WHO AM I TO SAY? A LAWYER'S DUTY TO ASSESS CAPACITY IN ESTATE PLANNING

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Can you prepare estate planning documents for a client if you are not convinced that the client has testamentary capacity? Do you have a duty to later advocate for the validity of the documents? This issue is subject to some debate. The American College of Trust and Estate Counsel (ACTEC) has published commentaries to the Model Rules of Professional Conduct (MRPC) addressing issues specific to estate planning lawyers. The ACTEC Commentary to MRPC 1.14 contains a detailed discussion of this tricky issue:

> Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. *The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline.* In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.
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> In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.[1]

In San Diego County Ethics Opinion 1990-3, the local bar advised that "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence."[2] The opinion states that:

> Once the issue [of capacity] is raised in the attorney's mind, it must be resolved. The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship.

Wow! This sounds simple and straightforward but ... am I really trained to make this assessment?[3] Why should I be the judge? I mean, seriously, don't I owe a duty to my client to carry out his or her wishes? Further, if I don't prepare the will, won't the client just go down the street to another lawyer? Why can't I just be a fact witness and tell the judge what I observed? All good questions. However, the law generally seems to place at least some burden on the lawyer although courts have been reluctant to impose liability on or criticize lawyers who act in good faith.

In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, after the settlement of a will and trust contest,

a lawyer was sued for malpractice by the testator's children for purportedly allowing the testator to amend his will when he allegedly lacked testamentary capacity.[4] The court recognized that "prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case."[5] However, the court refused to permit a claim for malpractice in favor of the nonclient beneficiaries, noting that the lawyer's duty is only in favor of the settlor.

In *Logetheti v. Gordon*, the Massachusetts Supreme Court, also addressing a legal malpractice case, held that:

> An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence. In making the required determination, the attorney must have undivided loyalty to the client.[6]

Despite recognizing that duty, the *Logetheti* court, like the court in *Moore*, held that a claim for legal malpractice could not be stated because the lawyer does not owe a duty to the beneficiaries as it would create a conflict of interest for the lawyer.

The Florida Supreme Court has weighed in on these issues under two disparate sets of facts. In *Florida Bar v. Betts*, an attorney was publicly reprimanded for preparing two codicils for a client "during a time when [the client] was in a rapidly deteriorating physical and mental state."[7] In the first codicil, the client testator removed his daughter and son-in-law as beneficiaries. The lawyer later spoke with his client several times in an effort to persuade him to reinstate his daughter as a beneficiary. Subsequently, the lawyer prepared a second codicil putting the daughter back in the will. When the second codicil was presented to the testator, "he was in a comatose state." The lawyer did not read the second codicil to the testator, the testator made no verbal response when the lawyer presented the codicil to him, and the lawyer had the codicil executed by an X that the lawyer marked on the document with a pen he had placed and guided in the testator's hand. In upholding a public reprimand by the Florida Bar Association, the court observed:

> Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [the lawyer] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own.[8]

The *Betts* case should be compared with the earlier decision of *Vignes v. Weiskopf*.[9] In *Vignes*, a codicil prepared by a lawyer and executed 16 days before the death of testator was declared invalid after the testator was found to have lacked testamentary capacity. The facts of *Vignes* as recited by the Florida Supreme Court are fascinating:

> The testator's secretary, who had been in his service for twenty years, was called by his nurse who told her that Mr. Weiskopf wished to see her. She went to his bedside, where she found him apparently sleeping. He made no response when first she spoke to him, but after an interval, said, "I want a codicil…. '[sic] $100,000 to Mrs. Vignes; you to get $30,000—ten, ten and ten." She continued: "…then he stopped. He seemed to be trying to break through…." After another pause he said: "I want to leave $100,000 to somebody, but I can't think who. Isn't that awful?" Then he kept repeating the question, "What else?" She endeavored to assist him by reviewing the contents of his original will with which, because of her position, she was familiar. At the end of this conference she called his attorney, as she had been directed, and "gave

him some sketchy notes and remarks." Because of the incomplete nature of the instructions to him, the attorney questioned her "very carefully," and evidently urged her to communicate to him more definite information. She continued: "I went back in the room and tried to get Mr. Weiskopf to be more specific, and more in detail, but he did not say anything further. That is how the codicil got to be written."

