THE DUTY AND STANDARD OF CARE OF THE LAWYER WHO DRAFTS WILLS

INTRODUCTION

It is perhaps trite to state that a lawyer owes to his or her client a duty of care to carry out his or her services so as to meet the standard of care of the reasonable lawyer acting in the same circumstances. But the application of that definition of a lawyer’s duty and standard of care poses some peculiar problems when applied to the area of wills preparation and advising on estate planning matters.

Errors made by a lawyer often do not cause a loss to the client or to the client’s estate but rather to a “disappointed beneficiary”, a person intended to receive a testamentary benefit who does not because of the failure of the will to effectively make the gift. There may also be cases in which the estate is put to the expense of litigating issues such as interpretation or testamentary capacity after the testator’s death, which litigation is then attributed to the inadequacy of the services of the lawyer who has drafted the will, or to the decision of a lawyer who has declined to take instructions in an instance where testamentary capacity is an issue.

This paper has two purposes, firstly to survey the rationale for, and the breadth of, the duty of care of the lawyer taking wills instructions and drafting wills, and secondly to gather and interpret what the Courts have said about the standard of care that is expected of lawyers advising on and preparing wills. A duty of care is a general and theoretical thing; the standard of care is the practical application of the duty to the specifics of the actual testator and file.
DUTY OF CARE

(a) Importance of the Retainer Agreement

The starting point for determining the duty of care is to ascertain the particulars of the lawyer’s retainer agreement. The content and circumstances of the retainer ought to determine the scope of the lawyer’s duty.

This is important not only in considering whether the testator or his estate has a claim against the lawyer but will give context to a claim (which will be a claim in tort) that might be brought by a person alleging “disappointed beneficiary” status.

This is well stated in the Ontario Court of Appeal decision in *Hall v. Bennett Estate*\(^1\) at paragraphs 56 and 57:

… I agree with counsel for the appellant that the existence of a retainer is fundamental to the question of duty of care. The retainer is usually the very basis of the relationship between a solicitor and client. Hence, insofar as the client is concerned, the absence of a retainer will usually be determinative, and no duty of care will arise in respect of the preparation of a will. It is simply a matter of common sense that there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform. Insofar as any possible liability to a client in tort is concerned, in the absence of a retainer, there would have to be other circumstances that gave rise to a duty of care. Such circumstances would be unusual…

Insofar as the potential liability in negligence to a third party is concerned, the existence of a duty of care, as stated earlier, will depend on the presence of both foreseeability and proximity. Again, it is my view that the existence of a retainer is fundamental.

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\(^1\) *Hall v. Bennett Estate* 2003 CarswellOnt 1730, 227 DLR (4\(^{th}\)) 263 (C.A.)
to the question of duty of care. In the absence of a retainer, the harm that may be occasioned to the third party beneficiary by the failure to make a will may still be foreseeable but, absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care. It is usually the retainer that creates the necessary proximity not only between the solicitor and the client but between the solicitor and the third party.

Cases defining the scope of a lawyer’s duty and the attributable standard of care must be read in the context of their facts for the conclusions drawn in them to be applicable as operable principles in other situations. For example, in *Earl v. Wilhelm*² the Saskatchewan Court of Queen’s Bench found a lawyer negligent and liable to a set of disappointed beneficiaries. This was upheld on appeal. These beneficiaries were gifted specific parcels of farm land by the testator but the gifts failed as the land was in fact owned by the testator’s wholly owned farm corporation, the shares of which devolved to another set of beneficiaries. The Court did not specifically address the content of the defendant lawyer’s retainer but these facts were found:

- The testator had incorporated the farming corporation and transferred the land to it with the assistance of the lawyer’s partner
- The lawyer had maintained the corporate records for several years
- The testator was well aware of the distinction between personal and corporate assets (as his accountant stated in evidence)
- The testator gave the lawyer instructions to make gifts of the specific parcels to the specific beneficiaries
- The lawyer prepared a will based on the instructions without reviewing the status of the land ownership, consulting with the accountant, considering income tax issues or the consequences of changing the corporate structure immediately or upon death

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² *Earl v. Wilhelm* [1998] 2 WWR 522 (Sask. Q. B.); affd. 2000 SKCA 68 (C.A.); leave denied 2000 CarswellSask 628 (SCC)