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**CANADA LAW BOOK.**

**CAPACITY AND THE ESTATE LAWYER:  
COMPARING THE VARIOUS STANDARDS  
OF DECISIONAL CAPACITY**

*Kimberly A. Whaley\* and Ameena Sultan*

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## 1. 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.<sup>1</sup> There are a wide variety of disorders that affect capacity and increase an individual's susceptibility, vulnerability and dependency. Other factors affecting capacity include normal aging, memory impairment, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, debilitating illnesses, senility, drug, alcohol abuse, and addiction. Even where capacity is not at issue, physical impairment can result in vulnerability and dependence.

This monograph will detail and compare the various "tests" so to speak, or more accurately put, the relevant factors in ascertaining capacity as they arise in the context of an estates and trusts practice.<sup>2</sup>

## 2. Capacity in General

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

Nor is there a general test to apply for 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.<sup>4</sup>

1. Kimberly Whaley, Michel Silberfeld, Heather McGee and Helena Likwornik, *Capacity to Marry and the Estate Plan* (Aurora, Canada Law Book, 2010), at p. 70.
2. For ease of reference, we have prepared a table found at the end of this paper which outlines the basic determining factors for capacity which are referred to within the paper.
3. S.O. 1992, c. 30 as amended.
4. *Palahnuk v. Palahnuk Estate* (2006), 154 A.C.W.S. (3d) 996, [2006] O.J. No.

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable test for decisional capacity.<sup>5</sup> When referring to the term “test”, it is important to note that there is no “test” *per se*, rather there are determining factors to consider in assessing particular decisional capacity. Consequently, reference to a “test” is a bit of a misnomer since rather there are standards 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.

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 particular task to or make a specific decision.

The assessment of capacity is a less-than-perfect science, both from a legal and a medical point of view. Capacity determinations are often complicated: in addition to professional and expert evidence, lay evidence can be relevant and even paramount to determining capacity in some situations. The standard of assessment varies and this too, can become an obstacle that is difficult to overcome and reconcile in determining capacity. And, to add to the complexity, 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 an individual, alive or since 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 at a point in time.

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 globally “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.

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5304 (Ont. S.C.J.); *Brillinger v. Brillinger-Cain* (2007), 158 A.C.W.S. (3d) 482, [2007] O.J. No. 2451 (Ont. S.C.J.); *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, [2004] O.J. No. 1267 (Ont. S.C.J.), affirmed 14 E.T.R. (3d) 27 (Ont. C.A.).

5. *Starson v. Swayze* (2003), 225 D.L.R. (4th) 385, [2003] 1 S.C.R. 722 (S.C.C.).



### (i) Capacity is Decision-Specific

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to grant a power of attorney (“POA”) 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 one’s property, or be deemed capable of granting a power of attorney document, but not capable of giving instructions for and executing a Will. The possibilities are unlimited since each task/decision has its own specific capacity criteria, or factors to consider in its determination.

### (ii) 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. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a Will can vary over time.<sup>6</sup>

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 the instructions, or 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 criteria (not medical criteria), for determining capacity commensurate with the time that instructions are received.<sup>7</sup>

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6. *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton*, all *supra*, footnote 4.

7. *Palahnuk Estate*, *supra*, footnote 4, at para. 71.

### (iii) Capacity is Situation-Specific

Lastly, capacity is *situation-specific* in that under different circumstances, an individual may have differing or fluctuating capacity. For example, a situation of stress or change may diminish a person's capacity. In certain cases, for example, a person at home may have capacity that may not be displayed in a lawyer's or doctor's office.

Although each task has its own specific capacity determination criteria, 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. Generally, to be found capable, a person must have factual knowledge as well as a comprehension of his or her options. Capacity assessment is, in sum, an evaluation of the process by which an individual makes a decision, and not an evaluation of the final decision itself.

The 2003 Supreme Court decision in *Starson v. Swayze*<sup>8</sup> is helpful in elucidating some guidance on capacity issues. Although the decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act, 1996*<sup>9</sup> (a statute which is not addressed in this paper) this decision is helpful in that there are similar themes applied in the context of all capacity determinations.

Writing for the majority, Major J. made several notable 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.<sup>10</sup>

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."<sup>11</sup> Then, a person must "be able to apply the relevant information to one's own circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof."<sup>12</sup>

A capable person requires the "ability to appreciate the consequences of a decision", and not necessarily "actual

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8. *Supra*, footnote 5.

9. S.O. 1996, c. 2, Sch. A as amended.

10. *Starson v. Swayze, supra*, footnote 5, at para. 77.

11. *Supra*, at para. 78.

12. *Supra*, at para. 78.

appreciation of those consequences.”<sup>13</sup> A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if possessing the ability to comprehend the information and the consequences of a decision.

Major J. also pointed out that the person subjected to the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.<sup>14</sup> A capable person is entitled to be unwise in his or her decision-making.

In the oft-cited decision of Quinn J. in *Re Koch*,<sup>15</sup> it was emphatically stated that folly is not equated with incapacity. A person is entitled to make a less-than-wise decision so long as that person has the requisite capacity to make that particular decision. Quinn J. wrote emphatically as follows:<sup>16</sup>

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.

### 3. Capacity Governed by the *Substitute Decisions Act*

#### (i) Capacity to Manage Property

The standard for determining the capacity to manage property is legislated pursuant to s. 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 test for capacity to manage property is straightforward, 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.

13. *Supra*, at paras. 80-81.

14. *Supra*, at para. 79.

