IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Weldon McInnis v. Doe,* 2014 NSSM 13

Claim: SCCH 424142
Registry: Halifax

Between:

Weldon McInnis

Applicant

v.

John Doe

Respondent

Adjudicator: Augustus Richardson, QC

Heard: March 18, 2014

Appearances: Aileen K. McGinty, for the applicant
Jonathan Hooper, for the respondent

Decision: June 17, 2014

By the Court:

[1] The news is now replete with articles about the social impact of a growing population of older people. Many of these discuss the concurrent growth of people whose mental capacity is impaired in varying degrees by the aging process. Others discuss the problem of elder abuse. This context will on occasion raise difficult questions of client assessment for lawyers. Is an allegation made by a client that his or her children are abusing him or her real, or a figment of suspicions born of declining mental faculties? Can a solicitor accept and act on the instructions of a client when there is reason to be concerned about the capacity of the client to give those instructions? What steps–if any–must or should or can a solicitor take to determine the mental capacity of his or her client prior to acting on those instructions? Under what circumstances can a solicitor charge such a client for following instructions that later prove to have been based on the client's delusions? How is the value of services provided under such circumstances to be assessed?

[2] Is it even fair to expect a solicitor to answer such questions? He or she is not an expert in assessing mental capacity. Moreover, the fact that a client may have delusions does not necessarily mean that–in a case where they allege they are being abused–they are not being abused–or that they do not need legal representation. A solicitor's decision that a potential client may lack capacity may

result in denying representation to a client who needs legal representation to resist the depredations of their relatives. On the other hand, in some cases it is the potential client's family who are in the best position to describe an aged parent's mental capacity.

[3] All of these are difficult questions. And yet, arriving at an answer will be clearly be important for a solicitor and his or her client. The answer–and the steps taken following that answer–it will have an impact on the reasonableness of steps taken by the solicitor in making a decision to represent such a client.

[4] This is the taxation or assessment of several legal accounts for services rendered for a client whose situation gave rise to a number of these questions. The reasonableness of the accounts depends to some extent on the answers to those questions. Given the personal nature of the client's condition and situation I have chosen to change his name to "John Doe" for purposes of this decision. His daughter, who gave evidence at the hearing, I have chosen to call "Jane Doe."

[5] Ms McGinty is a solicitor at the firm of Weldon McInnis, the applicant. She was the solicitor who provided the legal services here under question to the respondent. She also obtained an expert's report, the cost of which is objected to by the respondent.

[6] I heard the evidence of Ms McGinty and of the expert, Dr Brunet, on behalf of the applicant. I heard the evidence of Ms Jane Doe, the daughter of the respondent, on his behalf. I also heard the submissions of Ms McGinty in support of the reasonableness of her legal account, including the disbursement with respect to Dr Brunet's report. Two tabbed briefs (the McInnis Brief and McGuire Brief) were also put into evidence. I also heard the submissions of Mr Hooper on behalf of the respondent.

[7] The matter was heard on March 18, 2014. The parties subsequently consented to an extension of the time necessary for the delivery of a decision in this matter beyond the 60 day time limit, although such consent now appears to be unnecessary: see *Towle v. Samad* 2013 NSSC 260.

The Accounts

[8] There were four accounts in issue, as follows (including HST):

a. August 19, 2013. . . . . $2,972.75

b. September 25, 2013. . . . . $4,375.50

c. October 29, 2013.. . . . . $1,607.64

d. November 14, 2013.. . . . . $161.00

[9] The September 25th account was solely a disbursement account. It represent the cost of a medico-legal report obtained by Ms McGinty from Dr Aileen Brunet, as discussed below.

The Facts

[10] Ms McGinty first met Mr Doe in May 2013. He was at the time living at Arborstone Enhanced Care Facility ("Arborstone") in Halifax, Nova Scotia. As its name suggests, Arborstone is a facility that provides nursing supervision and support to clients who require some assistance with the activities of daily living.

[11] Ms McGinty met Mr Doe at the Arborstone on May 15th and again on May 17th, 2013. He had called earlier and asked her to meet with him. The first meeting was about an hour and a half, the second was shorter.

[12] (I pause here to note that neither meeting is recorded in the detailed account of August 19th. The very first time recorded is an hour of legal research on May 13th, followed by another hour of legal research on May 14th, a review of documents on May 15th, and a "telephone call with client and subsequent consideration of next steps in process" on May 21st. The total time up to that point was 3.5 hours.)