The following day the attorney, accompanied by his wife, appeared at the testator's home, bringing with him the codicil which he had undertaken to prepare from the meager information given him by the secretary. The testator did not read it nor was it read to him. At the time, according to one of the witnesses to the codicil, his nurse, it was questionable whether he knew what he was signing. The wife testified that when her husband asked the testator if he desired the instrument read to him he declined and said he would read it later. The lawyer signed it; then at his request his wife and the nurse signed it also. It was immediately sealed and delivered to the secretary, who kept it until after the testator's death; so it is a fair deduction that he never did know exactly what it contained.

It is obvious that the testator was desperately, incurably ill and was in such pain that a great deal of medicine to relieve him of his suffering was being administered, such as phenobarbital, novatrine, demerol, cobra venom, and so forth.[10]

After determining that the testator lacked testamentary capacity and that the codicil was invalid, the Florida Supreme Court addressed the conduct of the lawyer and ultimately praised him for doing his best under very difficult circumstances. The court stated that:

Much has been said in the arguments and written in the briefs about the conduct of the attorney who drafted the codicil and who appears now as counsel for the [will proponents] ….

When the attorney was interrogated about his securing the execution and attestation of the codicil, which he was later to state in the oath had been witnessed without a direct request of the testator, by one who at the time lacked testamentary capacity he gave an answer which seems to us to have been quite sensible. He said simply, "I did the best I knew how."

It occurs to us that he would have been unfaithful to an old client had he not done his best to comply with the request to prepare the codicil and bring it to him. It is true that the information was incomplete, but there is evidence that he tried diligently at the time to have it clarified. When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal question whether he was in fact capable of executing a valid codicil. That the question is debatable is demonstrated by the procedure which has taken its course in the county judge's court, the circuit court, and this court.

We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.

Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.[11]

The Georgia Supreme Court addressed a similar set of facts in *Sullivan v. Sullivan*.[12] In *Sullivan*, the lawyer met with the client after he had a long battle with

cancer. She had brought two alternate wills to discuss with the testator. During the meeting, the lawyer had serious questions about his competency. The testator was vacillating about the disposition of his property and was providing answers to basic questions which were factually inaccurate. The lawyer talked to the testator's wife and told her that testator was giving inconsistent directions about what he wanted in a new will. Minutes later the wife wheeled the testator out in a wheelchair and insisted that the lawyer proceed with the execution of a will she had prepared before the meeting—"it was now or never." The lawyer expressed concern to those present that the testator was unclear and inconsistent about what he wanted and that the will might not reflect his wishes. The will was not read to the testator before it was signed. The lawyer memorialized her concerns in a document entitled "Memo to File in Anticipation of Litigation." The memo indicated that the testator's capacity fell into a "gray" area. A jury ultimately set aside the will on the grounds of lack of capacity and undue influence by the wife. The court noted that, while the lawyer may have resolved the conflicting evidence before her in favor of capacity, the "jury was not bound to reach the same conclusion, which included evidence [the lawyer] did not have."[13] This court did not address the duties of the lawyer nor did it criticize her behavior.

Is there a lesson to be learned from these decisions? Perhaps the best lesson is that a lawyer has leeway if they are unsure whether a client has testamentary capacity.

Above all, it is important to be honest and to provide the court with the facts and a clear record so that a decision can be made. As an estate planning lawyer, your job is to make sure that your competent client's wishes are fulfilled. Your job is not to adjudicate capacity. Can you prepare a will for a clearly incompetent client? Probably not, as reflected in the above cases. Can you prepare a will for a dying client under circumstances where you are uncertain as to whether the client has testamentary capacity? Maybe. The authorities seem to differ on this issue. The *Vignes* case certainly provides support for the defense of "I did the best I knew how" under the circumstances.

Notes

1 ACTEC Commentaries on the Model R. of Prof. Conduct, Rule 1.14, at 171 (5th ed. 2016), available at https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf?hssc=1 (emphasis added).

2 San Diego City Bar Assoc., Ethics Op. 1990-3 (1990) (citation omitted), available at https://www.sdcba.org/?Pg=ethicsopinion90-3.

3 The American Bar Association and the American Psychological Association have jointly published "A Handbook for Lawyers: Assessment of Older Adults with Diminished Capacity" which attempts to provide some guidance. It can be found at https://www.apa.or g/pi/aging/resources/guides/diminished-capacity.pdf.

4 135 Cal. Rptr. 2d 888 (Cal. Ct. App. 2003).

5 Id. at 902.

6 607 NE 2d 1015 (Mass. 1993).

7 530 So. 2d 928 (Fla. 1988).

8 Id. at 929.

9 42 So. 2d 84 (Fla. 1949).

10 Id. at 85.

11 Id. at 86.

12 539 S.E.2d 120 (Ga. 2000).

13 Id. at 122.