15. (1997), 33 O.R. (3d) 485, 1997 CarswellOnt 824 (Ont. Gen. Div.), additional reasons 35 O.R. (3d) 71.

16. *Supra*, at para. 69.

The first circumstance or means is if a person is admitted to a psychiatric facility, at which point the *Mental Health Act*<sup>17</sup> (the “*MHA*”) requires that a physician assess the person’s capacity to manage property.<sup>18</sup> 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.<sup>19</sup> If the 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. This section of the *MHA* only does not apply if the person’s property is under guardianship under the *SDA* or the physician believes that the patient has a continuing power of attorney that provides for the management of the patient’s property.<sup>20</sup>

The second means to a finding of incapacity to manage property is by an assessment conducted pursuant to the *SDA*, by an authorized capacity assessor.<sup>21</sup> 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.<sup>22</sup> 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 there are 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.<sup>23</sup>

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 Quinn J. stated in *Re Koch*:<sup>24</sup>

17. R.S.O. 1990, c. M.7.

18. *MHA*, s. 54(1).

19. *MHA*, s. 54(2).

20. *MHA*, s. 54(6).

21. “Assessor” is defined at s. 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, Ministry of the Attorney General “Capacity Assessment” (Ottawa, 2011), <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp>>.

22. *SDA*, s. 78 and s. 79(1).

23. *SDA*, s. 16(2).



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.

In the same case, Quinn J. 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 the right to refuse to be interviewed; to carefully explain the "significance and effect" of a finding of incapacity; to inform the subject of the right to have a lawyer or friend in the interview; to carefully probe answers provided by the subject; and to seek verification of answers, all the while taking caution not to be influenced by a party "harbouring improper motives."<sup>25</sup>

Quinn J. 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.<sup>26</sup>

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.

The requirement to balance protection of the vulnerable with respect for individual autonomy is set out in the *SDA* and in the case law interpreting that legislation.

The purposes of capacity provisions under the *SDA* were addressed in *Re Phelan*:<sup>27</sup>

[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

24. *Re Koch, supra*, footnote 15, at para. 69 (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 *Health Care Consent Act, 1996*.

25. *Re Koch, supra*.

26. *Re Koch, supra*.

27. (1999), 29 E.T.R. (2d) 82, [1999] O.J. No. 2465 (Ont. S.C.J.).

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.

In the 2012 Ontario Divisional Court decision of *Zheng v. Zheng*,<sup>28</sup> Wilton-Siegel J. analyzed the purposes of the *SDA* and in particular, s. 79 which allows the court to order an individual to undergo a capacity assessment:

Without reasons for the Order but in the face of the extensive evidence as to the applicant's capacity, I think there is a good arguable case that the Order does not appropriately balance the autonomy of the individual and the duty of the state to protect the vulnerable in the particular circumstances of this case. The effect of the Order is potentially to discriminate against a person under a disability, relative to a person not under a disability, for the purposes of a proceeding under section 79(1) of the Act. It is important that the principle of the court's role in the present circumstances be addressed.

Only qualified assessors can make findings of incapacity in respect of property and personal care, and the criteria employed for determining incapacity in these respects is often described as higher or more stringent than that for granting or revoking power of attorney documents for property or personal care. Though there is some precedent referenced herein as authority for ascribing "levels" or "degrees" to capacity, or threshold capacity, there is also authority to suggest it is inaccurate to do so, and not appropriate to ascribe a "higher", "lower", or "lesser" degree/threshold to capacity determinations. In reality, there are simply different factors or criteria to apply in ascertaining decisional capacity. This further illustrates the complexity of issues of capacity.<sup>29</sup>

## (ii) Capacity to Make Personal Care Decisions

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

28. (2012), 295 O.A.C. 294, 2012 ONSC 3045 (Ont. Div. Ct.), at para. 41.

29. See, for example, the treatment by the court in the decisions of *Park Estate* (*infra*, footnote 80); *Re Calvert* (*infra*, footnote 110); and that in *Covello v. Sturino* (*infra*, footnote 123).

- (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 16 years of age or older is presumed to be capable of making personal care decisions.<sup>30</sup>

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

The protections referred to and noted in the case of *Re Koch*,<sup>31</sup> 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 and autonomy as found in *Re Koch* hold equally for personal care decision-making.

### **(iii) Capacity to Grant and Revoke a Power of Attorney for Property**

The criteria to be applied in assessing capacity to grant or revoke a continuing power of attorney for property ("CPOAP") is found at s. 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

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30. *SDA*, s. 2(2).

31. *Supra*, footnote 15.

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

The criteria applied to determine the capacity for revoking a CPOAP is the same as that for granting a CPOAP. A person is capable of revoking a CPOAP if capable of granting one.<sup>32</sup>

If, after granting a CPOAP, the grantor becomes incapable of granting a CPOAP, the power granted remains valid as long as the grantor had capacity at the time it was executed.<sup>33</sup>

The legal criteria applied in ascertaining the capacity to grant or revoke a CPOAP is often referred to as less onerous than that applied in determining the capacity to manage property.

In fact, a person need not have capacity to manage property in order to have the requisite capacity to grant or revoke a CPOAP. If the grantor is incapable of managing property, a CPOAP made is still valid so long as possessing the criteria for capacity to grant that CPOAP at the time the CPOAP was made.<sup>34</sup>

Assessments of capacity to make or revoke CPOAPs need not be conducted by certified capacity assessors, although they certainly can be completed by assessors. Indeed it is the responsibility of the drafting solicitor to assess a 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.<sup>35</sup> This does not mean to suggest that a solicitor, in discharging this duty of care, cannot choose to recommend, or advise on the potential merits of an assessment in circumstances where future litigation is predicted, or in borderline cases, all in an effort to protect the autonomy of the planning decision of the individual.

