

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Dumke v. Conrad*, 2019 NSSC 310

**Date:** 20191011

**Docket:** BWT No. 488455

**Registry:** Bridgewater

**Between:**

Kathryn Dumke and KMD Law Inc.,  
a Nova Scotia company operating  
under the style and name of Dumke Law

Applicants

v.

Alan Conrad

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Mona M. Lynch

**Heard:** September 26, 2019 in Bridgewater, Nova Scotia

**Written Decision:** October 11, 2019

**Subject:** Wills and Estates; Right of Personal Representative rights and duties

**Summary:** Application in Chambers by lawyer seeking direction as to the extent of disclosure of a deceased's legal file to provide to her personal representative. The file requested by the personal representative is a litigation file in a dispute between the deceased and the personal representative. The dispute was in relation to the personal representative acting under a Power of Attorney. The litigation ended with both sides signing a consent order approximately three years prior to the deceased passing.

**Issues:** Is the personal representative entitled to receive all or any

part of the litigation file held by the lawyer?

**Result:**

The personal representative is not entitled to receive any part of the litigation file held by the lawyer.

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**Judge:** The Honourable Justice Mona M. Lynch

**Heard:** September 26, 2019, in Bridgewater, Nova Scotia

**Counsel:** Kathryn Dumke and Jessica Rose, for the Applicants  
Benjamin Carver, for the Respondent

By the Court:

**Background:**

[1] In 2010 Lola Conrad granted a Power of Attorney to her son, the respondent. In May 2014, Lola Conrad suffered a stroke and was incapacitated for several months. When Lola Conrad was incapacitated, the respondent acted on the Power of Attorney and dealt with Lola Conrad's financial affairs.

[2] In August 2014, Lola Conrad had regained her capacity. In September 2014, with the assistance of a lawyer other than the applicants, Lola Conrad revoked her Power of Attorney to the respondent and granted a new Power of Attorney to other people.

[3] The respondent refused to provide an accounting as Lola Conrad's Attorney.

[4] The applicants were retained by Lola Conrad on October 6, 2014 to assist her in the dispute with the respondent in relation to him acting as her Attorney. On December 17, 2014, the applicants, acting for Lola Conrad, filed an Application in Chambers in the Supreme Court of Nova Scotia at Bridgewater, Nova Scotia. Lola Conrad sought a declaration that her new Power of Attorney had full legal effect; requiring the respondent to account for all transactions as Attorney to Lola Conrad and requiring the respondent to transfer all property held on behalf of Lola Conrad to the Attorneys named under the new Power of Attorney.

[5] The respondent retained counsel and a settlement was reached in May 2015 acknowledging that the September 2014 Power of Attorney granted by Lola Conrad to the new Attorneys was valid.

[6] Lola Conrad died on February 27, 2018 without a will. A Grant of Administration of the Estate of Lola Conrad was issued on March 22, 2018 granting administration of the estate to the respondent. The respondent is the sole beneficiary of the estate.

[7] In December 2018, the applicants received a copy of the Grant and a letter from counsel for the respondent requesting the entire contents of Lola Conrad's file. Further requests were made for the file. On May 23, 2019, the applicants filed this Application in Chambers to seek direction from the court as to the how much of the file, if any, should be provided to the respondent.

**Issue:**

[8] Is the personal representative entitled to receive all or any part of the litigation file held by the lawyer?

**Position of the Parties:**

[9] The applicants' position is that there is no case law that they could find which addressed the specific circumstances of this case. They frame the question that they are seeking direction on as: "Is the respondent, as personal representative under a Grant of Administration, entitled to receive the solicitor/client privilege from his deceased mother and waive that privilege when he was the actual opponent in the litigation on the file he seeks? They want direction from the court. From an ethical perspective, they have serious concerns about giving the file to a litigation opponent. They say that it would have been unthinkable when Lola Conrad was alive to share anything with the respondent.

[10] The respondent's position is, "Why is he in court?". The respondent is the sole beneficiary and personal representative. He is the only person with an interest in the estate. The solicitor/client privilege of Lola Conrad passes to him, as her personal representative, on her death. He has waived solicitor/client privilege and he is entitled to the file. It does not matter that he was the opposing party in the litigation. He is entitled to any legal file that Lola Conrad would be entitled to if she was still alive.

**Analysis:**

[11] The respondent points to *Baker v. Baker Estate*, 2018 NSSC 83, as authority that the privilege rests in the personal representative upon the client's death and the lawyer must deliver any of the deceased's property to the personal representative, including the legal file.

[12] However the facts in *Baker* were quite different from those here. In *Baker*, the files sought were in relation to prior wills prepared for the deceased in litigation where the beneficiaries were seeking proof in solemn form and removal of named executors. If the newest will failed, the prior wills could prevail. Also the intentions of the deceased were in issue. The only files which were sought were in relation to the preparation of any wills and communications with the client in 2016. There were no communications in 2016 and so no communications were ordered disclosed.