[13] Ms McGinty learned that Mr Doe was 68. McGinty explained that Mr Doe told her that he had made a Power of Attorney in favour of his daughter in 2004, but that he now wanted it changed. He also told Ms McGinty that he did not want to live at Arborstone and that he wanted to look at other homes, or get his own apartment. He told her that when he had mentioned his plan to the staff at Arborstone he had been told that "there were legal issues that prevented him from leaving."

[14] Mr Doe told Ms McGinty that he had revoked the 2004 Power of Attorney in April 2012. The handwritten revocation, in the form of a letter dated April 25th, 2012 and directed to his daughter's attention, advised that "your service to me as Power of Attorney are no longer required:" Ex. McInnis Brief, Tab C. Mr Doe said his bank had refused to recognize the revocation, and that he was concerned about how his finances were being managed by his daughter.

[15] Ms McGinty was satisfied following her meetings with him that Mr Doe was competent and had the capacity to instruct her. She discussed her retainer with him, and her fees. She discussed

various courses of action with him, and felt that he understood their various implications. It was clear in her view that he wanted to move out of the Arborstone into different living accommodations, and that he wanted a new Power of Attorney.

[16] Ms McGinty testified that it was clear to her at the time that Mr Doe needed legal assistance. He was in a place he did not want to be. His attempt to revoke his Power of Attorney had been ignored. He was concerned about how his bank account and finances were being managed. She testified that she was also alert to issues of competence. He also told her that the staff at the Arborstone had told him that he could not leave.

[17] Ms McGinty prepared a retainer letter dated May 17th, which Mr Doe signed on May 23rd: see Tab A, McInnis Brief. The retainer letter confirmed the retainer of Weldon McInnis "re Arborstone, Power of Attorney and related matters." Other than that reference, the letter contained nothing about what it was Ms McGinty proposed to do for Mr Doe. The letter instead detailed her hourly rate ($200/hour), how her time would be billed, how disbursements would be handled and when and how payment should be made. A retainer of $5,000.00 would at some point be expected. No estimate was provided. Indeed, the letter expressly disavowed any suggestion that the retainer of $5,000.00 represented an estimate.

[18] Ms McGinty also testified that given what Mr Doe had said about the Arborstone staff's comments about whether he could leave it was clear to her that there was–or would be–an issue as to his mental competence. She consulted with two of her law partners, and was told that Dr Brunet was an expert in the area of mental competence. In or about May 27th she asked Dr Brunet what her fee would be and was told it would be about $5,000.00. She discussed this with Mr Doe. (From the detailed account it would appear that this discussion took place on May 30th.) He said that he had thought that it would be closer to $7,000.00. She testified that they did not have a long discussion about getting such a report, but in her opinion it would be a struggle to do anything for him without a report establishing that he was, in fact, mentally competent.

[19] Ms McGinty was asked at the hearing why she did not simply prepare the new Power of Attorney, and leave any challenge as to Mr Doe's competence to others. Ms McGinty did not have a clear answer. She explained that in her own opinion Mr Doe was competent to give instructions, but she felt that his competence could still be challenged.

[20] Ms McGinty testified that she had also spoken to the nursing staff at the Arborstone. They had asked her why she was visiting Mr Doe; had told her that he didn't understand what he was doing; and that he couldn't manage his life. She explained that she ignored these comments because "at the time my focus was on my client" and it was "my duty not to be distracted by opinions of people I didn't know."

[21] The month of June was taken up with reviewing documents, meeting with Mr Doe on June 5th, and various correspondence and telephone discussions with various people, including Jane Doe. On June 11th Ms McGinty wrote to Ms Doe. She noted that a mortgage for $256,750.00 had been taken out on Mr Doe's rental property in January 2011, which mortgage had been signed by Ms Doe. Ms McGinty sought verification of the mortgage, saying that "[u]ntil last week, Mr Doe had not knowledge of its existence." The first letter to Arborstone from McGinty was sent on July 3rd. On July 23rd Ms McGinty recorded that she had a telephone call with Ms Doe "re capacity etc." that lasted .3 of an hour.

[22] Ms Doe stated in a statutory declaration filed at the hearing that in her conversation with Ms McGinty on July 23rd she

> "discussed [Mr Doe's] medical history and that it was my understanding from his treating physicians that [Mr Doe] did not have the capacity to make personal care decisions or financial decisions. I advised ... that I was acting as Power of Attorney for [Mr Doe]. I further advised Aileen McGinty to contact Dr Sophie Couture [the physician at Arborstone who was familiar with Mr Doe's condition] who could provide her with more information about ... [his] medical condition and mental capacity."

[23] Ms Doe also noted that insofar as legal fees were concerned, Mr Doe (who she visited regularly most weeks) thought that Ms McGinty "was hired through Dalhousie Legal Aid Service and that they were paying her fees."