With that said, the principle that capacity assessments should be undertaken only after careful consideration due to their negative impact on autonomy applies equally to assessments respecting capacity for the granting of a power of attorney. In the 2009 Divisional Court decision in *Abrams v. Abrams*,<sup>36</sup> Low J. was asked to grant leave to appeal a decision of Strathy J., where Strathy J. had declined to order an assessment of the applicant's mother's capacity

32. *SDA*, s. 8(2).

33. *SDA*, s. 9(2).

34. *SDA*, s. 9(1).

35. *Egli (Committee of) v. Egli* (2005), 262 D.L.R. (4th) 208, 2005 BCCA 627 (B.C. C.A.). In this case, the trial judge placed greater weight 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.

36. (2009), 247 O.A.C. 380, 2009 CarswellOnt 1580 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 2519 (Ont. Div. Ct.), additional reasons 2009 CarswellOnt 3502 (Ont. Div. Ct.).



to grant a CPOAP and a power of attorney for personal care. Low J. held that Strathy J. properly exercised his discretion when he denied the applicant's request for further capacity assessments. The court noted that a finding of incapacity has serious implications that infringe upon a person's privacy and autonomy; and that capacity assessments should only be ordered when necessary. In the Divisional Court ruling, Low J. wrote the following notable passage:<sup>37</sup>

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.

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.

This view does not take away from a solicitor's obligation, if consulted, to always ensure that the client who seeks to grant or revoke a CPOAP or power of attorney for personal care is capable of doing so. Indeed, a lawyer is obligated, when consulted, to ensure that a person taking such steps possesses the requisite capacity to do so. Solicitors should take careful notes of their legal assessments and observation of their client's capacity, and should keep those notes with the file and the executed power of attorney documents.

#### **(iv) Capacity to Grant and Revoke a Power of Attorney for Personal Care**

The criteria applied for determining capacity to grant or revoke a POA for personal care (“POAPC”) is found at s. 47 of the *SDA*. A person is capable of granting 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.<sup>38</sup>

37. *Abrams v. Abrams*, *supra*, at paras. 56 and 57 (emphasis added).

38. *SDA*, s. 47(1).

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.<sup>39</sup>

A POAPC is valid if, at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.<sup>40</sup> 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.<sup>41</sup>

The factors to be applied in assessing capacity to grant or revoke a POAPC are noticeably less onerous substantively than those for granting or revoking a CPOAP. Whereas the criteria to be met in order to possess the requisite capacity to grant a CPOAP incorporate a significant amount of information that the grantor must be able to comprehend, the grantor of a POAPC 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 personal care decisions for the grantor.

Again, 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.

#### 4. Capacity Governed by the Common Law

##### (i) Capacity to Contract

There is no statutory test for determining the requisite capacity to contract.

The *SDA* provides that all persons who are 18 years of age or older are presumed to be capable of entering into a contract.<sup>42</sup> The *SDA* also provides that 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."<sup>43</sup>

A cogent test for capacity to contract is set out in the 1973 Prince Edward Island, Supreme Court decision of *Bank of Nova Scotia v. Kelly*.<sup>44</sup> In that case, the court defined capacity to enter into a contract as requiring the following:

39. *SDA*, s. 47(3).

40. *SDA*, s. 47(2).

41. *SDA*, s. 47(4).

42. *SDA*, s. 2(1).

43. *SDA*, s. 2(3).

44. (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.).

- (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 contemplated. A person capable of entering into a contract must have the ability not only to understand the nature of the contract, but also 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:<sup>45</sup>

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.*

Requisite capacity to contract is based on the principle that a contract requires informed consensus on the part of the contracting parties.

In the 1953 decision of *Royal Trust Co. v. Diamant*,<sup>46</sup> the British Columbia Supreme Court emphasized that, in order to be capable of entering into a contract, the person must be able to understand the "nature and effect of the transaction." Specifically, the court wrote as follows:<sup>47</sup>

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

45. *Supra*, at p. 284 (emphasis in original).

46. [1953] 3 D.L.R. 102 (B.C. S.C.).

47. *Royal Trust Co. v. Diamant*, *supra*, at pp. 110-111.

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.

## (ii) Capacity to Make a Gift

There is no statutory test for determining the requisite capacity to make a gift. The criteria to be applied in part, depends on the size, nature, and circumstances of the gift. In general, however, the factors to consider are the same as for those in ascertaining 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 common law criteria on capacity to make a gift have been summarized in a number of decisions including the 1953 decision of *Royal Trust Co. v. Diamant*<sup>48</sup> (referred to above). In that case, the court held that an *inter vivos* transfer is not 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.”<sup>49</sup>

This test was further supported in the case of *Re Bunio (Estate of)*:<sup>50</sup>

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 British Columbia Supreme Court in *Dahlem (Guardian ad litem of) v. Thore*,<sup>51</sup> stated:<sup>52</sup>

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

48. *Supra*, footnote 46.

49. *Royal Trust Co. v. Diamant, supra*, at p. 6.

50. (2005), 15 E.T.R. (3d) 81, 2005 ABQB 137 (Alta. Q.B.), at para. 4.

51. (1994), 2 E.T.R. (2d) 300, [1994] B.C.J. No. 809 (B.C. S.C.), additional reasons 1994 CarswellBC 1903.

