

Do Illinois Attorneys Have a Duty to Assess Their Client's Mental Competence?

Carey v. Hartz, 2024 IL App (1st) 231323 (12/18/24)

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Brief Summary

In a legal malpractice action arising out of revisions to a client's estate plan, the appellate court considered whether an attorney has a duty to evaluate a client's mental capacity and, if so, whether the plaintiff alleged sufficient facts to show the defendants (a law firm and its attorneys) were aware of their client's disability at the time they provided legal services.

The appellate court reversed the trial court's dismissal order, explaining that while there is no general duty for an attorney to evaluate a client's mental competence, **the plaintiff alleged sufficient facts to support a claim that defendants were on notice of their client's disability at the time they rendered services and failed to take appropriate steps to ensure she was competent to modify her estate plan.**

Complete Summary

Before her death, Alyce K. Newman ("Newman") retained the defendants to assist her in modifying her estate plan to benefit one of her two sons. Upon discovering the modifications, Newman's other son obtained limited guardianship of her estate and person, alleging that she was suffering from dementia, and unwound the modifications.

He then filed a legal malpractice action against defendants on his mother's behalf, alleging they should have evaluated her mental capacity prior to effectuating the changes to the estate plan. The trial court granted defendants' motion and dismissed the complaint, finding that:

- (1) there is no duty for an attorney to evaluate the mental capacity of his or her client; and

(2) even if there was, the complaint did not sufficiently allege that defendants were aware of Newman's disability at the time they rendered services. Plaintiff appealed, and the appellate court reversed.

Newman had two adult sons, P. Andre Katz ("Andre") and Leonard Katz ("Leonard"). In October 2016, Newman prepared an estate plan that listed both sons as beneficiaries. In the spring of 2017, however, Leonard contacted defendants about modifying Newman's estate plan, and shortly thereafter, they met with defendants.

Plaintiff alleged, *inter alia*, that: "[a]t the time [Newman] met with Defendants, [she] was already suffering the effects of dementia. Specifically, [Newman] lacked the ability to recall past financial transactions made by her[,] including the writing of specific checks. Further, [Newman] lacked the ability to recall prior medical procedures, what medication she was taking[,] or even the name of her primary care physician."

Newman and Leonard met with defendants for a second meeting, at which time Newman "again displayed signs of dementia," and she also revealed that she had already given Leonard \$660,000 in the past seven months.

Defendants then prepared modifications to Newman's estate plan, including provisions favorable to Leonard, despite his "inability to manage his own finances in part due to his significant and long-standing gambling addiction." Newman executed the modified estate plan documents on May 31, 2017, at defendants' office, where she was accompanied by Leonard, despite the fact that a number of open issues remained.

At that time, Newman "continued to show signs of her condition." On June 9, 2017, Andre was appointed temporary guardian of Newman's estate and person by the probate court. In the order appointing Andre as guardian, the probate court identified the "harm" necessitating the appointment as Leonard's behavior, which clearly showed his undue influence over Newman. Newman was prohibited from, *inter alia*, "executing any estate planning documents ... until testamentary capacity is authenticated before this court."

Andre then contacted defendants to notify them about the guardianship. Defendants called Newman's home, but spoke with Leonard. In July 2017, Newman paid defendants for services provided through May 31, 2017, but they did not make any efforts to determine whether she had the capacity to execute the check.

After some motion practice and an earlier appeal, Newman passed away in early 2023. Carey was appointed independent executor, and he filed a second amended complaint against defendants. Count I was for legal malpractice and alleged, *inter alia*, that defendants "had reason to believe that [Newman] did not have the capacity to modify her estate [plan], and had a duty to evaluate the same."

Plaintiff alleged that defendants were negligent in failing to adequately investigate Newman's capacity to modify her estate plan and whether she was subject to Leonard's undue influence. Plaintiff claimed that as a result, Newman's estate was "required to incur hundreds of thousands in legal fees and other costs to unwind the illegal and ineffective modifications." Count II was for unjust enrichment. Ultimately, the trial court granted defendants' motion to dismiss, and plaintiff appealed.

The dismissal was based on the trial court's finding that there is no duty for an attorney to assess their clients' mental capacity, and even if there was, plaintiff failed to allege that defendants were on notice of Newman's

disability.

The appellate court initially noted that there is no Illinois law directly on point, making this a case of first impression. Plaintiff relied on Rule 1.14 of the Illinois Rules of Professional Conduct, however, to argue that such a duty should be imposed on attorneys. Rule 1.14 concerns clients with diminished capacity and generally requires that “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished,” the attorney should, as far as reasonably possible, “maintain a normal client-lawyer relationship with the client.” R. 1.14(a).

When, however, the attorney “reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest,” the attorney “may take reasonably necessary protective action,” including consulting with individuals or entities having the ability to take action to protect the client. R. 1.14(b). The comments to Rule 1.14 further explain that “[i]n determining the extent of the client’s diminished capacity,” the lawyer should consider and balance certain factors relating to a client’s competence.

Plaintiff argued that Rule 1.14 supports a duty to assess a client’s capacity. The court did not find this argument persuasive, however, because an attorney working with a client begins the relationship with the presumption that the client has testamentary capacity until proven otherwise.

Plaintiff’s position, by contrast, begins from the opposite perspective—namely, requiring the attorney to essentially make a finding of competence before embarking on representation. Such a position turns the presumption of competence on its head, making it something that needs to be affirmatively established instead of something that needs to be rebutted in appropriate circumstances.

Plaintiff also suggested that an affirmative duty to determine a client’s competence is supported by public policy, but the court disagreed. The court noted that although there is a public policy in favor of “vigilant protection” of the disabled, there is also a public policy in support of testamentary freedom.

Instead, the court concluded that here, there were well-pleaded facts alleging that Newman lacked the capacity to modify her estate plan at the time she engaged defendants and that her diminished capacity would have been apparent upon any significant questioning. The court thus found that plaintiff stated a cause of action for legal malpractice, and dismissal was therefore improper.

Significance of Decision

In a case of first impression, the court held that although there is no general duty for an attorney to evaluate a client’s mental competence, a plaintiff may be able to allege sufficient facts to support a legal malpractice claim against an attorney if plaintiff can show that the attorney was on notice of the client’s disability at the time they rendered services and failed to take appropriate steps to protect the client.

In this case, the facts alleged regarding the client's disability were detailed, but the question remains as to how much notice an attorney must have before taking action. An attorney acting too quickly may lose a client, while an attorney who fails to act may face a legal malpractice claim.

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