



**Power of Attorney Documents:  
Financial Abuse, Risks and Misuse**

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## **A. Introduction**<sup>1</sup>

The Power of Attorney document (the “**POA**”) has long been viewed as one way in which a person can legally protect their health and their financial interests by planning in advance for when they become ill, infirm or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one’s lifetime and prevent unnecessary, expensive and avoidable litigation. In certain circumstances, however, POA documents may cause rather than prevent conflict.

In our practice, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. We have also seen it used as a means of protection against predators, of which there is a very real risk. Unfortunately, we have also seen these documents used abusively, causing the grantor harm through fraud, neglect, and depletion of wealth. This is accompanied with negligence in the provision of necessary care requirements.

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

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

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<sup>1</sup> Authored by Kimberly A. Whaley, Principal of Whaley Estate Litigation, October 2014

that a vulnerable or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

One of the purposes of this paper is to provide practical guidance on minimizing the risks of abuse related to power of attorney documents and financial abuse. One of the primary ways of diminishing the chances of abuse of a POA document is to choose the right attorney for the adult being advised. Secondly, understanding the different types of POA documents as well as their provisions can ensure that all parties are clear on the legal relationship they are entering into. Thirdly, a review of the duties of attorneys for property will allow legal practitioners to properly advise those acting as attorneys. Fourthly, a survey of common abuses of POA documents can facilitate the task of identifying financial abuse at an early stage. Finally, this paper will provide a review of the civil and criminal cases and remedies available for those who are victims of older adult financial abuse through POAs or otherwise.

## **B. What is a Power of Attorney?**

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

In Ontario, there are three types of POAs:

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

A POA for Property can be used to grant:

- a specific/limited authority;

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

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

### **C. What are the different types of Power of Attorney documents?**

#### **1. The General Power of Attorney: Power of Attorney Act**

The ***Powers of Attorney Act*** has only three sections. This Act governs general Powers of Attorney but without imposing formality on the document. The general Power of Attorney contemplated by this Act does not survive the incapacity of the grantor. The language of the ***Powers of Attorney Act*** refers to the “donor” which is different from that of the ***SDA*** which refers to the giver of the Power of Attorney as the “grantor”. This Act does not set out any of the formalities dealing with a prescribed form, validity or execution requirements, as does the ***SDA***.

Generally speaking, a general Power of Attorney, if coupled with an interest (in other words, if adequate consideration is given), and if given for the purposes of securing a benefit to the donee or grantee, is not revoked by death, incapacity or bankruptcy. This topic is beyond the scope of this paper but, as with the construction or drafting of any document, certainty with respect to the revocability is best achieved within the document itself, wherein it actually states the extent of the power being given. There appears to be a great deal of English caselaw on this subject and there are evidentiary rules with respect to the irrevocability on death, incapacity or bankruptcy, and some Canadian caselaw which too, should be considered.<sup>2</sup>

#### **2. The Continuing Power of Attorney for Property**

A Continuing Power of Attorney for Property (or “**CPOAP**”) is commonly used to ensure that the financial affairs of a person are looked after in circumstances where that person is unable to look after them on their own, temporarily, as agent, and permanently when incapable.

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<sup>2</sup> *Spooner v. Sandilands* (1842) 1 Y. & C. Ch. Cas. 390; *Wilkinson v. Young* [1972] 2 O.R. (H.C.J.) 239-241; *Smith v. Humchitt Estate* 1990 B.C.J. No. 298 S.C., are useful cases to refer to in determining the degree of certainty with respect to irrevocability on death and irrevocability generally. Fridman’s Law of Agency, 7<sup>th</sup> Edition, Butterworths 1996 appears to indicate that irrevocable powers do not terminate on the bankruptcy of the principal.

Pursuant to the *SDA*, a POA for Property is a CPOAP if:

- (a) the document states that it is a continuing power for attorney; or
- (b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

A person is considered incapable of managing their property if they are unable to understand information that is relevant to making a decision in the management of their own property or unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. A CPOAP document can be limited to specific dates or contingencies and/or it can continue during the incapacity of the grantor, hence the name "*Continuing Power of Attorney for Property*."

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal test of capacity to give or revoke a CPOAP is different from that of capacity to manage property to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property.

Much to the surprise of many older adults, the CPOAP is effective immediately upon signing *unless* there is a provision or "triggering" mechanism in the document which directs that it will come into effect in accordance with a specified date or event, such as incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance.

The powers granted to an Attorney acting on behalf of an incapable person are extensive. An Attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to the *SDA* and any court-imposed conditions.

Guidelines for the execution, resignation, revocation, and termination of a CPOAP can be found in the *SDA*.

### **3. Power of Attorney for Personal Care**

A POAPC enables the (capable) grantor to appoint a person or persons to make personal care decisions on their behalf in the event that they are found to be incapable of being able to do so on their own. A person/grantor is considered incapable of their personal care if unable to understand information relevant to **health care, nutrition, shelter, clothing, hygiene, or safety**, or if unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same. As with the different legal criterion for testing capacity for managing property and giving or revoking a CPOAP, the *SDA* also provides a the criterion required for the capacity to make personal care decisions and give or revoke a POAPC. Again, the *SDA* specifically provides that a person may be capable of giving or revoking a POAPC even if he or she is mentally incapable of making personal-care decisions.

There are limitations on who a grantor may appoint as their attorney pursuant to a POAPC. The *SDA* prohibits a person who provides health care, or residential, social, training or support services to the grantor *for compensation* from acting as an Attorney for Personal Care, unless the Attorney is the spouse, partner or relative of the grantor, in which case they are permitted to act.

When making decisions on an incapable person's behalf, the Attorney for Personal Care is required to make those decisions in accordance with the *SDA*. Further guidance respecting consent to treatment decisions is also found in the HCCA. In addition, an Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person (ascertained while capable) or otherwise act in the incapable person's best interests guided by the HCCA, *SDA* and common law. To act in the incapable person's best interests, the attorney as substitute decision maker must consider the values and beliefs of the grantor in question, their current incapable wishes, if ascertainable, whether the decision will improve the grantor's standard and quality of life or otherwise either prevent it from deteriorating or reduce the extent or rate at which the quality of the grantor's life is likely to deteriorate, and whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.

A POAPC is generally considered a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so. Indeed, it is increasingly viewed as a planning tool for the end of a person's life.

The downside of the POAPC is that all too often the document does not contain detailed enough instructions or, alternatively, the instructions provided are far too detailed, as to cause confusion. Attorneys for personal care should be informed that written wishes and oral wishes have equal weight, and that later capable wishes take precedence over earlier wishes. It is at this juncture that discussion with family members can be beneficial, noting of course that the attorney must ensure that the incapable person's independence is fostered. The attorney must also assist in choosing the least restrictive or intrusive courses of treatment or action. It is important to understand that an Attorney for Personal Care is not a care provider but rather, a decision maker.

Another problem often faced by attorneys concerns the appointment of too many attorneys. Often the attorneys cannot easily work together. Often the governing document is drafted such that it makes the appointment joint and several and one, or more of the appointed attorneys acts severally without keeping the other(s) informed, yet curiously the other(s) are liable for the joint and several acts of the one attorney.

Guidance regarding the execution, revocation, resignation, and termination POAPCs can be found in the *SDA*.

#### **D. How to Choose the Right Attorney**

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

The *SDA* requires that an attorney be over the age of 18 in order to exercise decisional authority.<sup>3</sup> Before naming an attorney in a POA document, it is important to consult the person in question and ensure that he or she is willing to act. Some individuals will choose to appoint a trust company as an attorney. Such companies perform the services of an attorney for a fee. They are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

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<sup>3</sup> *Substitute Decisions Act, 1992*, SO 1992, c-30 [*SDA*], s. 5.

It is important to note that granting a new POA cancels any previous power of attorney document and as such, before granting a new POA, a grantor should ensure that there is no pre-existing POA document they wish to keep in existence.

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together, or enable each attorney to act separately on their behalf. Unless it is specified in the POA document that attorneys are allowed to act separately, statutory law assumes that jointly appointed attorneys must make decisions together.<sup>4</sup>

It is also possible to assign different responsibilities to separate attorneys.<sup>5</sup> You can also assign one attorney to act on your behalf and a substitute attorney to act for you should death or another event prevent the attorney first named to act.<sup>6</sup> It is important, when deciding whether to appoint more than one attorney, to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to a grantor's personal and financial well-being.

A person who is a grantor's health care provider may not be appointed to be his or her attorney for personal care unless the person is the grantor's spouse, partner or relative. Similarly, a person who provides residential, social, training or support services for compensation may not be appointed his or her attorney for personal care unless that person is the grantor's spouse, partner or relative.<sup>7</sup>

Although the Public Guardian and Trustee ("PGT") may act as an attorney of last resort in certain cases, it is important to note that the PGT cannot be named in a POA document unless her approval is obtained beforehand.<sup>8</sup>

## **E. Duties of Attorneys**

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<sup>4</sup> *Supra* note 2., s. 7(4), 46(4).

<sup>5</sup> See e.g. *ibid.* at s. 7(6), 46(7).

<sup>6</sup> Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>>; see *SDA*, *supra* note 2 at s. 7(2) and 46(2).

<sup>7</sup> *SDA*, *supra* note 2, s 46(3).

<sup>8</sup> Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>>.



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

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

Notably, in situations where a *capable* grantor appoints an Attorney to deal with property, the Attorney is considered to be an *agent* of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). Though the fiduciary standard or expectation is lower in such a relationship, an Attorney in this position is still a fiduciary with a duty only to the grantor and should, therefore, keep written documentation of instructions and act diligently and in good faith.

### **The Specific Duties of an Attorney for Property**

All of the duties of the CPOAP are set out in the *SDA*. In the case of *Banton v. Banton*, Justice Cullity discussed many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. According to the Court, some of the specific duties and obligations of an Attorney for Property include the following:

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

The Attorney for Property must consider whether a given transaction is in the 'best interests' of the individual for whom he is acting, and also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA*. The Attorney must keep detailed records of all transactions as well as ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. An Attorney for Property must be prepared to keep accounts for the passing of such accounts, in the event it is required by the grantor, or with leave of the Court requested by an interested person, or indeed after the death of the grantor if required by the Estate Trustee.

While an attorney is required to keep accounts, an attorney is not required to pass the accounts. The court may, however, order that all or a specified part of the accounts of an attorney be

passed.<sup>9</sup> The accounts are filed in the court office and follow the same procedure as the passing of estate accounts.<sup>10</sup> Although the passing of accounts may not be required, it may still be advisable to do so because once the accounts have been passed, they have received court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Attorneys for Property are statutorily entitled to compensation pursuant to the *SDA*.<sup>11</sup> The compensation taken should be in accordance with the prescribed fee schedule. The *SDA*, Section 40 sets out the guidelines to follow when an attorney is taking compensation. Often the Power of Attorney document itself will provide guidance as to compensation to be taken; however, in cases where the document is silent, section 40(1) of the Regulations to the *SDA* provide that compensation may be taken as follows:

An attorney may take annual compensation from the property of:

- 3% of capital and income receipts,
- 3% on capital and income disbursements, and
- 3/5 of 1% on the annual average value of the assets as a care and management fee.<sup>12</sup>

Notwithstanding such provision within the Act, the attorney can have compensation increased or reduced by the court when passing accounts.

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in certain circumstances, but accounts or records must be produced to the incapable person, the incapable person's other attorneys, and the Public Guardian and Trustee if required.<sup>13</sup>

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<sup>9</sup> *SDA*, *supra* note 2, s. 42(1): The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. Note: This would be done by way of Notice of Application

<sup>10</sup> *Ibid.*, s. 42(6): The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators' accounts and *Rules of Civil Procedure*, RRO 1990, Reg 194, R. 74.16-74.18.

<sup>11</sup> *Ibid.*, s. 40(1): A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale (see *SDA*, O. Reg. 26/95, amended by O. Reg. 159/00).

<sup>12</sup> *Ibid.*, s. 40(3): The guardian or attorney may take an amount of compensation greater than the prescribed scale allows,

- (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or
- (b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.

<sup>13</sup> *Supra* note 2, s. 42(3): A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.

### **The Specific Duties of an Attorney for Personal Care**

The Attorney for Personal Care must exercise powers diligently and in good faith. As with an attorneyship for property, attorneys for personal care are required by law to foster the incapable person's independence, to encourage the incapable person to participate in personal-care decisions to the best of his or her ability and to consult with the incapable person's supportive family and friends and with the persons who provide personal care to the incapable person. Attorneys are required to keep thorough and detailed records of any and all decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.

### **F. Attorney Disasters and Situations of Abuse**

As mentioned, a POA is an extremely powerful document which enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will. Consequently, there are a number of ways in which a POA document can be used to the detriment of a grantor. Some common scenarios in which the procurement or use of a POA go awry, and to the detriment of an older adult who is vulnerable or dependent are:

1. The grantor grants a POA while incapable of doing so;
2. The POA is fraudulently-procured from a vulnerable or physically dependent grantor by an individual with improper motives, as a result of exerting of undue influence,<sup>14</sup> or in a situation of suspicious circumstances, for the sole purpose of abuse, exploitation, and personal gain;

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**Others entitled to apply – s. 42(4)** – The following persons may also apply;

1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. The Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person, with leave of the court.

<sup>14</sup> See *Buccilli et al v. Pillitteri et al*, 2012 ONSC 6624, upheld 2014 ONCA 337, at para. 139: "The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely."

3. Disputes and accounting discrepancies arise concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;
4. The POA is fraudulently or imprudently used, for the sole purpose of self-interest of the Attorney and/or used in a way that constitutes a breach of fiduciary duty;
5. the Attorney makes unauthorized, questionable or even speculative investment decisions, or decisions lacking in diversity;
6. the Attorney fails to take into consideration the tax effects of the Attorney's actions or inactions;
7. the Attorney fails to seek professional advice where necessary or appropriate;
8. the Attorney inappropriately deals with jointly held assets or accounts;
9. The Attorney misappropriates the grantor's assets.
10. If more than one, one attorney acts without the knowledge, approval, or acquiescence of the other(s) either under a Joint or Joint and Several POA.

#### **G. Examples of POA Fraud Extracted from Case Law**

##### **1. POAs fraudulently-procured, for the sole purpose of abuse**

###### **(a) *Re Koch*<sup>15</sup>**

Although not a POA case *per se*, the case of ***Re Koch*** provides an example of a situation where one person may have an ulterior motive when seeking an assessment of a vulnerable person, particularly an assessment which results in a determination of incapacity. In this case, Ms. Koch had suffered from multiple sclerosis for fifteen years. She was confined to a wheelchair, although able to walk short distances with a walker. Ms. Koch and her husband separated in January 1996. Each retained lawyers and negotiations commenced with a view to resolving the usual property and support issues. On April 23rd, 1996, her lawyer forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In or about May 1996, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the formidable mechanisms of both the SDA and the HCCA. A hearing was held

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<sup>15</sup> *Koch, Re*, 1997 CarswellOnt 824, (Ont. Gen. Div.); Additional reasons in: *Koch, Re*, 1997 CarswellOnt 2230 (Ont. Gen. Div.).

before the Consent and Capacity Board (the "**CCB**") and Ms. Koch was adjudged by the CCB to be:

1. incapable of managing her financial affairs and property; and
2. incapable of consenting to placement in a care facility.

Ms. Koch sought a reversal of the CCB's decision. And, as stated by the Court, her cry was essentially thus: "My husband had me committed." The Court agreed with Ms. Koch and found the CCB to have erred in law. Justice Quinn stated:

The assessor/evaluator must be alive **to an informant harbouring improper motives**. [The Assessor] should have done more than merely accept the complaint of the husband, coupled with the medical reports [...], before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.<sup>16</sup>

**(b) *Covello v. Sturino***<sup>17</sup>

In *Covello v. Sturino*, the widow owned 50% ownership in her house; her son owned the remaining half. She also owned property in Italy. In 2001, the widow made a will which would divide her assets equally among her five children. Her doctor's notes indicate that she began experiencing memory loss in 2004, and began treatment for Alzheimer's in January of 2005. In the summer of 2005, her son took his mother to his own lawyer, and, on that same day, his mother executed a Continuing Power of Attorney appointing him as her attorney, which took effect on the date of execution, and transferred her ownership property in her home and in certain property in Italy to the attorney/son, for nominal consideration/as a gift. Almost a year later, and pursuant to a court order, the mother underwent a capacity assessment that found her incapable of managing her own affairs.

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<sup>16</sup> 1997 CarswellOnt 824, at par. 69.

<sup>17</sup> 2007 CarswellOnt 3726.

The Court applied *Bishop v. Bishop*, to state that, as a result of the grantor's diminished mental capacity, both the lawyer who drafted the new power of attorney document and the attorney appointed "should have insisted that [the grantor] undergo a medical assessment prior to executing her Power of Attorney."<sup>18</sup> The Court held that, where no such contemporaneous formal assessment exists, the court must rely on the evidence surrounding the execution of the power of attorney, such as doctors' consultation letters and a subsequent capacity assessment, and the facts and circumstances existing in the grantor's life as at the date of execution of the POA, such as evidence of financial mismanagement, lack of independent legal advice and the presence of undue influence from her the attorney appointed.

