Osgoode Elder Law Certificate Program

April 20, 2017

Parent/Adult Child and Sibling Struggles

Prepared by

Kimberly A. Whaley

kim@welpartners.com

www.welpartners.com

Table of Contents

Parent/Adult Child and Sibling Struggles

INTRODUCTION

Older adults have varied life experience. Some have experienced full lives, have worked, raised families or travelled the world, experienced joys and sorrow, and many have settled down to spend their final years in peace. No older adult expects or plans for their final years to be filled with family fights, anger, and emotional turmoil. Unfortunately however, many older adults find that their final years are far from peaceful. All families have some level or form of dysfunction and sometimes this dysfunction erupts into conflict between older parents and adult children, between sisters and brothers, and even between grandparents and grandchildren.

To illustrate the sorts of later life disputes that we are seeing in practice and before the courts and tribunals, I have set out a few scenarios for consideration, some based on real cases, all of which deal with actual situations that arise in “Parent/Adult Child and Sibling Struggles”. Following each case scenario is a brief (non-exhaustive) overview highlighting some of the legal issues to consider, including issues related to: an older adult’s vulnerability, dependency and capacity; susceptibility to undue influence; the presence of suspicious circumstances in testamentary and end-

of-life planning; an array of power of attorney disputes, risks and remedies; elder abuse whatever the nature or forum for remedy; and other prevalent issues concerning gifting, transfers of title to real property and jointly held assets as between parents and adult children, including adopted children/step-children. Some useful tools, resources, and checklists are referenced at the end of this paper, which may prove to be of assistance.

Demographics and changing social circumstances including changing family dynamics and family composition, the rise of complex family structures, developments in technologies and communications, travel and international trade and economy, all make our families and communities a much different place than in the past. Our elderly are not necessarily geographically near all of their family, or any of their family. Older adults today, enjoy greater longevity and as such, are increasingly susceptible to falling victim to predators, intent on financial exploitation given all of the changes in our social structure. These predators are often, but not always, family members. They are children, neighbours, scammers, opportunists, service providers, career or serial criminals and others.

CASE SCENARIO #1 - Brother Knows Best: Siblings Fight over Mother

- An older adult, Beth, was widowed and has four adult children, all of whom claim to love their elderly mother the most and know what is best for her.
- While Beth lives in her own house, lately she has started getting confused (forgetful of her children's names and losing items such as her glasses and wallet). She is also starting to find it difficult to cook for herself or walk upstairs to her bedroom. However, some days she is completely lucid, is laughing, cooks her meals and is in a good mood.
- Beth's two daughters believe that their mother is getting too confused and frail and that she needs full time care in a long term care facility. They want to put her in a home/LTCF and sell her house to pay for the care.
- Beth's two sons, however, think their sisters are just being silly and that Mother would hate it in a long term care facility. They are adamant that she stay in her home as long as possible if not until death, and refuse to even discuss any other options.
- Notably, it didn't matter what the sisters wanted because the brothers were Mother's joint attorneys under a Continuing Power of Attorney for Property and under a Power of

Attorney for Personal Care. As such they would make the decisions accordingly for Mother.

- Beth hates conflict, so when her daughters told her they were taking her to a lawyer to sign some papers, she agreed. The lawyer was someone she had never met before and she wasn't quite sure why she was there. The lawyer met with her while her daughters were out in the reception area. The lawyer told her that he understood she wanted to execute new Power of Attorney documents and that he had drafted some for her to sign. The documents appointed her daughters as her attorneys. Beth signed the papers, not because she wanted to, just because she didn't want her daughters mad at her if she didn't. She wanted to appease her children and avoid conflict, not contemplating that she was causing conflict.
- The daughters then sold Beth's home, put the money in an account in their joint names, and moved Beth into a long term care facility that they chose. This was all done without consultation with Beth and without the knowledge of their brothers.

LEGAL ISSUES – CASE SCENARIO #1

Power of Attorney Disputes / Breach of Duties

The Power of Attorney document (the "POA") has long been viewed as one way in which a person can legally plan to protect their health and their finances and property by planning in advance for when they become ill, infirm or incapable of making certain decisions. The POA is also seen as a potential means of minimizing family conflict during one's lifetime and preventing unnecessary, expensive, destructive and avoidable litigation. In certain circumstances, like this case scenario, however, POA documents may cause, rather than prevent, conflict.

In my practice, I have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care and management that their vulnerable loved one needs. I have also seen a POA used effectively as a means of protection against predators, of which there is a very real risk. Unfortunately, I have also seen POAs used abusively and procured fraudulently while a person is compromised cognitively and susceptible to influence, causing the grantor harm through fraud, neglect, and depletion of wealth. This

is often accompanied by negligence in the provision of necessary care requirements.

That POA documents are generally a good planning vehicle is a widely shared view. This is evident from the fact that, since 1994 and to this day, the Ontario Ministry of the Attorney General has distributed free POA kits and online forms to the public and solicitors have routinely recommended them as part of an estate plan. It is, however, not always clear to attorneys just what legislative principles they are to follow in carrying out their duties and obligations (for example, such as the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "*SDA*") or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "*HCCA*") or, even if they are indeed aware of such principles, whether they adhere to them as they are obligated to or not.

While a POA document can be used for the good of a vulnerable adult or a decisionally incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document. More often than not, it becomes apparent that the grantor never fully understood and/or put much thought into the nature and extent of the powers being granted, whether the chosen attorney truly had the ability to do the job and fulfill his/her duties, or

whether the attorney chosen could truly be trusted to act in an honest and trustworthy manner. Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result of a POA which has not been carefully contemplated or that has been procured through false or misleading pretenses. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our office, in my estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

One of the primary ways of reducing or eliminating the outcome of abuse under a POA document is to choose the right attorney, ensuring the qualities of honesty and integrity. Secondly, understanding the different types and uses of POA documents as well as their provisions can go a long way to ensuring that all parties understand the legal relationship they are entering into. Thirdly, a review of the duties and obligations expected of an attorney for property will facilitate legal practitioners properly advising those acting as fiduciaries.

In summary, a POA is an instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even unremitting incapacity. Proper, thoughtful preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

(1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;
(2) the Continuing POA for Property (or "**CPOAP**"), pursuant to the provisions of the *SDA*; and
(3) the POA for Personal Care (or "**POAPC**") pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;
- a general authority granting the power to do all that is permissible under the governing principles and legislation; and
- a continuing authority which survives subsequent incapacity.

A POA for Personal Care can be used to grant powers exercised during incapacity only.

A CPOAP is effective upon execution unless there is a triggering provision to the contrary. It can be used in an agency type relationship and during subsequent incapacity.

Choosing the right attorney is perhaps the most critical decision a person can make in order to protect his/her property or person in the event that he/she becomes unable to do so. In choosing an attorney, a grantor should consider whether a potential attorney has the values of honesty, integrity and accountability.

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together, or enable each attorney to act separately/alone. Unless it is specified in the POA document that attorneys are permitted to act separately, statutory law assumes that jointly appointed attorneys must make decisions together. Regardless of whether acting permissibly severally where two or more attorneys are appointed,

the attorneys are accountable to each other and similarily liable for the actions of the other.

