OVERVIEW OF DECISIONAL CAPACITY:
INDICATORS, RED FLAGS AND ASSESSMENTS

INTRODUCTION

Issues of capacity arise frequently in an estate practice. Such issues are complex and are only bound to increase in frequency as our population continues to age rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, 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 capability.[1] There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. 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.

[1] Kimberly Whaley et. al, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70 [hereinafter *Capacity to Marry and the Estate Plan*]

This paper will outline and compare the various "tests" (so to speak. Notably, there are no "tests" per se; rather there are determining factors or criteria applied in ascertaining capacity that frequently arise in the context of an estates and trusts practice.[2]

CAPACITY IN GENERAL

There is no single legal definition of "capacity". The *Substitute Decisions Act, 1992*[3] (the "SDA") which addresses various types of capacity, simply defines "capable" as "mentally capable", and provides that "capacity" has a corresponding meaning.

Equally, there is no general approach to apply in determining or establishing "capacity", "mental capacity" or "competency". Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[4]

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable test for capacity.[5] Again, when referring to "test", it is important to note that there is no "test" so to speak, as much as there are factors to consider in assessing particular decisional capacity. Therefore, it is important to understand there is no "test" *per se*, but rather a standard to be applied, or factors to be considered in an assessment of requisite mental capacity to make a certain decision at a particular time. Accordingly, all references to "test" should be read with this in mind. It is often the case that reference will be made to a "test" particularly as it simplifies the reference for a lay person.

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[2] For ease of reference, we have prepared a table as appended to this paper which outlines the basic determining factors for capacity referred to within the paper.

[3] S.O. 1992, c. 30 as am [hereinafter *SDA*]

[4] *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 (QL), 154 A.C.W.S. (3d) 996 (S.C.J.) [hereinafter *Palahnuk Estate*]; *Brillinger v. Brillinger-Cain*, [2007] O.J. No. 2451 (QL), 158 A.C.W.S. (3d) 482 (S.C.J.) [hereinafter *Brillinger v. Brillinger-Cain*]; *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (ed) 216 (Ont. S.C.J.) [hereinafter *Knox v. Burton*]

[5] *Starson v. Swayze*, [2003] 1 S.C.R. 722 [hereinafter *Starson v. Swayze*]

Capacity is an area of enquiry where medicine and law collide, in that legal practitioners are often dealing with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal tests in their clinical practices, or asked to review evidence retrospectively to determine whether at a particular time an individual had the requisite capacity to complete a specific task to or make a specific decision.

The assessment of capacity is a less-than-perfect science, both from a legal and medical point of view. Capacity determinations are often complicated: in addition to professional and expert evidence, lay evidence can be relevant to assessing capacity in some situations. The standard of assessment varies and this too, can become an obstacle that is difficult to overcome in determining capacity as well as in resolving disputes over the quality and integrity of assessment reports. And, to add to the complication, in contentious settings, often seen in an estate litigation practice, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long-past decision of a person, alive or deceased. The evidentiary weight given to such assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

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. A person is not globally “capable” or “incapable” and there is no test to determine 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.

Capacity is Decision-Specific

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one’s property or personal care. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, separate or divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making

personal care decisions, but not capable of managing his or her property, or capable of granting a power of attorney document, but, not capable of making a will. The possibilities are unlimited as each task or decision has its own specific capacity test so to speak, or factors to consider in its determination.

Capacity is Time-Specific

Capacity is *time*-specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for "good" and "bad" days where capacity can and does fluctuate. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. And even in situations where an individual suffers from a non-reversible and/or progressive disorder, that person may not be permanently incapable, and may have capacity at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a will can vary over time.[6]

The factor of time-specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may have less probative value than the evidence of for instance a drafting solicitor who applies the legal test for capacity commensurate with the time that instructions are received.[7]

Capacity is Situation-Specific

Lastly, capacity is *situation*-specific in that under different circumstances, an individual may have differing capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, for example, a person in his or her home may have capacity that he or she may not display in a lawyer's or doctor's office.

[6] *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton,* all *supra* note 4
[7] *Palahnuk Estate, supra* note 4 at para. 71

Although each task has its own specific capacity test, it is fair to say that in general, capacity to make a decision is demonstrated by a person's ability to understand all the information that is relevant to the decision to be made, or taken, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court decision in *Starson v. Swayze*[8] is helpful in elucidating some points about capacity. Although the decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act*, *1996* [9] (a statute which is not addressed in this paper) the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, Major J., made several points about capacity. First, he pointed out that the presence of a mental disorder must not be equated with incapacity, and that the presumption of legal capacity can only be rebutted by clear evidence.[10]

Major J., emphasized that the ability to understand and process information is key to capacity. The ability to understand the relevant information requires the "cognitive ability to process, retain and understand the relevant information."[11] Then, a person must "be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof." [12]

A capable person requires the "ability to appreciate the consequences of a decision", and not necessarily "actual appreciation of those consequences".[13] A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if he or she possesses the ability to comprehend the information and consequences of a decision.

Major J. also pointed out that the subject of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness

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8 *Supra* note 5
9 S.O. 1996, c. 2, Sched. A as am.
10 *Starson v. Swayze, supra* note 5 at para. 77
11 *Ibid.* at para. 78
12 *Ibid.* at para. 78
13 *Ibid.* at paras. 80-81 [emphasis in original]

or reasonableness.[14] A capable person is entitled to be unwise in his or her decision-making. In the oft-cited decision of *Re. Koch*,[15] Quinn J. wrote as follows:

> It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA.* The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...[16]

CAPACITY GOVERNED BY THE SUBSTITUTE DECISIONS ACT

CAPACITY TO MANAGE PROPERTY

The standard for determining the capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is defined as:

(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.

Although the factors in assessing capacity to manage property are straight-forward, a finding of incapacity to manage property is not easily made.

This assessment is not one that is conducted informally.

There are only two circumstances under which a person can be deemed incapable of managing property: The first circumstance or means is if a person is admitted to a psychiatric facility, at which point the *Mental Health Act*[17] requires that a physician assess the person's capacity to manage property.[18] Following that initial assessment, an attending physician is authorized by the *MHA* to assess the patient further, at later times, to determine whether the patient is capable of managing property.[19] If the

[14] *Ibid.* at para. 79
[15] 1997 CanLII 12138 (ON S.C.) [hereinafter *Re. Koch*]
[16] *Ibid.* at para. 89
[17] R.S.O. 1990, c. M.7 [Hereinafter *MHA*]
[18] *MHA,* subsection 54(1)
[19] *MHA,* subsection 54(2)

assessing physician finds the patient to be incapable of managing property, the physician is required to issue a formal certificate of incapacity and deliver a copy of the certificate to the Public Guardian and Trustee.