52. *Supra*, at p. 9 (emphasis added).



the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.

In his book, *Gifts: a Study in Comparative Law*,<sup>53</sup> 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 factors for determining capacity in various jurisdictions.

Referring to American law, Professor Hyland outlines the following proposition on capacity to gift:<sup>54</sup>

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.

While these considerations are similar to those outlined in the cases cited, there is a somewhat more onerous obligation to meet than just a simple test of understanding the nature of the gift and its effect, in that it requires donors to understand the “extent of their property.” These factors are arguably more aligned with the requirement to possess the capacity to manage property as set out in Ontario’s *SDA*.

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 questions of capacity being determined on a balance of probabilities, by reviewing all the circumstances of the gift:<sup>55</sup>

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.

Professor Hyland, moreover, highlights the problem with the proposition that a capable person is fully entitled to make a decision,

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53. R. Hyland, *Gifts: A Study in Comparative Law* (Oxford, Oxford University Press, 2009).

54. *Ibid.*, at p. 222.

55. *Ibid.*

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."<sup>56</sup>

As Professor Hyland does not address the Canadian legal perspective in his book, it is possible that this view is particularly American. The Canadian perspective emphasizes the importance of autonomy, and indeed the right to be foolish so long as a 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<sup>57</sup> to assess their capacity to make those decisions, so it is possible that the actual gift in question can have a bearing on a determination as to whether the donor had the requisite capacity.

### (1) *The Nature and Extent of Gift – A Factor*

The requisite mental capacity to give a gift changes if the gift is significant in value in relation to the total size of the donor's assets. In such cases, the applicable capacity criteria, it is argued, change to the criteria for capacity to make a Will, that is, testamentary capacity.<sup>58</sup>

As authority, in the English case of *Re Beaney*,<sup>59</sup> the judge explained the difference in the threshold of capacity to give gifts or 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

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56. *Ibid.*, at pp. 222 to 223.

57. See, for example, the Supreme Court decisions in *Pecore v. Pecore* (2007), 279 D.L.R. (4th) 513, 2007 SCC 17 (S.C.C.), and *Saylor v. Madsen Estate* (2007), 279 D.L.R. (4th) 547, 2007 SCC 18 (S.C.C.).

58. Testamentary capacity, or capacity to make a Will is addressed in detail in the following section.

59. [1978] 2 All E.R. 595 (Ch. D.).

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. This proposition is not new. In an even earlier case, *Mathieu v. St. Michel*<sup>60</sup> 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.

### **(iii) Testamentary Capacity: Capacity to Make a Will**

The legal criteria to be applied in determining the requisite capacity to make a Will was established in the 1800s in the seminal English case of *Banks v. Goodfellow*.<sup>61</sup> Testamentary capacity is defined as:

- (a) the ability to understand the nature and effect of making a Will;
- (b) the ability to understand the extent of the property in question; and
- (c) the ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

In order to validly make a Will, a testator need not have a detailed understanding of these three factors. 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.”<sup>62</sup>

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.”<sup>63</sup>

There is some school of thought in cases of what has been described as “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

60. [1956] S.C.R. 477 (S.C.C.), at p. 487.

61. (1870), L.R. 5 Q.B. 549 (Q.B.).

62. *Leger v. Poirier*, [1944] S.C.R. 152 (S.C.C.), at p. 153.

63. G. Robertson, *Mental Disability and the Law in Canada*, 2nd ed. (Toronto, Carswell, 1994), at p. 214.

example of this, as it is understood, could be an instance where a testator with borderline capacity seeks to make a limited change by making a Codicil that appoints a new executor, after the executor named in the Will has died. The writers take the view that these are matters a drafting solicitor would need to approach carefully, perhaps with the assistance of a qualified capacity assessor given the clarity of the accepted test for testamentary capacity.

An assessment of testamentary capacity is focused on the time at which instructions are given, not necessarily when the Will is executed. Though, as our case law expands, regard may be had to the time period after which instructions were given.<sup>64</sup>

The general rule, in *Parker v. Felgate*<sup>65</sup> 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.

These factors must be met in conjunction with the requirements for due execution as set out in the *Succession Law Reform Act* (the “*SLRA*”).<sup>66</sup>

64. *Eady v. Waring* (1974), 43 D.L.R. (3d) 667, 2 O.R. (2d) 627 (Ont. C.A.), at para.7:

While the ultimate probative fact which a Probate Court is seeking is whether or not the testator had 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.

65. (1883), 8 P.D. 171.

66. R.S.O. 1990, c. S.26, as amended, s. 4:

Execution

4.(1) Subject to sections 5 and 6, a will is not valid unless,

- (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
- (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
- (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.



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, if the testator provided instructions to a non-lawyer at a time when the testator had 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.<sup>67</sup>

The threshold capacity required to make a Will has been described as higher, or more onerous than the capacity required to grant a power of attorney, for property or for personal care.<sup>68</sup> Simply put however, the criteria are different.

Still, a testator need not be capable of managing property in order to have testamentary capacity. A finding that a person is incapable of managing one's own affairs does not automatically lead to a finding that that person lacks testamentary capacity. The question of whether the testator understood the nature and extent of 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.<sup>69</sup>

A solicitor drafting a Will is obliged to assess the client's testamentary capacity when instructed to prepare the Will where circumstances warrant it. The drafting lawyer must ask probing questions and be satisfied 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 her property, and all potential claims that could be expected with respect to the estate.<sup>70</sup>

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67. *Fergusson v. Fergusson* (1981), 81 A.P.R. 89, 43 N.S.R. (2d) 89 (N.S. C.A.); *Griffin's Estate, Re* (1978), 56 A.P.R. 39, 21 Nfld. & P.E.I.R. 39 (P.E.I.S.C.), affirmed 21 Nfld. & P.E.I.R. 21 (P.E.I. S.C.), leave to appeal to S.C.C. refused 24 Nfld. & P.E.I.R. 90 (note) (S.C.C.).

