The wills and estates bar

breathes a sigh of relief...

Contrary to a recent trial judgment, a solicitor cannot be liable to a "disappointed beneficiary" for declining to draw a will for a dying man who was barely able to maintain consciousness during the interview.

The case

In the March 2003 Edition of LAWPRO, we featured a case commentary on *Hall v. Frederick*, (2001), 40 E.T.R. (3d) 65; [2001] O.J. No. 5092. (Ont.S.C.J.).

The defendant solicitor Frederick received a telephone call early one Saturday morning requesting that he go immediately to Kingston General Hospital to prepare a will for Bruce Bennett, who was expected to die imminently. Frederick arrived at the hospital at 10:00 a.m.

All witnesses agreed that when Bennett was awake, he was lucid and communicated whatever instructions he wished to communicate. There were, however, frequent periods when Bennett drifted in and out of consciousness. To try and keep Bennett awake through the interview, it was necessary to elevate the head of his bed, turn on the fluorescent lights, speak loudly, and squeeze Bennett's hand from time to time.

One of the instructions which Bennett was able to impart was that he wanted his store left to the plaintiff Hall. However, Bennett was unable to tell Frederick what his net assets were, or what his debts were, or what the exact value of his property was. Bennett was unable to give instructions concerning his residuary estate. The instructions which he did give related to about 25 per cent of his property.

Frederick terminated the interview because he felt that he could not safely draw Bennett's will. Frederick could not obtain complete instructions, and it was unlikely that Bennett could maintain alertness long enough to have a will read to him and to understand its contents. Bennett was in any event about to receive strong medication. Bennett died at 7:00 p.m. that evening.

When Hall learned that Bennett intended to leave him the store, but the will had not been drawn, Hall sued Frederick.

Despite the evidence of two expert witnesses that the defendant had met the requisite standard of care, Manton, J. held that Frederick was negligent in the circumstances. Manton, J. held that Bennett did have testamentary capacity, and that a will should have been prepared based on the instructions given.

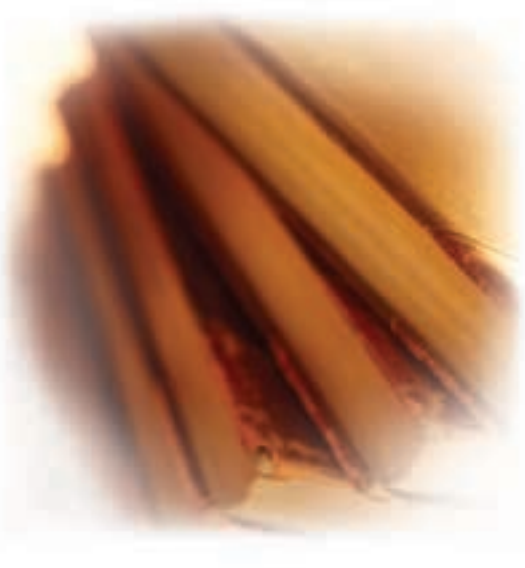
In reasons for judgment released May 14, 2003, the Court of Appeal reversed the trial judgment.

The Court of Appeal held that simply because Bennett was able to give several instructions concerning his assets during lucid moments as he drifted in and out of consciousness, it did not follow that Bennett had testamentary capacity.

The trial judge fell into error by failing to address the question of whether Frederick's view that Bennett lacked testamentary capacity was a reasonable one. The evidence in support of Frederick's opinion that he was unable to obtain complete instructions, and that Bennett lacked testamentary capacity, was overwhelming. It was Frederick's duty to decline Bennett's retainer to prepare a will.

Since there was no retainer between Frederick and Bennett, there could be no duty of care owed by Frederick to Hall, despite admissions to the contrary by Frederick at trial.

The Court raised the issue of whether a solicitor could ever have civil liability for declining a retainer. The Court declined to come to any conclusion, but noted that



breaches of the *Rules of Professional Conduct* do not in and of themselves give rise to civil liability. The presence or absence of civil liability must be determined according to the general principles of the law of tort.

Lessons learned

This case is helpful to the profession in that it refutes the notion that a solicitor owes a duty to a prospective third party beneficiary to draw a will on the instructions of a testator who can neither maintain consciousness nor give complete instructions. It was the solicitor's duty to decline to draw the will, and he did so. Since there was no accepted retainer to draw the will, there could be no liability to a third party based on a breach of this retainer. It is also a helpful reminder that a breach of a *Rule of Professional Conduct* is not in and of itself the basis for a negligence suit.

In one way, however, the judgment adds to the complexity facing a lawyer asked to draw a will in circumstances where testamentary capacity is doubtful. Justice Manton suggested that on the authority of *Scott v. Cousins*, [2001] O.J. No. 19 (Ont.S.C.J.), a lawyer, when in doubt, should draw the will and let a court decide whether testamentary capacity did or did not exist. The judgment of the Court of Appeal suggests that in some circumstances there is an affirmative duty not to draw the will at all.

Suppose Frederick had followed the procedure suggested by Justice Manton and had drawn up the will, but made extensive notes afterwards about why he doubted that Bennett had testamentary capacity. Suppose the estate representative decided to propound the will anyway, and was unsuccessful. Would Frederick have been liable to the estate, or to the estate representative for any costs thrown away? One would hope not. See *Philp v. Woods* (1985), 66 B.CL.R. 42, 34 C.C.L.T. 66. (B.C.S.C.)

Mr. Justice Hutchinson suggested that where a testator (trix)'s mental capacity is in doubt, the will should be prepared, along with a statement setting out the solicitor's concerns. If the estate representative nevertheless decides to propound the will in the face of this evidence, the estate representative does so at his or her own risk.

If time permits, it would be wise for a solicitor to suggest a capacity assessment.

But what if the client refuses? Hall v. Frederick suggests that the solicitor would then be within his or her rights to refuse to accept the retainer to draw the will. But may the solicitor proceed with the will, after taking the precautions outlined in the foregoing paragraph? One would hope that the answer would be "yes", but it is impossible to answer this question with perfect conviction.

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