The second means to a finding of incapacity to manage property is by an assessment by an authorized capacity assessor.[20] Unless the assessment is ordered by a court, a person has the right to refuse to have his or her capacity to manage property assessed by an assessor.[21] A person can only request that another person's capacity be assessed in limited circumstances: the assessment must be requested in the prescribed form; the person requesting the assessment must indicate that he or she has reasonable grounds to believe that the other person is not capable of managing property; and that the requesting person has made reasonable inquiries and found that there is no power of attorney for property that authorizes an attorney to manage the other person's property or that there are any other relatives who would seek to act as guardian of property.[22]

The limitations on capacity assessments were legislated in recognition of the serious ramifications of a finding of incapacity on a person's autonomy and ability to make future decisions. As Justice Quinn stated in *Re. Koch*:

> The mechanisms of the *SDA* and the *HCCA* are, as I stated at the outset, formidable. They can result in the loss of liberty, including the loss of one's freedom to live where and how one chooses.
> ....
> Any procedure by which a person's legal status can be altered (which is the *inevitable* result on a finding of mental incapacity) must be cloaked with appropriate safeguards and capable of withstanding rigorous review.[23]

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[20] "Assessor" is defined at subsection 1(1) of the *SDA* as "a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity."
The training of capacity assessors is managed and conducted by the Capacity Assessment Office. http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp

[21] *SDA*, section 78 and subsection 79(1)

[22] *SDA,* subsection 16(2)

[23] *Supra*, note 15 at para. 89 [emphasis in original]
In this case, Mrs. Koch, the allegedly incapable person had been assessed for her capacity to manage property under the *SDA*, as well as her capacity to consent to placement in a care facility under the *HCCA*

In the same case, Justice Quinn charged assessors with the responsibility of exercising extreme diligence in their assessments and reports: they are obliged to "maintain meticulous files", inform the subject of his or her right to refuse to refuse to be interviewed, to carefully explain the "*significance* and *effect*" of a finding of incapacity to the person being assessed, to inform the subject that he or she may have a lawyer or friend in the interview, to carefully probe answers provided by the subject, to seek verification of answers, all the while taking caution not to be influenced by a party "harbouring improper motives."[24]

Justice Quinn emphasized also that for someone to be found incapable, the incapacity must be such that it is sufficiently serious to override the primacy of that person's right to make his or her own choices.

> The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes.[25]

The purpose of capacity provisions under the *SDA* were addressed in *Re. Phelan*:[26]

> [at 20] The *Substitute Decisions Act* is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.

Only qualified assessors can make findings of incapacity in respect of property and personal care, and the factors considered in determining capacity in these respects is often said to be higher than that for granting or revoking power of attorney documents for property or personal care. That said, our court has made it clear there are no higher

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[24] *Ibid.*
[25] *Ibid.* at para. 19

or lower thresholds, rather the factors to be applied and considered in determining decisional capacity are simply different.

CAPACITY TO MAKE PERSONAL CARE DECISIONS

The standard of assessment to be applied to establish whether capacity to make personal care decisions is present, is found at section 45 of the *SDA*. "Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety. The factors to be applied for determining the capacity required for managing personal care are:

(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.

A person who is sixteen years of age or older is presumed to be capable of making personal care decisions.[27]

As there are various tasks that are covered by "personal care", a person may be capable with respect to one of more personal care decisions, and not capable with respect to others.

The protections referred to and noted in the case of *Re. Koch, supra*,[28] in respect of the capacity to manage property, apply equally to assessments of capacity to make personal care decisions. Capacity to make personal care decisions can only be assessed by a qualified assessor, as defined under the *SDA* and the applicable regulations. Unless an assessment is ordered by a court, an individual has the right to refuse to be assessed. The principles of the careful protection of an individual's dignity

[26] 1999 CarswellOnt 2039; 29 E.T.R. (2d) 82, [1999] O.J. No. 2465
[27] *SDA,* subsection 2(2)

and autonomy as found in *Re. Koch, supra* hold equally for personal care decision-making.

CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PROPERTY

The factors to be applied in assessing capacity to grant or revoke a continuing power of attorney for property ("CPOAP") is found at section 8 of the *SDA*. A person is capable of giving a CPOAP if he or she possesses 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.

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 or she is capable of granting one.[29]

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.[30]

[29] *SDA*, subsection 8(2)
[30] *SDA,* subsection 9(2)

The factors to be applied in determining capacity to grant or revoke a CPOAP are often referred to being as less stringent than those required for the capacity to manage property. Again, the factors are simply different.

In fact, a person need not have capacity to manage his or her property to have capacity to grant or revoke a CPOAP. If the grantor is incapable of managing property, a CPOAP made by him or her is still valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[31]

Assessments of capacity to make or revoke CPOAPs 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 to assess the client's capacity to grant or revoke a power of attorney, either for property or for personal care when asked to prepare such documentation for a client.[32] This does not mean to suggest that a solicitor in discharging this duty of care may not recommend, encourage or suggest a formal assessment by an assessor in cases where litigation is likely, or in borderline cases, all in an effort to protect the autonomy of the individual and the decision made.

With that said, the principle that capacity assessments should be undertaken carefully due to their negative impact on autonomy applies as well to assessments for the granting of a power of attorney. In a 2009 ruling in *Abrams v. Abrams*,[33] Justice Low was asked to grant leave to appeal a decision of Justice Strathy in which Justice Strathy had declined to order an assessment of the applicant's mother's capacity to grant a CPOAP and a power of attorney for personal care ("POAPC"). Justice Low held that Justice Strathy properly exercised his discretion when he denied the applicant's request for further capacity assessments. Justice Low noted that a finding of incapacity has serious implications that infringe upon a person's privacy and autonomy; and that capacity assessments should be ordered only when necessary. Justice Low wrote as follows:

[31] *SDA*, subsection 9(1)
[32] *Egli v. Egli*, 2005 BCCA 627 (CanLII)

> [56] **An application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.**
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> [57] That these rights should not be lightly interfered with and that the individual should not be visited with the intrusion into her privacy that an assessment entails simply by virtue of an allegation having been made – even if there is "good reason to believe that there is substance to the allegation" – is reflected in the statutory presumption of capacity and, in respect of the particular issue before the court, in the onus built into s. 79 for the moving party to show that there are reasonable grounds to believe that the person is incapable.[34]

The reference above refers to additional capacity assessments sought by family members, after a CPOAP and POAPC had already been granted.

This view does not take away from a solicitor's obligation to always ensure that the client who seeks to give or revoke a CPOAP or POAPC (see below) is capable of doing so. Indeed, a lawyer is obligated to ensure that a person taking such steps possesses the requisite 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.

CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PERSONAL CARE

The factors to be applied in granting or 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.[35]

In this case, the trial judge placed greater importance on the evidence of the drafting solicitor than that of a physician in finding that Mr. Egli had the requisite capacity to execute the POA in question.

[33] 2009 CanLII 12798 (ON. S.C.D.C.) [Hereinafter *Abrams*]

[34] *Ibid* at paras. 56 and 57 [emphasis added]

[35] *SDA*, subsection 47(1)

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.[36]

A POAPC is valid if at the time it was executed, the grantor was capable of giving a POAPC, even if that person was incapable of managing personal care at the time of execution.[37] The only exception to this is if the POAPC incorporates specific instructions for personal care decisions. Those instructions are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.[38]

The factors to be applied in assessing capacity to grant or revoke a POAPC have been referred to as less stringent (proviso above) than those for granting or revoking a CPOAP. While the factors applied in determining requisite capacity to grant a CPOAP incorporates a significant amount of information that the grantor must be able to comprehend, whereas, for a POAPC, the grantor is only required to be able to understand whether the proposed attorney for personal care has the grantor's best interests in mind, and that the POAPC means that the proposed attorney may be authorized to make such personal care decisions for the grantor. Again, the determination is relevant.

Moreover, as noted above, the onus of determining capacity to grant or revoke a POAPC falls squarely on the solicitor who has been retained to draft the documents.

CAPACITY GOVERNED BY THE COMMON LAW

Below are capacity standards which are not set out in legislation, but rather have been addressed and set out by courts and the common law.