68. *Penny v. Bolen*, 2008 CarswellOnt 5644 (Ont. S.C.J.) at para. 19 (additional reasons 2008 CarswellOnt 6552 (Ont. S.C.J.)): 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.

69. *Hamilton v. Sutherland* (1992), 45 E.T.R. 229, [1992] 5 W.W.R. 151 (B.C. C.A.).

70. *Murphy v. Lamphier* (1914), 31 O.L.R. 287, 6 O.W.N. 238 (Ont. H.C.) at p. 317, affirmed 20 D.L.R. 906, 32 O.L.R. 19 (Ont. C.A.); *Hall v. Bennett Estate* (2003), 227 D.L.R. (4th) 263 (Ont. C.A.), at para. 58.

#### (iv) Capacity to Revoke a Will

A testator who seeks to revoke a Will requires testamentary capacity, in the same manner as that required to make a Will.

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 capacity at the time of the destruction of the Will, then the Will is not deemed properly revoked.<sup>71</sup> 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)<sup>72</sup> at which time the Will is effectively revoked.<sup>73</sup>

#### (v) Capacity to Make a Codicil

Subsection 1(1) of the *SLRA* 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”)

Since a Codicil is included in the definition of a “Will”, the standard for requisite capacity to make a Will, that is, testamentary capacity applies equally to a Codicil. (Please note the discussion above about “borderline capacity” to execute limited Codicils or Wills in cases where an individual may lack capacity to execute.)

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71. This principle is outlined in the English case of *Sabatini, Re* (1969), 114 Sol. J. 35 (Prob. D.), as well as in Canadian case law: *Beattie Estate*, [1944] 3 W.W.R. 727 (Alta. Q.B.), at p. 537. For more detailed discussion on revocation and destruction of wills, please see Robertson, *supra*, footnote 63, at pp. 224 to 225.

72. Please see “Capacity to Marry”, below.

73. *Beattie Estate, supra*, footnote 71.

## (vi) 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 either by 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 arguably requires testamentary capacity.

## (vii) 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*.

The capacity required to create an *inter vivos* trust is less clear. While the capacity factors 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 manages the funds, complicates the analysis, such that a more comprehensive capacity regime might well apply.

## (viii) Capacity to Marry

There is no statutory criteria to apply in determining the requisite capacity to marry nor to separate or divorce.

Section 7 of the Ontario *Marriage Act*<sup>74</sup> 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.*"<sup>75</sup> Legislation in Ontario, therefore requires that in order to legally marry, a person must possess the capacity to marry. The definition of what that capacity is comprised of is a developing area of common law.

74. R.S.O. 1990, c. M.3.

75. Emphasis added.

The historical and traditional English view is that the capacity required to marry is analogous to the capacity required 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:<sup>76</sup>

- (a) the ability to understand the nature of the contract of marriage; and
- (b) the ability to understand the effect of the contract of marriage.

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.<sup>77</sup>

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*<sup>78</sup> which finds that “the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.”

In another English case, *Estate of Park, Deceased*,<sup>79</sup> Singleton J. opined 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 commencing from the proposition the contract of marriage is a simple one, Birkett, L.J. contributed as follows:<sup>80</sup>

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.

In the same decision, Karminski J. proposed the factors to be applied to determine a valid marriage, as follows:<sup>81</sup>

76. Whaley *et al.*, *supra*, footnote 1.

77. *Ibid.*, at p. 50.

78. (1885), 10 P.D. 80 (P.D.A.), at p. 82.

79. [1953] 2 All E.R. 1411 (C.A.), affirming [1953] 2 All E.R. 408 (P.D.A.).

80. *Supra* (C.A.), at p. 1411.



- (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.

While the court struggled with setting out the appropriate test, so to speak, for the requisite 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."<sup>82</sup>

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 referenced to in the English cases of *Browning v. Reane*<sup>83</sup> and *Spier v. Spier*.<sup>84</sup> The decision in *Browning v. Reane*, provided 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 *Re Spier*, the court stated that one must be capable of managing his or her property, in order to be capable of marrying.<sup>85</sup>

In recent cases in Canada, 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 an estate, not the least of which is the revocation of all previous Wills, is increasingly apparent.

In the case of *Banton v. Banton*,<sup>86</sup> Cullity J. was asked to assess whether the deceased, prior to his death a then-88-year old man, had had the requisite capacity to marry a then-31-year old woman.<sup>87</sup>

81. *Supra*, at p. 1417.

82. *Supra*, at p. 1425.

83. 161 E.R. 1080 (K.B.).

84. *Spier v. Benyen*, [1947] W.N. 46 (P.D.A.).

85. *Supra*, at para. 46, *per* Willmer J.

86. (1998), 164 D.L.R. (4th) 176 at p. 244, 1998 CarswellOnt 4688 (Ont. Gen. Div.).

87. The woman the deceased married had worked as a waitress in the retirement

Cullity J. reviewed the law on the validity of marriages, emphasizing the glaring 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, 1992*.<sup>88</sup>

Cullity J. commented that Mr. Banton had been a “willing victim” who had “consented to the marriage.”<sup>89</sup>

Cullity J. took care to distinguish between “consent” and “capacity”, and embarked upon an analysis of the “test” for capacity to marry, and whether Mr. Banton passed this “test”.