[24] Ms McGinty for her part testified that her recollection of the conversation with Ms Doe was that she was told there were "concerns about his capacity." However, being "mindful of the solicitor/client relationship" and her "duty to her client" such comments were not enough to justify altering her course of action. On July 25th McGinty recorded 2 hours of legal research "re report from Aileen Brunet." (The report itself was not delivered until August 23rd.)

[25] Ms McGinty also explained that she did not speak to Dr Couture because Mr Doe told her that she was biassed. Ms McGinty saw no need to speak to Dr Couture because "she would not have fresh eyes." She also acknowledged that while Mr Doe had given her copies of some of his older medical records, she did not have a complete file.

[26] Dr Brunet saw Mr Doe at Arborstone on two occasions. (No detail as to when exactly those meetings took place was provided.) She reviewed his Capital Health District Authority ("CHDA")

file. She also spoke briefly with a staff member at the Arborstone. All of this is detailed in her report dated August 23rd: McInnis Brief, Tab E. She opined that Mr Doe had some cognitive impairments "which he does not recognize as being present" but that he had "the capacity to instruct counsel and designate a power of attorney." She added, however, that "[f]or the more complex decision making of managing his estate I consider him to lack capacity," although "he does have the ability to participate in decisions about his estate and is not sufficiently impaired that consideration should not be given to his input, suggestions and preferences."

[27] Ms McGinty did at one point speak to a social worker attached to Arborstone. She asked about the "order" that Mr Doe had suggested was keeping him at the Arborstone. She was told that there were in fact no orders in place. This discussion was "several weeks down the line," after Dr Brunet had delivered her report of August 23rd.

[28] Continuing on, Ms McGinty testified that she had several discussions with Mr Doe during the late spring and summer of 2013 as to who he wanted to act as his new Power of Attorney. However, she was never able to get a satisfactory answer out of him. He told her that he had "a couple of friends" who might serve, but he never gave her a name. As she explained, "one day he said he would give me a name, and the next day he would say that he didn't want to fall out with his family." And that was about as far as they ever got. Ms McGinty explained that she ended up "trying to see if we could negotiate something with the lawyer for Mr Doe's daughter [Mr Hooper]." She got "some financial information" from Mr Hooper "which was helpful." She then received a report from Dr MacKnight, a specialist in geriatrics, dated August 26th. The report had been obtained by way of a referral from Dr Courture. Dr MacKnight, who had assessed Mr Doe on August 24th, concluded that he was "[not] competent to make decisions regarding his living situation, his overall care, or his financial management."

[29] With two conflicting medical reports Ms McGinty found herself in a bit of an impasse. While both reports suggested that Mr Doe was not competent to manage his affairs, Dr MacKnight's report had not suggested that Mr Doe lacked capacity to instruct legal counsel. However, she was not able to obtain a "satisfactory response" or instructions from Mr Doe. He "eventually told me to close the file ... that he did not want to jeopardize his relationship with his daughter." She then closed her file in November 2013.

[30] Ms Doe's statutory declaration, and testimony at the hearing, fleshed out her father's background and condition. Mr Doe had been a teacher. He had purchased a rental property which was to be "his retirement plan." But he also had problems with alcohol. In 2010 he was admitted to hospital suffering the effects of long term alcohol abuse. In July 2010 a certificate for involuntary psychiatric assessment was issued because he was "likely to suffer serious physical impairment or serious mental deterioration, or both." A long series of specialists confirmed Mr Doe's inability to

look after his affairs, and in particular, the fact that it would be unsafe–either to him or to others–to release him back into the community. After his hospitalization he was subsequently released to Arborstone. His condition had not improved to the point where he could be released back into the community. He was however unhappy at Arborstone, in part because most of the clients there were either older or more severely disabled than himself. He continued to have problems with alcohol. During this period Ms Doe had searched for other assisted living situations that would provide the assistance and care he needed, albeit in a more independent-like situation than was the case with Arborstone.

[31] At the time of his initial hospitalization Mr Doe's rental property had been in a state of severe disrepair. He had not looked after the property. Its units were becoming impossible to rent. In order to obtain the necessary repairs to the roof, the building structure and plumbing, and the units Ms Doe, under her Power of Attorney, obtained the mortgage that was placed on the property. She had discussed the need for the repairs and the mortgage to raise the funds with Mr Doe a number of times. Mr Doe persisted in the belief that such repairs were unnecessary and that rental income was more than sufficient. (I accept that this belief was in fact unfounded.)