[36] *SDA*, subsection 47(3)
[37] *SDA*, subsection 47(2)
[38] *SDA*, subsection 47(4)

CAPACITY TO CONTRACT

There are no statutory criteria for determining the requisite capacity to contract. A cogent approach for capacity to contract is set out in the Prince Edward Island, Supreme Court decision of *Bank of Nova Scotia v. Kelly.*[39] 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.

In undertaking an analysis of the requisite capacity to contract, the determining factor is a person's ability to understand the nature and consequences of the contract at hand. A person capable of entering into a contract has the ability not only to understand the nature of the contract, but the impact on his or her interests.

In *Bank of Nova Scotia v. Kelly,* the Court emphasized that a person entering into a contract must exhibit an ability to understand all *possible* ramifications of the contract. In the ruling, Nicholson J. concluded:

> ..It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests.*[40]

The criteria to be applied for determining capacity to contract are based on the principle that a contract requires informed consensus on the part of the contracting parties.

In *Royal Trust Co. v. Diamant*,[41] the Court stated as follows:

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[39] (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) [hereinafter *Bank of Nova Scotia v. Kelly*]
[40] *Ibid.* at 284 [emphasis in original]
[41] [1953] 3 D.L.R. 102 B.C.S.C. [hereinafter *Royal Trust v. Diamant*]

> The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.
>
> The degree of mental incapacity which must be established in order to render a transaction inter vivos invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches v. Trimborn* (1946), 115 L.J.K.B. 305.[42]

All persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[43] A person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[44]

CAPACITY TO MAKE A GIFT

There are no statutory criteria for determining the requisite capacity to make a gift. The common law factors that are applicable depend in part on the size and nature of the gift.

In general, however, the criteria to be applied are the same as that applied to determine capacity to enter into a contract.

Similar to capacity to contract, the capacity to make a gift requires the:

(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 law on capacity to make a gift is set out in the 1953 decision of *Royal Trust Co. v Diamant*, referred to above. In that case, the Court held that an *inter vivos* transfer is not

[42] *Ibid.* at 6
[43] *SDA,* subsection 2(1)
[44] *SDA*, subsection 2(3)

valid if the donor had "such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."[45]

This approach was further supported in the case of *Re Bunio (Estate of)*[46]:

> A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it...

Citing earlier case law on the capacity to gift, the Court in *Dahlem (Guardian ad litem of) v. Thore*, [1994] B.C.J. No. 809 B.C.S.C. at page 9 [para. 6] stated:

> The transaction whereby Mr. Dahlem transferred $100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore. **On the authority of *Kooner v.Kooner* (1979), 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.** [47]

In his study, *Gifts: a Study in Comparative Law*,[48] Professor Richard Hyland of Rutgers University examines the law of gifts in the United States, England, India, Belgium, France, Germany, Italy, and Spain and addresses the test for capacity in various jurisdictions. Referring to American law, Professor Hyland outlines the test for capacity:

> ...In American law, donors generally have the capacity to make a gift only if they understand the extent of their property, the natural object of their bounty, the nature of the disposition, and the effect the gift may have on their future financial security.[49]

While the approach is similar to that outlined in the cases referenced, it is somewhat more onerous than the simple test of understanding the nature of the gift and its effect, in that it requires donors to understand the "extent of their property." This test is more aligned to the requirement to possess the capacity to manage property.

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[45] *Royal Trust v. Diamant*, *supra* note 41 at page 6
[46] 2005 ABQB 137 at para. 4
[47] [emphasis added]

Professor Hyland also points out that in analyzing whether an individual has the requisite capacity to give a gift, courts will look at the circumstances surrounding the gift, and in particular the gift itself to determine the donor's capacity. Professor Hyland importantly raises the consideration of the criteria determined on a balance of probabilities by reviewing all the circumstances of the gift:

> Though this is easily stated, the proof difficulties are often intractable. It is often impossible to separate the capacity question from all of the facts and circumstances of the transaction. The fact that a donor may be old, sick, or absent-minded is not enough to prohibit the gift. If the gift seems reasonable, the courts are likely to conclude, that the donor was competent. If the gift is difficult to explain, the court may reach the opposite conclusion. In other words, the capacity to make a gift may depend on the gift the donor is attempting to make. [50]

Professor Hyland highlights the problem with the proposition, in that a capable person is fully entitled to make a decision, and give a gift that others may perceive as foolish. Still, Professor Hyland states that where a person's capacity is in question, a foolish and inexplicable decision could very much be evidence of that person's incapacity. Professor Hyland explains: "An unnatural and unreasonable disposition of property may be shown as bearing on the issue of mental condition." [51]

As Professor Hyland does not address Canadian law in his book, it is possible that this view is particularly American. Canadian case law emphasizes autonomy, and indeed the right to be foolish as long as the person is capable. Still it is true that courts will look at the decisions people make and the reasons they give for them, as well as the intent behind them [52] to assess their capacity to make those decisions, so it is possible that the gift in question can have a bearing on whether the donor has capacity.

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[48] Hyland, R., *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009)
[49] *Ibid.* at page 222
[50] *Ibid.* at page 222
[51] *Ibid.*, FN 26 at pages 222 to 223
[52] *Pecore v. Pecore*, [2007] 1 S.C.R. 795, and *Madsen Estate v. Saylor,* [2007] 1 S.C.R. 838

NATURE AND EXTENT OF GIFT – A FACTOR

The determination of the requisite capacity to give a gift changes if the gift is significant in value, in relation to the donor's estate. In such cases, the applicable capacity criteria applied changes to that required for capacity to make a Will, that is, testamentary capacity. [53]

In the English case of *Re. Beaney,*[54] the judge explained the difference in approach regarding the capacity to give gifts, or to make gratuitous transfers as follows:

> At one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on an intestacy, then the degree of understanding required is as high as that required to make a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.

While the judge in *Re. Beaney* imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. In an even earlier case, *Mathieu v. Saint-Michel* [55] the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it be less than the entirety of the estate, then the standard for testamentary capacity applies for the gift to be valid.

CAPACITY TO ENTER INTO REAL ESTATE TRANSACTIONS

There is no set standard for capacity to enter into a real estate transaction. To determine which standard is applicable it is important to consider the nature of the real estate transaction.

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[53] Testamentary capacity, or capacity to make a will is addressed in detail in the following section.
[54] [1978] 2 All E.R. 595 (Ch.D.) [hereinafter *Re. Beaney*]

When determining capacity in real estate transactions, such as purchasing or selling real property, courts generally consider whether the individual in question had capacity to enter into a *contract*. [56] This means that he or she requires the ability to understand the nature of the real estate transaction, and the ability to appreciate the impact of that transaction on his or her interests.

In cases where the person in question is undertaking a real estate transaction to make a gift, then the standard for capacity to make a gift is relevant. This may be in cases where an individual transfers a property for nominal consideration, or places someone on title on their property. In such instances, the transaction is a gift, rather than a contract.

Where that gift is substantial, or otherwise affects the individual's testamentary dispositions, then it is arguable that the standard for testamentary capacity applies. Depending on the size of the gift, it may venture into the territory of testamentary transaction. That is to say, if the size of the gift is significant, and would affect the size of the client's estate, then arguably it is a testamentary disposition. It is worth noting that since most real estate transactions are of significant value compared to an individual's estate, then most gratuitous transfers of real property would require testamentary capacity.

Where the gift is significant in value, the onus is higher on the real estate lawyer, and clear enquiry into and well-documented notes on the issue of capacity are warranted.

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[55] [1956] S.C.R. 477 at 487

[56] 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)

CAPACITY TO MAKE A WILL (TESTAMENTARY CAPACITY)

The law on capacity to make a will is established in the common law.

