

Inter-Generational Family Representation Case Study in Ethics

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NEW YORK STATE BAR ASSOCIATION
ELDER LAW AND SPECIAL NEEDS SECTION

Ethics Committee CLE Materials

Summer Meeting 2019

CASE STUDY: THE BRADY FAMILY

THE FAMILY

JIM BRADY: Age 85; Family patriarch married to SANDRA for 30 years. JIM was previously married to MICHELLE and they have one child together -CLAUDIA BRADY

SANDRA: Age 65; JIM'S current wife in good health. They have one child, WALTER BRADY

MICHELLE: Age 83; 1st wife of JIM, and mother of CLAUDIA

CLAUDIA: Age 54; has had a number of behavioral issues over the years including paranoia and bipolar disorder and has been hospitalized for those conditions, most recently about six months ago. She has two children, PETER and MEGAN

PETER BRADY: Age 30

MEGAN BRADY: Age 18- has recently graduated from high school and intends to go to college. She has had some developmental delays and issues since birth.

WALTER BRADY: 28, married with three children. His relationship with his wife has become strained over the past couple of years because of his gambling habits.

THE FACTS

JIM has always been friendly with his first wife, MICHELLE. They divorced about 30 years ago and you represented JIM in an uncontested divorce at that time. You have remained friendly with both MICHELLE and CLAUDIA. JIM is the sole owner of a trucking business in New York City and his son, WALTER, has worked for JIM for seven years. While CLAUDIA has a good relationship with her stepmother, SANDRA, she has always been a little suspicious of her and sometimes thinks she is out to get the family money and cut her out of the estate.

About 20 years ago, JIM and SANDRA consulted with you about drafting estate planning documents and they signed "mirror image" Wills which provide that upon the survivor's death the property would be split equally with the share for WALTER being held in a "Minor's Trust" until age 25 and the share for CLAUDIA to be held in an Escher type Trust. The Will directed that MICHELLE act trustee and WALTER as the successor trustee of the trust for CLAUDIA. At that time they disregarded your advice and chose not to sign a Power of Attorney or Health Care Proxy.

When MEGAN (CLAUDIA's daughter) was 12, she was injured in an automobile accident and received a settlement of \$100,000.00 which remains on deposit in a joint bank account with CLAUDIA and a bank officer as signatories. Now that MEGAN is 18 years old, CLAUDIA wants to have MEGAN apply for public benefits but has been told that the settlement funds will interfere with some of MEGAN'S benefits. CLAUDIA only recently told MEGAN about the settlement.

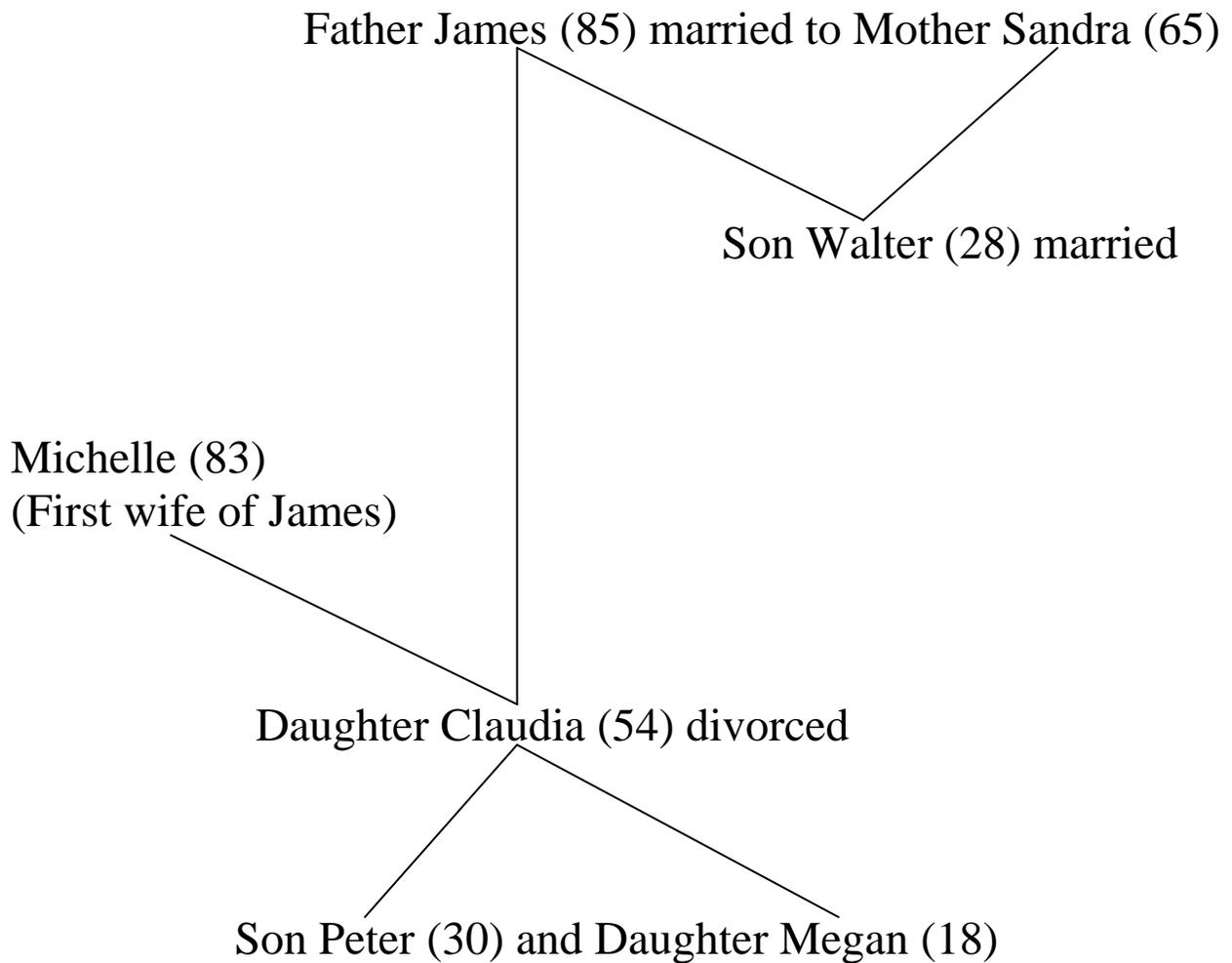
About 5 years ago, prior to surgery, JIM asked you to prepare a Power of Attorney for him designating his son, WALTER, as his agent with no Statutory Gift Rider. As far as you are aware, CLAUDIA has never been informed of the provisions of JIM and CLAUDIA's Wills and does not know about the executed Power of Attorney.