Although the Court found that the medical evidence strongly suggested that the grantor did not have sufficient legal capacity to execute the Continuing Power of Attorney at the time it was granted and it should, therefore, be declared invalid, it noted that, even if one were to find that the grantor did have sufficient legal capacity, the lack of independent legal advice and the presence of undue influence from her son Giovanni, still worked together to invalidate the document. In fact, it did more. The Court's finding that the son exercised undue influence and always acted in his own best interests, rather than the interests of his mother, sufficiently disentitled him to be appointed as guardian of her property.

Importantly, although there was no evidence in this case that the drafting solicitor was aware of the grantor's cognition issues, the case appears to place an onus on drafting solicitors to insist on capacity assessments in situations where it is known that the would-be grantor has diminished mental capacity, before taking instructions to draft a power of attorney. As stated by the Court, "[h]ad [the drafting solicitor] made sufficient inquiries into the state of [the grantor's] health and cognitive abilities, as reported by her physicians, he would have been alerted to the fact that her ability to understand, think, remember and communicate had been affected."<sup>19</sup>

**(c) *Dhillon v. Dhillon***<sup>20</sup>

The case of *Dhillon v. Dhillon* involved a wife and son who, while the husband/father was living in India, used a forged POA to sell residential property that the husband owned, and used another forged POA to withdraw funds from the husband's RRSP and bank account. The wife

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<sup>18</sup> 2007 CarswellOnt 3726 at 23.

<sup>19</sup> 2007 CarswellOnt 3726 at 33.

<sup>20</sup> 2006 CarswellBC 3200 (B.C. C.A.).

used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded a considerable amount in damages, including \$5,000 in punitive damages and special costs at 80 percent of solicitor-client costs. The British Columbia Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son and substantially upheld the decision of the trial judge with respect to damages.

**(d) *Nguyen-Crawford v. Nguyen*<sup>21</sup>**

In *Nguyen-Crawford v. Nguyen*, a daughter accompanied her mother to her mother's lawyer's office where her mother executed powers of attorney appointing her daughter as her attorney. Before executing the documents, the daughter translated them to her mother, whose primary language was Vietnamese. The siblings later sought a declaration that the powers of attorney were invalid on the basis that the daughter, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her and was the only person who translated both the documents and the lawyer's advice concerning them.

The Court found that the daughter did not meet the "high evidentiary burden" necessary to uphold the documents and demonstrate that her mother knew what she was signing or that the powers of attorney were clear expression of her wishes at the time the mother signed the documents, and, consequently, the powers of attorney were of no force and effect. In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that the attorney daughter exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was that (a) the mother was dependent upon her daughter, b) the daughter provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves (which, in turn, conferred on the daughter extensive powers to act on her mother's behalf), and, somewhat perplexingly, c) the daughter and her husband used the mother's funds as if they were their own. This latter point is somewhat peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents, but took place two years later.

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<sup>21</sup> 2010 CarswellOnt 9492 (Ont. S.C.J.).



Importantly, in *obiter*, there was some discussion of the fact that since the drafting solicitor failed to obtain an independent translator for the grantor/mother before the documents were executed, the solicitor may have failed to discharge her duty of care, and could have been found negligent. The attorney daughter had attempted to argue that such a finding was a condition precedent, so to speak, to finding the powers of attorney documents invalid. The Court did not agree with the daughter's submission, but did suggest that the drafting solicitor's notes, records and testimony would have been useful had it provided positive evidence that the documents and advice were independently translated.

On the issue of solicitor negligence, the Court did refer to the similar case of *Barbulov v. Cirone* (2009),<sup>22</sup> and noted that "[t]here was no comment as to whether the solicitor had breached his duty to the donor/father by failing to have the power of attorney translated to him by an independent translator." Unfortunately, the Court did not delve further into the issue on the basis that there was no evidence to support any finding on that issue, since it lacked the drafting solicitor's notes, records and testimony.

The case of *Nguyen-Crawford v. Nguyen* sends a clear message to drafting solicitors who attempt to draft documents for grantors with little command of the languages spoken by the drafting solicitor. Care should be taken to ensure that proper independent translators are obtained—not those who do not stand to benefit from the document itself. Would-be attorneys ought to be equally vigilant, if they do not wish to have the document they later act pursuant to, to be challenged at a later date on the basis of grantor's lack of capacity to grant the power.

**(e) *Johnson v. Huchkewich***<sup>23</sup>

The case of *Johnson v. Huchkewich* involved a similar set of facts as that of *Nguyen-Crawford v. Nguyen*, thus underscoring the point that many individuals view power of attorney documents as a way in which to gain access to the assets of a vulnerable individual.

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<sup>22</sup> 2009 CarswellOnt 1877 (Ont. S.C.J.)

<sup>23</sup> 2010 CarswellOnt 8157 (Ont. S.C.J.).

In this *Johnson v. Huchkewich*, one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as a "a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets. During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother, in Polish; and no one else in the room understood Polish. Shortly after that and as stated by the Court "before the ink had dried'?", the daughter used the power of attorney to transfer \$200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant cost associated therewith, and a number of orders were made against the attorney/daughter, including:

- An order that she return of the \$200,000 to the joint bank account;
- An order that the other sister/daughter be appointed as guardian of the widow's property and personal care and that the widow would reside with that daughter and her family; and, among other things,
- an order restraining the attorney/daughter from harassing and annoying her sister/the appointed guardian.

Interestingly, and somewhat disappointingly, these facts and orders were brought to light in the context of a will challenge by the same sister who had misappropriated her mother's funds. This application, however, was dismissed as not even being a "close call" and costs submissions were requested.

While the Courts were able to remedy the attorney injustices in *Johnson v. Huchkewich* and *Nguyen-Crawford v. Nguyen*, these cases raise the important question of how many power of attorney abuse cases exist, but go unreported or unnoticed by our judicial system, thus leaving vulnerable adults at risk of being preyed upon by individuals seeking financial gain, to the vulnerable and/or incapable person's detriment.

**(f) *Grewal v. Bral***<sup>24</sup>

The Manitoba case of ***Grewal v. Bral*** involved a widow and her daughter, the plaintiffs, who had lived most of their lives in India and had moved to Canada around 2006. The plaintiffs had resided with the defendant and his family when they first arrived to Canada. The defendant claimed that he had provided for them financially while they lived with his family, while the plaintiffs denied this fact and claimed that the mother had provided the defendant with financial remuneration and had cared for his children during the work week without being financially compensated.

At issue in this case was the validity of two POA documents, one signed by each plaintiff, which had been used to sell two properties in India. The defendant had ultimately benefitted from the proceeds of the sale. The defendant asserted that the plaintiffs had agreed to the sale of the properties and that he be given their proceeds as compensation for the expenditures he had incurred when they lived with him upon moving to Canada. The plaintiffs denied having been aware of the sale of the properties and claimed damages for the value of the properties sold as well as punitive damages from the defendant.

Both the plaintiffs and the defendant agreed that the plaintiffs had each been given a document to sign while they were living with the defendant and that they had signed it. However, the opposing parties disagreed as to the circumstances under which the documents had been signed—for instance, whether the document had been signed at the lawyer’s office and whether the nature and effect of the document they were signing had been explained. The plaintiffs claimed that they had been given the document by the defendant without the lawyer’s presence or advice and that the defendant had said to them that the document pertained to a matter being litigated in India.

Justice Perlmutter stated that his analysis turned on credibility. He found that the plaintiffs’ story was corroborated by third party evidence, while the defendant as well as the lawyer he had retained in respect of the POAs presented evidence which conflicted with the evidence presented at trial.<sup>25</sup> Consequently, Justice Perlmutter accepted the plaintiffs’ evidence as to the circumstances under which they had signed the 2009 POAs.

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<sup>24</sup> 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

<sup>25</sup> 2012 MBQB 214 at para. 81.

In his opinion, Justice Perlmutter applied *Nguyen-Crawford v. Nguyen*, above, in considering the mother's limited understanding of the English language and the fact that the POA had not been translated into her native tongue of Punjabi. This increased their reliance on the defendant's representation regarding the POAs. The judge found that the defendant had falsely induced the plaintiffs to sign the POA document and used it to benefit himself to their detriment. As such, the POAs were declared void *ab initio*.

In addition, Justice Perlmutter found that the defendant's conduct had given rise to "the independent actionable wrong of fraud and misrepresentation"<sup>26</sup> and, consequently, awarded punitive damages against the defendant in the amount of \$30,000.

This case is useful not only as an example of courts following the precedent of *Nguyen-Crawford v. Nguyen*,<sup>27</sup> but also in showing that in circumstances where a defendant's behavior constitutes a certain level of fraud and misrepresentation, punitive damages may be used to punish this behavior.

**(g) *Sevello v. Sevello***<sup>28</sup>

While not specifically a POA case, in this decision, a son took his recently widowed mother to what he told her was a "courthouse" and had her sign a "document which would give him the power to look after her as she grew older."<sup>29</sup> In reality, he took her to the registry office and with the assistance of a conveyancer transferred the title of his mother's residential property into his name as sole owner. A few weeks later he returned and transferred the property to himself and his mother as joint tenants.

When the mother discovered the title transfer she commenced an action against her son and requested an order from the court transferring the property back to her as sole owner. The son counterclaimed seeking a legal or equitable interest in the property, based on improvements he had made to the house. The Court set aside the son's transfer of the house and observed that:

[47] At the time Antonio took his mother to the registry office, he was living in her house. She was recently widowed. English is not her first language, and the family had always used Mr. Sinicrope as their lawyer when they engaged in real estate transactions. Mr. Sinicrope knew the family and the family history, and he could speak Italian. However,

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<sup>26</sup> *Ibid.* at para 88.

<sup>27</sup> *Nguyen-Crawford v. Nguyen*, *supra* note 20.

<sup>28</sup> 2014 ONSC 5035.

<sup>29</sup> *Ibid.* at para.6.

Antonio chose not to take Rosina to Mr. Sinicrope's office, but instead he took Rosina directly to the registry office where he arranged for a conveyancer to arrange for the transfer of the home property to him. The conveyancer did not speak Italian, and she was a stranger to Rosina, who signed the deed without the benefit of independent legal advice. Antonio, who received the benefit of the transaction, was by her side throughout.

[48] The law is clear that in the case of gifts or other transactions *inter vivos*, the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves is an undue influence.

[49] This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina did not receive independent legal advice, and accordingly the two deeds which gave Antonio an interest in the land should be set aside on this basis as well.<sup>30</sup>

The Court dismissed the son's claim for a legal or equitable interest in the house as, among other reasons, he did not come to court with "clean hands".<sup>31</sup>

## **2. POAs fraudulently-used, for the sole purpose of self-interest**

### **(a) *Elford v. Elford***<sup>32</sup>

In *Elford v. Elford*, the husband put certain property into his wife's name, with her knowledge and for the purpose of defeating his creditors. He had a general POA over his wife's property. A disagreement developed between them and the husband, using the POA, transferred the property into his own name. The wife sued to have the property re-transferred to her. The trial judge dismissed the action; the Court of Appeal reversed it and maintained the wife's action. The Supreme Court of Canada affirmed, finding that the transfer by the husband to himself "transgresses one of the most elementary principles of the law of agency."<sup>33</sup> It was *ex facie* void and should not have been registered.

### **(b) *Burke Estate v. Burke Estate***<sup>34</sup>

In *Burke Estate v. Burke Estate*, the husband used the POA granted to him by his wife to transfer Canadian savings bonds registered in the wife's name to their joint names. The Court

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<sup>30</sup> 2014 ONSC 5035 at paras. 47-49.

<sup>31</sup> 2014 ONSC 5035 at para. 106.

<sup>32</sup> 1922 CarswellSask 162 (S.C.C.).

<sup>33</sup> *Supra* note 27. at para. 22.

<sup>34</sup> 1994 CarswellOnt 442.

held that the husband had acted in breach of the fiduciary duty owed to the wife. The bonds were deemed to be held on constructive trust and formed part of the deceased wife's estate.

**(c) *Gironda v. Gironda***<sup>35</sup>

This recent case, ***Gironda v. Gironda***, saw the grantor of a Power of Attorney for Property in 2005, Catarina, naming one of her three sons, Vito, as her attorney for property.<sup>36</sup> Her other two sons brought an application seeking their appointment as guardian of property of Catarina and challenging, *inter alia*, the 2005 power of attorney documents and the validity of certain transfers of Catarina's property to Vito in 2008 and 2009. Vito lived in Catarina's house with her until she was hospitalized for a fall in 2011. In 2008, Vito transferred Catarina's residential property to himself for two dollars, and in 2009 he transferred \$175,000 of Catarina's funds to himself and took \$19,400 of that money for his own purposes.<sup>37</sup>

The Court found that both transfers were invalid by reason of Catarina's lack of requisite capacity as at the relevant times. Regarding the transfer of Catarina's real property, the court also found that Vito exercised undue influence on Catarina. The court found that the 2005 power of attorney for property was valid and that Catarina was incapable of managing her property; nevertheless the Court prohibited Vito from acting in his capacity as attorney for property and granted the applicants' application for guardianship. The Court granted judgment against Vito in respect of the \$19,400, and ordered him to pay Catarina market rent and back rent to the date of Catarina's incapacity to manage her property. This case is noteworthy respecting the court's treatment of undue influence, a factor that is often present in these types of proceedings. According to Supplemental Reasons released on October 18, 2013<sup>38</sup> this decision was under appeal, however Vito has since died<sup>39</sup> and no appeal decision has been released.

**3. POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty**

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<sup>35</sup> 2013 ONSC 4133; supplemental reasons 2013 ONSC 6474.

<sup>36</sup> 2013 ONSC 4133.

<sup>37</sup> *Ibid* at para. 178.

<sup>38</sup> 2013 ONSC 6474.

<sup>39</sup> The Toronto Star, December 28, 2013

[http://www.thestar.com/news/crime/2013/12/28/christmas\\_death\\_a\\_murder\\_police.html](http://www.thestar.com/news/crime/2013/12/28/christmas_death_a_murder_police.html) [accessed September 19, 2014]

**(a) *Chu v. Chang***<sup>40</sup>

The case of ***Chu v. Chang*** involved an interesting and somewhat unusual set of facts. The case revolved around Mrs. Chang, a then 98 year old woman, and the way in which her children and one of her grandchildren were involved in her care. The matter first came before the Court in December 2008 when her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang’s sons) and Lily’s son, Dr. Stephen Chu.

Any family peace dissipated shortly thereafter and the parties went back and forth before the Court on countless occasions and in one endorsement the Court voiced concerns about Mr. Chang and Dr. Chu getting along and executing their duties appropriately. The Court warned all of Mrs. Chang’s children that they should be guided by Mrs. Chang’s wishes (found, in this case, in her affidavit) which were that she was happy when her children spent time with her and got along. The Court told the parties to “act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life.”<sup>41</sup>

Unfortunately, further proceedings ensued and Dr. Chu requested an urgent motion on the ground that he had been compelled to remove Mrs. Chang from her home on the basis of information he had received from Mrs. Chang’s caregiver that she had been told “not to feed” Mrs. Chang. Notwithstanding the concerns about feeding (of which there was considerable debate), Justice Brown ordered Dr. Chu to return Mrs. Chang to her home the following day.<sup>42</sup>

Two competing motions were then heard within which each guardian sought to have the other removed. In light of all the evidence, Justice Brown terminated *both* guardianships on the basis that the two sides could not work together. As for Dr. Chu, Justice Brown wrote: “It is difficult to find words to describe adequately his misconduct. Suffice it to say, by, in effect, kidnapping his grandmother Dr. Chu demonstrated that he was not prepared to work within the legal framework

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<sup>40</sup> *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010), 2010 CarswellOnt 4507 (Ont. S.C.J.), 2011 CarswellOnt 1840 (Ont. C.A.).

<sup>41</sup> *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.) at para. 35.

<sup>42</sup> 2010 CarswellOnt 246.

of a guardianship.”<sup>43</sup> Although Mr. Chang’s misconduct was not found to be as serious as Dr. Chu’s, he too had showed he was obstructive in the process and not a suitable candidate to act as a guardian of property (he had refused to sign a court-imposed management plan). The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company.

Mrs. Chang’s youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang’s personal care. However, Peggy was reminded of her duty to consult family members regarding her personal care decision-making, pursuant to the *SDA*, as well as her statutory obligation to foster contact between Mrs. Chang and those family members considered “supportive family members”—of which Lily was not considered one.<sup>44</sup> The court held that given the history of high conflict in the family, restrictions on access by Lily and her son would be in Mrs. Chang’s best interests, and stipulated both by the times and the conditions under which visits would occur. Peggy was, however, required to provide fresh information about Mrs. Chang’s medical condition in the event of significant developments.