The legal criteria for determining the requisite capacity to make a will was established in the 1800's by the English case of *Banks v. Goodfellow*.[57] Testamentary capacity is defined as the:

(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.

In order to validly make a will, a testator need not have a detailed understanding of the points listed above. The testator requires a "disposing mind and memory" which is defined as a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like." [58]

Testamentary capacity does not depend on the complexity of the will in question. One is either capable of making a will or not capable of making a will. Testamentary capacity "focuses on the testator's ability to understand the nature and effect of the act of making a will, rather than the particular provisions of the proposed will."[59]

There is some school of thought in cases of borderline capacity that a change in a will or a codicil could be undertaken where the testator understands the change in question and the reasons for the change even where it could not be said that the testator has full testamentary capacity. An example of this could be an instance where a testator with borderline capacity seeks to make a limited change by making a codicil that appoints a

[57] (1870) L.R. 5 Q.B. 549.
[58] *Leger et al. v. Poirier*, [1944] S.C.R. 152 at page 153
[59] Robertson, G., *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at p. 214 [hereinafter *Mental Disability and the Law in Canada*]

new executor, after the executor named in the will has died. The writer takes the respectful view that these are considerations a drafting solicitor would need to carefully and cautiously approach, perhaps with the assistance of a qualified capacity assessor given the clarity of the requirements for testamentary capacity. Either a person has capacity or not to make the decision in question.

The question of testamentary capacity focuses on the time at which instructions are given, not necessarily when the will is executed. Though, as our case law expands, we know this to be a factor.[60] The rule, in *Parker v. Felgate* [61] provides that even if the testator lacked testamentary capacity at the time the will was executed, the will is still valid if:

(a) The testator had testamentary capacity at the time he or she gave the lawyer instructions for the will;

(b) The will was prepared in compliance with those instructions; and

(c) When the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his or her own previous instructions.

This, keeping in mind the requirements for due execution as set out in the *Succession Law Reform Act* (the "SLRA").[62]

Courts have cautioned that the rule in *Parker v. Felgate* can only be applied where the instructions for the will (referred to in (a) above) were given to a lawyer. In other words, even if the testator provided instructions to a non-lawyer at a time when the testator had

[60] *Banton*, 1998, 164 D.L.R. (4th) 176; *Eady v Waring* (1974), 2 O.R. (2d) 627 (Ont.C.A.) : While the ultimate probative fact which a Probate Court is seeking is whether or not the testator has testamentary capacity at the time of the execution of his will, the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proven incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself. at p. 639 [emphasis added], para 178

[61] (1883), 8 P.D. 171 [hereinafter *Parker v. Felgate*]

[62] *Succession Law Reform Act* R.S.O. 1990, C.S. 26, as amended s. 4

testamentary capacity, and that layperson then conveyed those instructions to a lawyer, the resulting will could not be valid if the testator lacked testamentary capacity on the date of its execution.[63]

The threshold capacity required to make a Will is again, often described as higher than the capacity required to grant a power of attorney, for property or for personal care.[64] In fact, it is simply a different criteria applied to a certain decision. The threshold are different.

Still, a testator need not be capable of managing his or her property in order to have testamentary capacity. A finding that a person is incapable of managing his or her own affairs does not automatically lead to a finding that that person lacks testamentary capacity. The questions of whether the testator understood his or her assets and the impact of the will may be distinct from whether the testator actually managed or had the capacity to manage his or her own property.[65]

A solicitor drafting a will is obliged to assess the client's testamentary capacity prior to preparing the will. The drafting lawyer must ask probing questions and satisfy him or herself that the testator not only can communicate clearly, and answer questions in a rational manner, but that the testator has the ability to understand the nature and effect of the will, the extent of his or he property and all potential claims that could be expected with respect to the estate.[66]

In the recent case of *Laszlo v. Lawton* 2013 BCSC 305 the Supreme Court of British Columbia examined the effect of delusions on testamentary capacity. In this case, the

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[63] *Re Fergusson's Will; Fergusson v. Fergusson* (1981), 43 N.S.R. (2d) 89 (C.A.); Re. Griffin's Estate (1978), 21 Nfld. & P.E.I.R. 39 (P.E.I.C.A.), leave to appeal to S.C.C. refused 24 Nfld. & P.E.I.R. 90n (S.C.C.)

[64] *Penny v. Bolen,* 2008 CanLII 48145 (ON.S.C.) at para. 19:
" There are different tests for the capacity to make a Power of Attorney for personal care and for property. A person may be incapable of managing property but capable of making a Power of Attorney for Property. With respect to Powers of Attorney for Personal Care the capacity threshold is much lower than for Power of Attorney for Property which is lower than the capacity required to execute a will."

[65] *Hamilton v. Sutherland*, [1992] 5 W.W.R. 151 (B.C.C.A.)

[66] *Murphy v. Lamphier*, [1914] O.J. No. 32 at para. C.A.) at para. 58; *Hall v. Bennett Estate*, 2003 CanLII 7157 (ON C.A.) at para. 58

deceased believed that she could communicate telepathically with objects by touching them; that characters on television were communicating with her; and that unidentified individuals had stolen significant amounts of money from her, among other irrational beliefs. However, these delusions were not obviously connected to her decision to disinherit her husband's family who, on the evidence, were her previously-named beneficiaries and deserving of her generosity.

There was evidence that the deceased was still possessed of her cognitive faculties – that is, her ability to reason and remember – at the time she made her will in spite of the delusions (although it should be noted that there was also some evidence that she was confused and forgetful at times).

The court was left with an apparent dilemma. On the one hand, the deceased suffered from inexplicable and irrational beliefs that had only emerged in recent years; and the will was a significant departure from the previous will, cut out family members who would be expected to benefit, and made irrational bequests to two charities that the deceased and her husband had no affiliation with. On the other hand, there was some evidence that the deceased did not suffer from significant cognitive defects when she made her will and there is an apparent rule of law that non-vitiating delusions alone do not invalidate a will.

The court reconciled these opposing factors by accepting the evidence of an expert who explained that the onset of a delusional disorder, "often heralds an unrecognized and, therefore, untreated somatic illness, impacting brain function or degeneration of the brain itself." Justice Ballance explained that:

> It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator's mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.

> In my view, consideration of non-vitiating delusions in this broader sense where the evidence suggests that all or some of the testator's delusions accompany a progressive degenerative brain disease like Alzheimer's does not run afoul of the rule in Banks or its lineage.

Ultimately the Court found that the testator lacked capacity, but not because she suffered from delusions. The court was not convinced on the evidence that the deceased understood the nature and quantum of her estate.

It remains to be seen whether the weight of scientific authority continues to support this opinion and whether other courts adopt this method of examining delusions as a feature of mental function at large, but notably it does seem to fit tidily into the legal analysis under *Banks v. Goodfellow*.

Two other discussions in this case are worth noting. The court made some interesting observations about the use of MMSE results on the law of capacity. The deceased had twice been given a Mini-Mental State Examination (MMSE) around the time she made her will. She scored very well both times; i.e. the test showed no or minimal cognitive impairment. The court gave little weight to the test results, saying that the ubiquitous MMSE is a blunt tool, which has a limited ability to detect frontal lobe dysfunction or deficits in executive functioning, which are common in Alzheimer's disease. Without more evidence of its reliability, it is impossible to determine the relative importance of its role in determining testamentary capacity.