CLAUDIA comes to see you about some options for MEGAN's funds but does not bring MEGAN to the meeting. At the meeting you inform CLAUDIA that a first party special needs trust is the best option. After you tell her how it works, she agrees with you but also tells you that MEGAN is anxious to get the funds and to manage them herself. In passing, she also mentions that she has concerns about her father's (JIM BRADY) mental state. She is also concerned that SANDRA and WALTER have recently been limiting her meetings with her father; although she does have a weekly meeting scheduled with JIM for next week and would like to bring him to see you for a "chat." She is especially concerned about WALTER since he is having marital difficulties and incurring significant gambling debts. About midway through the conversation you realize that CLAUDIA is speaking very rapidly and somewhat incoherently, and you are concerned about her mental state which is heightened when she asks you to draw a will for her leaving \$100,000 to the treatment center she currently visits with the entire balance to PETER because leaving money to MEGAN is unnecessary and might cause problems with obtaining benefits in the future and PETER will always take care of MEGAN.

You promise to call CLAUDIA back, but after she leaves your office you ask yourself if you should you meet with JIM and CLAUDIA together. If you do, you question what you can discuss with both of them, or whether you should meet with each of them separately, and what you can share between them.

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WHO IS THE CLIENT?

- a. Jim Brady?
- b. Claudia?
- c. Peter?
- d. Megan?
- e. Some or all of the above?

Because our clients often have diminished capacity or changing capacity and because they are often accompanied or “represented” by others, i.e., an adult child, there are certain ethical challenges often confronting the elder law attorney.

INFORMED CONSENT

New York Rules of Professional Conduct, Rule 1.0(j)

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

What if the client does not fully understand the explanation or does not have the desire to understand it or prefers to shift the responsibility to the non-client? Informed consent is required for many of the Rules.

DUE DILIGENCE

New York Rules of Professional Conduct, Rule 1.3

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

The standard of “reasonable diligence and promptness” is, of course, dictated by the circumstances. With elderly clients, time is often even more critical than for younger clients. An elderly client going in for surgery who wants a change to his estate plan, a client with rapidly diminishing capacity who needs to execute a power of attorney, etc., probably take priority over younger clients, despite what your younger client may think. The elder law attorney must prioritize appropriately. Prioritizing inappropriately may amount to neglect and unethical conduct. If you take on the representation of an elderly client, be prepared for late night frantic phone calls from family members, and be ready to assist as needed. Clients who are starting to

have diminished capacity especially may want work done as soon as possible- be sensitive to their concerns, and try to be very clear on the timetable to get the work accomplished.

Maintaining confidentiality is of course essential and required by the Code of Ethics. Confidential information consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential (Rule 1.6(a)(3)).

If a client cannot give informed consent to a course of action or plan, the disclosure of confidential information is permitted if it will advance the best interests of the client and is reasonable under the circumstances or customary in the professional community or the attorney reasonably believes it is necessary to prevent reasonably certain death or substantial bodily harm. It is prudent for the lawyer to meet with the client to assess whether the client can give informed consent; the lawyer should not rely on the agent's assertions.

CONFIDENTIALTY OF INFORMATION

RULE 1.6.

Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community;

or

(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

“Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

b) *A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:*

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;

(5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

When a client's capacity to make adequately considered decisions in connection with the representation is diminished, the lawyer shall, as far as reasonably possible, maintain a "conventional relationship" with the client (Rule 1.14(a)). Query: what does that mean?

How does a lawyer determine capacity? Capacity to understand- exactly what? Does the setting matter? Does the time of day matter? Should you have a witness present? Should you record your conversation with the client?

DIMINISHED CAPACITY

New York Rules of Professional Conduct, Rule 1.14

Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer 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 lawyer may take reasonably necessary protective action, including consulting with individuals or

entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

When the lawyer 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 interests, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian (Rule 1.14(b)). When taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests (Rule 1.14(c)).

Nt. Guidance beyond the Code of Ethics can be found in the *"Assessment of Older Adults with Diminished Capacity. A Handbook for Lawyers"* published by the American Psychological Association ("APA") in collaboration with the ABA:

<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

RULE 1.7.

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interest; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.9.

Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person;

and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.