On January 6, 2010, Mr. Justice D. Brown ordered, among other things, that the Bank of Nova Scotia Trust Company be appointed guardian of the property of How Seem Chang; and, that Lily Man-Lee Chu, Dr. Stephen Chu, Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang prepare accounts, in the form prescribed by Rule 74.17 of the *Rules of Civil Procedure*, for their terms as attorneys or guardians of the property of How Seem Chang.

On the matter of costs of bringing their respective motions, on March 26, 2010, Justice D. Brown released his costs endorsement.<sup>45</sup> In their submissions, the respondents had sought full indemnity costs in the amount of \$82,591.25 payable by Dr. Chu. It was their position that Dr. Chu’s reprehensible conduct, including misleading the Public Guardian and Trustee, removing his grandmother from her home, surreptitiously filming his uncle in the courthouse, and filing affidavits that raised irrelevant attacks on the respondents warranted an award of full indemnity costs. The PGT also sought costs against Dr. Chu in the amount of \$8,347.50 on the basis that it was required to file affidavits with the court in order to correct misleading information provided to the court by Dr. Chu. Dr. Chu took the position that as there was mixed success on the

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<sup>43</sup> 2010 CarswellOnt 246 at para. 5.

<sup>44</sup> *Ibid.* at para. 29.

<sup>45</sup> *Chu v. Chang*, 2010 ONSC 1816.



motion—the court removed both co-guardians, appointed an institutional guardian suggested by Dr. Chu and appointed another relative as Mrs. Chang’s guardian of the person—this signaled that each party should bear its own costs or, alternatively, Dr. Chu should pay the respondents costs of \$4,266.96. In reaching his decision on costs, Justice D. M. Brown gave little weight to the offers to settle that were made by both parties primarily on the basis that both guardians had requested that the other resign and both ended up being removed and replaced by his Honour. The Court did not accept Dr. Chu’s submission that the success on the motions was mixed. Instead, his Honour focused his attention on the fiduciary duty owed by guardians of the property as set out in the *SDA*—that being to exercise their powers and duties diligently, with honesty and integrity and in good faith **for the incapable person’s benefit**—and the consequences of a guardian of the property and/or person breaching his/her fiduciary duties [emphasis by his Honour].<sup>46</sup> His Honour opined that substantial indemnity costs may be awarded where a party has made serious allegations of misconduct against another which were unfounded and misused the court’s process. And, according to Justice D. M. Brown, “that is what happened here.” His Honour stated:

Dr. Chu breached his fiduciary duties by misleading the court, making baseless allegations against his co-guardian and other relatives and then, incredibly, resorting to self-help by kidnapping his grandmother. At the same time as he was instructing his counsel to seek an urgent hearing from the court, Dr. Chu removed his grandmother from her home, took her to an undisclosed location, kept her sequestered from her children who had seen her virtually daily up until that point, and did not return his grandmother until ordered to do so by the court.<sup>47</sup>

In light of the forgoing, the Court concluded that at paragraph 15 that Dr. Chu was not motivated by an objectively-based concern for the welfare of his grandmother, but by a desire to improve the position within the family of the interests of his mother, the applicant, and himself, and, in the Court’s view, to use *SDA* proceedings for such a purpose amounted to an attempt to subvert the whole purpose of the *SDA*. As, in the Court’s view, Dr. Chu’s misconduct stood at the extreme end of the scale, the Court concluded that it was appropriate in this case to award costs against him on a substantial indemnity scale. The Court fixed the PGT’s substantial indemnity costs to \$8,000.00, inclusive of disbursements and GST and fixed the respondents’ costs at \$35,000.00, inclusive of GST and ordered Dr. Chu to pay those costs personally. At paragraph 24, the Court

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<sup>46</sup> 2010 CarswellOnt 1765 at para. 10.

<sup>47</sup> *Ibid.* at para. 14.

noted that “while some might raise an eye-brow when they see an award of close to \$45,000.00 in costs for a one-day motion,” the following was worth repeating:

Dr. Chu's initiation of the post-November 20, 2009, litigation was baseless, a breach of his fiduciary duties as a guardian, motivated by self-interest, and a misuse of the scheme of the SDA. When viewed in that light, I regard the resulting costs award as temperate in the circumstances.<sup>48</sup>

On June 7, 2010, the parties attended before Justice Lederer.<sup>49</sup> Among the motions heard was that successfully brought by Dr. Stephen Chu who, although not a named party, stated that Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang were in contempt of the order of Mr. Justice Brown, in that did not prepare the requisite accounts for their terms as attorneys or guardians of the property of How Seem Chang.

This decision was then appealed to the Court of Appeal,<sup>50</sup> which found no error on the part of the motion judge, and fixed costs to the respondents fixed at \$5,000 inclusive of disbursements and applicable taxes.

**(b) *Abrams v. Abrams***<sup>51</sup>

The case of ***Abrams v. Abrams***, concerned a contested guardianship application. The parties were Ida and Philip Abrams (respondents) and two of their three children — the applicant, Stephen, and the respondent, Judith Abrams. At the date of the endorsement, Ida was about 87 years old and Philip 92 years old. Philip had “accumulated a tidy fortune”. Although the family had got along reasonably well, in the fall of 2005, a major dispute arose about what the parents should leave to their children. In January 2007, Ida executed a Continuing Power of Attorney for Property and Power of Attorney for Personal Care naming her husband, Philip, as her attorney, with her daughter, Judith, as an alternate attorney. Ida subsequently signed a number of other POAs. In January 2008, Stephen brought a guardianship application seeking his appointment as guardian for Ida and more than two years later, the proceedings had not been resolved. That failure led to this endorsement, which warned that a failure to abide by the timetable therein

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<sup>48</sup> *Ibid.* at para. 24.

<sup>49</sup> 2010 CarswellOnt 4507 (Ont. S.C.J.).

<sup>50</sup> 2011 CarswellOnt 1840 (Ont. C.A.).

<sup>51</sup> *Abrams v. Abrams*, 2008 CarswellOnt 7786 (Ont. S.C.J. Dec 19, 2008); Additional reasons in: *Abrams v. Abrams*, 2009 CarswellOnt 524 (Ont. S.C.J. Feb 03, 2009); affirmed by: *Abrams v. Abrams*, 2009 CarswellOnt 3618, 2009 ONCA 522 (Ont. C.A. Jun 25, 2009).

would lead to costs consequences not only for the parties but as against counsel, personally. The context of the endorsement is the fact situation of the *Abrams* guardianship application and also contested guardianship applications, in general, where as Justice Brown put it, “the parties have lost sight of the key issue”, which is always the best interests of the incapable person.<sup>52</sup> The case shows that although the *Substitute Decisions Act* sets out a mechanism for addressing incapable persons’ needs, it is clear that it is imperfect, and still allows for matters to be dragged out while family disputes continue.

**(c) *Teffer v. Schaefers***<sup>53</sup>

The case of ***Teffer v. Schaefers*** is one that concerned the use of an invalid power of attorney. The victim in that case was Mrs. Schaefers, who was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24 hour nursing care in her home. She had also been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed. Despite the fact that there was considerable evidence which supported the view that Mrs. Schaefers did not have capacity to assign a POA, Mr. Verbeek, a lawyer, had Mrs. Schaefers execute a POA on April 27, 2006 naming him as her attorney.

While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on April 27, 2006 and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for Property should be terminated. The Court found that Mrs. Schaefers' best interests were not being met and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as complying with disclosure requests or proceeding with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary and the duties and responsibilities of an attorney are

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<sup>52</sup> 2010 CarswellOnt 1135 at par. 38.

<sup>53</sup> *Teffer v. Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).

significant. Thus, if Mr. Verbeek was too busy as a sole practitioner to discharge his duties as an attorney for the property of Mrs. Schaefers then he should be relieved of those responsibilities.

**(d) *Fiacco v. Lombardi***<sup>54</sup>

***Fiacco v. Lombardi*** was a case involving an elderly woman named Maria Lombardi who suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

The children did not act jointly as their mother wished. Instead, in 2008 they engaged in contested guardianship litigation regarding their mother. By order dated January 23, 2009, Cameron J. declared Maria incapable of managing property and incapable of personal care, and he appointed Carmella Fiacco and Antonio Lombardi as her joint guardians of property and of the person. The Order contained several additional provisions which required, among other things, that Giovanni Lombardi and Guiseppina Lombardi account for their dealings with their mother's property and deliver the keys to her home to the applicants. Although the court noted that the Order should have been a simple one to implement, it found that the guardians encountered difficulties in obtaining information from their brother and sister about the assets of their mother they controlled.

The Court found the respondents' behavior unacceptable and in contravention of the Order and the SDA. As stated by the Court: "The Order could not have been clearer - the respondents were required to account for their dealings with Maria Lombardi's property. The SDA is equally clear- the property of an incapable person must be delivered to a guardian "when required by the guardian."<sup>55</sup> The respondents were ordered to comply with the previous Order and had costs awarded against them. The Court made the further comment that the respondents may think the result harsh, but added that to fix costs against them in a lesser amount would result in the incapable person having to pay for their misconduct and that would not be just. Paramount to the Court's decision was the view that the respondents could have avoided the motion had they cooperated with the guardians as required by law and by prior Order of the Court.

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<sup>54</sup> 2009 CarswellOnt 5188.

<sup>55</sup> *Supra* note 45 at para. 14.

**(e) *Woolner v. D'Abreau***<sup>56</sup>

In *Woolner v. D'Abreau*, Norah D'Abreau executed a Continuing Power of Attorney for Property in favour of the applicant, Robert Woolner, a lawyer, as well as another person, under which Mr. Woolner began to manage Ms. D'Abreau's property and financial affairs. Ms. D'Abreau subsequently retained another lawyer, Mr. Marcovitch, who began to ask Mr. Woolner questions about how he was handling Ms. D'Abreau's financial affairs.

Mr. Woolner suggested that Ms. D'Abreau undergo a capacity assessment; Mr. Marcovitch communicated that Ms. D'Abreau saw no need to do so. Ms. D'Abreau then appointed Mr. Marcovitch as her attorney, whereupon Mr. Woolner brought this application to compel Ms. D'Abreau to submit to a capacity assessment. Mr. Marcovitch then retained Mr. Koven as litigation counsel for Ms. D'Abreau. Mr. Koven recommended that she undergo an assessment. Ms. D'Abreau did so, and the assessment found her to be capable of managing her own affairs. According to the Court, counsel then debated the issue of costs of the application for the better part of half a year, which led to no costs being ordered due to collective loss of proportionality.

A hearing under Rule 57.07(2) of *Rules of Civil Procedure* was held with respect to the possibility of disallowing any costs as between client and her counsel and costs were disallowed beyond what had already been paid for in the earlier portion of litigation. According to the Court, as the legal services provided up to the costs dispute had contained value for their clients, counsel were entitled to compensation for them. However, the Court found that the parties could have settled costs simply by re-attending court with little expense and that the evidence adduced had not established, on balance of probabilities, that Mr. Marcovitch clearly informed his client as to the risks and potential costs of the litigation strategy employed or that he received informed instructions to proceed with that strategy. The Court found that the strategy was unreasonable, disproportionate to what was at stake, and provided no value to the client. As such, Mr. Marcovitch was not entitled to compensation beyond the \$6,250, already paid. Mr. Koven's fiduciary obligation required that he ensure the client understood the nature and risk of litigation, and no documentation indicated that he had done so. Similarly, the Court found that the legal work provided by Mr. Koven referable to the costs dispute provided no value to the

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<sup>56</sup> *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).

client and resulted in costs being incurred without reasonable cause. As such, Mr. Koven was not entitled to recover any costs incurred for the costs dispute stage of the litigation.

**(f) *Down Estate v. Racz-Down***<sup>57</sup>

In December of 2003 William and Marion, then in their late 70s, entered into a marriage contract that established a regime of separate property. The couple had cohabited for some time before they married. William executed a will under which he made Marion his executor, along with children from a previous marriage. Under the will, the revenue from William's estate was to be paid to Marion, while the children were beneficiaries of the estate on her death. In January of 2004, William began treatment for dementia. There was evidence to show that Marion was aware of this and that she had in fact attended with him at his various doctor appointments when the diagnosis was made. In July, William added Marion as a joint account holder on his primary bank account. The judge made a point of noting that Marion never reciprocated with any of her own bank accounts, by making them joint. The Court found that Marion made significant unexplained withdrawals on their shared account. It also noted that while in August and September of 2004, the account balance on the shared account was \$739,224.36, on May 26, 2009 when William died, the account had dwindled away to \$72,438.16. The Court found that most of the transactions could be traced to Marion's separate accounts. The plaintiffs in the action, William's children, brought an action against Marion for damages for conversion and breach of fiduciary duty, alleging misappropriation. Marion defended her actions on the basis of joint ownership of the account.

The issue before Justice Gordon was whether to maintain a previous order which granted a Mareva injunction which restrained Marion from disposing of certain real and personal property, including the funds in her account. Justice Gordon found that the plaintiff children had met the test for the injunction. In the Court's view, not only had the plaintiffs shown a strong prima facie case, but, in his view, "the case is overwhelming." As stated by the Court at paragraphs 88 to 93:

88           The spousal relationship, William's vulnerable state and the circumstances pertaining to finances establish a fiduciary relationship. Marion owed William a duty of utmost good faith and trust. The power of attorney was required on the sale of the

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<sup>57</sup> *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010).

condominium. Marion had direct access to the joint bank account. Marion had a discretion, indeed a unilateral ability, in dealing with the funds.

89 In exercising her discretion, Marion was required to have regard for the provisions of the marriage contract and William's will.

90 The gratuitous transfers from the joint account to Marion's sole bank account are unexplained. There was no reason or purpose for the transfers that could be justified. A resulting trust results from the fiduciary relationship. No evidence was tendered in rebuttal.

91 The exclusion in Section 14, *Family Law Act*, at best, applies at the time of William's death. It does not justify gratuitous inter vivos transfers, nor does it negate the common law principles regarding fiduciaries and resulting trust in all circumstances involving spouses.

92 The marriage contract established a regime of separate property. The will granted Marion a life interest in William's estate. Marion's transfer of funds defeats the obvious intent of both documents.

93 The plaintiffs have established a prima facie case. Indeed, on the evidence presented, in my view, the case is overwhelming.<sup>58</sup>

The Court found that the remaining components of the test for Mareva injunction had been met: there would irreparable harm to the plaintiffs if the injunction was not granted, and damage award would not suffice; there was a risk that Marion would remove/dissipate what minimal assets remained in her possession; and the balance of convenience favoured the plaintiffs. Justice Gordon ordered that the order granting the injunction would continue until trial or further order.

**(g) *Zimmerman v. McMichael Estate***<sup>59</sup>

The deceased were husband and wife and founders of extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executors of their estates. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate

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<sup>58</sup> *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J.).

<sup>59</sup> *Zimmerman v. Fenwick*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).



was to go to the McMichael Collection after five bequests of \$50,000 were made. The husband died on November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for \$250,000 which was held back to satisfy the bequests in her will. The trust deed contained terms that differed from will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were a granted certificate of appointment of estate trustee with will.

The niece and her husband successfully brought an application for a declaration that the power of attorney and the trust were void and an order that required Mr. Zimmerman to account for his dealings with the trust property. Mr. Zimmerman was ordered to his pass accounts, but failed to do so and was removed as trustee on March 9, 2009. The niece and her husband made many objections to his accounts and Mr. Zimmerman failed to respond and made an application to pass his accounts for the property and the trust. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit verifying the accounts were inadequate, incomplete and in many respects false. The accounts contained no statement of the compensation claimed by Mr. Zimmerman in connection with the discharge of his responsibilities under the Trusts. In fact, it was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners not while, but after visiting Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home. There was a



dearth of evidence and/or explanation as to how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the *SDA*. Although the trust deed impliedly permitted pre-taking, the court found that the authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: he failed to properly account; he made improper and unauthorized payments and loans to himself, or for his benefit out of the Trusts; he mingled Trust property with his own property and he used the two interchangeably for his own purposes; he paid himself compensation of almost \$450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of \$356,462.50 CDN and \$85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of \$34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And, there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs. Mr. Zimmerman has since deceased.

**(h) *Bosch v. Bosch***<sup>60</sup>

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<sup>60</sup> 2010 ONSC 1352.

Michael Bosch was married to Maria Bosch and they had two children, Alan and Charlotte. Michael, the father, had resided in a nursing home since 2005. Maria had acted as his guardian of property and his attorney for personal care. However, in 2009, Alan commenced two applications seeking orders declaring Maria incapable and appointing him as her guardian of property and personal care, and appointing him as father's guardian of property and personal care. At mediation, the parties entered into settlement agreement resolving litigation, subject to court approval. Pursuant to that agreement, the first application would be dismissed without costs and the second application would be settled by appointing mother and son as joint guardians of the father, and on other terms. As well, Maria would seek court approval of the settlement and her reasonable costs of the motion for approval would be paid by Michael's estate on a full indemnity basis.