The court also made interesting observations on the fluidity of capacity. As a generality, in the older adult, capacity will often emerge and worsen over time. However, capacity in any given case is not static. It can fluctuate slightly or wildly. There may be periods of incapacity interspersed with periods of lucidity. Appearances can be deceiving since a person who seems rational may not have capacity and a person who seems compromised may be capable. A diagnosis of dementia is not equivalent to a finding of testamentary incapacity; testamentary capacity is a legal concept rather than a medical one and both medical and lay evidence feature importantly.

CAPACITY TO REVOKE A WILL

A testator who seeks to revoke a will requires testamentary capacity, as outlined above.

This is clear in the case where a testator revokes a will by executing a later will or document.

As for revocation by physical destruction, however, for that decision to be a capable one, the testator must be able to understand the nature and effect of the destruction and revocation at the time the will is destroyed, and must have testamentary capacity at the time of the destruction. If the testator lacks that ability at the time of the destruction of the will, then the will is not deemed properly revoked.[67] It is extremely important as a result, to know when precisely a will was destroyed, and if at that time, the person was capable of revoking his will.

As revocation requires testamentary capacity, in cases where a testator makes a will and then subsequently and permanently loses testamentary capacity, that testator cannot revoke that will. The only exception to this is if the testator marries (and has capacity to marry)[68] at which time the will is effectively revoked. [69]

CAPACITY TO MAKE A CODICIL

Subsection 1(1) of the SLRA [70] defines "will" as follows:

> "will" includes,
>
> (a) A testament,
> (b) A codicil,
> (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")

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[67] This principle is outlined in the English case of *Re. Sabatini* (1969), 114 Sol. J 35 (Prob. D.), as well as in Canadian case law: *Re. Beattie Estate,* [1944] 3 W.W.R. 727 (Alta. Dist. Ct.) at 729-730, [hereinafter *Beattie Estate*] *Re. Drath* (1982), 38 A.R. 23 (Q.B.) at 537
For more detailed discussion on revocation and destruction of wills, please see *Mental Disability and the Law in Canada, supra* note 58 at 224 to 225.

[68] Please see "CAPACITY TO MARRY", below

[69] *Re. Beattie Estate, supra* note 67

[70] R.S.O. 1990 c. S26, as amended

Since a codicil is included in the definition of a "will", the criteria for determining capacity to make a Will, that is, testamentary capacity applies equally to a codicil. (Please note the discussion above about capacity to execute limited codicils or Wills in cases where an individual may lack capacity to execute.)

CAPACITY TO MAKE A TESTAMENTARY DESIGNATION

Subsection 51(1) of the *SLRA* provides that "A participant may designate a person to receive a benefit payable under a plan on the participant's death, (a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or (b) by will, and may revoke the designation by either of those methods."

Likewise a person may revoke the designation by either a signed instrument or a will. Since a testamentary designation is by definition in a will, or similar document, to make such a designation a person requires testamentary capacity.

CAPACITY TO MAKE A TRUST

In order to create a testamentary trust, a person requires testamentary capacity as it arguably constitutes "any other testamentary disposition" as defined under subsection 1(1)(d) of the *SLRA.*

Capacity to create an *inter vivos* trust is less clear. While the criteria of assessment for making a contract or gift may be applicable, in that a trust is comparable to a contract or gift, the fact that a trust may be irrevocable, and that another person handles the funds complicates matters, such that a more comprehensive capacity test might be required.

CAPACITY TO MARRY

There are no statutory criteria for determining the requisite capacity to marry, nor to separate nor to divorce.

Section 7 of the Ontario *Marriage Act* [71] prohibits a person from issuing a license to or solemnizing "the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, *lacks mental capacity* to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason.*"[72] Legislation in Ontario, therefore requires that in order to marry, a person must possess the capacity to marry. The definition of what that capacity comprises is a developing area of common law.

The traditional English view is that the factors to be applied to determine capacity to marry are analogous to the capacity to enter into a contract. As a result, according to this view, in order to be deemed capable of entering into a marriage, a person must have the:

> (a) Ability to understand the nature of the contract of marriage; and
> (b) Ability to understand the effect of the contract of marriage.[73]

In this traditional view, spouses are required to understand only the most basic components of marriage, such as the commitment of the spouses to be exclusive, that the relationship is to be terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation. In general, to be found capable of marrying [according to historical common law], a person need not have the ability to understand the more serious financial implications that accompany marriage, such as revocation of previous wills, support obligations, and potential equalization. [74]

This view that one only need have the ability to understand the basic components of marriage is based on the conclusion in the leading English case of *Durham v. Durham*[75] which finds that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."

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[71] R.S.O. 1990, c. M.3
[72] [emphasis added]
[73] *Capacity to Marry and the Estate Plan*, *supra* note 1
[74] *Ibid.* at page 50
[75] (1885), 10 P.D. 80 at 82 [hereinafter *Durham*]

In another English case, *In the Estate of Park, Deceased*,[76] Justice Singleton outlined that in order to be deemed capable of marrying, "a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage."

Again starting from the proposition that the contract of marriage is a simple one, Birkett, L.J. contributed as follows:

> The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.[77]

In the same decision, Karminski J. outlined the requirements for a valid marriage as follows:

> i. the parties must understand the nature of the marriage contract;
> ii. the parties must understand the rights and responsibilities which marriage entails;
> iii. each party must be able to take care of his or her person and property;
> iv. it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and
> v. if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid...The question for consideration is whether he sanely comprehended the nature of the marriage contract.[78]

[76] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [hereinafter *Estate of Park*].
[77] *Ibid.* at 1411
[78] *Ibid.* at 1417

While the Court struggled with developing the appropriate criteria to be applied in determining what defines capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract, and certainly at a lower threshold than testamentary capacity. Karminski J. stated clearly that there is "a lesser degree of capacity ... required to consent to a marriage than in the making of a will."[79]

Historically, therefore, the Courts have viewed marriage as a contract, and a simple one at that.

There is an alternative view of the requirements to determine capacity to marry, and it is one that was alluded to in the cases of *Browning v. Reane*[80] and *Spier v. Spier*[81] . The Court in *Browning v. Reane* stated that for a person to be capable of marriage, he or she must be capable of managing his or her person and property. Similarly, in *Spier,* the Court stated that one must be capable of managing his or her property, in order to be capable of marrying.[82]

In recent cases before the Ontario Superior Court of Justice, the tension between the traditional historical view of marriage as an easy-to-understand contract, and the reality that marriage brings with it very serious implications for property and the estate, not the least of which is the revocation of all previous wills is increasingly apparent.

In the case of *Banton v. Banton*[83] Cullity J. was asked to assess whether the deceased, a then-88-year old man had had the requisite capacity to marry a then-31-year old woman.[84]

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79 *Ibid.* at 1425

80 (1812),161 E.R. 1080 (Eng. Ecc.) [hereinafter *Browning v. Reane*].

81 *Spier v. Benyen (*sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier* v. *Spier* [1947] The Weekly Notes. [hereinafter *Spier*]

82 *Ibid.* at para. 46 per Willmer J.