[13] Paragraph 8 of *Baker* says:

[8] The request for disclosure of the legal files was broad and included any file materials relating to instructions for a new will in the fall of 2016. Mr. Ryan, Q.C. has said that there were no communications between himself and Rebecca Baker in relation to the preparation of a new will in the fall of 2016. Therefore, there is nothing to disclose in relation to a 2016 will. Also, Mr. Ryan, Q.C. represented Rebecca Baker in another matter and nothing in relation to that file need be disclosed as no relevancy has been established to any matter that is being decided in this proceeding. (emphasis added)

The files in *Baker* that were not relevant to any matter in the proceeding were not ordered disclosed to the personal representative or the named executors. It was not a case, as here, where the persons seeking the files were the litigation opponents on those files.

[14] The purpose of solicitor/client privilege is considered by the Supreme Court of Canada in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839, and is described as a fundamental civil and legal right, founded upon the unique relationship of solicitor and client. In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, considers the privilege and the history of it as set out in *Minet v. Morgan* (1873), 8 Ch. App. 361, by Lord Selbourne, L.C.,:

The privilege protecting from disclosure communications between solicitor and client is a fundamental right—as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. The Courts should be astute to protect both. As long ago as *Pearson v. Foster* (1885), 15 Q.B.D. 114, Brett, M.R., warned that free and confident communication within the solicitor-client relationship is so vital a part of the right to counsel that the privilege ought not to be 'frittered away'. At pp. 119-20 he said:

The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client ... (emphasis added)

[15] The respondent quotes many cases such as *Wayne v. Wayne*, 2012 ABQB 763, *Hicks Estate v. Hicks*, 1987 CarswellOnt 367 (Ont.Dis.Ct.), which state that, upon death, the privilege rests in the personal representative of the deceased client and the personal representative can waive the privilege and call for disclosure of any material that the client would have been entitled to if living. However, the facts in *Wayne* and *Hicks* are different than in this case. In both *Wayne* and *Hicks*

the issue to be determined was the intention and capacity of the incompetent person or the deceased.

[16] In *Stapleton v. Doe*, 2017 BCSC 12, the plaintiff was the executor and sole beneficiary of her father's estate. Four months prior to his death, the deceased purchased an insurance policy and named the plaintiff as beneficiary but then changed the beneficiary to an unknown party two months later. At around the same time the deceased consulted a lawyer about estate planning. The personal representative sought a copy of the lawyer's file. The court considered the relevance of the file sought and found that the lawyer's file was relevant to the testamentary capacity and intentions of the deceased.

[17] In *Descôteaux*, Lamer J. formulated a substantive rule at page 876:

It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

In applying the rule, Lola Conrad is not alive to consent to the disclosure of communications between herself and her lawyer. The law provides that solicitor/client privilege after death rests with the personal representative, here the respondent, and gives him the right to waive the privilege. The respondent's ability to waive Lola Conrad's privilege interferes with the confidentiality that she had when she consulted the applicants. That confidentiality should not be interfered with except to the extent necessary and the right of the respondent to waive privilege must be interpreted restrictively.

[18] In the present case, the respondent asserts that he has the absolute right to the file as he now stands in the place of his mother, the deceased, and relevance need not be established. I do not agree. As in *Stapleton*, the file must be relevant to an issue being decided or to the ability of the respondent to exercise his authority as the administrator of his mother's estate. Lola Conrad did not name the respondent as her personal representative, she did not choose to give him the authority to waive her confidentiality. She died without a will and without a named executor. The respondent says that she could have named a representative and the respondent would not have the authority to obtain her legal files.

[19] A deceased person could have criminal files, child protection files, divorce files, etc. If a person seeking advice from a lawyer knew that, after their death, their children would have access to those files, the free, confident, candid communication necessary between a lawyer and client would not occur. The basis of solicitor/client privilege would be eroded. As stated above in *Descôteaux*, the right to counsel would be imperfect if the privilege is eroded or frittered away.

[20] The respondent submits that Lola Conrad's capacity is a live issue in relation to the Power of Attorney. However, in May 2015 the respondent agreed that Lola Conrad had capacity when the litigation was settled by an agreement that the new Power of Attorney entered into in September 2014 was valid. The respondent cannot now question whether Lola Conrad had the capacity to instruct counsel.

[21] The respondent submits that the file may be relevant to a claim for an accounting and damages against Lola Conrad's attorneys. This is Lola Conrad's litigation file not the file of her attorneys under the Power of Attorney. The file would not be relevant to that claim.

[22] The respondent submits that the file may be relevant to a claim for damages against the solicitor who drafted Lola Conrad's Power of Attorney. The applicants did not draft the Power of Attorney. The file would not be relevant to that claim.

[23] The respondent submits that the file would be relevant to a taxation of the applicants' accounts. The litigation was settled in May 2015 and the file continued into 2016. Lola Conrad died at the end of February 2018. I do not find that the file would be relevant to the taxation of the applicants' accounts.

[24] The respondent has not shown that the file would be relevant to ascertain the intentions of Lola Conrad as there is no will to interpret. The respondent has not



shown that the file would be relevant to the execution of his duties as her personal representative.

[25] The request by the personal representative for a file in which he was the opposing litigant appears to be for personal reasons not relevant to the administration of the estate of Lola Conrad. Providing the respondent with the file would fritter away and not preserve solicitor/client privilege, a fundamental civil and legal right.

**Conclusion:**

[26] The file in relation to the litigation between Lola Conrad and the respondent should not be disclosed to the respondent.

Lynch, J.