Maria brought her motions for court approval of settlement. However, Justice D. M. Brown was not prepared to approve the settlement on the materials filed, due to several reasons, the first of which is important and is as follows (at paragraph 4):

(i) I have significant reservations about appointing two competing litigants as joint guardians for Michael's personal care. How, might I ask, will Michael's best interests be served by appointing as his joint guardians two persons who have engaged in litigation against each other? If there is a history of lack of co-operation between son and mother, I do not see how appointing them as joint guardians will suddenly change their relationship into one of harmony and co-operation. Absent clear evidence of the unalterable willingness of two disputing persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person, joint guardianship can become a minefield, with the incapable person the loser: *Chu v. Chang* [2009 CarswellOnt 7246 (Ont. S.C.J.)], 2009 CanLII 64816 para. 30; and 2010 ONSC 294 (Ont. S.C.J.) (CanLII), para. 4;

As can be seen, his Honour cited *Chu v. Chang* as support for this position. The other reasons were as follows: (ii) Maria and Alan did not file a joint Guardianship Plan signed by each; (iii) evidence of Michael's incapacity with respect to personal care decisions was not included in the motion records seeking approval of the settlement; and, (iv) Maria did not file any evidence about the costs of the motion to approve for which she seeks payment from Michael's estate, and neither party advanced any reasons why Michael's estate should pay for the legal costs of their dispute.

His Honour required further evidence on all of the issues and, therefore, adjourned the motions *sine die*. Of note, His Honour concluded at paragraph 5 that, “If Alan and Maria wish a court to consider their request for a joint guardianship, they must each file affidavits which demonstrate that they will stop arguing, start co-operating, and focus their efforts solely on the best interests of Michael.”<sup>61</sup>

**(i) *Ziskos v. Miksche***<sup>62</sup>

Johanna Miksche had no living relatives save an 87-year-old sister (Ursula Lill) and nephews who lived in Germany (Heinz, Johann, and Hannes). Until her death, she spent her later years living in a long term care centre. She appointed her friends Perry and Teresa as her attorneys for personal care and property and, when it became apparent to them that she was no longer capable of living independently, they sold her house. Shortly thereafter, her nephews visited her in the company of a lawyer of the law firm of Polten & Hodder, where Mrs. Miksche signed powers of attorney for property and personal care in favour of one nephew and her sister. The nephews also had her sign a retainer, retaining the law firm to act on her behalf, as well as theirs. Mrs. Mikshche later retained an alternate solicitor, Mr. Silverberg, who served a notice of change of solicitors in late November 2005.

Competing applications for guardianship of Mrs. Miksche's personal care and property ensued. The proceedings were case managed and the disputed matters were resolved on either consent or unopposed basis, save for the issue of costs. Applications for costs were brought by Mrs. Miksche's nephews and sister, her legal counsel (Mr. Silverberg), and the public guardian and trustee. The June 29, 2007 decision of *Ziskos v. Miksche* disposed of the claims and cross claims for costs, which claim for costs together totaled almost \$1.175 million and exceeded the total value of Mrs. Miksche's estate. The court found astonishing the fact that the claim for costs of one group of parties (the nephews) was for more than \$1 million—an amount that was almost 90% of the total costs claimed by all four sets of counsel, notwithstanding the fact that the within applications were never argued on the merits and, in fact, not a single motion was argued on the merits saved for the motions on costs. The court characterized the amount claimed by the nephews as “scandalous,” particularly given the circumstances known to the nephews and their counsel early on in the litigation.

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<sup>61</sup> *Supra* note 52 at para. 5.

<sup>62</sup> 2007 CarswellOnt 7162.

In the result, the nephews and sister were awarded \$35,500 to be paid by the estate, Perry and Teresa were awarded \$54,480 to be paid by the estate, Mrs. Miksche's lawyer was awarded \$30,173 in costs, and the public guardian and trustee was awarded \$11,034. However, the nephews were ordered to personally pay costs in the amount of \$28,000 to Perry and Teresa, \$10,000 to the deceased's lawyer (Mr. Silverberg), and \$3,100 to the public guardian. According to the Court, most of the work done by the nephews' counsel could not be justified. Moreover, as noted by the Court, "there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance."<sup>63</sup>

In support of its cost award, the Court noted that the nephews conducted the litigation in an oppressive manner by making unreasonable demands on the other parties and that both the nephews and the law firm ignored credible medical evidence that the deceased lacked capacity. As well, they maintained the unreasonable position that the deceased remained in the care facility against her will, and, consequently, incurred unnecessary costs. Resultantly, the Court found that the nephews were to be responsible for the unnecessary costs incurred by Perry and Teresa, which costs were the result of the nephews' conduct. In addition, the court found that there was no basis on which to challenge the retainer of the deceased's solicitor (Mr. Silverberg), and it was accepted that deceased's solicitor spent at least 50 per cent of his time dealing with unreasonable claims and positions taken by the nephews. It was also found that the allegations made by the nephews against the public guardian and trustee were serious and required considerable response.

An additional hearing took place before Justice D. M. Brown on September 19, 2009.<sup>64</sup> The key issue to be determined on the application for directions brought by the Estate Trustee of the estate of the late Johanna Miksche was whether the law firm of Polten & Hodder could, under the guise of seeking to enforce a facially-accepted offer to settle, obtain, in effect, a charging order against the interests of one of the beneficiaries, Ursula Lill, the deceased's sister and formerly their client. In his judgment of November 4, 2009, Justice Brown admonished the conduct of the law firm, Polten & Hodder, stating: "The conduct of the law firm, and in particular

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<sup>63</sup> 2007 CarswellOnt 7162 at para 74.

<sup>64</sup> 2009 CarswellOnt 6770.

of one of its principals, Eric Polten, has been scandalous and in breach of their duties as officers of this court.”<sup>65</sup> Justice Brown described the costs of Polten & Hodder as “staggering” and made a costs order in the matter. However, since the costs were being sought pursuant to Rule 15.02 (4), as well as because of the conduct of the proceedings by Polten & Hodder for costs of the proceedings, including those before the Court of Appeal, Justice Brown adjourned the issue of costs to oral submissions and directed the law firm to engage independent counsel to represent them at the hearing.

**(j) *Re Eronen***<sup>66</sup>

This case concerned a 78 year old man with memory troubles. His 63 year old wife, a personal care aid, provided information to the effect that her husband had difficulties tending to his personal and financial care needs. She brought an application to be appointed committee of the person and finances of her husband. She provided two affidavits of medical practitioners in support of her application, which were of limited assistance.

A few months earlier, Mr. Eronen had granted a power of attorney and a section 9 representation agreement to his daughter from a previous marriage. Reports from two medical practitioners had also been obtained at that point.

On the basis of the medical evidence presented to the Court, it found that Mr. Eronen did not have the requisite capacity to grant a power of attorney or representation agreement when he did. As a result, the power of attorney and representation agreements would not bear any weight on who the Court would appoint as committee. Finding that the wife, who had been taking care of her husband on a full-time basis and had been married to him for 20 years, was the most suitable candidate to be committee of his person and estate, the Court ordered that she be appointed as committee for her husband.

This case demonstrates that a Court will not automatically assume that a former power of attorney or representative should be appointed a person’s committee; to minimize risks of abuse, the Court will consider all of the circumstances of the case at hand in appointing a committee.

**(k) *Juzumas v. Baron***<sup>67</sup>

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<sup>65</sup> 2009 CarswellOnt 6770, at par. 2.

<sup>66</sup> 2010 CarswellBC 3777.

The decision of *Juzumas v. Baron* provides a tool kit for practitioners seeking to remedy a wrong created by a perpetrator of elder abuse. The case involves a scenario not unlike the stories many of us have come across involving an older adult who comes into contact with an individual who, under the guise of “caretaking”, moves to fulfill more of the latter part of that verb. The result: an older person is left in a more vulnerable position than that in which they were found.

This recent decision of the Ontario Superior Court of Justice involves a man, the plaintiff, who was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years.<sup>68</sup> Once a “lovely and cheerful” gentleman, the plaintiff was later described as being downcast and “downtrodden.”<sup>69</sup> The defendant’s infiltration in the plaintiff’s life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator.

The defendant “befriended” the respondent in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff’s initial reluctance.<sup>70</sup> The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.<sup>71</sup>

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow’s pension following his death, and for no other reason related to his money or property.<sup>72</sup> She promised to live in the home after they were married and to take better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared.<sup>73</sup> The plaintiff agreed.

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<sup>67</sup> 2012 ONSC 7220.

<sup>68</sup> *Ibid.* at para 1.

<sup>69</sup> *Ibid.* at paras 39 and 56.

<sup>70</sup> *Supra* note 59 at para 25.

<sup>71</sup> *Ibid.* at para 28.

<sup>72</sup> *Ibid.* at paras 26-28.

<sup>73</sup> *Ibid.* at para 28.

The defendant however, testified that the plaintiff had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, Justice Lang found otherwise.<sup>74</sup> The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous “caretaking” experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone’s Will on the basis that she provided that person with care is unenforceable.<sup>75</sup>

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff’s house (\$600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet with the plaintiff without the defendant being present.<sup>76</sup>

After the wedding ceremony, which took place at the defendant’s apartment, she dropped him off at a subway stop so that he would take public transit home alone.<sup>77</sup> The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant’s promise that she would provide better care to the plaintiff if they married, testimonies from the plaintiff’s tenant and neighbor, which were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff’s niece, as “‘abusive’, ‘controlling’ and ‘domineering’”.<sup>78</sup>

With the help of a plan devised over the course of the defendant’s consultation with the lawyer who had drafted the plaintiff’s Will made in contemplation of marriage, the defendant’s son drafted an agreement which transferred the plaintiff’s home to himself, no this mother to financially protect her. The “agreement” acknowledged that the plaintiff did not want to be

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<sup>74</sup> *Ibid.* at para 27.

<sup>75</sup> *Ibid.* at para 24.

<sup>76</sup> *Ibid.* at para 30.

<sup>77</sup> *Supra* note 59 at para 31.

<sup>78</sup> *Ibid.* at para 54.

admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.<sup>79</sup>

The plaintiff, the defendant and her son attended the lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that overall his evidence indicated that it had not been explained to the client with sufficient discussion, or understanding the consequences of the transfer of property and moreover, that he was in the court's words "virtually eviscerating the Will he had executed only one month earlier..."; that he did not meet with the plaintiff alone; and only met with the parties for a brief time.<sup>80</sup> Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.<sup>81</sup>

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. In fact, it seems the lawyer was under the impression that the defendant, and not the plaintiff, was the vulnerable party.<sup>82</sup>

The lawyer's notes likely read as a whole, but unknown on the reasons alone, indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.<sup>83</sup> In addition, Justice Lang found that the plaintiff had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on testimonial evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff<sup>84</sup>

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The

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<sup>79</sup> *Ibid.* at paras 68-69.

<sup>80</sup> *Ibid.* at paras 79-84.

<sup>81</sup> *Ibid.* at para 84.

<sup>82</sup> *Supra* note 59 at para 88.

<sup>83</sup> *Ibid.* at para 91.

<sup>84</sup> *Ibid.* at paras 63 and 92.



lawyer explained to the plaintiff that the transfer could not be reversed because it was “in the computer”<sup>85</sup>

When the plaintiff was injured with some severity, he was taken to the hospital. The hospital informed of the transfer of his house and release to a nursing home, instead, sent him home with two days a week of homecare.<sup>86</sup>

Notably, although the plaintiff initially sought a declaration that his marriage to the defendant was a nullity and void ab initio, he did not pursue this claim, instead seeking a divorce/dissolution of the marriage, which was granted in its place.

In considering the transfer of property, Justice Lang applied and cited McCamus’ Law of Contracts, which outlines a “cluster of remedies” that may be used “where a stronger party takes advantage of a weaker party in the course of inducing the weaker party’s consent to an agreement.”<sup>87</sup> Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: “if any of these doctrines applies, the weaker party has the option of rescinding the agreement”<sup>88</sup>

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which allows him or her to provide “a fully-informed and considered consent to the proposed transaction.”<sup>89</sup>

As for the doctrine of unconscionability, Justice Lang stated that the doctrine “gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power.”<sup>90</sup> The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

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<sup>85</sup> *Ibid.* at para 97.

<sup>86</sup> *Ibid.* at para 104.

<sup>87</sup> *Supra* note 59 at para. 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.

<sup>88</sup> *Ibid.* at para 8.

<sup>89</sup> *Ibid.* at para 11.

<sup>90</sup> *Ibid.* at para 13.

In addressing the defendant's claim of quantum meruit for services rendered, Justice Lang found that the period during which services were rendered could be distinguished as two categories: pre-marriage and post-marriage.

During the pre-marriage period, the defendant undertook to care for the plaintiff without an expectation or promise of remuneration, and persuaded the plaintiff to compensate her with a monthly income. Justice Lang found that no additional remuneration could be claimed for that period.

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had agreed to do so.<sup>91</sup> For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.<sup>92</sup> Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary, and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle that restitutionary relief allows a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."<sup>93</sup> In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behaviour is such that it taints the entire relationship."<sup>94</sup> As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her quantum meruit claim.

Substantial costs were awarded in favour of the older adult plaintiff.<sup>95</sup>

This case provides helpful guidance in the area of elder abuse, as it demonstrates the tools of contract law and equity afforded to the court, in order to remedy a wrong incurred in the context of financial abuse. This case provides what is, in cases of financial abuse, a rarity: an uplifting

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<sup>91</sup> *Ibid.* at para 129.

<sup>92</sup> *Supra* note 59 at para 128.

<sup>93</sup> *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1987), 44 DLR (4<sup>th</sup>) 592 (CA) at 661.

<sup>94</sup> *Ibid.* at para 142.

<sup>95</sup> 2012 ONSC 7332 (CanLII).

ending. In this case, it is not a family member or acquaintance who brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult himself who, with the help of his neighbor, was able to seek justice and reverse some of the defendant's wrongdoing.

It is not every case of elder abuse that involves an older adult who is able to, or capable of being present during court proceedings to represent the facts as he or she recalls them. In addition to its review of the legal concepts that are available to counsel seeking to remedy the wrongs associated with predatory marriages, this case demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

Some interesting on-line blog postings concerning the evidence of neighbours/tenants supporting Mr. Kazys Juzumas including affidavit evidence, can be accessed at: <http://www.thethoughtvox.com/?p=9155>

***(I) Sutherland v. Dorland, 2012 BCSC 615***

This is a recent case coming out of British Columbia, respecting Eileen Fountain, a woman who had died at the age of 90 previous to the commencement of these proceedings. Mrs. Fountain had two daughters: Marilyn Dorland and Julie Sutherland. The latter was appointed her committee of the person and property (similar to Ontario's POAs) prior to her death, and initiated this action in that capacity. The action was to recover just over \$150,000 from Ms. Dorland and just under \$30,000 from her nephew, Donald Rendall.<sup>96</sup>

Between 1999 and 2003, Mrs. Fountain wrote a number of cheques to help her daughter, Ms. Dorland and her grandson, Ms. Dorland's son, Mr. Rendall. Ms. Dorland and her common law spouse had supported themselves mainly by having recourse to social assistance for most of their adult lives. Over the course of four and a half years, Mrs. Fountain wrote approximately 35 cheques ranging in amount from \$500 to \$25,000 for Ms. Dorland's benefit.<sup>97</sup>

At trial, Ms. Dorland was inconsistent in her description of why these cheques were given, but insisted that her mother had written them out of her own free will.<sup>98</sup> Mrs. Sutherland argued that the cheques had been written when her mother lacked capacity or that, failing that, they had not

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<sup>96</sup> *Sutherland v. Dorland*, 2012 BCSC 615 at para 1.

<sup>97</sup> *Ibid.* at para 2.

<sup>98</sup> *Ibid.* at para 12.

been written out of her own free will; that they had been made under circumstances of undue influence.<sup>99</sup>

In his analysis, Barrow J. discussed the appropriate law that applies to gifts between family members:

The first legal concept relevant to the analysis is that of the resulting trust. As explained by Rothstein J. in *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.) at paragraph 20:

*A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner...*

The law presumes a resulting trust in certain situations. Again, as explained by Rothstein J. at paragraph 24 of *Pecore*: (...) where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended... To rebut the presumption, the transferee must show on a balance of probabilities that the transferor had an intention contrary to or inconsistent with the intention the law presumes in relation to gratuitous transfers (*Pecore* at paragraph 43).

To the extent that the cheques in question were given without consideration, the onus is on Ms. Dorland and Mr. Rendall to rebut the presumption of resulting trust. Ms. Dorland and Mr. Rendall argued that the cheques were gifts. In accordance with the law of resulting trusts, they must establish that Mrs. Fountain had the capacity to make a gift and that she exercised that capacity in writing the cheques currently in dispute.

Barrow J. went on to state:

The court will set aside a gift if it is procured by undue influence (*Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.) at paragraph 23). Undue influence may be established in one of two ways: it may be positively proven or it may be presumed. **Whether it will be presumed depends on whether "the potential for domination inheres in the nature "of the relationship between the parties to the transfer (Geffen at paragraph 42). Once the presumption arises, the onus shifts to the recipient or donee of the property to rebut it by showing that the transaction was the product of the donor's "full, free and informed thought" (Geffen at paragraph 45). Discharging this burden "may entail a showing that no actual influence was deployed in the particular transaction" (Geffen at paragraph 45). Finally, the size of the impugned gift may be "cogent evidence going to the issue of whether influence was exercised" (Geffen at paragraph 45).**<sup>100</sup>

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<sup>99</sup> *Ibid.* at paras 2-3.