[32] Dr MacKnight in his report (noted above) was of the view that some form of homecare support, or assisted living arrangement, was necessary for Mr Doe. The latter had serious problems with alcohol. He did not understand or appreciate his deficits, and indeed did not believe he had any–or that they were or could be related to alcohol abuse, which he proved unable to avoid if allowed to live independently. He was able to groom himself, and generally presented well. But he could not be trusted to manage his affairs–financial or otherwise–prudently or at all.

The Position of the Parties

[33] Ms McGinty's submission was in essence that at the time she met Mr Doe he appeared to have the mental capacity sufficient to instruct a solicitor. He understood the retainer and the fees he was expected to pay. His mental capacity was "task specific"–that is, it related to looking into the revocation of his Power of Attorney, whether it was valid and whether he could appoint a new Power of Attorney. He also asked her to see if he could leave Arborstone. He also had concerns about the management of his financial affairs by his daughter that he wanted her to look into. She took instructions from a senior partner in her firm, which resulted in the retainer of Dr Brunet. As a result all of her accounts were reasonable and ought to be paid.

[34] Mr Hooper's submission on behalf of Ms Doe, on behalf of Mr Doe, was that Ms McGinty had not acted in a reasonable fashion. What she should have done first was speak to the family physician (Dr Couture) as well as to Ms Doe and the staff at Arborstone. Had she done that she

would have learned that Mr Doe was on a waiting list to get out of Arborstone into a different and better living situation; that he was not able to look after his financial affairs. She ought to have done all this before taking any further steps–and, in particular, before retaining Dr Brunet.

[35] Mr Hooper submitted that none of the accounts should be paid because on the evidence before me Mr Doe lacked the mental capacity to retain a lawyer. Alternatively, if he did have the capacity to retain a lawyer, it was not reasonable in the circumstances of this case to retain a costly expert report; nor to incur as much in the way of fees as happened here.

Analysis and Decision

[36] As noted above, there are four accounts in issue. Three relate to fees; one relates to the cost of Dr Brunet's report. I deal with the former first.

The Fee Accounts

[37] The three fee accounts total $4,741.39. They cover a period from May 13, 2013 to November 12th, 2013.

[38] I do not in this case accept Mr Hooper's submission that Mr Doe lacked capacity to retain a solicitor for purposes of advising and representing him in respect of his interests.

[39] The question of competence is determined by the task for which competence is required: *Minister of Health and JJ* (2003) 217 NSR (2d) 264; *Hemphill v. Hemphill* 1998 CarswellNS 227 (CA); *Burchell MacDougall v. Mansfield* 2008 NSSM 67 (CanLII) at para.11. A person is presumed to be competent with respect to a particular task until he or she is proved otherwise. On the medical evidence before me it was not established that Mr Doe was not competent to retain and instruct counsel. A finding that he was not competent to manage his financial affairs is not a finding that he was not competent to wonder whether those affairs are being properly run–or to retain counsel to investigate whether or not that was so: see, for e.g., *Minister of Health, supra*. This principle is all the more important in cases involving clients who–precisely because of frail or failing mental capacities–may be at risk of being abused in some way. A too-quick finding of mental incapacity to retain and instruct a solicitor puts such clients at risk of being taken advantage of by others without the protection that legal representation might provide. It might make solicitors leery of accepting retainers from such clients for fear that their accounts would not be paid. Such a result would not be a good policy.

[40] However, a finding that Mr Doe did have capacity to retain and instruct counsel does not end the inquiry. A solicitor is still required to establish the reasonableness of his or her account.

[41] Ms McGinty was retained to do three things:

a. obtain a new Power of Attorney;

b. investigate or obtain Mr Doe's "release" from Arborstone; and

c. look into the management of his financial affairs by his daughter.

[42] The bulk of the time related to services provided under this retainer up to September 10th. The total of all the time spent by Ms McGinty over the three accounts was 33 hours. Had the accounts been rendered at her normal rate they would have totalled $6,611.50. However, the accounts were reduced by a "legal fee discount" to the amounts claimed (as set out above).

[43] In my opinion total fees in excess of $4,500.00 in respect of what Ms McGinty's was retained to do is in this case unreasonable. It takes little to draft a Power of Attorney. An investigation of Mr Doe's state and condition–and of the conduct of his financial affairs–would reasonably have taken more time and involved more work. A review of the three accounts details roughly 9 hours related to review of documents and discussions with staff at Arborstone, the bank and Ms Doe (and her counsel). Discussions with Mr Doe about those matters would have taken up more time. For that I allow 3 more hours, for a total of 12 hours. I allow a further hour for the Power of Attorney, which brings it to a total of 13 hours. At Ms McGinty's hourly rate of $200/hour that would amount to $2,600.00 plus HST of $390.00, for a total of $2,990.00.