It is also possible to assign different responsibilities to separate attorneys. You can also assign one attorney to act on your behalf and a substitute attorney to act for you should death or another event prevent the attorney first named to act. It is important, when deciding whether to appoint more than one attorney, to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to a grantor's personal and financial well-being.

An attorney is a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law (and statute) imposes obligations on what an attorney acting as a fiduciary may do. Thus, in addition to any specific duties that may have been set out by the grantor in the POA document, the common law has also imposed the following duties upon an attorney:

- The attorney must act within the scope of the authority delegated;

- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (If acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his/her own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);
- The attorney must not make secret profits;
- The attorney must cease to exercise authority if the POA is revoked;
- The attorney must not act contrary to the interests of the grantor or in a conflict with those interests;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

According to the court in *Banton v. Banton,*[1] some of the specific duties and obligations of an Attorney for Property include the following:

- Manage a person's property in a manner consistent with decisions for the person's personal care;
- Explain to the incapable person the Attorney's powers and duties;
- Encourage the incapable person's participation in decisions;
- Consult with the incapable person from time to time as well as family members, friends and other Attorneys;
- Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will; and
- Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into account the value of the property of the incapable person, including considerations as to the standard of living and other legal obligations.

In our case scenario, Beth has unwittingly become involved in a Power of Attorney dispute. By choosing two of her four children, the children have aligned themselves in a fight over her care and

[1] 1998 CanLII 14926 (ONSC).

well-being. Perhaps Beth could have chosen a friend or other family member, or a professional rather than two of her four children. Then again, she may have had no idea that her children would have reacted this way.

Beth's daughters breached their fiduciary duties and obligations as attorneys when they sold Beth's home without consulting with her or indeed their brothers; and then, by putting the sale proceeds into accounts in their own names. In effect they have acted outside the scope of their authority in that they have wrongly appropriated the assets of Beth. While the sisters may be using the money to pay for Beth's care, the money still belongs to Beth and should remain in her name. Furthermore, not only should the daughters have discussed their plans with their mother they should have discussed the plans with their brothers as well.

Checklists: Appendices "A" and "B" - Duties of Attorneys for Property Checklist; and Duties of Attorneys for Personal Care Checklist. Weblinks:
http://www.welpartners.com/resources/WEL_CapacityChecklist_POA_Property.pdf
http://www.welpartners.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf

Capacity and Undue Influence Issues

Beth may not have been capable to grant new powers of attorney or revoke her old ones and/or she may have been unduly influenced by her daughters to do so. The *SDA* proscribes the required capacity criteria to grant and revoke each type of POA document.

Capacity

Issues of capacity arise frequently in matters concerning the older adult. With longevity often comes an increase in the occurrence of medical issues affecting executive functioning in the brain, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and decisional capability. There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependent. Among other factors affecting capacity include normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.

Capacity is decision, time and situation-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. As an example, a person may have the requisite capacity to decide to enter into a contract of marriage, but may not have the requisite decisional capacity to execute a Will or other testamentary document.

A person is not globally "capable" or "incapable" and there is no test to administer that determines general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision and at a moment in time. There is no 'test', per se, though this term is often colloquially used. Rather, there are determining factors or criteria applied in ascertaining requisite decisional capacity.

In this scenario, Beth may not have been capable to revoke her POAs and grant new ones. The factors to be applied in assessing capacity to grant/revoke a continuing power of attorney for property ("CPOAP") are found at section 8 of the *SDA*. A person is capable of giving/revoking a CPOAP if he/she possesses the following:

(a) Knowledge of what kind of property he/she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a Will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his/her dealings with the person's property;

(e) Knowledge that he/she may, if capable, may revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him/her.

The factors to be applied in ascertaining capacity for revoking a CPOAP are the same as that for granting a CPOAP. A person is capable of revoking a CPOAP if he/she is capable of granting one.

Assessments of capacity to grant/revoke CPOAP documents need not be conducted only by certified capacity assessors, although they certainly can be completed by assessors. Indeed, it is the responsibility of the drafting solicitor, if there is one, to assess the client's capacity to grant/revoke a power of attorney, either for property or for personal care, when asked to prepare such documentation. A lawyer is obligated to ensure that a person taking such steps possesses the requisite decisional capacity to do so. Solicitors should take careful notes of their assessments of their client's capacity, and should keep those notes with the file and the executed powers of attorney.

The factors to be applied in granting/revoking a POA for personal care ("POAPC") are found at section 47 of the *SDA*. A person is capable of giving a POAPC if the person has:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.

In Beth's case, it was the responsibility of the drafting lawyer to determine whether or not Beth had the capacity to grant or revoke the POAs. The lawyer, however, on the facts as we know them, arguably failed to ask Beth any questions or take any steps to determine whether or not she had capacity to execute these documents.

Checklists: Appendices "C", "D" and "E" - Summary of Capacity Criteria; Capacity in the Estate Planning Context and "Red Flags" for Decisional Incapacity of a Legal Retainer. Weblinks:
http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf
http://www.welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf
http://www.welpartners.com/resources/WEL_ILA%20checklist.pdf

Undue influence

Was Beth unduly influenced to grant the POA documents? The doctrine of undue influence is an equitable principle, employed by the courts to set aside transactions that have been procured by undue influence, or in other words, influence tantamount to coercion, or in a relationship of un-equals. Where one person has

the ability to dominate the will of another, whether through manipulation, coercion, or the outright, but subtle abuse of power, undue influence may be found.

In the context of gifts, even where there is no evidence of actual and/or specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence. In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[2]

In cases where planning instruments have been drafted and executed, such as power of attorney documents, courts will look at the timing and circumstances of the planning documents and for a pattern of change involving a particular individual as a potential indicator that undue influence is at play.

In cases where a client has limited mastery of the language used by the lawyer in the taking of instructions, and drafting and execution of legal documents, courts have sometimes considered such limitation to be an indicator of undue influence. For

[2] *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).

instance, where the only translation of the planning document was provided to the grantor by the grantee, not the lawyer, and a relationship of dependence exists in that relationship, undue influence may be found.[3] As another example, after a woman with limited English language skills and no access to independent legal advice signed a document transferring title in her property to her adult son, believing that she was signing a document that would allow her son to care for her as she got older, undue influence was found.[4]

In a recent Divisional Court case,[5] the Court highlighted some indicators or red flags for undue influence in the context of executing testamentary or planning documents:

- Whether there is any increasing isolation, alienation, sequestering of the testator;
- Is the testator dependent upon anyone?
- Any substantial *inter vivos* transfers of wealth by the testator;
- Any failure to provide a reason or explanation for excluding someone who would have an expectation to inherit under the Will;

[3] *Nguyen Crawford v Nguyen*, 2010 CarswellOnt 9492; *Grewal v Brar*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[4] *Servello v. Servello*, 2014 ONSC 5035, 2014 CarswellOnt 12095, aff'd in *Servello v. Servello*, 2015 ONCA 434, 2015 CarswellOnt 8911.
[5] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct).