<sup>100</sup> *Supra* note 88 at para 64 [emphasis added].

When considering the gifts made from Mrs. Fountain to Mr. Rendall, Barrow J., appears to have considered her actions through the lenses of a reasonable person: Mrs. Fountain provided Mr. Rendall with a number of cheques after he had recently been laid off from his work due to the closure of the plant which was his place of employment. Mr. Rendall has three children for whom he needed to provide during this period. Mr. Rendall faced financial hardship both as a result of his unemployment, and because he had recently become separated, which meant he had to furnish his mobile home after his wife took most of the furniture when she left him. For a brief time after losing his job, Mr. Rendall had a gambling problem. Part of the money given to him by his grandmother was used to repay his gambling debts.<sup>101</sup>

Barrow J., found that most of the money that had been given to Mr. Rendall was, in fact, used to buy furniture for his new home and to otherwise assist with living expenses for himself and his three children, who had returned to live with him after living with their mother for a short while. Although a portion of the gratuitous transfers that were given to him by his grandmother were used to assist with his gambling debt, Barrow J., found that Mrs. Fountain had been aware of this fact and had nevertheless chosen to help her grandson. As a result, Barrow J., chose not to interfere with these gratuitous transfers.<sup>102</sup>

As such, it seems courts will try to balance the need to protect older incapacitated adults' estates with a reasonable amount of deference to the older adults' wishes when these can be ascertained.

It is interesting to note the effect of credibility on Barrow's J., findings. The Justice found that Mr. Rendall's testimony matched the information presented in his affidavits, and a result relied on the evidence he gave. Barrow J., however, did not feel he could rely on Ms. Dorland's testimony, as he found it to be inconsistent both internally and in comparison to her affidavit evidence.<sup>103</sup>

**(m) Valente v. Valente 2014 ONSC 2438**

In this recent Ontario case, a daughter was removed as attorney for property for her elderly mother. The mother had been diagnosed with Alzheimer's disease and dementia. She also suffered from diabetes, congestive heart failure, hypertension, osteoporosis, and dyspepsia,

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<sup>101</sup> *Ibid.* at para 80.

<sup>102</sup> *Supra* note 88 at para 82.

<sup>103</sup> *Ibid.* at para 37.

among other ailments. Since her husband's death, the mother resided with her daughter and her family, including a teenage son. On an application brought by another of the elderly woman's five children for the removal of the daughter as attorney and an appointment of a guardian, video evidence was submitted of the grandson manipulating the elderly and vulnerable mother into "acting" for the camera including, manipulating her into: chugging or drinking a beer, getting her to repeat swear words, getting her to hit people or objects with a slipper and getting her to repeat derogatory and racist slurs.<sup>104</sup>

Evidence was also submitted that the daughter and her husband had made a number of unexplained financial transactions, using the mother's funds, including: taking vacations, purchasing a \$50,000-\$60,000 Escalade, a \$20,000 diamond ring, an eight person trip to Jamaica, a \$30,000 yellow diamond ring, a new bath tub, home renovations and a Harley Davidson motorcycle. The list was not exhaustive.<sup>105</sup>

Justice Barnes found that this was "strong evidence of misconduct, specifically financial misappropriation on the part of the [daughter and husband], to warrant the removal of [the daughter] as an attorney for [the mother's] personal care and property."<sup>106</sup> The Court went on to appoint another daughter and son as joint guardians of their mother for both personal care and property.

#### **H. Mandatory Financial Reporting**

The absence of mandatory financial reporting on the part of attorneys may have played a role in the abuse perpetrated by the attorneys in the cases reviewed in this paper. The Law Commission of Ontario's (LCO) 2012 Report on Older Adults suggests that there may be limits to the protections afforded by Ontario's attorney for property model of substitute decision making.<sup>107</sup> The LCO focused on the absence of mechanisms for monitoring attorneys under power of attorney for property and states that it is impossible to know how this substitute decision making authority is being used (or, as the within cases illustrate, misused).<sup>108</sup>

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<sup>104</sup> 2014 ONSC 2438 at para. 19.

<sup>105</sup> *Ibid* at para. 28.

<sup>106</sup> *Ibid.* at para. 32.

<sup>107</sup> Law Commission of Ontario, *A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice* (Toronto: April 2012) at page 236 ["LCO Report"] available online at the LCO's website: < <http://www.lco-cdo.org/en/older-adults-final-report> >.

<sup>108</sup> *Ibid.*

This issue is not particular to Ontario; the Alberta Law Reform Institute recommends strengthening the transparency and accountability of attorneys for property in part by mandating additional safeguards.<sup>109</sup> Perhaps not coincidentally, Courts in Ontario seem to take it for granted that substitute decision making ought to include some form of mandatory financial reporting. This perspective is apparent in the context of guardianship appointments. As with attorney for property appointments, the SDA also governs guardianship. Guardianship is another form of substitute decision making which essentially mirrors attorney for property appointments, duties and obligations, with one significant difference: guardians are court-appointed. By contrast, attorneys are appointed by the granting of an executed Continuing Power of Attorney for Property document. In ordering guardianship appointments, Courts routinely order guardians to pass their accounts periodically despite the fact that no such requirement is mandated by the SDA.

Having reviewed and considered select federal and provincial statutes that affect older adults in Canada and whether and to what extent those statutes prevent financial abuse and exploitation of older adults, it may be that the protective provisions are partially diminished by other social factors. For example, older adults often rely on their abusers for their care and support, which may prevent many victims from reporting their abusers to the police. There appears to be ongoing tension between our theoretical notion of who ought to be trusted to carry out the important role of financial substitute decision making, and whether that substitute decision maker ought to report periodically on the management of the grantor's property. On the one hand, the SDA enables individuals to grant authority to their family members as attorneys for property without any mandatory financial reporting; on the other hand, our Courts do not grant family members comparable immunity from reporting in court-ordered guardianship appointments. Developing case law indicates an apparent need to revisit the substitute decision-making regime to develop more effective tools in preventing the financial abuse and exploitation of older adults.

There are widespread changes currently being contemplated both federally and provincially that may curb the incidence of financial abuse and exploitation. In the criminal law realm (discussed below), *Criminal Code* amendments include additional aggravating factors for the purposes of protecting older adults, which is a positive development; the extent of its utility remains to be

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<sup>109</sup> Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (2003) as cited in the LCO Report, *supra* note 39, at p. 236.

seen. Provincial laws are also changing. For example, with respect to substitute decision making regimes, the LCO's Report focused on the needs of older adults and presented a framework for identifying ways in which existing laws can be improved insofar as they impact, for better or worse, the lives of older adults.<sup>110</sup> That framework may serve as an impetus for the re-evaluation of the SDA in the near future. Indeed, the SDA was referenced in the report as an example of a statute that may have unintended negative consequences on the lives of older adults.<sup>111</sup>

Canada has a robust statutory substitute decision making framework that is, generally speaking, useful in the prevention of abuse and exploitation of older adults.<sup>112</sup> Indeed, it has been a model for other countries of recent application, including Ireland.<sup>113</sup> It will be interesting to see if the considered and ongoing changes of inter-related legislation will reduce the incidence of financial abuse perpetrated through the misuse and abuse of the current substitute decision making regime.

## **G. Criminal Remedies and Case Law**

While there is not one specific offence of "elder abuse" or "elder financial abuse" created by the *Criminal Code*, there are various sections that an abuser could be charged under for elder financial abuse, including the following:

- Theft by a Person Holding a Power of Attorney (s. 331);
- Theft (s. 322);
- Criminal Breach of Trust (Conversion by Trustee) (s. 336);
- Forgery (s. 366);
- Extortion (s.346);
- Fraud (ss. 386-388); and
- Neglect: Failure to Provide the Necessaries of Life (s. 215) and Criminal Negligence (s. 219).

## **Review of Criminal Cases**

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<sup>110</sup> LCO Report, *supra* note 38.

<sup>111</sup> *Ibid*, pp. 135 to 137.

<sup>112</sup> See CBA National Elder Law Concordance tables on cross-provincial legislation: [http://www.cba.org/CBA/sections\\_wills/main/Tables\\_2013.aspx](http://www.cba.org/CBA/sections_wills/main/Tables_2013.aspx)

<sup>113</sup> *Assisted Decision-Making (Capacity) Bill* 2013.



Below is a review of recent criminal cases organized by the offence under which the accused was charged.

**Theft by a Person Holding a Power of Attorney (s. 331)**

The full provision of s.331 of the Criminal Code reads:

*s.331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.*

Interestingly, in researching this paper the only reported case that could be found regarding this section of the *Criminal Code* was the 2011 case of *R. v. Kaziuk*<sup>114</sup> (discussed below). However, in actuality the accused was not even charged with this offence. Instead the accused was charged under ss.322 and 368, the regular theft and fraud provisions. He had also originally been charged under s.336 with committing a "*Criminal Breach of Trust*", ultimately this charge was dismissed at the request of the Crown "*on the basis that the wrong section of the Criminal Code had been laid. The offence should have been laid under s. 331, theft by a person holding a Power of Attorney.*"<sup>115</sup> At the conclusion of the trial Justice Baldwin "*found that the s.331 offence had been proven by the Crown beyond a reasonable doubt*" and that even though the accused was not charged with this offence it was an "*aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code*".<sup>116</sup>

**(a) *R. v. Kaziuk, 2011 ONCJ 851***

Roman Kaziuk is the only child of Feliska Kaziuk who was 88 years old at the time of this trial in 2011. Mrs. Kaziuk's husband and Roman's father died in 2000. At this point, Mrs. Kaziuk was well off financially, owning three mortgage free properties including a residence in Miami, Florida as well as significant savings in her bank account of over one million dollars. At the end of this sad story, due to the actions of her son, Mrs. Kaziuk was living in a homeless shelter run by the Salvation Army without a penny to her name.

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<sup>114</sup> 2011 ONCJ 851

<sup>115</sup> *Ibid.* at para. 2.

<sup>116</sup> *Ibid.* at para. 3.

On November 7, 2006 Mrs. Kaziuk signed a Power of Attorney for Property naming Roman as her attorney. At the end of 2008, Roman's home was noted for being in arrears on mortgage payments so he obtained a \$20,000.00 loan from a lawyer. As collateral for that loan, Roman used the POA to provide the lawyer with a mortgage on one of the properties owned by his mother. Evidence also showed he had placed other mortgages on her properties including one for \$98,000.00 and another for \$65,000.00, by using the POA.

The issue at trial was whether or not Mrs. Kaziuk gave her son permission to obtain the loans by putting mortgages on her properties.

On September 17, 2009, Mrs. Kaziuk provided a sworn videotaped statement to a police officer stating that she never gave permission to Roman to put any mortgages on her property. However, Mrs. Kaziuk recanted her statement and at trial testified that she did indeed give permission. Due to physical ailments (significant eyesight and hearing decline), Mrs. Kaziuk was unable to adopt her sworn statement to the police at the trial. Prior to admitting the video-taped statement into evidence, a *voir dire* ruling was made based on the principled exception to the hearsay rule: out of court statements may be admitted into evidence for the truth of their contents where it is established, on a balance of probabilities, that the evidence is necessary and reliable. The Court allowed the videotaped statement into evidence based on the following factors:

- Mrs. Kaziuk's trial testimony directly contradicted her video statement. This inconsistent version, coupled with the impossibility of challenging her on the inconsistency, established necessity;
- The quality of Mrs. Kaziuk's testimony demonstrated that she was confused as to various facts in the past and present, and that she was unable to maintain a focus on the discussion at hand. She was incapable of giving reliable present-time evidence;
- Her inability to hear and see adequately, without any alternative means of communication, prevented her from giving present-time evidence; and
- Crown and Defence counsel agreed that the necessity criteria had been met.<sup>117</sup>

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<sup>117</sup> *Supra* note 96 at para. 70.

The Court then ruled that the sworn video-taped statement met the ultimate test of reliability and was proof of the truth of its contents beyond a reasonable doubt. This was based on the following factors:

- The statement was video-taped so Mrs. Kaziuk's tone and demeanour could be observed. She was visibly distraught about what her son had done with her properties;
- The statement was taken under oath and she knew she was being video-taped;
- The statement was taken shortly after the discovery of the fraud and it was apparent that Mrs. Kaziuk's cognitive and physical abilities subsequently deteriorated significantly; and
- The accused is her only child and her love for him was clear in court. She indicated that she had willingly financially assisted him on numerous occasions in the past, in very substantial amounts. There was no motive for her to fabricate a story that on this occasion he stole from her without her permission.<sup>118</sup>

The Court also noted that Mrs. Kaziuk recanted her statement after visiting the accused in jail. The Court found that Mrs. Kaziuk had been influenced by the accused to falsely reconstruct the events in question. Mrs. Kaziuk also appeared "fixated on the idea that everyone in her world, except for Roman, [was] out to take all her money."<sup>119</sup>

The Court held that the Crown had proven its case beyond a reasonable doubt.

The sentencing proceedings were held between June and November of 2011 and a sentencing decision was released on January 24, 2012. Even though the Crown only sought a total sentence of 3-4 years incarceration, Justice Baldwin sentenced Kaziuk to the maximum **10 year** sentence for the theft over \$5000.00 charge and a concurrent **10 year** sentence for the fraud charge. The commentary provided by Justice Baldwin provides useful guidance for future cases in sentencing these types of offences.

In determining the sentences imposed, the Court took into consideration additional crimes of dishonesty Roman perpetrated against his mother and the lawyer from whom he obtained the loans, and attempts to obstruct justice, even though the accused was never formally charged with these offences.

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<sup>118</sup> *Supra* note 96 at para. 73.

<sup>119</sup> *Ibid.* at para. 77.

The Court also looked at the circumstances of the victim and noted that in 2009 Mrs. Kaziuk had over one million dollars in her bank account, a car and credit cards. Due to the actions of her son, she no longer had a car, any money in her bank account or any credit cards because he took everything from her. On September 12, 2011 she was evicted from her condominium because of the fraudulent mortgages her son put on it and the banks seized her other properties. At the time of the sentencing decision she resided in a residence for homeless people run by the Salvation Army. However, through the efforts of the police officers concerned with Mrs. Kaziuk, the Office of the Public Guardian and Trustee have since become involved in Mrs. Kaziuk's case.<sup>120</sup>

In reviewing the circumstances of the offender, Justice Baldwin observed that he had a total of 69 convictions of crimes of dishonesty, including, fraud, theft, uttering forged documents etc. Justice Baldwin also found the following aggravating factors on sentencing:

- "This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim."<sup>121</sup> (para. 85)
- "Not even the notorious fraudster Bernie Madoff was guilty of destroying his own mother as Mr. Kaziuk has repeatedly done."<sup>122</sup> (para. 101)
- "Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could."<sup>123</sup>(para. 96)
- "Mrs. Kaziuk is homeless due to the offender's actions. He has wiped her out financially and broken her heart."<sup>124</sup> (para. 89)
- "In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm."<sup>125</sup> (para. 102)

Mr. Kaziuk appealed.<sup>126</sup> The Court of Appeal dismissed the conviction part of the appeal, but held that the sentence proffered "was excessive" having regard to the fact that the trial judge referenced in the sentencing considerations another offence that was not proven at trial, and "having regard to sentences imposed in similar cases, and the fact that the appellant had some

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<sup>120</sup> *Supra* note 96 at para. 51.

<sup>121</sup> *Ibid.* at para 85

<sup>122</sup> *Ibid.* at para 101

<sup>123</sup> *Ibid.* at para 96

<sup>124</sup> *Ibid.* at para 89

<sup>125</sup> *Ibid.* at para102

<sup>126</sup> *R. v Kaziuk* 2013 ONCA 217.

39 months left to serve on a prior offence.”<sup>127</sup> The Court accordingly reduced the 10-year sentence to 8 years, but in doing so, observed, “[w]e agree with the trial judge’s observations about the offender.”<sup>128</sup>

While the theft and fraud perpetrated against the accused's own mother in this case is severe, it is highly unlikely that this fact pattern is unique. Although the stiff maximum penalty as imposed by Justice Baldwin was reduced on appeal, hopefully this case will act as a deterrent to attorneys under POAs from abusing their position of trust.

**(b) *R. v. Taylor***<sup>129</sup>

The case of *R. v. Taylor* is another notable example of an abuse of trust and an aggravating factor considered in sentencing.<sup>130</sup> Ms. Dokaupé, now deceased, was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable. She employed a caregiver whom she relied upon for her daily needs. At the caregiver’s suggestion, Ms. Dokaupé executed a power of attorney for property in her favour. Ms. Dokaupé also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the attorney for property to obtain a bank card for Ms. Dokaupé’s savings account. She then drained the bank account of \$126,000, leaving only \$17,000. The caregiver used that money for her own benefit.