83 1998, 164 D.L.R. (4th) 176 at 244 [hereinafter *Banton*]

84 The woman the deceased married had worked as a waitress in the retirement home in which the deceased resided. Two days after the marriage, the couple attended at a solicitor's office and instructed the lawyer to prepare a Power of Attorney in favour of the wife, and a will, leaving all of the deceased's property to the wife.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the tests for testamentary capacity, capacity to manage property, capacity to give a Power of Attorney for Property, capacity to give a Power of Attorney for Personal Care capacity to marry, and the provisions of the *Substitute Decisions Act*.[85]

In Justice Cullity's view, Mr. Banton had been a "willing victim" who had "consented to the marriage." [86]

Justice Cullity took pains to distinguish between "consent" and "capacity", and then embarked upon an analysis of the appropriate criteria to be applied in determining capacity to marry and whether Mr. Banton met the criteria. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[87] In the Court's view, the test per se, is not one that is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before the marriage in question and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry." [88]

Justice Cullity then turned his attention to whether or not, in Ontario law, there was or arguably could be an "additional requirement" for mental capacity to marry:

> An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in *Browning v. Reane* (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:
>
> > If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental

[85] *Banton, supra* note 83 at para. 33
[86] *Ibid.* at para. 136
[87] *Ibid.* at para. 142
[88] *Ibid.* at para. 144

> imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. at pp. 70-1

The principle that a lack of the ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in *Spier v. Bengen*, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:

> There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "the test for capacity to marry at common law":

> Whether a person of unsound mind was capable of contracting a valid marriage depended, according to ecclesiastical law to which the court had to have regard, upon his capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities created, his freedom or otherwise from the influence of insane delusions on the subject, and his ability to take care of his own person and property.

After review of these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v. Reane* appeared to require both incapacity to manage oneself as well as one's property; whereas Willmer J.'s statement in *Re Spier* could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to incapacity to marry. Notably, Halsbury's statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to

manage oneself *and* one's affairs, including one's property. It is only with the enactment of the *SDA* that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."[89]

Despite articulating what would, at the very least, be a dual test per se, for capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid.

Somewhat surprisingly at first blush, Justice Cullity made this determination in spite of the fact that he found that, at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "judgment was severely impaired and his contact with reality tenuous." Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v. Reane*." However, you will note that, earlier in his reasons, he stated that the case of *Browning v. Reane* is the source to which the "additional requirement" is attributed, which requirement goes beyond a capacity to understand "the nature of the relationship and the obligations and responsibilities it involves" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's own person *and property*.

In 2003, five years after *Banton,* Justice Greer arguably extended the criteria and factors in the determination of the capacity to marry in another Ontario decision: *Feng v. Sung Estate*.[90]

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[89] *Ibid.* at para. 157

[90] 2003 CanLII 2420 (ON S.C.). [hereinafter *Fung v. Sung Estate*]
The deceased secretly married his caregiver just over a year after his first wife had died, and he died a mere six weeks after the marriage. Following the deceased's death, the caregiver made a claim for support and preferential share against the estate.

Greer J. adopted the criteria for determining the capacity to marry articulated by one of the medical experts, Dr. Malloy, in the Alberta decision of *Barrett Estate v. Dexter.*[91] Dr. Malloy was qualified as an expert in geriatric medicine in that trial and detailed the requirements for capacity. In particular, Dr. Malloy 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.[92]

Applying the facts of the case to the requirements set out in *Barrett Estate*, *supra* Justice Greer found that Mr. Sung lacked capacity to marry as he had not understood the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.[93]

The law on capacity to marry is evolving. Apart from the many historical cases including the case of *Park Estate* which emphasizes the simplicity of marriage and the marriage contract, the cases of *Browning v. Reane* and *Re Spier* suggest that capacity to manage one's person *and* one's property are a component of the test for capacity to marry. In the more recent Ontario decisions of *Banton* and *Re. Sung Estate* courts appear to be moving in the direction of developing an approach that reflects the financial implications of death or marital breakdown on a marriage.[94] And since marriage carries with it serious financial consequences, it stands to reason that the requisite capacity to marry should be more involved and require the higher standard attributed to the capacity to manage property, which is itself a very high standard of capacity. The development of property rights over time reinforces the need for common law to keep pace in its development with the legislation, particularly when pursuant to statute, marriage revokes a Will.

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[91] 2000 ABQB 530 (CanLII). [hereinafter *Barrett Estate*]
[92] *Ibid.* at para. 72, also referred to in *Feng v. Sung Estate, supra* note 90 at para. 62
[93] The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the capacity to enter into the marriage with Ms. Feng. The Court of Appeal endorsed Justice Greer's decision, but remarked that the case was a close one.
[94] *Supra* note 83 at page 272

By way of an update on my further thoughts under consideration presently, two New York cases that I examined more recently, suggest however, that invoking an equitable approach or one founded in public policy, may be a successful alternative in challenging a predatory marriage on grounds other than capacity.

The cases, *In the Matter of Berk,* 71 A.D. 3d 710 (2010) and *Campbell v. Thomas,* 897 NYS2d 460 (2010) are quite similar. In both, a caretaker used her position of power/trust to secretly marry a significantly older adult where capacity was at issue. After death the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to 1/3 of the estate or $50,000, whichever is more). Children of the deceased argued that the marriage was "null and void" as their father lacked capacity to marry. However, the court at first instance held that even if the deceased was incapable, legislatively the marriage was only void from the date of the court declaration and as such, not void *ab initio.*

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by one's own fraud, or take advantage of one's own wrong, or to found any claim upon one's own iniquity, or to acquire property by his own crime." This principle, called the "Slayer's Rule" was first applied in *Riggs v. Palmer*, 115 N.Y. 505,511 [1889] to stop a murderer from recovering under the Will of the murdered person. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that would flow from the wrongdoing. The rule was similarly applied to deny a murderer the right to succeed in any survivorship interest in a victim's estate.

The court recognized that while the actions of predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits pursued was even more direct. A murdering beneficiary exists in a position to benefit from his victim's estate when he commits the wrongdoing, which is distinguished as against the predatory marriage which itself constitutes the wrongdoing that put the spouse in a position to profit. The court held that the spouse should not be permitted to

benefit from wrongful conduct any more than should a person who through coercion becomes a beneficiary in a Will.

Canadian courts have frequently engaged similar doctrines in the estates/trusts context. It is well founded that no murderer can take under the Will or life insurance of his victim [*Lundy v. Lundy* 1895 24 SCR 650]. It is established that a beneficiary will not inherit where the beneficiary perpetrated a fraud on the testator to obtain a legacy by virtue of that fraud [*Kenell v. Abbott* 31 E.R. 416]; or, where a testator was coerced by the beneficiary into a bequest [*Hall v. Hall* (1868) L.R. 1 P.& D. 48].

These "rules" are equitable, and legal, founded in public policy, and by virtue of the legal maxim, *ex turpi causa non oritur actio* (no right of action arises from a base cause). The maxim, a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social" [*Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742]; or, "illegal, wrongful or of culpable immorality" [*Hall v. Hebert* 1993 2 S.C.R. 159] both in contract and tort. Simply put, a court will not assist a wrongdoer to profit from a wrongdoing.

Arguably, such an approach should be viable in Canada to defend or attack against these predatory entitlements. The duplicitous, should not be entitled to financial gain arising from "anti-social" or "immoral" predatory/scheming acts. A predatory spouse alters property rights during life and the testamentary plan by securing entitlements in the same manner as if one coerced a testator to add one's name to a Will.

These New York cases suggest there is significant merit to the exploration of other defences outside of the common law capacity approach including the doctrine of unconscionability, where one party takes unfair advantage, or where an inequality of bargaining power/relationship exists [*Juzumas v. Baron* 2012 ONSC 7220] as well as in equity, any/all of which may well tip the balance in favour of denying the iniquitous predator the profits sought.