- Any material changes in circumstances between the time of the first Will from the time of the final Will that would undermine the testator's earlier reasons for favouring his son in his Will;
- Has the testator been moved from his home?
- Is the lawyer unknown to the testator? Was the lawyer chosen by someone other than the testator?
- Who provided the instructions to the lawyer? The testator or someone else?
- Did someone else receive a draft of the Will before it was executed?
- Did the lawyer meet with the testator alone?
- Any evidence of the testator's documented statements that he was afraid of the respondent.[6]

In this case scenario, there are a few indicators or red flags that Beth may have been unduly influenced, and these should have been explored or probed by the drafting solicitor. Beth did not know the lawyer. Beth's daughters contacted the lawyer and provided the instructions. While the lawyer met with Beth alone, it was Beth's daughters who brought Beth to the lawyer's office and were waiting outside in the reception. Also, Beth was not comfortable in executing the documents and was only signing

[6] See *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para. 9.

them so her daughters would not be mad at her. If the lawyer had explored the potential for undue influence he may have been able to discover this. Furthermore, it is unclear in this scenario whether the lawyer was also the sisters' lawyer. If so, independent legal advice (ILA) for the mother may have been warranted. ILA is usually the best evidence to prove free will. Indeed, in the case of *Csada*,[7] the court determined that ILA was the "best way" to rebut the presumption of undue influence and as such appears to be well established in the prevailing jurisprudence.

Even more recently, in the Saskatchewan Court of Appeal decision of *Thorsteinson Estate v. Olson,*[8] the court summarized the purpose of independent advice and stated that: "*whether it emanates from an accountant, lawyer, financial advisor, a trusted and knowledgeable friend, or someone else, it is to provide evidence that the donor knew what he or she was doing, was informed, and was entering into the transaction of their own free will."*

Furthermore, any lawyer providing ILA should be cautious where the client's does not speak the same language as the lawyer.

---

[7] *Csada v. Csada*, 1984 CanLII 2403 (SK CA) at para 29
[8] *Thorsteinson Estate v. Olson*, 2016 SKCA 134 (CanLII), para 51

Instructively, the Law Society of British Columbia has helpfully stated:

> When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences. **You must consider whether the client has capacity and whether the client may be subject to undue influence by a third party.** Further, if the client has communication issues (e.g. limited knowledge of the English language), you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter.[emphasis added][9]

Checklist: Appendix "F" - Undue Influence. Weblink: http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf

Case Scenario #2 – The Unemployed Son and Guilty Mother

- Olga is an older adult who is a widow and mother of six children. Olga does not speak English well. She relied on her husband, when he was alive, to handle the finances and run the house and speak English when it was needed.
- All but one of her children, Victor, grew up and moved away from home. Victor lives in his mother's basement. He suffers

[9] Law Society of British Columbia, Practice Resources, Independent Legal Advice Checklist, https://www.lawsociety.bc.ca/docs/practice/resources/checklist-ila.pdf

from an anxiety disorder and never did well at school. While he has had some jobs, he cannot cope with full-time work and has spent most of his life on either unemployment or disability assistance.

- He also drinks heavily. His parents, and then Olga, paid for all of the bills and food for Victor. His brothers and sisters strongly disapproved.
- At times Olga would get “fed up” with Victor and his drinking and ask him to leave. Victor would just ignore her and wait until she changed her mind.
- She told her other children: “What can I do? He has no money and I have to take care of him.” Olga feels that she owes this to Victor because he is her son and he has had a hard life.
- Olga is physically struggling around the house, relying more and more on Victor to assist her.
- Olga used to be an enthusiastic bingo player. Lately she stopped going because Victor decided he did not want her to go anymore. Victor also changed the locks on the house so his siblings could not come and go as they used to. Victor also stopped going grocery shopping for Olga, and stopped letting her leave the house. He orders pizza for her if she is hungry. Olga is depressed, but she doesn’t want to tell her

other children what Victor is doing because she doesn't want them mad at him, or to get Victor in trouble.[10]

LEGAL ISSUES – CASE SCENARIO #2

Elder Abuse

Is Victor abusing his mother? Elder abuse can involve abuse of a sexual, emotional or financial nature, or outright willful neglect. Abuse can be perpetrated by a trusted family member, a spouse, daughter, son, caregiver, service provider, or other person in a position of power or trust (even if only as a result of an inequality in bargaining power due to compromised capacity, dependency or vulnerability).

Elder financial abuse can include: fraudulent procurement, misuse of powers of attorney or joint accounts, forgery, sharing an older adult's home without payment of rent, gifts nearing the full value of assets held by the grantor/giftor, misusing, stealing, diverting, using, appropriating or depleting an older adult's assets, and can even include targeted financial scams.

[10] This scenario is loosely based on *Monk v. Monk* 1990 CanLII 835 (BCSC) and *Gironda v. Gironda* 2013 ONSC 4133.

The Toronto Declaration on the Global Prevention of Elder Abuse defines senior abuse as:

> " … a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."[11]

The National Initiative for the Care of the Elderly (NICE) provides a broad conceptual definition of mistreatment of older adults in Canada:

> "Mistreatment of older adults refers to actions/behaviors or lack of actions/behaviors that cause harm or risk of harm within a trust relationship."[12]

Financial abuse has also been defined by NICE as:

> "An action or lack of action with respect to material possessions, funds, assets, property, or legal documents,

[11] Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts, Canadian Center for Elder Law (March 2013): The Toronto Declaration is an international call to action jointly authored by the World Health Organization, the University of Toronto, and the International Network for the Prevention of Elder Abuse. Toronto Declaration on the Global Prevention of Elder Abuse (2002) online: http://www.who.int/ageing/projects/elder_abuse/en/ [Toronto Declaration].

[12] National Initiative for the Care of the Elderly, Defining and Measuring Elder Abuse, online: http://www.nicenet.ca/tools-dmea-defining-and-measuring-elder-abuse [Defining and Measuring Elder Abuse].

> that is unauthorized, or coerced, or a misuse of legal authority."

The critical concepts that emerge are imbalance of power, control, restrictions on rights and freedoms, and abuse of trust.

The most common civil proceedings to remedy elder abuse concern powers of attorney proceedings before the Ontario Superior Court of Justice under the SDA or before the Consent and Capacity Board Tribunal ("CCB") (including removal of attorneys for misuse or abuse), guardianship, and breach of fiduciary duty claims. These proceedings often involve disputes amongst and between siblings, families, friends, strangers and predators. Such proceedings can also involve disputes over the personal care of the older adult including end-of-life decision making. Disputes over the person can include disputes over the nature and extent of care and related costs, the nature and extent or type of care required, and end-of-life and treatment decisions.

The Canadian Criminal Code plays a role, directly and indirectly, in protecting older adults from financial abuse and exploitation. Select criminal offences can be, if used, helpful in deterring and penalizing perpetrators of abuse. Moreover, section 718.2(a)(i) of

the Criminal Code indicates that if there is evidence that a person who committed a criminal offence was motivated by bias, prejudice or hate based on age, a court imposing a sentence can consider increasing the length of that sentence.[13]

The Criminal Code does not itself provide for the specific offence of "elder abuse" or "financial abuse." Instead, the Criminal Code provides for approximately ten separate offences under which such a perpetrator could be charged, including the regular theft and assault provisions, fraud, criminal breach of trust, as well as theft by a power of attorney. There is also section 215, “Failing to Provide the Necessaries of Life”, which reads:

> 215. (1) Everyone is under a legal duty:
>
> . . .
>
> (c) to provide necessaries of life to a person under his charge if that person
>
> (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
>
> (ii) is unable to provide himself with necessaries of life.