The caregiver subsequently left Ms. Dokaupé’s employment, and when Ms. Dokaupé’s new caregiver read Ms. Dokaupé’s bank statements, she told Ms. Dokaupé what she saw and called the police. The police charged the caregiver with fraud and obtained expert reports confirming that Ms. Dokaupé was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupé died before the trial took place. In her absence, the Crown relied on Ms. Dokaupé’s witness statements which had been recorded by the police. The judge accepted Mrs. Dokaupé’s evidence and the expert’s evidence and sentenced the accused to 21 months in prison.

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<sup>127</sup> *R. v. Kaziuk* 2013 ONCA 217, *supra* note 109 at paras. 3 and 4.

<sup>128</sup> *Ibid* at para. 4.

<sup>129</sup> 2012 ONCA 809.

<sup>130</sup> *R. v. Taylor*, 2012 ONCA 809 (CanLII).

The caregiver appealed her conviction on the grounds that Ms. Dokaupé's recorded statements were hearsay and inadmissible, and on the basis of mitigating factors that should have reduced the severity of the sentence. In dismissing the appeal, Justice Rosenberg wrote:

...this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over \$126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.<sup>131</sup>

Leave to appeal was granted, but was ultimately dismissed.<sup>132</sup>

**(c) *R.v. Zimmerman (unreported)***

This case came through to our offices from an article in the Hamilton Spectator. As this case is unreported it is unknown whether the accused was charged under the simple "theft" provision or whether under "theft by a person holding a power of attorney." The case involved a man named Jurgen Fritz Zimmerman, who was 64 years old, who had been appointed his father's attorney pursuant to a power of attorney for property in 2007 after both his father and stepmother were hospitalized. The couple was later placed in a long-term care facility. Using the power of attorney, Jurgen Zimmerman withdrew almost all of the couples' life savings from their various bank accounts, which savings amounted to over \$394,000 Canadian dollars as well as \$12,000 US dollars, and sold the couples' home to his own son. It was the couples' grandchildren that eventually reported the matter to the police.

Jurgen Zimmerman who was given a nine-month conditional sentence, including six months of house arrest and a three-month curfew (he is required to wear an electronic-monitoring bracelet), after pleading guilty to attempting to appropriate his parents' life savings pursuant to a power of attorney. Jurgen Zimmerman was also ordered to pay \$51,805.00 within ten (10) days. Jurgen Zimmerman's lawyer was quoted as saying that Jurgen Zimmerman, a retired truck dispatcher, was not very knowledgeable about this role as an attorney acting pursuant power of attorney.

**Theft**

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<sup>131</sup> *R. v. Taylor* 2012 ONCA 809 at para. 36.

<sup>132</sup> *Ibid* at para. 37.

**(d) R. v. Webb<sup>133</sup>**

Terence Webb was charged with stealing a sum of money exceeding five thousand dollars contrary to s.322 of the *Criminal Code*. Webb pleaded guilty to the offence and a joint submission was put forward by the Defence and the Crown for sentencing.

The facts of this case are quite sad and likely not uncommon. The accused (43 years old) was the nephew of the elderly victim, George Swan, and the sole surviving beneficiary of his estate. In February 2009 Webb obtained a Power of Attorney for Property over his uncle's affairs. Within a month Webb used the POA to place Mr. Swan's residence in joint tenancy with him, and then shortly thereafter placed Mr. Swan in a private nursing care home signing a contract as POA. The care home only received two payments from Webb. Webb then sold his uncle's house for \$125,000.00 and at the same time removed the remaining amount of money Mr. Swan had in his bank accounts. Webb also took his uncle's CPP and OAP monthly benefits. After his uncle was placed in the nursing home Webb had no more contact with him. According to a report dated May 7 2009 Mr. Swan was suffering from a severe form of chronic dementia likely due to Alzheimer's disease. Webb used the money he stole from his uncle to start up a "smoothie" business in British Columbia.

Mr. Swan was left with no money and the home care owner covered his personal care items (such as razors, hair cuts and foot care) out of her own pocket. Eventually the home care owner notified the Office of the Public Guardian and Trustee ("PGT") and the PGT was appointed as Mr. Swan's guardian. The PGT commenced a civil lawsuit (no reported decision could be found) and the accused was charged with theft.

At the sentencing hearing the accused professed his love for his uncle and presented a cheque in court representing the balance of the entire amount stolen so that full restitution was made.

The Court rejected the joint submission on sentencing, negotiated between the Crown and the defence, for a 12 month conditional sentence whereby the accused would be under house arrest for the first two months and have a curfew of 11pm for the subsequent 10 months.

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<sup>133</sup> 2011 SKPC 181.

The Court instead imposed a longer conditional sentence of 18 months with the first three months being house arrest the subsequent 15 months with a curfew and 100 hours of community service. In rejecting the joint submission and imposing its own sentence, the Court took the following factors into consideration:

- The Court found that notwithstanding the mitigating factors, the term and conditions proposed by the prosecution and defence did not constitute "a fit and proper sentence" in this particular case and to accept it would have been contrary to the public interest;
- The accused was an attorney under a Power of Attorney and as such was in a position of trust *vis a vis* the victim;
- The victim was in a completely vulnerable state mentally incapable of attending to his own needs;
- The victim was left totally destitute by the accused without any means of support including even his OAP and CPP benefits;
- The theft was "calculated and ruthless and displayed an extremely callous disregard for the certain dire consequences that would follow for his hapless uncle";
- The sole motivation for the theft was "pure greed and avarice. . . clearly this was a crime of opportunity whereby the accused would have instant access to his uncle's funds rather than leaving this to chance as sole beneficiary of his estate.";
- Youth and elderly victims are the most vulnerable in our society and are deserving of our greatest vigilance and protection.<sup>134</sup>

The Court also observed that had full restitution not been made actual jail time would have been the appropriate sentence.

### **Fraud (s.380)**

#### ***(a) R. v. Cousineau***<sup>135</sup>

The British Columbia Court of Appeal granted leave to appeal the sentence of Mr. Cousineau, who was convicted of three counts of fraud under section 380(1), and was sentenced to 18 months in jail and two years' probation.<sup>136</sup> The advanced age and vulnerability of his victims was

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<sup>134</sup> *R. v. Webb* 2011 SKPC 181 at para. 12.

<sup>135</sup> 2013 BCCA 289.

<sup>136</sup> *R. v. Cousineau*, 2013 BCCA 289, 107 WCB (2d) 487 [*Cousineau* BCCA].



considered as an aggravating factor in the court's sentencing.<sup>137</sup> Mr. Cousineau was employed by a seniors' facility to market the residence. On three occasions he met with potential residents and pocketed their rent deposits. In addition to the penal sentence, the court at first instance also ordered Mr. Cousineau to repay \$7,357.00 and to pay victim surcharges in the amount of \$300.00.<sup>138</sup> Mr. Cousineau's appeal related only to the monetary components of his sentence.<sup>139</sup> Interestingly, leave appears to have been granted on the basis of a technicality. Mr. Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order refusing leave to appeal, so leave was granted.<sup>140</sup> Regardless, it would be surprising if Mr. Cousineau succeeds on appeal. No appeal decision has yet to be released.

**(b) *R. v. Owen***<sup>141</sup>

In *R. v. Owen* a 57 year old son was convicted of, among other things, defrauding his elderly mother who suffered from Alzheimer's, by forging a deed and transferring a condo parking spot into his own name (he thought he was transferring the whole condominium but inadvertently he transferred only the parking spot).

The son had lived with his mother from 1989 to 2009 and was the mother's attorney under a power of attorney for property and looked after all of his mother's finances. The son was arrested in June of 2009 for assaulting his sister and mother. After that, the mother granted the sister power of attorney for her personal care and property. The sister became suspicious of her brother's handling of their mother's finances once she viewed her mother's financial statements. When she completed a search on the title to her mother's condominium she discovered the forged deed and transfer of the parking spot into her brother's name. It also came to light that the son had been cancelling his mother's doctors' appointments,<sup>142</sup> attempted to steal her pension cheques,<sup>143</sup> and had made "heavy withdrawals" from a joint account he had with her.<sup>144</sup>

The Court stated:

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<sup>137</sup> *R. v. Cousineau*, 2013 BCSC 947 at 11 and 25 [*Cousineau* BCSC].

<sup>138</sup> *Ibid* at 59; *Cousineau* BCCA, *supra* note 18 at 9.

<sup>139</sup> *Cousineau* BCCA, *supra* note 18 para 7.

<sup>140</sup> *Ibid.* at para 9 and 15.

<sup>141</sup> 2014 ONSC 748.

<sup>142</sup> 2014 ONSC 748 at para.20.

<sup>143</sup> *Ibid* at para. 15.

<sup>144</sup> *Ibid.*

It is in all of these circumstances that I conclude the accused committed the offences, including the perjury by affidavit, for his intended personal benefit and financially abused an elderly family member. As such, he committed a serious breach of trust, a serious breach of his fiduciary duty to his mother. All of these factors serve to highlight the seriousness of his actions and to aggravate sentence: s. 718.2(a)(iii) C.C.; R. v. C.D., [2000] O.J. No. 1668 (CA).<sup>145</sup>

The son was sentenced to 18 months incarceration.<sup>146</sup>

### **Neglect: Failing to Provide the Necessaries of Life (s. 215)**

The full s. 215 of the *Criminal Code* states:

215. (1) Every one is under a legal duty:

...

(c) to provide necessaries of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessaries of life.

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

...

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

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

### **(e) *R. v. Kos-Rabcewics-Zubkowski, 2010 ONCJ 780***

This case provides a good overview of the elements of the charge of failing to provide the necessaries of life and the standards the Court will impose.

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<sup>145</sup> *Ibid.* at para. 40.

<sup>146</sup> *Ibid.* at para. 62.

In this case, Monica Kos was charged with assault and failing to provide the necessities of life for her elderly mother Halina Kos. The questions at the trial to determine the elements of a charge under s.215 are as follows:

- i) Is there proof beyond a reasonable doubt that Halina Kos was unable, by reason of age, illness, or insanity to withdraw herself from the charge of Monica Kos?
- ii) Is there proof beyond a reasonable doubt, that the life of Halina Kos was endangered or that her health was likely to be injured permanently, by the failure of Monica Kos to provide the necessities of life?

The leading case on this offence is the case of *R. v. Naglik*, [1993] 3 S.C.R. 122 in which a parent was charged with not providing the necessities of life to a child (the more common fact scenario of when this charge is laid).

In *Naglik* the Supreme Court of Canada held that s.215 "punishes a *marked departure* from the conduct of a reasonably prudent parent in circumstances where it was *objectively foreseeable* that the failure to provide the necessities of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health of a child." [emphasis added]<sup>147</sup>

Since 1996, when Halina had a stroke, Halina appointed her daughter as an attorney under a POA for Property and a POA for Personal Care. The evidence showed that the daughter had actually been supporting herself financially with Halina's investments, house and other real estate which she had sold, unknown to her mother. The evidence also revealed that each day the daughter forced the mother out of her own house to sit on the front porch all day long in both winter and summer. Neighbours observed that the elderly woman would be sitting in a white plastic chair and would not be wearing a hat, scarf or gloves in the winter.

The daughter admitted that she had care of her mother at the material time. However, the daughter denied that she had a duty to provide the necessities of life to her mother as she was not being detained and was free to go back to a nursing home that she had once been living in. Based on the medical evidence presented at the trial the Court concluded that Halina Kos did not have the capacity, mentally or physically to extricate herself from the care of her daughter.

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<sup>147</sup> *R. v. Naglik*, [1993] 3 S.C.R. 122 (CanLII) at p.12

The Court also held that based on "the evidence of neglect, i.e. the long periods of time that the mother was outside in the heat and he cold by the neighbours, the filthy house, the rotting food, the urine soaked mattress" that the "danger of freezing, frostbite or other injury was foreseeable and that Monica Kos is guilty. . .of failing to provide the necessaries of life to Halina Kos and thereby endangering her life or at a minimum of putting her in conditions that were likely to cause or endanger her health permanently."<sup>148</sup>

While there is no reported sentencing decision for this case, in a civil claim between Ms. Kos and her lawyer,<sup>149</sup> the Court revealed that Monica Kos was sentenced to 22 days of imprisonment with pre-trial custody of 8 days.

**(f) *R. v. Nanfo, 2008 ONCJ 313***

In this case, Mary Nanfo pleaded guilty to a charge under section 215 of the *Criminal Code* for failing to provide the necessaries of life to her mother who was under her charge. While there was no indication in the decision that she was an attorney under a power of attorney for her mother, it was clear that the daughter was reliant upon her mother's pension and used it to support herself.

Mary Nanfo was a 44 year old single woman who always lived at home with, and was dependant upon her parents. When her parents became older and her father died, a role reversal happened whereby her mother, Maria, became the dependant and Mary became the caregiver.<sup>150</sup> Maria was diagnosed with dementia, had suffered heart attacks and her vision had deteriorated to the point of almost blindness. A gerontologist testified that Maria's care would have been a "challenge" to anyone and that she would have required full time care. Instead of seeking that care however, the daughter attempted to provide that care herself.<sup>151</sup>

Maria died in late 2006 of a heat attack and the daughter waited at least 24 hours before she called the police and coroner so that she could attempt to clean up the house that they had shared. When officials arrived they found the mother covered in bed sores and fecal matter. The house was appalling, particularly the upper level where the mother lived, with among other

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<sup>148</sup> *R. v. Kos-Rabcewics-Zubkowski* 2010 ONCJ 780 at paras.37 and 55.

<sup>149</sup> *Richer & Richer v. Kos* 2014 CanLII 48549 (ON SCSM).

<sup>150</sup> *R. v. Nanfo*, 2008 ONCJ 313 at para. 2

<sup>151</sup> *Ibid.* at para.3-4

things, feces covering the floor, the walls, and garbage piled high in the rooms. Flies were thick in the air.<sup>152</sup>

The Crown's case was that the daughter's neglect endangered the mother's life and health even if it did not ultimately cause or contribute to her death. The neglect included failure to provide the most basic hygiene, rudimentary safety, supervision, and required health care.

In deciding on a sentence, Justice Duncan commented that "a sentence of imprisonment is appropriate and necessary in order to properly reflect the gravity of the offence, to denounce the abuse of elderly helpless parents and to satisfy the principles of deterrence."<sup>153</sup> Ultimately, after taking into consideration Mary's own dependence upon her parents for the majority of her life and her diagnosis of depression, Mary was sentenced to "imprisonment of one year". However, the Court directed that "it be served in the community" with the mandatory conditions that she be on house arrest every weekend and that she will perform 100 hours of community service.<sup>154</sup>

**(g) *R. v. Peterson, 2005 CanLII37972 (ONCA)***

In this case a son was charged and convicted of failing to provide the necessities of life to his father. He was sentenced to six months imprisonment, two years probation and one hundred hours of community service. He appealed his sentence to the Ontario Court of Appeal and the sentence was upheld in a 2-1 decision. In his dissenting opinion, Justice Borins would have set aside the sentence and substituted a conditional sentence of six months.

The facts revealed that the father had lived in the same house in Toronto for over forty years. At some point his son and grandson came to live with him. In 2000, the son and his sister had a lawyer draft two powers of attorney documents, one for property and one for personal care whereby the siblings would act as joint attorneys.

The father lived on the first floor and basement. There was no working bathroom in his living quarters, only a broken toilet in the basement. The only working bathroom was on the second floor and the door to the second floor was often locked. Neighbours observed that the father's

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<sup>152</sup> *Supra* note 111 at para. 3

<sup>153</sup> *Ibid.* at para. 22

<sup>154</sup> *Ibid.* at para. 25

health deteriorated to the point where he could not dress himself, he stopped shaving, and his clothes became dirty and he began to smell. Eventually a neighbour called the police.

At trial the court concluded that the father was in his son's charge and that he could not withdraw himself from his son's charge due to Alzheimer's and dementia. The trial judge also concluded that the son failed to supply the necessities of life: "Put simply, this is a case of blatant neglect of an aged, vulnerable parent by the accused."<sup>155</sup> The trial judge also found that: the father was a dependant, the accused had a familial relationship with the victim and was aware of his father's dependency, the son controlled the father's living conditions and kept him in an unsafe environment, the son had control over his personal care and property, and the son chose not to make decisions that would result in the father receiving the necessities of life.

In the appeal of the sentence the Court observed that sentences for this type of offence generally fall between four and eight months incarceration with a period of probation following. The majority in the Court of Appeal decision held that the sentence of six months' incarceration was within the range of sentences and was "not demonstrably unfit."<sup>156</sup>

**(h) *R. v. Chartrand, 2009 CanLII 20709 (ONSC)***

This case started with a death-bed promise by the victim, Harry Matthews, to the accused Daniel Chartrand's grandmother that Mr. Matthews would always guide and support Chartrand once his grandmother had passed on. Mr. Matthews knowingly volunteered to assist Chartrand financially and otherwise. Soon this death bed promise turned into a clear case of elder financial abuse.

Mr. Matthews was a single male who was born in 1927. In 2002 he had a net financial worth in excess of \$1 million. By 2005 his net worth was down to almost nothing, a significant part of his funds having been squandered on Chartrand.