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.<sup>90</sup> In the court’s view, the test 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.”<sup>91</sup>

Cullity J. similarly focused his attention on whether or not, in Ontario law, there was or arguably could be an “additional requirement” for establishing requisite 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 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

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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.

88. *Banton, supra*, footnote 86, at para. 33.

89. *Banton, supra*, at para. 106.

90. *Banton, supra*, at para. 111.

91. *Banton, supra*, at para. 113.

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 proposed additional requirement, Cullity J. also cited *Halsbury*<sup>92</sup> 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, Cullity J., found that the passages quoted were not entirely consistent. In his analysis, Sir John Nicholl's statement in *Browning v. Reane*<sup>93</sup> appeared to conclude that incapacity to marry required both incapacity to manage oneself as well as one's property, whereas Willmer J.'s statement in *Re Spier*<sup>94</sup> 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, Cullity J. looked to the historical 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, Cullity J. made explicit his preference for the original statement of the principle of capacity to marry found 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

92. 4th edition, vol. 22 (London, Butterworths, 1979), at para. 911.

93. *Supra*, footnote 83.

94. *Supra*, footnote 84.



inordinate weight to the proprietary aspects of marriage and would be unfortunate.”<sup>95</sup>

Despite articulating what would, at the very least, be a dual test 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 (not incapable of marriage), Cullity J. was unable to find that Mr. Banton did not have the capacity to marry at the time in question and therefore concluded that such marriage was valid.

Cullity J. 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, Cullity J. made his decision expressly “on the basis of *Browning v. Reane*.” However, earlier in his reasons, Cullity J. 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*. One glaring and notable omission was the lack of any reference to any expert medical evidence before the court expressly addressing the issue of whether Mr. Banton had the requisite capacity to marry.

In 2003, five years after *Banton*, Greer J. arguably extended the test and application of the capacity to marry in another Ontario decision: *Re Sung Estate*.<sup>96</sup>

Greer J. adopted the test for capacity to marry articulated by one of the medical experts, Dr. Malloy, in the Alberta decision of *Barrett Estate v. Dexter*.<sup>97</sup> Dr. Malloy, qualified as an expert in geriatric medicine and an expert witness in that trial, detailed the proposed 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.<sup>98</sup>

95. *Banton, supra*, footnote 86, at para. 157.

96. (2003), 4 E.T.R. (3d) 137, 2003 CarswellOnt 4002 (Ont. S.C.J.). 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.

97. (2000), 34 E.T.R. (2d) 1, 2000 ABQB 530 (Alta. Q.B.).

98. *Barrett Estate, supra*, at para. 72, also referred to in *Re Sung Estate, supra*, footnote 96, at para. 62.



Applying the facts of the case to the requirements set out in *Barrett Estate*, Greer J. 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.<sup>99</sup>

As the law on capacity to marry (and separate and divorce) is elusive and evolving, it is helpful to have regard to its treatment in other jurisdictions.

In the English case of *SMBC v. WMP*<sup>100</sup> the recently established 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, and that without a conclusive finding that he was incapable, he could rely on the legal 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 to be completed. 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 relied on *prima facie* evidence that "A" lacked an understanding of marriage and divorce, as well as the proceedings in

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99. *Sung Estate, Re* (2004), 11 E.T.R. (3d) 169, 2004 CarswellOnt 4512 (Ont. C.A.), at para. 8. The decision of Greer J. 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 Greer J.'s decision, but remarked that the case was a close one.

100. [2011] EWHC B13 (C.O.P.).

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 took the opportunity that these proceedings presented to set out guidelines respecting capacity proceedings as follows:

- (1) experts should seek information and set out questions before completing their reports;
- (2) 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) 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 obtaining clear assessments, evidence, 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 and in turn such that courts have the best evidence available to facilitate decision-making.

The Canadian cases referenced also highlight the need for clear information, so that full and proper assessments can be obtained. Many of the difficulties in such cases are complicated 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.

The common law application as it relates to the issue of capacity to marry, is evolving. Apart from the many historical cases including the case of *Park Estate*, which notably 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 components of the test for capacity to marry. In the more recent Ontario decisions of *Banton* and *Feng v. Sung Estate*, and the Alberta decision in *Barrett Estate*, courts appear to be moving in the direction of developing a test for capacity to marry that reflects an understanding of the financial implications of death

or marital breakdown on a marriage.<sup>101</sup> Since marriage carries with it serious financial consequences, it stands to reason that the requisite capacity to marry should encompass a more comprehensive standard, such as that attributed to the capacity to manage property. The development of legislated property rights over time reinforces the need for common law to keep pace in its development, and this particularly so, when pursuant to statute, at least in Ontario, marriage revokes a Will.

### (ix) 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 *AB v. CD*.<sup>102</sup> In that decision, the court agreed with the characterization of the different standards of capacity including 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*.<sup>103</sup> Professor Robertson's standard focuses on the spouse's overall capacity to manage his or her own affairs. This standard, which had been relied upon by the lower court, is set out by the British Columbia Court of Appeal in this decision as follows:<sup>104</sup>

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.

It was noted by the court that this standard differs and is less onerous than that adopted in the English decisions of *Perry v. Perry*,<sup>105</sup> and *Brannan v. Brannan*,<sup>106</sup> which both concluded that when a spouse suffers from delusions that lead to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The British Columbia Court of Appeal noted that it preferred Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal

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101. Robertson, *supra*, footnote 63, at p. 272.