[13] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 718.2(a)(i).

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if:

. . .

b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

This is a hybrid offence punishable by a maximum penalty of imprisonment for a term not exceeding two years where the Crown elects to proceed by indictment. While many of the cases where abusers have been charged under section 215 focus on the physical and mental abuse of the victims, most of these cases also involve an element of financial abuse as well.

In Olga's scenario, Victor is isolating Olga from her friends and family. He is stopping her from participating in her hobbies and interests and from leaving the house. She is likely not eating nourishing meals and is likely not able to care for herself. Victor is not providing Olga with the necessaries of life including proper food and social well-being. Olga's health could be permanently injured.

Case Scenario #3 – Unwanted Houseguests

- George, a retired teacher, purchased a house after his wife died and his adult granddaughter moved in with him, as she was not getting along with her parents.
- George decided to have his granddaughter on title as a joint tenant, even though he paid for the house himself in full. He wanted his granddaughter to look after the property in trust for him as he progressed into old age.
- Beneficial ownership was always supposed to remain with him, though. He used his own savings to buy the house.
- George also set up a joint bank account with his granddaughter so she could do the banking when he could not leave the house or she could pay the bills on her computer. All of the money in the joint account came from George.
- Eventually, without George's consent, the granddaughter had her boyfriend moved in with her. George does not like the boyfriend at all. They pay nothing toward the upkeep of the house, any expenses or the mortgage. They do not pay rent.
- His relationship with his granddaughter has deteriorated. He has repeatedly asked them to leave but they refuse. The

boyfriend is very disrespectful of George and calls him names and often yells at him. He is abusive to George. One day George goes to the bank and discovers all of the money in his joint bank account is gone.[14]

LEGAL ISSUES – CASE SCENARIO #3

Dealing with Joint Assets

Many older adults will add their children to their bank accounts, investment accounts and even houses, both as a planning tool and also as a way for the adult children to easily look after finances for the older adults. We often hear that there has been some advice given to plan in this way so as to avoid probate. However, these initiatives may not be as safe as they appear. Often older adults have no understanding of the legal implications of taking such steps and have not contemplated the legal consequences to themselves or indeed their chosen heirs.

Joint Bank Accounts

Joint bank accounts are often used by older adults to permit their adult child or children to assist them with bill payments and other

[14] This scenario is loosely based on *Jones v Jones*, 2014 ONSC 787.

financial matters. Joint accounts with rights of survivorship are also used as estate planning tools by individuals who wish to avoid paying probated taxes and/or the fees of professionals who draft Wills and other testamentary planning documents. In our practice, however, we often find that where there is estate litigation, there is a joint bank account.

At common law there is a presumption of advancement that applies to gratuitous *inter vivos* transfers from parents to their minor children (children under 18 years of age); these transfers, in other words, are assumed to be gifts. This presumption does not apply to situations of gratuitous transfers by a parent to an adult child. Rather, the law presumes that the adult child is holding the property in trust for the parent (a "resulting trust"). This presumption can be rebutted with evidence that speaks to the grantor's intentions when he/she granted status of joint bank account holder to his/her adult child. See the case of *Pecore v. Pecore*.[15]

It is relatively easy to attach "rights of survivorship" to a joint account; often it is only a matter of checking the appropriate box on a banking agreement. Checking that box does not necessarily

[15] [2007] 1 S.C.R. 795.

rebut the presumption of resulting trust, but it can be used as evidence that the deceased parent had intended the funds in that account to pass to the adult child/joint account holder outside of the estate. Regardless, section 72 of the *Succession Law Reform Act*[16] provides that funds held jointly by the deceased and another can be clawed-back into the estate for the purpose of satisfying claims for dependant's support against the estate.

A joint bank account may seem like a benign financial planning tool. However, many older adults sell their homes to provide for their health care, and many never owned property in the first place. An individual who has only one or two accounts takes an enormous risk if he/she gives an adult child – or anyone else – immediate access to all of their property.

Joint Tenancies

Like joint bank accounts, payments or transfers of title from a parent to an adult child are generally not presumed to be gifts; they are presumed to form a resulting trust in which the parent keeps an interest in the property. However, it is open to a party claiming the transfer is a gift to rebut the presumption of a

[16] R.S.O. 1990, Chapter S.26

resulting trust by providing evidence to that effect. See the case of *Pecore v. Pecore*.

The above case scenario is loosely based on the case of *Jones v. Jones*,[17] where a mother had put her daughter on title to her house even though she paid for everything and her daughter refused to leave. While the daughter at the last minute consented to the order sought, the Court advised that it would have granted a vesting order in favour of the mother placing all legal and beneficial ownership in the name of the mother, and an order requiring the daughter and boyfriend to vacate the property and give sole possession to the mother.[18] The Court would have granted these orders based on the fact that the evidence supported a finding of resulting trust in favour of the mother based on *Pecore v. Pecore*. In our case scenario the grandfather would likely have enough evidence to show that the beneficial interest in the house was to remain with him.

The Court will look at evidence of intention when determining whether the presumption of resulting trust has been rebutted. A valid gift requires intention to gift, acceptance of the gift and sufficient delivery. Absence of intention means no valid gift could

[17] 2014 ONSC 787.
[18] *Jones v. Jones,* 2014 ONSC 787 at para.13.

have been made. Often, when the giftor has died, evidence of intention will be found in the banking documents, through deeds of gift, or through evidence of third parties such as drafting lawyers, paralegals, notary publics, financial or investment advisors or bank tellers. See our Chart on Survey of Appellate Cases – Pecore in the Last 10 Years.

Checklist: "G" - Grounds to Attack an *Inter Vivos* Gift. Weblink: http://www.welpartners.com/resources/WEL_Chart_of_relevent_grounds_to_attack_intra_vivos_gift.pdf

Checklist: "H" – Presumption of Resulting Trust. Weblink: http://www.welpartners.com/resources/WEL-Checklist-Resulting-Trust-2017.pdf

Chart "I": Pecore Last 10 Years – Survey of Appellate Cases

CONCLUDING COMMENTS:

While not all family disputes can be avoided, having proper planning in place may reduce the nature and extent of those disputes involving older adults and/or reduce or avoid the costs of litigation. Perhaps some of these disputes in our case scenarios could have been avoided if the families knew in advance of the wishes and plans of the older adult. Communication is critical in planning for older adults. Determining the best people to act as

substitute decision makers is also important. How will one daughter react when the brother is appointed? Can all three children work together? Before putting that daughter on your joint bank account, is there another way? Perhaps children are not the best choice; there could be a family friend or neighbour. Sibling rivalry can be costly, and evinces bad behaviour amongst siblings including alienation, kidnapping, and other forms of abuse. Once these disputes arise, the cost is large, both emotionally and financially and often it is the older adult's assets that are depleted in litigating these disputes.