The Account In Respect of the Disbursement for Dr Brunet's Report

[44] A solicitor's decision to advise a client that a costly expert's report is necessary is one that must be made carefully. It must be founded on a sound analysis of the facts and the actual issues the client faces. It must not be made prematurely. After all, much can sometimes be obtained without an expert's report, by way of investigation and negotiation with the "other" side. Moreover, experts require factual foundations upon which to base their opinions. It is often better to wait for that foundation to be built before a solicitor decides that an expert's report is required. A report that is obtained before it is needed may be an unnecessary–and hence unreasonable–disbursement: see, for e.g., *Coleman Fraser Whittorne & Parcells v. Canada (Attorney General)* 2003 NSSM 3 (CanLII) at paras.65-68; *Grey v. Dore* 2012 NSSM 12 (CanLII) at paras.8-9.

[45] In this case I was not persuaded that it was reasonable for Ms McGinty to advise Mr Doe when she did that it was necessary to obtain a report from Dr Brunet. Ms McGinty made the decision shortly after meeting with Mr Doe. She made it notwithstanding the principle that Mr Doe was in law presumed to be competent unless someone else challenged–and disproved–that competence. She made it before knowing for certain that competence would be an issue raised by anyone. She made it without the benefit of Mr Doe's complete medical file; without the benefit of speaking to the family physician (Dr Courture); or to Ms Doe. She also made the decision–and gave the advice–before she knew exactly what the history and issues with respect to his competence were, or whether an additional report was indeed necessary.

[46] Moreover, the need for an opinion as to Mr Doe's competence at the early stage of Ms McGinty's retainer is unclear. Mr Doe retained her to draft a new Power of Attorney; to look into why he was still at Arborstone; and to look into the management of his affairs by his daughter. All of this could have been done without the need for an expert report. Accepting the retainer did not require a medical opinion as to Mr Doe's competence to retain and instruct counsel, at least given the legal assumption that he was competent to that task. Ms McGinty could have performed the initial steps in her retainer–the drafting and the investigation–without a report. She could have provided advice and recommendations based on that investigation without a medical report. The issue of Mr Doe's competence to give instruction ***once he had received that advice*** might have become relevant if he had ***then*** given her instructions that were or might be contrary to his best interests. And at that point Ms McGinty as a solicitor would have faced the difficult and complex question of deciding what to do–of deciding whether she should or could continue to act, or of deciding whether additional reports were necessary in the event of an attack on Mr Doe's competence to give those instructions. But that was a fork in the road that Ms McGinty had not reached in the spring and summer of 2013–and indeed, might never have reached. And to recommend and obtain a report before that fork was reached was in my opinion unreasonable in the circumstances.

[47] The decision to retain Dr Brunet cannot be justified by Mr Doe's apparent consent to obtaining the report. If Mr Doe's mental competence to manage his affairs was, to Ms McGinty's knowledge, an issue then one is hard pressed to understand how she could rely on that competence before it was established. As well, and as noted above, the nature of the retainer–and the legal assumption of competence–did not require an opinion with respect to his competence at that stage in the proceeding.

[48] In my view a more reasonable course of action would ***first*** have been to request and obtain Mr Doe's complete medical file; to speak to his family physician (Dr Courture); and to speak to the Arborstone staff and Ms Doe. Such information may have established that a report from yet another specialist was unlikely to produce a different conclusion. It may also have led to different advice to

Mr Doe–advice that (a) he was in Arborstone legally, (b) his desire to leave Arborstone for different accommodations was being addressed, and (c) his affairs were being managed properly by his daughter. To say this is not to say that Mr Doe had to accept that advice. Nor is it to say anything about what Ms McGinty should or ought to have done had Mr Doe refused to accept that advice. But it is to say, as noted above, that the stage at which such questions might arise had not yet been reached.

[49] I accordingly disallow the September 25th account in its entirety. The cost of the report is not the responsibility of Mr Doe–not on the grounds of competence, but on the grounds of reasonableness.

Conclusion

[50] For the reasons set out above I disallow the September 25, 2013 account in its entirety. I assess, allow and certify the three accounts dated August 19th, October 29th and November 14th, 2013, in total, as follows:

a. in respect of fees. $2,600.00

b. HST thereon. $390.00

c. TOTAL. $2,990.00

[51] There will be an order to the effect that Mr Doe pay to the applicant $2,990.00

DATED at Halifax, Nova Scotia
the 17th day of June, 2014

Augustus Richardson, QC
Adjudicator