CAPACITY TO SEPARATE AND DIVORCE

The question of the requisite capacity to separate was addressed in the recent British Columbia Court of Appeal case of *A.B. v. C.D.*[95] In that decision, the Court agreed with the characterization of the different standards of capacity and the standard of capacity to form the intention to leave a marriage, set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*. [96] Professor Robertson's standard focuses on the spouse's overall capacity to manage his or her own affairs. This standard, which had also been relied upon by the lower court, is found at paragraph 21 of the Court of Appeal`s decision as follows:

> Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.

The Court noted that this standard differs and is less onerous than that adopted in the English decisions of *Perry v. Perry* [97] and *Brannan v. Brannan* [98] which conclude that when a spouse suffers from delusions that leads to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notes that it prefers Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her life.[99]

In cases where capacity fluctuates or disappears altogether, courts have held that as long as a person had capacity at the time that he or she separated from his or her spouse, and maintained the intention to remain separate and apart from his or her spouse while capable, then the entirety of the separation period could be counted for

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[95] *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 [hereinafter *A.B. v. C.D.*]
[96] *Supra* note 59 at page 272
[97] [1963] 3 All E.R. 766 (Eng. P.D.A.)
[98](1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.)

the purposes of a divorce, even if the person lost capacity during the period of separation.[100]

In *Calvert (Litigation Guardian of) v. Calvert*[101] Justice Benotto compared the different standards of capacity – to marry, separate and divorce:

> [57] Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to *remain* separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.
>
> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. **The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins,* 136 A.3d 45 (Ill., 1985).**

It appears that the Court arguably places the threshold for capacity to divorce as arguably somewhat higher than the test for capacity to separate. It equates the threshold for capacity to divorce with the threshold for capacity to marry. Justice Benotto continues, and points to a "simple" test for capacity to marry, consistent with the reasoning in *Durham*[102]*,* and in *Park*:[103]

> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins,* 136 A.3d 45 (Ill., 1985).

As for the specifics of the factors to be applied in assessing capacity, Justice Benotto favourably refers to the evidence of an expert physician, Dr. Molloy who outlined a case for the requisite factors for determining capacity:

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[99] *A.B. v. C.D.*, *supra* note 95 at para.30.
[100] *O. (M.K.) (Litigation Guardian of) v. C. (M.E.)* 2005 CarswellBC 1690 (B.C.S.C.) at para. 40
[101] 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.
[102] *Supra* note 75

> [73] I found the evidence of Dr. Molloy very helpful. Although he, like Drs. Silberfeld and Freedman, did not see Mrs. Calvert, he provided a useful analysis of the evidence and methodology for determining capacity. To be competent to make a decision, a person must:
>
> 1. understand the context of the decision;
> 2. know his or her specific choices; and
> 3. appreciate the consequences of these choices.

In English case law, the issue of capacity to consent to a decree of divorce is treated in the same manner as all other legally binding decisions. In the England and Wales Court of Appeal decision of *Masterman-Lister v Brutton & Co*., [104] the Court wrote that "a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself" and citing the decision of *Mason v. Mason*[105] pointed out that this includes consenting to a decree of divorce.

In a very recent decision,[106] the Missouri Court of Appeal upheld a lower court finding that the wife was capable to commence proceedings for the dissolution of her marriage as she was able to explain the reasons why she wanted the divorce (in spite of having difficulties with dates and events), and because her testimony was consistent with evidence in other legal proceedings. As a result, over the objections of her husband, the Court granted the wife's request for a divorce.

Put simply, the requisite factors for establishing the capacity to divorce, like the requisite criteria for the capacity to marry, and the requisite criteria for the capacity to separate, at common law and rightly, or wrongly, appears to be based on whether the person in question has an ability to appreciate the nature and consequences of the act, and in particular the fact that the act taken is legally binding. However, as the law on capacity to marry is evolving, so must the law on the capacity to divorce. This is an area warranted of tracking as the law continues to develop in light of the financial

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[103] *Supra* note 76
[104] [2002] EWCA Civ 1889 (19 December 2002) at para. 57
[105] [1972] Fam 302
[106] *Szramkowski v. Szramkowski*, S.W.3d, 2010 WL 2284222 Mo.App. E.D.,2010. (June 08, 2010)

considerations raised in both marriage and divorce, the development of property rights and attendant legislative changes.

Wolfman-Stotland v. Stotland: Divorce

In *Wolfman-Stotland v. Stotland*[107] the British Columbia Court of Appeal was asked to consider the requisite capacity necessary to form the intention to live separate and apart. The appellant, Lillian Wolfman-Stotland at 93 years of age had sought a declaration from the British Columbia Supreme Court that there was no reasonable prospect of reconciliation with her 92-year old husband. Mr. Stotland had applied for a medical examination of Mrs. Stotland and Justice Smith of the Supreme Court had ordered that Mrs. Stotland be examined by a physician with respect to her capacity to instruct counsel, to manage her affairs, her capacity to form the intention to live separate and apart from her husband, and her capacity to "appreciate the nature and consequences of abandoning the marital relationship."[108]

Somewhat confusingly, the assessing physician found that Mrs. Stotland "likely" had the capacity to instruct counsel in respect of the divorce; but did not have the capacity to manage her property; nor did she have the capacity "to form the intention to live separate and apart from her husband;" however, he did find that she had the capacity "to appreciate the financial nature and consequences of abandoning her marital relationship."[109]

The Chambers judge found, even more confusingly, in spite of the conclusion that Mrs. Stotland had capacity to instruct counsel, that she lacked the necessary capacity required to obtain the declaration she sought.

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[107] 2011 CarswellBC 803, 2011 BCCA 175, [2011] B.C.W.L.D. 3528, [2011] W.D.F.L. 2593, 16 B.C.L.R. (5th) 290, 333 D.L.R. (4th) 106, 97 R.F.L. (6th) 124, 303 B.C.A.C. 201, 512 W.A.C. 201 [hereinafter *Stotland*]
[108] *Ibid.* at para. 12
[109] *Ibid*. at para. 14

The Court of Appeal overturned the Chambers judge's finding, and concluded that the judge "erred in law in the formulation and application of the proper test of the capacity necessary to form the intention to live separate and apart."[110]

The Court of Appeal referred to the decisions in *AB v. CD*, and *Calvert*, above, and referred favourably to Professor Robertson's *Mental Disability and the Law in Canada* and in particular cited the following passage from pages 253 to 254 of the book, which points to a low threshold for capacity to marry:

> In order to enter into a valid marriage, each party must be capable, at the date of the marriage, or understanding the nature of the contract of marriage and the duties and responsibilities which it creates…The test does not, or course, require the parties to be capable of understanding all the consequences of marriage; as one English judge aptly noted, few (if any) could satisfy such a test…the common law test is probably only concerned with the legal consequences and responsibilities which form an essential part of the concept of marriage. Thus, if the parties are capable of understanding that the relationship is legally monogamous, indeterminable except by death or divorce, and involved mutual support and cohabitation, capacity is present. The reported cases indicate that the test is not a particularly demanding one…

The Court of Appeal concluded, based on the authorities that capacity to separate is the same as the standard for the requisite capacity to marry, and that the "requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one's affairs."[111]

It is notable in this case, however, that there was a finding that the appellant was capable of instructing counsel, and of appreciating the financial consequences of a divorce. In fact, therefore there was evidence that she understood and appreciated the ramifications of a separation and divorce, such that her capacity was *not* so low.