TOOLS AND RESOURCES: APPENDICES "A" TO "H"

Checklists which can also be found online at:

http://welpartners.com/resources/practicechecklists

Checklists

Appendix "A": Duties of an Attorney Under Power of Attorney for Property

Appendix "B": Duties of an Attorney Under Power of Attorney for Personal Care

Appendix "C": Summary of Capacity Criteria

Appendix "D": Capacity – Estate Planning Context

Appendix "E": Checklist – ILA Red Flags for Decisional Incapacity in Legal Retainer

Appendix "F": Undue Influence

Appendix "G": Grounds to Attack an *Inter Vivos* Gift or Wealth Transfer

Appendix "H": Presumption of Resulting Trust Checklist

WEL publications, papers, articles, case reviews, newsletters, reported decisions and publications will offer further materials for consideration:

http://welpartners.com/resources/

APPENDIX "A"

ATTORNEY CHECKLIST

DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the "*SDA*")

An Attorney MUST...

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act*, 1992 (the "SDA") and the *Health Care Consent Act*, 1996 (the "HCCA")

- Be 18 years of age

- Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision

- Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
  - Is the power a "Continuing" Power of Attorney?
  - Is the power limited to a particular period of incapacity?
  - Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
  - Is the power to be exercised solely or jointly with another?

- Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will

- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:
  - Is the grantor aware of the scope of property possessed?
  - Is the grantor aware of the approximate value of property possessed?
  - Is the grantor aware of obligations owed to dependants?

- Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
- Is the grantor aware that an attorney has a duty to account for all actions taken?
- Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
- Is the grantor appreciative of the risks of entrusting property to the attorney?

❖ Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

❖ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

❖ Be aware of the statutory obligations of resignation
- Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable
- Notify persons previously being dealt with on the grantor's behalf

❖ Be aware that a Power of Attorney terminates upon the death of the grantor

❖ Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care

❖ Explain to the grantor its powers and duties and encourage the grantor's participation in decisions

❖ Facilitate contact between the grantor and relatives or friends

 Consult with relatives, friends and other attorneys on behalf of the grantor

❖ Keep accounts of all transactions

- Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs
    - Ordinary prudence v. Professional prudence

- Be aware of the legal liability assumed for a breach of an attorney's duties

- Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will

- Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care

- Be aware of the rights and duties to make application to the court for directions if deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions

- Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order

- Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney

- Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations

- Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority

- Do not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee

- Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts

There are limits and restrictions for authority of Estate Planning, and gifting by

the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:

- **Duties**

32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit;

- **Personal comfort and well-being**

(1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit;

- **Personal care**

(1.2) A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions;

- **Exception**

(1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care;

- **Explanation**

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are;

- **Participation**

(3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property;

- **Family and friends**

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person;

- **Consultation**

(5) The guardian shall consult from time to time with,

(a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care.

- **Accounts**

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property;

- **Standard of care**

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs;

- **Same**

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise;

- **P.G.T.**

(9) Subsection (8) applies to the Public Guardian and Trustee;

- **Management plan, policies of P.G.T.**

(10) A guardian shall act in accordance with the management plan established for the property, if the guardian is not the Public Guardian and Trustee, or with the policies of the Public Guardian and Trustee, if he or she is the guardian;

- **Amendment of plan**

(11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval;

- **Application of Trustee Act**

(12) The Trustee Act does not apply to the exercise of a guardian's powers or the performance of a guardian's duties;

- **Liability of guardian**

33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty;

- **Same**

(2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability;

- **Exception, corporate directors**

(3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation;

- **Breach of duty**

(4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute.

The following further restrictions and limitations should be considered in light of a decade of case law on the subject of Attorney duties, obligations and the authority of the Attorney to conduct Estate Planning on behalf of the Grantor of a Power of Attorney:

- An Attorney may not change a beneficial designation of life insurance or a "Plan". Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person's death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario. R. S. O. 1990, C.I.8 as amended) and a "Plan" pursuant to the *Succession Law Reform Act, (*R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty *(Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII). [2001] B.C.J. [No. 2547]).*

- An Attorney may want to protect an incapable person's assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton* v. *Banton*, *1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.).*

- An Attorney may complete transactions already entered into by an incapable person.

- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher* v. *Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.).*

- ❑ An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.

- ❑ An Attorney may settle an "*Alter Ego Trust"* or *inter vivos* trust. Similarly, certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor's Last Will and Testament, or otherwise if the ultimate beneficiary consents. The planning must be in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. Attorneys may settle *inter vivos* trusts as long as the trust does not contravene the intentions of the Grantor and is considered to be in the Grantor's best interests as defined by the SDA. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. A trust which is contrary to a Grantor's intentions (for example, where a trust has the effect of adding beneficiaries not named in a Will or avoids a gift established by a Will) then the trust may be successfully challenged. Tax considerations must also be factored into any planning (*Easingwood v. Cockcroft*, 2013 BCCA 182).

- ❑ Attorney's should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.

- ❑ An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.

- ❑ An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.

WEL PARTNERS

APPENDIX "B"

ATTORNEY CHECKLIST

DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the "*SDA*")

An Attorney MUST...

- ☐ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the" SDA") and the *Health Care Consent Act*, *1996*

- ☐ Be aware that an individual of 16 years of age is capable of giving or refusing consent of one's own personal care

- ☐ Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor's behalf

- ☐ Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid

- ☐ Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor

- ☐ Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
    - Is the power to be exercised solely or jointly?
    - Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?

- ☐ Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power

    - Does the grantor have the ability to understand and appreciate the role of

the attorney and in particular the risks associated with the appointment?
- Does the grantor have capacity to give instructions for decisions to be made as to personal care?
- Is the grantor aware of the Power to revoke the Power of Attorney if capable?
- The grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care

☐ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

☐ Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

☐ Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions

☐ Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document

- The HCCA applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
- The HCCA prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
- Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the SDA?
- What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?

☐ Be aware that special provisions exist in the SDA and the HCCA addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment

- ☐ Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the SDA and the HCCA

- ☐ Arrange for a capacity assessment at the request of the grantor, except where there as been an assessment performed in the six months immediately previous

- ☐ Be aware the statutory requirements concerning resignation
  - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
  - Notify persons previously being dealt with on the grantor's behalf

- ☐ Be aware that a Power of Attorney for personal care terminates on the death of the grantor

- ☐ Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care

- ☐ Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions

- ☐ Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor

- ☐ Keep records of all decisions made on the grantor's behalf

- ☐ Facilitate contact between the grantor, relatives and friends

- ☐ Consult with relatives, friends and other attorneys on behalf of the grantor

- ☐ Facilitate the grantor' independence

- ☐ Make decisions which are the least restrictive and intrusive to the grantor

- ☐ Not use or permit the use of confinement, monitoring devices, physical restrain by the use of drugs or otherwise except in so far as preventing serious harm to

the grantor or another

- ☐ Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the HCCA

- ☐ Maintain comprehensive records
  - A list of all decisions made regarding health care, safety and shelter
  - Keep all medical reports or documents
  - Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor

- ☐ Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required

- ☐ Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority

- ☐ Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS **2017**

WEL PARTNERS

APPENDIX "C"

SUMMARY OF CAPACITY CRITERIA

The following is a synopsis which attempts to summarize the various criteria or factors, and/or 'test' so to speak respecting certain decisional capacity evaluations:

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Manage property	*Substitute Decisions Act, 1992*[1] *("SDA"),* s. 6	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	*SDA,* s. 45	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	*SDA,* s. 8	(a) Knowledge of what kind of property he or she has and its approximate value; (b) Awareness of obligations owed to his or her dependants; (c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney; (d) Knowledge that the attorney must account for his or her dealings with the person's property; (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney; (f) Appreciation that unless the attorney manages the property prudently its value may decline; and (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.
Grant and revoke a	*SDA,* s. 47	(a) Ability to understand whether the proposed

[1] S.O. 1992, c.30

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
POA for Personal Care		attorney has a genuine concern for the person's welfare; and (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; and (b) Ability to understand the specific effect of the gift in the circumstances. *In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.*
Make a Will ***Testamentary Capacity***	Common law	(a) Ability to understand the nature and effect of making a Will; (b) Ability to understand the extent of the property in question; and (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; and (b) Ability to understand the trust`s specific effect in the specific circumstances. *In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)*

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Capacity to Undertake Real Estate Transactions	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances. *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children. Also possibly required: capacity to manage property and the person Dr. Malloy[2] stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.
Capacity to separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry)[3].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[4].
Capacity to instruct counsel	Common law	(a) Understanding of what the lawyer has been asked to do and why; (b) Ability to understand and process the information, advice and options the lawyer presents to them; and (c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[5]

[2] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[3] *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998 [hereinafter *Calvert*]
4 *Calvert*

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Capacity to give evidence	*Evidence Act*,[6] ss. 18(1), 18(2), 18(3)	***18.*** *(1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).* ***Challenge, examination*** *(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).* ***Exception*** *(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).*
	Canada Evidence Act,[7] s. 16(1)	***Witness whose capacity is in question*** *16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine* *(a) whether the person understands the nature of an oath or a solemn affirmation; and* *(b) whether the person is able to communicate the evidence*

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS **2017**

[5] Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", *www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0*

[6] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)

7 R.S.C. 1985, c.C-5, S. 16(1)

APPENDIX "D"

CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

Capacity Generally

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[1]

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.[2]

In determining the ability to understand information relevant to making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

(a) The nature of the act of making a Will (or testamentary document) and its effects;

(b) The extent of the property of which he or she is disposing of; and

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[3]

---

[1] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161

[2] Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013

[3] *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:

- A "*disposing mind and memory*" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. [4]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[5]:

> *"If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity*."

Notably, the court has opined on "delusions", specifically, as the impact testamentary capacity and finding their existence alone is not sufficient to determine testamentary capacity, but, a relevant consideration under the rubric of suspicious circumstances.[6]

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act* [7] defines a "Will" to include the following:

(a) a testament,

(b) a codicil,

---

[4] The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz,* 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne* Estate (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (BailII)

[5] *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227*

[6] *Laszlo v Lawton*, 2013 BCSC 305,SCBC

[7] R.S.O. 1990 c.s.26 as amended subsection 1(1)

(c) an appointment by will or by writing in the nature of a will in exercise of a power, and

(d) any other testamentary disposition. ("testament").

- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.[8] Therefore, capacity is determined on the criteria applied to determining testamentary capacity
- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.[9] The criteria to be applied, is that of testamentary capacity.

- The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, more onerous criteria may be applied to assess capacity.

Capacity to Grant or Revoke a Continuing Power of Attorney for Property ("CPOAP")

Pursuant to section 8 of the *Substitute Decisions Act,* [10] to be capable of granting a Continuing Power of Attorney for Property ("CPOAP"), a grantor requires the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[11]

[8] S.51(10 of the Succession Law Reform Act
9 S 1(1)(a) of the SLRA

[10] R. S.O. 1992, c 30, as am.

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[12]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.[13]

When an Attorney should act under a CPOAP

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* [14]

Capacity to Manage Property

The criteria for assessing the capacity to manage property are found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

(a) The ability to understand the information that is relevant in making a decision in the management of one's property; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. [15]

A person may be incapable of managing property, yet still be capable of making a Will.[16]

[11] *SDA,* subsection 8(2)
[12] *SDA*, subsection 9(1)
[13] *SDA,* subsection 9(2)
[14] R.S.O. 1990, c. M.7
[15] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[16] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the *Substitute Decisions Act*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.[17]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[18]

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[19]

When an Attorney should act under a POAPC

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

[17] *SDA*, subsection 47(1)
[18] *SDA*, subsection 47(3)
[19] *SDA*, subsection 47(2)

Capacity under the Health Care Consent Act, 1996[20]

Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

(a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[21]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[22]

Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and
(b) The ability to understand the contract's specific effect in the specific circumstances.[23]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[24] Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[25] Subsection 2(3) then provides that a person is entitled to rely on that presumption of

[20] S.O. 1996, C.2 Schedule A

[21] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
[22] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859
[23] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6
[24] *SDA, supra* note 2
[25] *SDA,* subsection 2(1)

capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[26]

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

(a) The ability to understand the nature of the gift; and
(b) The ability to understand the specific effect of the gift in the circumstances.[27]

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.[28]

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[29] which as set out above, requires the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.[30]

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

(a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;

(b) The ability to understand the extent of the property in question; and

(c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

---

[26] *SDA*, subsection 2(3)
[27] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[28] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487
[29] See for example: *Park v. Park,* 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)
[30] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.[31]

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.[32]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[33]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[34]

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.[35] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

> (d) Understand what they have asked the lawyer to do for them and why,
>
> (e) Be able to understand and process the information, advice and options the lawyer presents to them; and
>
> (f) Appreciate the advantages, disadvantages and potential consequences of the various options.[36]

---

[31] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[32] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[33] *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik
[34] *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494
[35] Staff lawyer at ARCH Disability Law Centre.
[36] At page 3

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[37]

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;[38]
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion [39]

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependancy.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[40]

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.[41]

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences. [42]

---

[37] *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon,* 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.

[38] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

[39] *Wingrove v. Wingrove* (1885) 11 P.D. 81

[40] *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)

[41] *Wingrove v. Wingrove* (1885) 11 P.D. 81

[42] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)

Psychological pressures creating fear may be tantamount to undue influence.[43]

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document … "cannot be said to be that of the deceased."[44]

Undue influence must be corroborated. [45]

Suspicious circumstances will not discharge the burden of proof required.[46]

* See Undue Influence Checklist

Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

(a) circumstances surrounding the preparation of the Will;

(b) circumstances tending to call into question the capacity of the testator; or

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[47]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[48]

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS 2017

[43] *Tribe v Farrell,* 2006 BCCA 38
[44] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[45] S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; Orfus Estate v. Samuel & Bessie Orfus Family Foundation, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224
[46] *Vout v Hay*, at p. 227
[47] *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin,* (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)*
[48] *Laszlo v Lawton, 2013 BCSC 305 (CanLII)*

APPENDIX "E"

CHECKLIST: "RED FLAGS" FOR DECISIONAL INCAPACITY IN THE CONTEXT OF A LEGAL RETAINER

In general and particularly given our current demographics, it is advisable for lawyers to be familiar with and attuned to issues associated with decisional incapacity. When taking on a new client, providing independent legal advice, or when witnessing a change in an existing client, lawyers must be equipped with the tools to know their client and be alive to certain indictors of incapacity so as to facilitate the development of protocol. While indicators are not determinative of a person's capacity or incapacity, there are some "red flags" and suggested 'best practices' which may assist in the navigation of this complex concept of capacity. For information on the factors criteria to determine requisite decisional capacity in select areas see WEL's Capacity Checklist: Re Estate Planning Context and Summary of Capacity Criteria.