102. (2009), 66 R.F.L. (6th) 237, 2009 BCCA 200 (B.C. C.A.), leave to appeal refused 489 W.A.C. 319 (note) (S.C.C.).

103. Robertson, *supra*, footnote 63, at p. 272.

104. *AB v. CD*, *supra*, footnote 102, at para. 21.

105. [1963] 3 All E.R. 766 (P.D.A.).

106. [1973] 1 All E.R. 38 (Div. Ct.).



autonomy of the individual in making decisions about his or her life.<sup>107</sup>

In cases where capacity fluctuates or disappears altogether, courts have held that, as long as a person had capacity at the time of separation from the spouse and maintained the intention to remain separate and apart from the spouse while capable, then the entirety of the separation period could be counted for the purposes of a divorce, even if the person lost capacity during the period of separation.<sup>108</sup>

In *Calvert (Litigation Guardian of) v. Calvert*,<sup>109</sup> Benotto J. compared the different standards of capacity to marry, separate and divorce, as follows at paragraphs 57 and 58:

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.

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). [Emphasis added]

The court in this decision placed the threshold for capacity to divorce as higher than the test for capacity to separate. It equates the threshold for capacity to divorce with the threshold for capacity to marry. Benotto J. ascribes a "simple" test for the requisite capacity to marry, consistent with the reasoning in *Durham*,<sup>110</sup> and in *Estate of Park*.<sup>111</sup>

As for the specifics of the test, Benotto J. favourably refers to the evidence of an expert physician, Dr. Molloy, who outlined a case for the requisite test for capacity:<sup>112</sup>

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

107. *AB v. CD, supra*, footnote 102, at para. 30.

108. *O. (M.K.) (Litigation Guardian of) v. C. (M.E.)*, 2005 BCSC 1051, 2005 CarswellBC 1690 (B.C. S.C.) at para. 40, additional reasons 47 B.C.L.R. (4th) 346, 2005 BCSC 1344.

109. (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), affirmed 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused 111 O.A.C. 197 (note) (S.C.C.).

110. *Supra*, footnote 78.

111. *Supra*, footnote 79.

112. *Calvert, supra*, footnote 109, at para. 73.



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 the 2011 decision of *Wolfman-Stotland v. Stotland*,<sup>113</sup> 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.

In response to the proceedings, the husband, Mr. Stotland, applied for a medical examination of Mrs. Stotland. Smith J. 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.”<sup>114</sup>

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.”<sup>115</sup>

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.

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.”<sup>116</sup>

The Court of Appeal referred to the decisions in *AB v. CD*, and *Calvert*, and referred favourably to Professor Robertson’s *Mental*

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113. (2011), 333 D.L.R. (4th) 106, 2011 BCCA 175 (B.C. C.A.), leave to appeal refused 533 W.A.C. 319 (note) (S.C.C.).

114. *Supra*, at para. 12.

115. *Supra*, at para. 14.

116. *Supra*, at para. 21.

*Disability and the Law in Canada* and in particular cited the following passage:<sup>117</sup>

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, of 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 requisite 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.”<sup>118</sup>

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 she possessed mental capacity in key areas.

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. Jewell*,<sup>119</sup> 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*<sup>120</sup> emphasized that this includes consenting to a decree of divorce.

In a 2010 decision,<sup>121</sup> the Missouri Court of Appeal upheld a lower court decision 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

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117. Robertson, *supra*, footnote 63, at pp. 253-254.

118. *Stotland*, *supra*, footnote 113, at para. 27.

119. [2002] EWCA Civ. 1889 (C.A. (Civ.)), at para. 57.

120. [1972] Fam. 302.

121. *Szramkowski v. Szramkowski*, S.W.3d, 2010 WL 2284222 (Mo.App. E.D., 2010).

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 test for the capacity to divorce, like the requisite test for the capacity to marry, and the requisite test for the capacity to separate, at common law, 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 continues to evolve, so too, does the law on the capacity to divorce. This area of law warrants tracking as it continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights and attendant legislative changes.

### **5. Lawyer's 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 very complex. There is no clear hierarchy of capacity. Indeed courts are increasingly loath to say that one test is higher or lower than another.

In *Covello v. Sturino*,<sup>122</sup> Boyko J. was careful to distinguish the varying capacity standards as being not necessarily higher or lower, but rather simply as different. The writer's view is that this approach is the most sensible.

The fact that there is no one comprehensive or exhaustive capacity test means that a drafting lawyer must at all times be mindful of a client's capacity to complete a specific task or decision. This in effect means that a lawyer may be able to assist a client with completing one type of task, yet possibly not another.

The message from our common law suggests that the drafting lawyer should be satisfied that his or her client has the requisite capacity to give instructions for and execute the documents in question, notwithstanding presumptions of capacity. This duty is particularly significant if a client is elderly, infirm, dependant or vulnerable, or if the instructions vary substantially from previous instructions and governing documents (Wills, trusts, powers of attorneys, etc.), or where the instructions are not received from the testator directly. Lawyers are also wise to exercise additional caution in circumstances where a potential beneficiary brings a client to the

122. 2007 CarswellOnt 3726, 2007 WL 1697372 (Ont. S.C.J.).



office, appears overly involved in the process, or where there is susceptibility to influence due to vulnerability or compromised cognition.

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

It is the obligation of the drafting lawyer to interview the client and where appropriate determine the requisite legal capacity for the task sought by the client. If the lawyer is confident that the client meets the standard for capacity, this should clearly be indicated in the solicitor's notes. Those notes should be thorough and carefully recorded and preserved.