In 2003, Mr. Matthews was diagnosed with Parkinson's disease. As his disease progressed, Mr. Matthew's doctor wanted to have Mr. Matthew's assessed at a hospital to determine whether or not he should be living on his own. Chartrand advised the doctor that he was Mr. Matthew's

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<sup>155</sup> *R. v. Peterson*, 2005 CanLII 37972 (ONCA) at para. 27.

<sup>156</sup> *Ibid.* at para. 59.

caregiver and that he checked on him and cared for him on a daily basis. However, this was not the truth. Chartrand did check in on Mr. Matthew but only for his money. The evidence showed that Mr. Matthew paid Chartrand between \$3,000 and \$8,000 per month to act as his caregiver. However, Chartrand failed to provide any caregiving services aside from sporadically cooking him dinner or taking him to get groceries. Chartrand produced a letter signed by Mr. Matthews in which Mr. Matthew states that he has "engaged the services of Daniel Chartrand as caregiver". Chartrand would pay himself by getting Mr. Matthew to endorse his pension cheques over to Chartrand each month. Chartrand also had access to Mr. Matthew's bank accounts and credit cards.

Eventually one of Mr. Matthew's neighbours called the police after having not seen Mr. Matthews for a few days. The police found him on his back on the floor of his bedroom. There were feces and urine stains on the floor and the smell of the apartment was awful.<sup>157</sup> Mr. Matthews was taken to a hospital and turned over to hospital authorities.

The Court held that beyond a reasonable doubt, Chartrand failed to ensure, as he was legally bound to do, that Mr. Matthews was properly fed, sheltered, cared for, received medical attention and was protected from harm.<sup>158</sup> The Court also held that:

Mr. Chartrand was entrusted and therefore "charged" with the care of Mr. Matthews. He accepted this charge and trust not only because there had been a long term relationship between Mr. Matthews and Mr. Chartrand from which he, Mr. Chartrand had received incredible financial benefits, but, as well, he was charged or entrusted by contract for valuable consideration. He publicly acknowledged his role as Mr. Matthew's caregiver.<sup>159</sup>

Unfortunately there is no reported sentencing decision so Mr. Chartrand's ultimate sentence is unknown.

### **Conclusion on Criminal Cases and Sentencing**

It is interesting to note that in the majority of these cases it is a neighbour who reports the abuse and/or neglect to the police. Just imagine how many neighbours may be turning a blind eye to such abuse.

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<sup>157</sup> *R. v. Chartrand*, 2009 CanLII 20709 (ONSC) at para. 23.

<sup>158</sup> *Ibid.* at para. 39

<sup>159</sup> *Ibid.* at para. 42.

Due to the dearth of reported criminal cases of elder financial abuse it appears as if there may be an underutilization of certain offences in the *Criminal Code* to prosecute financial abusers of the elderly and older adults. Hopefully these offences will be used more frequently in the future. A challenge in investigating POA theft is the immediacy issue meaning theft, by the time the crime is reported by family members or neighbours the money is already gone. Such cases need to be dealt with right away, importantly there is often the deteriorating health of the victim which is a factor. If the victim can no longer testify to the offence, evidence is lost.

In an online article, retired Saskatoon Police Officer R.B. Trainor argues that the reason there are not more charges under the *Criminal Code* is that the police and the Crown see Power of Attorney abuse as a civil issue only<sup>160</sup> or that they are unaware of the Criminal Code provisions:

Section 331 of the Criminal Code of Canada clearly sets out the offence, Theft by Persons Holding Power of Attorney. This section has been in existence for many decades now, and yet very few police officers have heard of it. One of the reasons for this may be the fact this section is not a charging section, but what is referred to as a descriptive section. When someone is charged with stealing funds from a senior, the charge is section 336 Theft, not 331ccc. This causes confusion, however no matter of how it's viewed, a theft is a theft, and an investigation needs to be undertaken by the police. . .

In the 5 years I investigated such complaints, I found the victims in most instances suffered from some degree of dementia. They were simply unaware of what was happening to their finances. Thus the victims were not able to report the matter to police. Many complaints came from people in the banking sector who managed the accounts for their senior clients. They became suspicious, looked into matters further, then reported their findings to me. The most frequent comment I heard from professionals such as bankers, lawyers, and doctors was, "We can't report anything to the police because of privacy issues." That is utter nonsense. You have a duty to protect those on whose behalf you act.<sup>161</sup>

While it is ultimately up to the police and the Crown as to whether or not a person will be charged, the cases discussed above, especially *R. v. Kaziuk*, show that once charges are made the courts are taking such cases very seriously and are imposing strict sentences to deter further abuse of older adults.

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<sup>160</sup> Police Sgt. R.B. Trainor (Ret.), *Power of Attorney Abuse: Civil or Criminal?*, online: [http://www.notaries.bc.ca/resources/scrivener/spring2007/scrivener\\_spring\\_2007%2014.pdf](http://www.notaries.bc.ca/resources/scrivener/spring2007/scrivener_spring_2007%2014.pdf)

<sup>161</sup> *Ibid.*



In January, 2013 the *Protection of Older Adults Act* S.C. 2012, c. 29 was enacted. The Act amends the Criminal Code so that evidence that an offence had a significant impact on the victims due to their age and other personal circumstances, such as health or financial situation, will now always be considered as an aggravating factor for sentencing purposes. The backgrounder and news release from the Department of Justice stated that "*the amendments will help ensure the consistent application of the established sentencing practice, that violence against individuals who are vulnerable due to their age and other personal circumstances should be treated seriously. The Criminal Code already contains similar measures that denounce the abuse of vulnerable persons. For instance, it states that the abuse of a person under the age of 18 is an aggravating factor at sentencing.*"<sup>162</sup> Section 718.2(a)(iii) now includes subsection (iii.1) which provides that "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation" can be taken into consideration during sentencing.<sup>163</sup>

In the recent case of *R. v. Piche*,<sup>164</sup> Justice Rosborough referred to this new subsection when sentencing a man for assaulting an elderly couple:

[40] Dawne and Marion Gilchrist were octogenarians, seeking to live out the remaining years of their lives together, independently and in the home they had occupied for decades. Subparagraph 718.2(a)(iii.1) C.C. enjoins courts to increase what would otherwise be a fit sentence where the circumstances disclose 'elder abuse'. The reason for that is obvious on the facts of this case. The Offender is a young man of some stature. The Gilchrists were no match for him, whether sober or intoxicated. The assaults they suffered in that context were much more serious.

[41] Similarly, Marion Gilchrist suffered from alzheimers disease. This is not an uncommon malady and may well become more prevalent with an aging Canadian population. Those suffering from it are more vulnerable to crime than the average citizen. In *R. v. Foubert*, [2009] O.J. No.5024 (S.C.J.), the court addressed this in the following terms (at para.30):

In my opinion, there is little to distinguish individuals suffering from Alzheimer's disease or severe dementia from children. Both are among the most vulnerable members of our society. Just as one is forbidden to strike a baby, one is forbidden to strike a vulnerable, elderly person.

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<sup>162</sup> Department of Justice, *Backgrounder: Protecting Canada's Seniors Act*, online: [http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32826.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html)

<sup>163</sup> *Protection of Older Adults Act* S.C. 2012, c. 29; Department of Justice, *Backgrounder: Protecting Canada's Seniors Act*, online: [http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_32826.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html).

<sup>164</sup> 2014 ABPC 93 (CanLII).

[42] Compounding this statutory aggravating factor are the nature of the injuries suffered by the Gilchrists. I will not review the immediate injuries suffered by this couple nor the significant steps necessary to treat those injuries. Dawne Gilchrist was transformed from a retired senior citizen capable of independent living and the care of his declining spouse to an invalid who can no longer walk of his own accord. He has permanent brain damage resulting in cognitive impairment. Marion Gilchrist's immediate trauma may have healed but she is now separated (likely for the remainder of her life) from her spouse of 60+ years in a separate extended care facility.

The perpetrator was sentenced to 9 years imprisonment for the assault and other offences committed including theft.<sup>165</sup>

This new subsection is also discussed in *R. v. McKenna*<sup>166</sup> where an offender appealed a 14 month sentence for breaching an undertaking not to contact an elderly gentleman. The offender had been previously arrested for "*calling the elderly gentleman and directing him to meet and accompany him to the bank to get the [offender] some money*".<sup>167</sup> When he contacted the elderly gentleman again (after providing an undertaking that he would not) and requested more money, he was arrested and sentenced to 14 months incarceration which was reduced to 6 months on appeal. The Court reviewed the following facts in relation to the new sentencing subsection:

And I take into account what the Crown Attorney has said that Mr. McKenna's offences did not cause Mr. Stewart to require hospitalization, and assessment, and/or treatment, but Mr. Stewart was a person who Mr. McKenna was not permitted to have contact with and not only did Mr. McKenna have contact with Mr. Stewart, and as I indicated, that contact was pre-planned, deliberate and flagrant the circumstances of that contact were that Mr. McKenna was requesting this elderly gentleman to give money to him to feel sorry for him and to give money for him [sic].<sup>168</sup>

Several other sentencing cases have referred to this new subsection as well, but mostly in passing, and mostly in the context of assault or sexual assault cases.<sup>169</sup> It will be interesting to see how this new section will affect the sentences of perpetrators of elder financial abuse going forward.

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<sup>165</sup> 2014 ABPC 93 at para. 45.

<sup>166</sup> 2014 NSSC 92.

<sup>167</sup> 2014 NSSC 92 at para. 2.

<sup>168</sup> 2014 NSSC 92 at para. 14.

<sup>169</sup> See for example: *R. v. Sidwell*, 2014 MBQB 74, *R. v. RL*, 2013 ONCJ 617, *R. v. Amador*, 2014 ONSC 4187, *R. v. Maisonneuve*, 2014 NBCA 32, *R. v. Lemoine*, 2014 NSPC 49, *R. c. JF.*, 2013 QCCQ 16127.

Another potential change to our criminal legislation that may affect prosecution of elder financial abuse is Bill C-32, the *Victims Bill of Rights Act*,<sup>170</sup> which was introduced and read in the House of Commons on April 3, 2014. This Bill of Rights sets out rights in four major areas to victims of crime – information, protection, participation and restitution. These rights include the:

- Right to have the court consider making a restitution order for all offences for which there are easy-to-calculate financial losses (s.16);
- Right, on request, to information about the status and outcome of the investigation into the offence and the location of the proceedings in relation to the offence, when they will take place and their progress and outcome (s. 7);
- Right to request testimonial aids when appearing as a witness in proceedings relating to the offence (s. 13);
- Right to have their identity protected if they are a complainant to the office or a witness in proceedings relating to the offence (s.12);
- Right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered (s. 15 of the Bill).

This Bill of Rights will hopefully allow victims of elder financial abuse a more substantial role in the process of bringing their perpetrators to justice.

### **The Interplay Between Civil and Criminal Proceedings Arising from Same Facts**

There is no general rule that a civil proceeding will be stayed because of criminal charges and proceedings arising out of the same set of facts.<sup>171</sup> However, sometimes either an accused or a plaintiff will request that a civil proceeding be stayed until a criminal proceeding has been completed, pursuant to s.106 of the Courts of Justice Act, RSO 1990, c C.43, which reads:

"A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

The threshold test for granting such a stay of civil proceedings is a high one, "requiring the demonstration of extraordinary or exceptional circumstances".<sup>172</sup> The mere fact that criminal proceedings are pending at the same time as the civil proceeding, or that the criminal accused

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<sup>170</sup> Bill C-32, An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6510370&Language=E&Mode=1>

<sup>171</sup> *Nash v. Ontario*, (1995), 27 O.R. (3d) 1 (C.A.) at p.6.

<sup>172</sup> *Schreiber v. Federal Republic of Germany*, 2001 CanLII 20859 (ON CA) at para. 4.

is the same as the defendant in the civil action, is not sufficient ground to qualify as an exceptional case to stay the civil proceedings.<sup>173</sup> Extraordinary or exceptional circumstances have been interpreted as meaning that the moving party has an onus to show some specific or particular way in which his or her right to a fair trial in the criminal proceeding will be prejudiced.<sup>174</sup> However, the potential disclosure through the civil discovery process of the nature of the accused's defence or of self-incriminating evidence is not by itself exceptional.<sup>175</sup>

If however, a criminal trial is heard first, there is no doubt about the admissibility of a criminal conviction in subsequent civil proceedings. The matter is dealt with by the Evidence Act, R.S.O. 1990, c. E. 22, s.22.1, as amended by S.O. 1995, c.6, s.6:

22.1(1) Proof that a person has been convicted or discharged anywhere in Canada is proof, in the absence of evidence to the contrary, that the crime has been committed by the person, if,  
(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or  
(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

However, Canadian courts distinguish between "offensive" and "defensive" use of prior convictions in civil proceedings.<sup>176</sup> If a victim is relying on a conviction to establish the defendant's liability for a crime, this is considered "offensive" and the conviction is treated as prima facie proof that the person committed the offence charged, subject to rebuttal. If however a convicted criminal brings a civil action and seeks to basically re-litigate in civil court, the prior conviction will be raised "defensively" to oppose the claim and the courts may use the abuse of process doctrine to preclude re-litigation.<sup>177</sup>

Therefore, in elder financial abuse situations it does not necessarily mean that it has to be one or the other, civil or criminal litigation. If both avenues are pursued, a criminal conviction will go a long way in proving the civil case for the plaintiff. This will however depend on whether or not the criminal case is tried first.

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<sup>173</sup> *Supra* note 124 at p.7.

<sup>174</sup> *Stickney v. Trusz* (1974), 2 O.R. (2d) 469 (H.C.J.) at p. 471.

<sup>175</sup> *Supra* note 124 at p.7.

<sup>176</sup> *F.(K.) v. White*, 2001 CanLII 24020 (ON CA) at para.29

<sup>177</sup> *Ibid.*

#### H. A Judicial Cry for Change: *Re Baranek Estate*<sup>178</sup>

In *Re Baranek Estate*, a case that involved “intense litigation” that ensued between a prior and subsequent attorney for property, Justice D. Brown made the following remarks which, in our view, truly epitomize the problems associated with powers of attorney today and emphasize the need for legislative reform in this area:

The so-called "battle of competing powers of attorney" is emerging as a growing area of litigation. This is a most unhealthy development. I suspect that when the Legislature passed the *Substitute Decisions Act* back in 1992 it intended to put in place a legal framework which would protect the affairs of the vulnerable elderly, not spawn a new breed of litigation which would see the hard-earned money of the vulnerable being exposed to claims for the payment of legal fees incurred by those whom they had appointed to protect their interests. In so commenting I am not passing judgment, one way or the other, on the conduct of Mr. Coon or Ms. Biegun. I am signaling that the inter-attorney litigation which erupted in this case is symptomatic of a much larger problem which, as Ontario's population ages, risks turning into a very serious social issue. Indeed, I think the time may have arrived for the Legislature of this province to look into this problem of litigation involving competing powers of attorney, especially involving subsequent powers of attorney made during the latter periods of a person's life when they are vulnerable to pressure, in order to see whether new protections are required to ensure that the assets of the vulnerable are used for one purpose only - the satisfaction of the needs of the vulnerable elderly while they are alive.

#### I. Awareness & Prevention

Solicitors, planners, legislators, health care practitioners and the public at large, must be alert to the possibility of fraudulently obtained and fraudulently used POA documents and the risks to the older adult and to the cognitively impaired, the vulnerable, the dependant, and incapable. Fraudulently obtained or fraudulently used documents can wreak havoc for grantors and third parties alike. To that end, we advise everyone when dealing with powers of attorney to be cautious and vigilant, to make enquiries and to be constantly aware of both the risks and benefits that attach the preparation and use of a power of attorney document.

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<sup>178</sup> 2007 CarswellOnt 7162.