RED FLAGS FOR INCAPACITY

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place

- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension

- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)

- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns

- Comprehension problems: difficulty repeating simple concepts and repeated questions

- Calculation or financial management problems, i.e. difficulty paying bills

- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.

- Intellectual impairment

- Cannot readily identify assets or family members

- Experienced recent family conflict

- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.
- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependant and vulnerable
- Poor living conditions in comparison with the client’s assets
- Changes in the client’s appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client’s instructions seem rational? For example, does the client’s choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation
- Keep in mind issues related to capacity including, **undue Influence**. See WEL’s Undue Influence Checklist
- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a

demographic perspective. However, this means that great age alone becomes a red flag[49]

- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives[50]

- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia[51]

- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia[52]

- A deathbed will where there is a strong likelihood that the testator may be delirious[53]

- Complexity or conflict in the milieu of a vulnerable individual[54]

BEST PRACTICES:

- Be alert to the signs of incapacity and always ask probing questions not leading questions

- Interview the client alone and take comprehensive, detailed notes

- Use open-ended questions to confirm or elicit understanding and appreciation

[49] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[50] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[51] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[52] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[53] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[54] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client

- Have clients re-state information in their own words and revert back to earlier discussions

- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken

- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege

- Be mindful of the Law Society of Upper Canada, *Rules of Professional Conduct*, http://www.lsuc.on.ca/lawyer-conduct-rules/, particularly the Rules related to capacity

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS 2017

APPENDIX "F"

UNDUE INFLUENCE CHECKLIST

Undue Influence: Summary

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney.

The Courts' Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968):[1]

> *"To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,— these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made*."

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,[2] stated:

> "*Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not mean*."[3]

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". We see in *Hall v Hall*, influence of a more subtle characterization which when read together

[1] (1968) LR 1 P&D.
[2] *Craig v Lamoureux*, [1919] 3 WWR 1101.
[3] *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

with more recent cases, arguably the application and scope of the doctrine is broadened.

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[4]

In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[5]

Relationships Where There is an Imbalance of Power

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid. [6]

Multiple Documents

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[7]

---

[4] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[5] *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).
[6] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.
[7] See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

Language

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[8] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[9]

Other factors indicative of undue influence

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.[10]

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property. [11]

Not All Relationships of Dependency Lead to Findings of Undue Influence

As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the

[8] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[9] Nguyen Crawford v Nguyen, 2009 CarswellOn 1877; Grewal v Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[10] *Juzumas v Baron*, 2012 ONSC 7220.
[11] *Covello v Sturino*, 2007 CarswellOnt 3726.

genuine willingness of the grantor to effectuate an otherwise questionable transaction in favourable manner.[12]

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[13]

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*[14] provided a (non-exhaustive) list of indicators of undue influence:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[15]

In *Tate v. Gueguegirre*[16] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;

[12] See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.
[13] *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.
[14] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[15] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[16] 2015 ONSC 844 (Div. Ct.)

- ❑ The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- ❑ The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- ❑ The beneficiary conveyed the instructions to the lawyer;
- ❑ The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- ❑ There were documented statements that the testator was afraid of the respondent.[17]

Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.[18]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[19]

Although the leading Supreme Court of Canada ("SCC") case of *Vout v Hay* held that "*the extent of proof required is proportionate to the gravity of the suspicion*,"[20] the more recent SCC case of *C(R) v McDougall*[21] held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*[22] elicited the principles that apply to the standard of proof relating to undue influence:

> "*The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind*

[17] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[18] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[19] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[20] *Vout v Hay* at para 24.
[21] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[22] (1993), 90 Man R (2d) 245 (Man QB) at para 38.

> *to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's."*[23]

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention that the transaction was made as a result of the donor's "*full, free and informed thought*."[24]

See also *Buccilli et al v. Pillitteri et al*,[25] where the Court stated that:

> "*The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely*."[26]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[27] recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

[23] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*
[24] *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.
[25] 2012 ONSC 6624, upheld 2014 ONCA 337.
[26] *Buccilli, supra* note 248 at para. 139.
[27] *Shrader v Shrader, [2013] EWHC 466 (ch)*

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[28]

In *Leger v Poirier*,[29] the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing mind and memory*" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[30]

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly "unnatural" dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and

[28] See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.
[29] *Leger v Poirier*,[1944] SCR 152.
[30] *Vout v Hay,* [1995] 2 SCR 876 (SCC).

- Physical, psychological or financial dependency by the testator on beneficiaries.[31]

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[32]

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence demonstrating that the requisite formalities have been complied with and that the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[33]

Lawyer's Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?

[31] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.
[32] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).
[33] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?

- ❑ Is there conflict within your client's family?

- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

- ❑ If the client is isolated, does he/she live with one particular individual?

- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

- ❑ Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?

- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?

- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

- ❑ Has the client had any recent significant medical events?

- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?

- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

- ❑ Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- ❑ Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?

- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?

- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?

- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?

- ❑ Is the client making a marked change in the planning documents as compared to prior documents?

- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

- ❑ Does the client have a physical impairment of sight, hearing, mobility or other?

- ❑ Is the client physically dependent on another?

- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- ❑ Interview the client alone;

- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

- ❑ Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;

- ❑ Address recent health changes;

- ❑ Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including

corroborating information from third parties with appropriate client directions and instructions;

- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;

- ❑ Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations …?

- ❑ Consider evidence of intention and indirect evidence of intention; and

- ❑ Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers

Checklist

- ❑ Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;

- ❑ Determine Intentions;

- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of

anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[34] and

- Be mindful of the *Rules of Professional Conduct*[35] which are applicable in the lawyer's jurisdiction.

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS 2017

[34] For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf

* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

[35] *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

APPENDIX "G"

CHECKLIST: GROUNDS TO ATTACK AN *INTER VIVOS* GIFT

GROUND	CRITERIA
Decisional Capacity	In order to be found to have the requisite decisional capacity to make a gift, a donor requires the following: (a) The ability to understand the nature of the gift; and (b) The ability to understand the specific effect of the gift in the circumstances. The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the factors for determining requisite testamentary capacity arguably apply.
Undue Influence	1) **Direct or Actual undue influence**: • Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[1] • Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[2] 2) **Presumed undue influence** or undue influence by relationship: • Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.[3] • Does the "potential for domination inhere in the relationship itself"?[4] • Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, "as well as other relationships of dependency which defy easy categorization."[5]

[1] *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.
[2] *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.
[3] *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.
[4] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.
[5] *Geffen v. Goodman Estate*,[1991] 2 S.C.R. 353 at para. 42.