The decision as to whether to act where capacity is in issue is complex. The role of the drafting solicitor was addressed in a paper by Professor Albert H. Oosterhoff, "Every Child's Nightmare: January/December Marriages – The *Banton* Case", which, as the title suggests, addressed the *Banton* decision and capacity to marry. In that paper, Professor Oosterhoff made the following points on whether a solicitor should act on instructions to draft a Will where capacity is in issue:<sup>123</sup>

It is certainly true that a solicitor, if satisfied that a client clearly lacks testamentary capacity (or is being subjected to undue influence, or both) should refuse to draw a will for the client. However, a solicitor does not warrant capacity and if the solicitor has taken reasonable steps to ascertain whether the client has capacity and concluded that he or she does, the solicitor should prepare the will. A solicitor cannot refuse to draft a will merely because he or she has some suspicions about testamentary capacity or undue influence. Only if the suspicions prove to be well-founded, should the solicitor refuse to prepare the will.

Professor Oosterhoff's comments underscore that it is the role of counsel to take reasonable steps to ascertain that a client has capacity and that his or her instructions are free of undue influence, and that only once that has been ascertained, should a solicitor act on the instructions received.

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123. Albert H. Oosterhoff, "Every Child's Nightmare: January/December Marriages – The *Banton* Case", in 1999 Annual Institute of Continuing Legal Education, *Estates – The Outer Limits: Current Issues in Agency, Guardianship and Power of Attorney Law*, G.M. Davies, and A.J. Rabino-witz, eds. (Toronto, Canadian Bar Association, 1999).



The comments also highlight the point that suspicion alone is not enough for a lawyer to decline to act on instructions received.

Best practices for lawyers would demand that they take their time in asking the client probing questions, provide the client with as much information as possible about the legal proceedings and give the client the opportunity to answer carefully. 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 lawyer has serious concerns about the client's capacity, it is worth discussing with the client his or her available options with respect to the implications, benefits, or otherwise of having a capacity assessment to protect the planning in question.

A lawyer's request for a capacity assessment should be clear and thorough, and should concisely identify the legal test that is to be applied for the particular task sought to be assessed. A capacity assessment that is not carefully considered and 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 issues of capacity are involved. Lawyers must turn their minds to issues of capacity, vulnerability, undue influence and other red flags, including abuse, when preparing trusts, gifts, wills, contracts, powers of attorney, domestic contracts, and other legal documents for clients. 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 are.

## **6. 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:

### SUMMARY OF CAPACITY CRITERIA

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
<b>Manage property</b>	<i>SDA</i> , s. 6	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
<b>Make personal care decisions</b>	<i>SDA</i> , 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; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
<b>Grant and revoke a POA for Property</b>	<i>SDA</i> , 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;

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
<p><b>Grant and revoke a POA for Property</b> <i>(cont'd)</i></p>	<p><i>SDA</i>, s. 8</p>	<p>(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;</p> <p>(d) Knowledge that the attorney must account for his or her dealings with the person's property;</p> <p>(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;</p> <p>(f) Appreciation that unless the attorney manages the property prudently its value may decline; <u>and</u></p> <p>(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.</p>

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
<b>Grant and revoke a POA for Personal Care</b>	<i>SDA</i> , s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; <u>and</u> (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
<b>Contract</b>	Common law	(a) Ability to understand the nature of the contract; <u>and</u> (b) Ability to understand the contract's specific effect in the specific circumstances.
<b>Gift</b>	Common law	(a) Ability to understand the nature of the gift; <u>and</u> (b) Ability to understand the specific effect of the gift in the circumstances.  <i>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.</i>



CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
<b>Make a Will</b>	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; <u>and</u> (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
<b>Revoke a Will</b>	Common law	(Same as above – to Make a Will)
<b>Make a codicil</b>	Common law	(Same as above – to Make a Will)
<b>Make a testamentary designation</b>	Common law	(Same as above – to Make a Will)
<b>Create a trust</b>	Common law	(a) Ability to understand the nature of the trust; <u>and</u> (b) Ability to understand the trust's specific effect in the specific circumstances.  <i>In cases of a testamentary trust, the test for testamentary capacity applies.</i>

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Capacity to marry	Common law	<p>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.</p> <p>Also possibly required: capacity to manage property and the person.</p> <p>Dr. Malloy<sup>124</sup> 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.</p>
Capacity to separate	Common law	<p>Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry).<sup>125</sup></p>
Capacity to divorce	Common law	<p>Ability to appreciate the nature and consequences of a divorce (same as capacity to marry).<sup>126</sup></p>

124. *Barrett Estate*, *supra*, footnote 97.

125. *Re Calvert*, *supra*, footnote 109.

126. *Re Calvert*, *supra*.

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
<p><b>Capacity to give evidence</b></p>	<p>Ontario <i>Evidence Act</i><sup>127</sup></p> <p><i>Canada Evidence Act</i><sup>128</sup></p>	<p><b>18.</b> (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6(1).</p> <p><b>Challenge, examination</b></p> <p>(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).</p> <p><b>Exception</b></p> <p>(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).</p>

127. R.S.O. 1990, c. E.23, s. 18(1), 18(2) and 18(3).

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

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Capacity to give evidence ( <i>cont'd</i> )		<p><b>Witness whose capacity is in question</b>                      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</p>

This summary of capacity tests is intended for the purposes of providing information and guidance only. This summary of capacity tests 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

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