree to review that counsel's advice.[16] In *Societe Internationale de Telecommunications Aeronautiques SC* v. *The Wyatt Co. (U.K.) Ltd.*[17], the court considered the *Credit Lyonnaise* v. *Russell, Jones & Walker* decision and held that the following proposition prevails in respect of the duties of a solicitor, either express or implied:

> If solicitors know what their client wants to achieve, and also know that if they do what they are instructed to do, that will not, or will not by itself, achieve the client's objective, it is obvious that they ought to point that out to the client.[18]

THE ONTARIO RETAINER EXPERIENCE: *HALL* V. *BENNETT ESTATE*[19]

When considering the nature and extent of the retainer agreement, one must also look at the Ontario Court of Appeal decision in *Hall* v. *Bennett*.

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[15][2000] W.T.L.R. 417. See also *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.* (1997) for the US experience and where, thus, the Court held, once a solicitor undertakes to rewrite a trust instrument, he or she has a duty to discuss with his or her client the possibility of an effective spousal election being made against the trust, and to advise him or her of alternative methods of transferring property to accomplish his or her desired distributions.
[16]*Supra* note, 13 at p. 15.
[17][2002] E.W.H.C. 2025.
[18]*Supra* note,13 at p. 16.
[19] (2003), 50 E.T.R. (2d) 72 (Ont. C.A.).

The facts of *Hall* v. *Bennett* were that Bruce Bennett died in Kingston at 7 p.m. on Saturday, January 13, 1996, at 79 years of age. At 8 a.m. in the morning, the appellant solicitor, Mark Frederick, received a telephone call at his home from a social worker requesting that he attend at the hospital to see a terminally ill patient who wished to make a will. Frederick agreed to meet the social worker at the hospital at 10 a.m. On the way to the hospital, he purchased a will form at a local store in case a will would have to be prepared quickly.

At 10 a.m., Frederick met the deceased, Mr. Bennett, in his hospital room. For the next sixty-five minutes, Frederick interviewed Bennett with a view to ascertaining his testamentary wishes. Frederick was unable to obtain the necessary instructions and did not prepare a will. Bennett died that night, intestate.

The trial judge concluded that Bennett had the necessary capacity to make a will and that Frederick, in failing to prepare a will in accordance with Bennett's instructions, had breached his duty of care to Hall, a then disappointed beneficiary.

In overturning the lower court decision, the Ontario Court of Appeal took what might be seen as a unique approach to the question of solicitor's liability. The Court of Appeal went on to consider the whole question of the duty and obligation of a solicitor when taking instructions for a will.

In setting aside the trial judge's decision, the Court of Appeal adopted the appellant solicitor's submission that no duty of care can arise with respect to the preparation of a will in the absence of a retainer between the solicitor and client. The appellant further submitted that the retainer is the anchor that grounds both the contractual duty owed to the client and the duty of care that may be owed to third parties at tort. Further, it was submitted that no retainer to prepare a will was given or accepted, and that Bennett was incapable of fully conveying instructions. It was argued that solicitor Frederick never accepted a retainer to draw a will and, consequently, no

duty of care arose in respect of carrying out Bennett's testamentary wishes. These submissions were essentially accepted by the Ontario Court of Appeal.[20]

The Court of Appeal stated that it is usually the retainer that creates the necessary proximity, not only between the solicitor and the client, but also between the solicitor and the third party.[21]

In exonerating the solicitor, the Court of Appeal essentially split the retainer in half. The Court accepted that solicitor Frederick had undertaken to interview Bennett with a view to obtaining instructions to prepare a will and that, in so doing, his first obligation was to inquire into Bennett's testamentary capacity before undertaking to do a will. Based on the evidence, Bennett did not have such sufficient capacity to give instructions.

The Court of Appeal went on to say that, in the circumstances, it was Bennett's duty to *decline* the retainer.[22]

In its conclusion, the Court of Appeal noted that solicitor Frederick fulfilled any obligation that he owed to Bennett and, in the absence of any retainer to prepare a will, he owed no duty of care to a disappointed beneficiary.[23] Interestingly, the Court of Appeal went on and made some additional comments, in *obiter*. These were done in an effort to try to give guidance in future cases of this nature. It seems that the Court of Appeal tried to make it clear that this case was in some ways very special and distinguishable. The Court went on to say that if, for example, the facts had been otherwise and solicitor Frederick had been of the view that Bennett was able to make a will but nonetheless declined the retainer, these circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on the circumstances,

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[20] *Hall* v. *Bennett Estate* (2003), 50 E.T.R. (2d) 72 (Ont. C.A.), p. 86.
[21] Ibid.
[22] Ibid.
[23] Ibid.

could form the basis of disciplinary proceedings.[24] The Court of Appeal also went on in *obiter* to say that, in the future, a court should address the important question of whether, in all the circumstances, the solicitor was under a legal obligation to accept a retainer.

CONCLUSION AND SOME GUIDANCE FOR THE PRACTITIONER

a) The extent of the duty of care is in part based upon the client's apparent need for advice. For example, if a layperson would not be expected to be aware of a pitfall, the solicitor should not assume that the client is actually aware of it unless they have good reason to assume so.[25]

b) It is in large measure the obligation of the solicitor to identify the tasks and clarify the scope of the retainer in written form to the extent that it is possible.

c) As to whether or not a solicitor has a duty to go beyond their express retainer, this will depend upon the closeness of the connection between the job they are asked to do and the pitfall which they have failed to point out.[26]

Fundamentally, the real concern in the context of solicitor's negligence arises when the solicitor himself does not even recognize the pitfall, and fails to realize that he is in a potential minefield.