GROUND	CRITERIA
	• A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[6]
Resulting Trust	• Where there is a gratuitous transfer between a parent and an independent adult child there is a presumption of resulting trust.[7] • The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient. • The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.[8]
Non Est Factum	• *Non est factum* is the plea that a deed or other formal document is declared void for want of intention: "[W]here a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of *non est factum* on the basis that his mind at the time of the execution of the document did not follow his hand."[9] • *Non est factum* places the legal onus on the person attacking the transfer or gift to prove "no intention".
Unconscionable Bargain	A gift or other voluntary wealth transfer is prima facie unconscionable where: 1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests; and 2) The transaction affects a substantial unfairness or disadvantage on the maker.[10]
Unconscionable Procurement	1) A significant benefit obtained by one person from another;

[6] *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102
[7] *Pecore v. Pecore* 2007 SCC 17.
[8] *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 63.
[9] *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.
[10] *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).

GROUND	CRITERIA
	2) An active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.[11]

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS 2017

[11] John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.580.

APPENDIX "H"

PRESUMPTION OF RESULTING TRUST CHECKLIST

- A **resulting trust** arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he/she can establish it was given as a gift.

- In the case of a gratuitous transfer, **a rebuttable presumption of resulting trust** applies when the transfer is challenged. A Court must commence the inquiry with the presumption, weigh all of the evidence and attempt to ascertain the actual intention of the transferor. The presumption of resulting trust determines the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities.[12]

- The presumption of resulting trust applies to gratuitous transfers between parents and adult children. The **presumption of advancement** is still applicable between parents and minor children.

- A gift is a gratuitous transfer made without consideration. The donor must have *intended* to make a gift, the subject matter of the gift must be delivered to the donee, and the donee must accept the gift.[13] Once a gift is given it cannot be retracted. The standard for proving a gift is the usual civil standard of a balance of probabilities. The **intention of the donor** at the time of the transfer is the governing consideration.

JOINT TENANCY/JOINT ACCOUNTS & RIGHT OF SURVIVORSHIP

- **Joint Tenancy**: Is a form of concurrent property ownership. However, parties may hold legal title to property as joint tenants while beneficial ownership is held differently. For example, a mother and adult son may own real property as joint tenants in law while the mother alone owns the beneficial interest. In such circumstances the beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'.[14]

- **Right of Survivorship**: When a joint tenant dies, his/her interest in property is extinguished. The last surviving joint tenant takes full ownership of the property.

- **Gift of the Right of Survivorship**: So long as the requirements of a binding gift are met, the owner of property may, during his/her lifetime, make an immediate gift of a joint tenancy including the right of survivorship. The donee of the gift may

[12] *Pecore v. Pecore* 2007 SCC 17 at paras. 20, 22-25, 44; *Kerr v. Baranow*, 2011 SCC 10 at para.18
[13] *McNamee v. McNamee* 2011 ONCA 533 at para. 24
[14] Pecore v. Pecore 2007 SCC 17 at para. 4

be holding it for the benefit of the donor while he/she is alive. When gifted *inter vivos*, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies. Donor may gift the right of survivorship but continue to deal freely with property throughout his/her lifetime. When legal title to property is transferred gratuitously and a resulting trust arises, the right of survivorship is held on trust by the transferee unless otherwise established.

EVIDENCE OF INTENTION

- The intention of a person who transfers property gratuitously to another is sometimes difficult to determine, particularly when the transferor is deceased. In *Pecore,* Justice Rothstein set out a non-exhaustive list of factors for a Court to examine:

    - **Evidence of the deceased's intention at the time of the transfer**: including, where admissible, evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);

    - **Bank documents**: The clearer the wording in the bank documents as to the deceased's intention, the more weight that evidence might attract;

    - **Control and use of the funds in the account**: The circumstances must be carefully reviewed and considered to determine the weight to be given to this factor since control can be consistent with an intention to retain ownership, yet it is also not inconsistent with an intention to gift the assets in certain circumstances;

    - **Granting a Power of Attorney**: The court should consider whether a power of attorney is evidence, one way or another, of the deceased's intention;

    - **Tax treatment of joint accounts**: This is another circumstance which might shed light on the deceased's intention as, for example, a transferor may have continued to pay taxes on the income earned in the joint account since they intended the assets to form part of their estate. However, once again the weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge.[15]

- Several cases have also turned on the **testimony of drafting lawyers,[16] notary public,[17] financial and investment advisors[18] and bank tellers**[19] with respect

[15] *Pecore* at paras. 55-70
[16] *Laski v. Laski* 2016 ONCA 337; *Van De Keere Estate Re* 2012 MBCA 109; *Lorintt v Boda* 2014 BCCA 354; *McKendry v. McKendry* 2017 BCCA 48
[17] *Fuller v. Harper* 2010 BCCA 421

to the deceased's intention at the time a transfer is made or the joint bank account is opened.

APPLICABILITY

- **Gratuitous Transfer of Assets or Title into Joint Property**: In *Pecore*, the Supreme Court of Canada confirmed that the presumption of resulting trust applies to gratuitous transfers of assets or joint property between parents and adult children. The presumption of advancement still exists, but *Pecore* eliminated it as between parents and adult children.

- **Testamentary Dispositions**: The presumption of resulting trust does not arise with respect to testamentary dispositions since there is clear evidence of intention in the Will or other testamentary document.

- **Beneficiary Designations**: There is conflicting law on whether the presumption of resulting trust applies to beneficiary designations under RRSPs, RRIF or insurance policies for example. Courts in England,[20] Manitoba,[21] British Columbia,[22] Ontario,[23] and Alberta[24] apply the presumption of resulting trust to beneficiary designations. Only one province, Saskatchewan takes the position that the presumption of resulting trust does not apply to beneficiary designations.[25]

- **Transfers of Land**: Some cases have questioned whether the presumption of resulting trust applies to gratuitous transfers of land,[26] although there are several cases and authority that support the view that it does.[27]

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS 2017

[18] *Foley (Re*) 2015 ONCA 382; *Laski v. Laski* 2016 ONCA 337
[19] *Comeau v. Gregoire*, 2007 NSCA 73; *Doucette v. McInnes* 2009 BCCA 393
[20] *In Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, (1901), [1902] 1 Ch 282
[21] *Dreger (Litigation Guardian of) v. Dreger* [1994] 10 WWR 293
[22] *Neufeld v. Neufeld Estate*, 2004 BCSC 25
[23] *McConomy-Wood v. McConomy* (2009), 46 ETR (3d) 259
[24] *Morrison Re.* 2015 ABQB 769
[25] *Nelson et al. v. Little Estate* 2005 SKCA 120
[26] *Thorsteinson Estate v. Olson* 2016 SKCA 134 at para. 17, citing *Thorsteinson Estate v. Olson* 2014 SKQB 237 at para. 103
[27] *Fuller v. Harper* 2010 BCCA 421