SMBC v. WMP **and others**

[110] *Ibid.* at para. 21
[111] *Ibid.* at para. 27

Finally, in *SMBC v. WMP and others*[112] the fairly new, Court of Protection of the High Court of England and Wales was asked to give directions in proceedings respecting the capacity to marry and capacity to manage property of a person referred to as "A". The case was prompted by police seeking forced marriage protection orders for A and his two brothers based on concerns about A's capacity to marry and family pressure for A to undergo an arranged marriage abroad.

A argued that the Court of Protection was not the proper forum for him since he had not been properly found incapable. A relied on the fact that there was no conclusive finding that he was incapable, such that he could rely on the presumption of capacity.

Indeed, the Court found that the capacity assessment (termed a "COP3") was incomplete and flawed, but noted that it did raise concerns of incapacity such that it warranted the attention of the Court of Protection. A further report was ordered, however, the second assessing psychiatrist was unable to provide a fulsome assessment as he required background information and additional tests which A refused to participate in. There were further complications: a social worker had met with and interviewed A without involving his lawyer, which was in breach of the legal requirements. The Court still allowed the social worker's evidence but gave it less weight.

One of the issues in question was whether as part of capacity proceedings, an individual's medical records can be obtained.

The Court appeared to have prima facie evidence that "A" lacked an understanding of marriage and divorce, as well as the proceedings in general. In light of the evidence of possible incapacity, the Court allowed the release of A's information as sought by the expert.

The Court used these proceedings as an opportunity to set out guidelines for capacity proceedings as follows:

[112] [2011] EWHC B13 (CoP)

(1) including requirements that experts should seek information and set out questions before completing their reports;

(2) that social workers investigating capacity inform the party's lawyer of the intent to interview the party;

(3) medical assessors must provide clear reports;

(4) it is not a violation of human or common law rights for a medical expert to be provided with a party's medical records; and

(5) that psychometric testing is appropriate even if the person who may indeed be capable so objects.

While these proceedings are different from those in the cases noted above, in that they were prompted by protective legislation that allows the state to prevent marriage on the basis of incapacity, the principles are interesting in that they emphasize the importance of clear assessments and the need for access to information. While the decision underscores the importance of respecting an individual's rights, and the presumption of capacity, it also emphasizes the need for experts to have access to full information in order to make proper, informed assessments.

The (Canadian) cases cited above also highlight the need for clear information, so that full and proper assessments can be obtained. Many of the difficulties in the above-cited cases are caused by the inability to properly determine whether the party in question had capacity to marry or divorce at the requisite time. For capacity assessments to be meaningful, they must not only address the legal issues in full, they must also be informed by proper and complete background information on the person in question.

PROFESSIONAL ADVISOR ROLE WHERE CAPACITY IS AT ISSUE

Capacity is a complicated concept in that each task has its own standard, and often the issues involved where capacity is in question can be less than crystal-clear. There is no

clear hierarchy of capacity. Indeed courts are loath to say that one "test" to establish decisional capacity is higher or lower than another. Though, this does happen as demonstrated by some of the decisions reviewed herein. In *Covello v. Sturino,*[113] Justice Boyko was careful to distinguish the varying capacity standards as not necessarily higher or lower, but rather simply as different. My view is this approach makes more sense, but inconsistency of treatment underscores the complexity of understanding.

The fact that there is no all-encompassing capacity" test" to apply or criteria to consider means that a drafting solicitor must at all times be mindful of the client's capacity to complete the specific task at hand. This in effect means that a lawyer may be able to assist a client with competing one task, but not another – yet advice and discussion of options may suffice.

The message from our common law precedent suggests that the drafting solicitor should satisfy him or herself that the client has capacity to give instructions for and execute the document in question, notwithstanding the presumption. This duty is particularly significant if the client is elderly, infirm, dependant or if the instructions vary substantially from previous documents (wills, trusts, powers of attorneys, etc.) or where the instructions are not received from the testator directly. Solicitors are also wise to exercise additional caution in circumstances where the potential beneficiary brings the client to the office, and appears overly involved in the process.

As issues of capacity can cause complications and significant cost consequences many years after legal services have been rendered, a solicitor is well-advised to maintain careful notes when dealing with clients, and to turn his or her mind to the issue of capacity and assure him or herself that the client has the requisite legal capacity required to complete the task requested.

It is always the obligation of the drafting solicitor, to interview the client for the purpose of determining the requisite legal capacity for the task sought by the client. If the lawyer is confident that the client meets the standard for capacity, he or she should clearly

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[113] 2007 W.L. 1697372, 2007 CarswellOnt 3726 (ON. S.C.J.)

indicate this in file notes. Those notes should be thorough and carefully recorded and preserved.

It is wise for lawyers to take their time in asking the client probing questions, to give the client a chance to answer carefully, to provide the client with as much information as possible about the legal proceedings. All questions and answers should be carefully recorded in detail. Lawyers should also consider seeking to corroborate the answers provided by the client, for example, relating to the extent of the client's assets.

If the solicitor has serious concerns about the client's capacity, it is worth discussing with the client the implications, benefits, or otherwise of having a capacity assessment to protect the planning in question.

The approach of professionals ought to be direct, yet sensitive.

Requests for capacity assessments should be clear and should concisely outline the legal criteria to be applied in assessing the specific decisional capacity that is to be met for the particular task sought. A capacity assessment that is not carefully written and that does not apply the evidence to the appropriate legal standard will be deemed deficient and unhelpful should a legal challenge arise in the future.

Lawyers have an important role to play where capacity is at issue. Solicitors must turn their minds to issues of capacity, undue influence and other red flags, including abuse, when discussing and preparing trusts, gifts, wills, contracts, powers of attorney, domestic contracts, and other legal documents. Although the area of capacity is complex, the more information a lawyer has about the issues and interaction of applicable factors, and the state of the client's abilities and understanding, the better protected both the lawyer and the client.

Other related tools/resources/checklist:

1. Undue Influence Checklist: http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist.pdf

2. Capacity Checklist: The Estate Planning Context: http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

3. *"Between A Rock And A Hard Place: The Complex Role and Duties Of Counsel Appointed Under Section 3 of the Substitute Decisions Act, 1992"* by Kimberly A. Whaley and Ameena Sultan, Advocates Quarterly, November 2012, Volume 40, Number 3: http://whaleyestatelitigation.com/blog/?s=section+3+counsel+

4. "*Capacity and the Estate Lawyer: Comparing the various Standards of Decisional Capacity"* (2013) E.T.& P.J. 215-250: http://whaleyestatelitigation.com/blog/?s=ETPJ

5. Predatory Marriages: Legal Capacity to Marry and the Estate Plan: http://whaleyestatelitigation.com/blog/2014/06/paper-predatory-marriages-legal-capacity-to-marry-and-the-estate-plan/

Also note a new recently released publication by John Poyser, entitled: "*Capacity and Undue Influence*" is an excellent resource and I recommend it highly as a comprehensive and insightful resource.

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

Kimberly A. Whaley, Whaley Estate Litigation July 2014

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*[114] *("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

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
		(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.
Grant and revoke a POA for Personal Care	*SDA,* s. 47	(a) Ability to understand whether the proposed 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.*
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)
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)

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
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 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[115] 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)[116].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[117].
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

[115] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[116] *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*]
117 *Calvert*

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
		presents to them; and (c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[118]
Capacity to give evidence	*Evidence Act*,[119] ss. 18(1), 18(2), 18(3) *Canada Evidence Act*,[120] s. 16(1)	***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).* ***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 summary of capacity criteria is intended for the purposes of providing information and guidance only. This summary of capacity criteria is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation July, *2014*

[118] Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", *www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0*
[119] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)
120 R.S.C. 1985, c.C-5, S. 16(1)