The following is a list of questions that we use when examining a solicitor who is a witness in a proceeding, which we believe give the practitioner some guidance as to the nature of the specific inquires that will be made:

EXAMINATION QUESTIONS

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[24]Hall v. Bennett Estate, p. 87.
[25]*Supra* note 13, at p. 16.
[26]*Supra* note 13, at p. 16-17.

- **GENERAL QUESTIONS:**

  Education of deceased;

  Employment of deceased;

  Relationship of interested parties to deceased;

  Particulars and production of previous wills and other pertinent documents, such as separation agreements, inter vivos settlements, letters, etc; and

  Names of prior solicitors.

- **SPECIFIC QUESTIONS:**

  Ability of deceased to understand the will;

  Ability of deceased to understand the language;

  Any hearing problems;

  Ability of deceased to read the will;

  Dependency of the testator on persons interested and vice versa;

  Statements by the testator concerning testamentary intention or acts;

  Names of acquaintances with whom the testator had a close relationship;

  Idiosyncrasies of deceased; and

  Statements or facts relating to the testator's feelings towards a beneficiary or other person interested.

Medical evidence:

(a) Known physical capacities or incapacities;

(b) Known mental capacities or incapacities;

(c) Expert evidence determined after death, for example psychiatric evidence based upon evidence obtained from relatives or friends without an actual examination of the testator as dealt with under the heading of Medical Evidence;

(d) Hospital records or autopsies;

(e) Any medical opinions as to testamentary capacity or mentality at the time of execution; and

(f) Any fact which would indicate senility or mental illness.

Particulars of execution:

(a) Sequence of signing;

(b) Position of testator;

(c) Position of witnesses;

(d) Ability of witnesses to see testator;

(e) Actual or implied acknowledgment of signature; and

(f) Request by testator for witnesses to sign.

Facts relating to instructions given to solicitor on preparation and execution of will;

(a) Length of testator's acquaintance with solicitor;

(b) Who made the arrangements for the appointment;

(c) Was the solicitor of the testator his ordinary solicitor, or was he the solicitor of choice of the beneficiary or a solicitor spuriously chosen at the last moment;

(d) Person accompanying testator to solicitor's office;

(e) Presence or absence of persons in solicitor's office at time for instructions or execution and at time of interviews with the deceased;

(f) Extent of solicitor's acquaintance with the deceased;

(g) Production of solicitor's notes of meetings with the testator;

(h) Details of questions put to testator concerning assets;

(i) Questions put to testator concerning relatives (born out of wedlock);

(j) Questions put to testator re other persons who might benefit, for example a housekeeper or as suggested by solicitor taking instructions;

(k) Evidence of questions put to testator concerning prior wills;

(l) Evidence of questions put by solicitor to testator to explain changes in wills;

(m) Testator's reasons for changes in wills;

(n) Testator's memory as to recent events;

(o) Testator's memory as to remote events;

(p) Other tests conducted by the solicitor for testamentary capacity;

(q) Evidence of testator's questions concerning cloistering of testator;

(r) Ability of testator to be influenced - strength of mind;

(s) Ability of testator to influence others - strength of mind;

(t) Historical events or afflictions which might influence the testator's mind in relation to the making of a disposition;

(u) Ability of beneficiary to coerce testator;

(v) Evidence of any acts of physical or mental cruelty either by or against the testator;

(w) Inducements held out by the beneficiary of the testator;

(x) Inducements held out by the testator to the beneficiary;

(y) Any other tests conducted by the solicitor in relation to undue influence;

(z) Particulars of any discussion between solicitor and testator as to tax or succession duty implications of the will;

(aa) The manner in which the instructions for the typing of the will were given by the solicitor to his staff;

(bb) Length of time elapsing between first meeting with testator and meeting at which testator executed will;

(cc) Persons accompanying the testator to solicitor's office on the second visit for the execution of the will;

(dd) Persons present at the solicitor's office at the time of the second visit for the purpose of executing the will;

(ee) Evidence of reading over of the will to the testator;

(ff) Particulars of items explicitly discussed with the testator;

(gg) Statements made by deceased after execution, eg. glad that the ordeal was over;

(hh) Any notable changes in testator's behaviour, mental or physical health before and during the time that the will was being prepared, and upon the second visit for the purpose of executing the will;

(ii) Any correspondence by or from the testator to the solicitor; and

(jj) Any suspicious circumstances.[27]

[27] *Ettore Estate, Re* (2004), 11 E.T.R. (3d) 208 (Ont. S.C.J.), *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.), *Streisfield v. Goodman* (2001), 40 E.T.R. (2d) 98 (Ont. S.C.J), *Omyterko Estate v. Kulikowsky* (1992), 47 E.T.R. 66 (Ont. C.J. (Gen. Div.)), *Burke Estate v. Burke Estate* (1994), 1994 CanLII 7442, David J. Hayton, Underhill and Hayton, Law of Trusts and Trustees, 17th ed. (Markham: LexisNexis Butterworths, 2006), Irwin N. Peer, "Wills, Testamentary Capacity & Undue Influence" (1980) Bulletin of the APL Vol. IX, NO. 1:15, Kenneth I. Shulman, et al., "Assessment of Testamentary Capacity and Vulnerability to Undue Influence" (May 2007) 164 Am J Psychiatry 5, Lawrence A. Frolik., "The Biological Roots of the Undue Influence Doctrine; What's Love Got To Do With It?" (1996) 57 U. Pitt. L. Rev. 841, Lawrence A, Frolik, "The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are we protecting older testators or overriding individual preferences?" (2001) 24 Intl J.L. & Psychiatry 253, Nelson Enonchang, 2006, "Duress, Undue Influence and Unconscionable Dealing", (Carswell: Toronto) See also Martyn Frost, Penelope Reed Q.C and Mark Baxter, Risk and Negligence In Wills, Estates and Trusts Oxford University Press 2009.