## **J. Checklists**

It is our view that checklists can be of assistance to grantors in considering the choice of attorney, and attorneys alike throughout the attorneyship appointment. For this reason, we have provided appended our checklists to this paper. The checklists can also be found on our website at the links below:

**Appendix “A”:** Legal duties and obligations associated with a Continuing Power of Attorney for Property:

[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_POA\\_Property.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_Property.pdf);

**Appendix “B”:** Legal duties and obligations associated with a Power of Attorney for Personal Care:

[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_POA\\_PersonalCare.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_PersonalCare.pdf);

**Appendix “C”:** Checklist on Capacity in the Estate Planning context:

[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_EstatePlanningContext.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf)

**Appendix “D”:** Checklist for Undue Influence Factors:

[http://whaleyestatelitigation.com/blog/resources/WEL\\_Undue\\_Influence\\_Checklist.pdf](http://whaleyestatelitigation.com/blog/resources/WEL_Undue_Influence_Checklist.pdf)

## **K. Tools and Resources**

- The International Federation of Ageing - <http://www.ifa-fiv.org>
- The Advocacy Centre for the Elderly - <http://www.advocacycentreelderly.org>
- Whaley Estate Litigation (**see *Elder Law and Elder Abuse Links***) - <http://www.whaleyestatelitigation.com/practice/elderlaw.html>
- The Toronto Police Community Mobilization Unit, Vulnerable Persons Issues - <http://www.torontopolice.on.ca/communitymobilization/cmw.php>
- The Public Guardian and Trustee <http://www.attorneygeneral.jus.gov.on.ca>
- The Ontario Network for the Prevention of Elder Abuse (Senior Safety Line) <http://www.onpea.org>
- Whaley Estate Litigation Checklists and other useful links <http://whaleyestatelitigation.com/blog/tag/checklists>
- Elder Law links <http://whaleyestatelitigation.com/links.html>

*This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Please visit our new website at <http://www.whaleyestatelitigation.com>*

*Kimberly A. Whaley*  
2014

*October*

**APPENDIX "A"**

**ATTORNEY CHECKLIST**

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

**An Attorney MUST...**

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the "SDA") and the *Health Care Consent Act, 1996* (the "HCCA")
- Be 18 years of age
- Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision
- Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
  - Is the power a "Continuing" Power of Attorney?
  - Is the power limited to a particular period of incapacity?
  - Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
  - Is the power to be exercised solely or jointly with another?
- Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will
- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:
  - Is the grantor aware of the scope of property possessed?
  - Is the grantor aware of the approximate value of property possessed?
  - Is the grantor aware of obligations owed to dependants?
  - Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
  - Is the grantor aware that an attorney has a duty to account for all actions taken?



- Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
  - Is the grantor appreciative of the risks of entrusting property to the attorney?
- Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
- Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- Be aware of the statutory obligations of resignation
  - Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable
  - Notify persons previously being dealt with on the grantor's behalf
- Be aware that a Power of Attorney terminates upon the death of the grantor
- Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care
- Explain to the grantor its powers and duties and encourage the grantor's participation in decisions
- Facilitate contact between the grantor and relatives or friends
- Consult with relatives, friends and other attorneys on behalf of the grantor
- Keep accounts of all transactions
- Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs
  - Ordinary prudence v. Professional prudence
- Be aware of the legal liability assumed for a breach of an attorney's duties
- Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will
- Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care
- Be aware of the rights and duties to make application to the court for directions if

deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions

- Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order
- Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney
- Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations
- Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority
- Not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee
- Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts

**There are limits and restrictions for authority of Estate Planning, and gifting by the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:**

- **Duties**

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

- **Personal comfort and well-being**

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

- **Personal care**

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

- **Exception**

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

- **Explanation**

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

- **Participation**

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

- **Family and friends**

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

- **Consultation**

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

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

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

- **Accounts**

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

- **Standard of care**

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

- **Same**

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

- **P.G.T.**

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

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

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

- **Amendment of plan**

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

- **Application of Trustee Act**

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

- **Liability of guardian**

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

- **Same**

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

- **Exception, corporate directors**

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

- **Breach of duty**

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

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

- ❑ An Attorney may not change a beneficial designation of life insurance or a “Plan” Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person’s death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario, R. S. O. 1990, C.I.8 as amended) and a “Plan” pursuant to the *Succession Law Reform Act*, (R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty (*Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII). [2001] B.C.J. [No. 2547]*).
- ❑ An Attorney may want to protect an incapable person’s assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton v. Banton, 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.*).
- ❑ An Attorney may complete transactions already entered into by an incapable person.
- ❑ An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher v. Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.*).
- ❑ An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.
- ❑ An Attorney may settle an “Alter Ego Trust” similarly certain “Estate Freeze” planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor’s last Will and Testament, or otherwise if the ultimate beneficiary(s) consent and it is in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. Tax considerations must be factored into any planning.
- ❑ Attorney’s should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.
- ❑ An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.
- ❑ An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor

of a Power of Attorney, particularly in a corporate or succession planning context.

*This checklist is intended for the purposes of providing information and guidance only. This memorandum/checklist 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

2014

## APPENDIX “B”

### ATTORNEY CHECKLIST

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

##### An Attorney **MUST**...

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the “SDA”) and the *Health Care Consent Act, 1996*
- Be aware that an individual of 16 years of age is capable of giving or refusing consent of one’s own personal care
- Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor’s behalf
- Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid
- Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor
- Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
  - Is the power to be exercised solely or jointly?
  - Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?
- Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
  - Does the grantor have the ability to understand and appreciate the role of the attorney and in particular the risks associated with the appointment?
  - Does the grantor have capacity to give instructions for decisions to be made as to personal care?
  - Is the grantor aware of the Power to revoke the Power of Attorney if capable?
  - The grantor’s capacity to give a power is **not** related to the incapability of the grantor’s own personal care
- Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- Be aware that the Power of Attorney can be revoked and such revocation must be in

writing and executed in the same manner as the Power of Attorney document itself

- Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document
  - The HCCA applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
  - The HCCA prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
  - Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the SDA?
  - What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?
- Be aware that special provisions exist in the SDA and the HCCA addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment
- Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the SDA and the HCCA
- Arrange for a capacity assessment at the request of the grantor, except where there has been an assessment performed in the six months immediately previous
- Be aware the statutory requirements concerning resignation
  - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
  - Notify persons previously being dealt with on the grantor's behalf
- Be aware that a Power of Attorney for personal care terminates on the death of the grantor
- Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care
- Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions



- Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor
- Keep records of all decisions made on the grantor's behalf
- Facilitate contact between the grantor, relatives and friends
- Consult with relatives, friends and other attorneys on behalf of the grantor
- Facilitate the grantor' independence
- Make decisions which are the least restrictive and intrusive to the grantor
- Not use or permit the use of confinement, monitoring devices, physical restraint by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another
- Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the HCCA
- Maintain comprehensive records
  - A list of all decisions made regarding health care, safety and shelter
  - Keep all medical reports or documents
  - Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor
- Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required
- Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority
- Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records

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## **APPENDIX “C”**

### **CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT**

#### **1. Capacity Generally**

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

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.<sup>179</sup>

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.<sup>180</sup>

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

#### **2. Testamentary Capacity**

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

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

- (a) The nature of the act of making a Will (or testamentary document) and its effects;
- (b) The extent of the property of which he or she is disposing of; and
- (c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).<sup>181</sup>

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

- A “*disposing mind and memory*” to comprehend the essential elements of making a Will;

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<sup>179</sup> *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161

<sup>180</sup> *Estates, Trusts & Pension Journal*, Volume 32, No. 3, May 2013

<sup>181</sup> *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.<sup>182</sup>

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*<sup>183</sup>:

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

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.<sup>184</sup>

### **Capacity to Make Testamentary Dispositions other than Wills**

The *Succession Law Reform Act*<sup>185</sup> defines a “Will” to include the following:

- (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”)
- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.<sup>186</sup> Therefore, capacity is determined on the criteria applied to determining testamentary capacity

<sup>182</sup> The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz*, 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4<sup>th</sup>) 263; *Bourne v. Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (Baill)

<sup>183</sup> *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227

<sup>184</sup> *Laszlo v Lawton*, 2013 BCSC 305, SCBC

<sup>185</sup> R.S.O. 1990 c.s.26 as amended subsection 1(1)

<sup>186</sup> S.51(10 of the *Succession Law Reform Act*

- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.<sup>187</sup> The criteria to be applied, is that of testamentary capacity.
- The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

### ***Capacity to Grant or Revoke a Continuing Power of Attorney for Property (“CPOAP”)***

Pursuant to section 8 of the *Substitute Decisions Act*,<sup>188</sup> to be capable of granting a Continuing Power of Attorney for Property (“CPOAP”), a grantor requires the following:

- (a) Knowledge of what kind of property he or she has and its approximate value;
- (b) Awareness of obligations owed to his or her dependants;
- (c) Knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- (d) Knowledge that the attorney must account for his or her dealings with the person’s property;
- (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;
- (f) Appreciation that unless the attorney manages the property prudently its value may decline; and
- (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.<sup>189</sup>

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.<sup>190</sup>

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.<sup>191</sup>

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<sup>187</sup> S 1(1)(a) of the SLRA

<sup>188</sup> R. S.O. 1992, c 30, as am.

<sup>189</sup> SDA, subsection 8(2)

<sup>190</sup> SDA, subsection 9(1)

<sup>191</sup> SDA, subsection 9(2)

### ***When an Attorney should act under a CPOAP***

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

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*<sup>192</sup>

### ***Capacity to Manage Property***

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

- (a) The ability to understand the information that is relevant in making a decision in the management of one's property; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.<sup>193</sup>

*A person may be incapable of managing property, yet still be capable of making a Will.*<sup>194</sup>

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

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

- (a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- (b) The appreciation that the person may need to have the proposed attorney make decisions for the person.<sup>195</sup>

A person who is capable of granting a POAPC is also capable of revoking a POAPC.<sup>196</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>197</sup>

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<sup>192</sup> R.S.O. 1990, c. M.7

<sup>193</sup> See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)

<sup>194</sup> *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

<sup>195</sup> *SDA*, subsection 47(1)

<sup>196</sup> *SDA*, subsection 47(3)

<sup>197</sup> *SDA*, subsection 47(2)

### ***When an Attorney should act under a POAPC***

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

### ***Capacity to Make Personal Care Decisions***

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

- (a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

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

### **3. *Capacity under the Health Care Consent Act, 1996*<sup>198</sup>**

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

- (a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

### **4. *Capacity to Contract***

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.<sup>199</sup>

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.<sup>200</sup>

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

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract’s specific effect in the specific circumstances.<sup>201</sup>

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<sup>198</sup> S.O. 1996, C.2 Schedule A

<sup>199</sup> G.H. Treitel, *The Law of Contract*, 11<sup>th</sup> ed. (London: Sweet & Maxwell, 2003).

<sup>200</sup> *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859

<sup>201</sup> *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* (“*SDA*”).<sup>202</sup> Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.<sup>203</sup> Subsection 2(3) then 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>204</sup>

## **5. Capacity to Gift**

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

- (a) The ability to understand the nature of the gift; and
- (b) The ability to understand the specific effect of the gift in the circumstances.<sup>205</sup>

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.<sup>206</sup>

## **6. Capacity to Undertake Real Estate Transactions**

Most case law on the issue of real estate and capacity focuses on an individual’s capacity to contract,<sup>207</sup> which as set out above, requires the following:

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract’s specific effect in the specific circumstances.<sup>208</sup>

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

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

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<sup>202</sup> *SDA*, *supra* note 2

<sup>203</sup> *SDA*, subsection 2(1)

<sup>204</sup> *SDA*, subsection 2(3)

<sup>205</sup> *Royal Trust Company v. Diamant*, *Ibid.* at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

<sup>206</sup> *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487

<sup>207</sup> See for example: *Park v. Park*, 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)

<sup>208</sup> *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

## **7. Capacity to Marry**

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.<sup>209</sup>

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.<sup>210</sup>

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.<sup>211</sup>

The capacity to separate and divorce is arguably the same as required for the capacity to marry.<sup>212</sup>

## **8. Capacity to Instruct Counsel**

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

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.<sup>213</sup> In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

- (a) Understand what they have asked the lawyer to do for them and why,
- (b) Be able to understand and process the information, advice and options the lawyer presents to them; and
- (c) Appreciate the advantages, disadvantages and potential consequences of the various options.<sup>214</sup>

## **Issues Related to Capacity**

### **9. Undue Influence**

Undue influence is a legal concept where the onus of proof is on the person alleging it.<sup>215</sup>

<sup>209</sup> *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3d) 284 (B.C.S.C.)

<sup>210</sup> *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)

<sup>211</sup> *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik

<sup>212</sup> *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494

<sup>213</sup> Staff lawyer at ARCH Disability Law Centre.

<sup>214</sup> At page 3

<sup>215</sup> *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4<sup>th</sup>) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Kejjanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4<sup>th</sup>) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4<sup>th</sup>) 194, 47 O.A.C. 345, 1991 CarswellOnt 280



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

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one’s will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;<sup>216</sup>
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion<sup>217</sup>

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

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.<sup>218</sup> Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.<sup>219</sup>

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences.<sup>220</sup>

Psychological pressures creating fear may be tantamount to undue influence.<sup>221</sup>

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document ... “cannot be said to be that of the deceased.”<sup>222</sup> Undue influence must be corroborated.<sup>223</sup>

Suspicious circumstances will not discharge the burden of proof required.<sup>224</sup>

\* See Undue Influence Checklist

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(C.A.); *Brandon v. Brandon*, 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.

<sup>216</sup> *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

<sup>217</sup> *Wingrove v. Wingrove* (1885) 11 P.D. 81

<sup>218</sup> *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)

<sup>219</sup> *Wingrove v. Wingrove* (1885) 11 P.D. 81

<sup>220</sup> *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)

<sup>221</sup> *Tribe v Farrell*, 2006 BCCA 38

<sup>222</sup> *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58

<sup>223</sup> S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d)

<sup>224</sup>

<sup>224</sup> *Vout v Hay*, at p. 227

## 10. *Suspicious Circumstances*

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

- (a) circumstances surrounding the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator; or
- (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.<sup>225</sup>

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.<sup>226</sup>

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

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<sup>225</sup> *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin*, (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)

<sup>226</sup> *Laszlo v Lawton*, 2013 BCSC 305 (CanLII)

## **APPENDIX “D” UNDUE INFLUENCE CHECKLIST**

### **Undue Influence: Summary**

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

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

### **The Courts’ Historical View of Undue Influence**

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968).<sup>227</sup>

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

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,<sup>228</sup> stated:

*“Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator’s mind, but which really does not express his mind, but something else which he did not mean.”*<sup>229</sup>

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

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<sup>227</sup> (1968) LR 1 P&D.

<sup>228</sup> *Craig v Lamoureux*, [1919] 3 WWR 1101.

<sup>229</sup> *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

## **Developing/Modern Application of Undue Influence**

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

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.<sup>230</sup>

In making such determinations, courts will look at whether “the potential for domination inheres in the nature of the relationship between the parties to the transfer.”<sup>231</sup>

## **Relationships Where There is an Imbalance of Power**

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid.<sup>232</sup>

## **Multiple Documents**

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.<sup>233</sup>

## **Language**

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.<sup>234</sup> For instance,

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<sup>230</sup> *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

<sup>231</sup> *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).

<sup>232</sup> *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.

<sup>233</sup> See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

<sup>234</sup> See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Brai*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.<sup>235</sup>

### **Other factors indicative of undue influence**

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.<sup>236</sup>

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property.<sup>237</sup>

### **Not All Relationships of Dependency Lead to Findings of Undue Influence**

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

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the genuine willingness of the grantor to effectuate an otherwise questionable transaction in favourable manner.<sup>238</sup>

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

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not

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<sup>235</sup> *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

<sup>236</sup> *Juzumas v Baron*, 2012 ONSC 7220.

<sup>237</sup> *Covello v Sturino*, 2007 CarswellOnt 3726.

<sup>238</sup> See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.<sup>239</sup>

### Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*<sup>240</sup> provided a (non-exhaustive) list of indicators of undue influence:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.<sup>241</sup>

### Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.<sup>242</sup>

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.<sup>243</sup>

Although the leading Supreme Court of Canada (“SCC”) case of *Vout v Hay* held that “*the extent of proof required is proportionate to the gravity of the suspicion*,”<sup>244</sup> the more recent SCC case of *C(R) v McDougal*<sup>245</sup> held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

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<sup>239</sup> *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

<sup>240</sup> *Gironda v Gironda*, 2013 CarswellOnt 8612.

<sup>241</sup> *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

<sup>242</sup> *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.

<sup>243</sup> *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

<sup>244</sup> *Vout v Hay* at para 24.

<sup>245</sup> 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

The case of *Kohut Estate v Kohut*<sup>246</sup> elicited the principles that apply to the standard of proof relating to undue influence:

*“The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be “the offspring of his own volition and not the record of someone else’s.”*<sup>247</sup>

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention, that the transaction was made as a result of the donor’s “full, free and informed thought.”<sup>248</sup>

See also *Buccilli et al v. Pillitteri et al*,<sup>249</sup> where the Court stated that:

*“The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely.”*<sup>250</sup>

### **Indirect Evidence in Undue Influence Claims**

In the U.K. case of *Shrader v Shrader*<sup>251</sup> recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator’s vulnerability and dependancy of the influencer, including consideration of the influencer’s “physical presence and volatile personality.” The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

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<sup>246</sup> (1993), 90 Man R (2d) 245 (Man QB) at para 38.

<sup>247</sup> (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall*, *supra*.

<sup>248</sup> *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.

<sup>249</sup> 2012 ONSC 6624, upheld 2014 ONCA 337.

<sup>250</sup> *Buccilli*, *supra* note 248 at para. 139.

<sup>251</sup> *Shrader v Shrader*, [2013] EWHC 466 (ch)



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

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.<sup>252</sup>

In *Leger v Poirier*,<sup>253</sup> the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a “*disposing mind and memory*” without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

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

### **Suspicious Circumstances**

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

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.<sup>254</sup>

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly “unnatural” dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.<sup>255</sup>

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<sup>252</sup> See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman’s will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.

<sup>253</sup> *Leger v Poirier*, [1944] SCR 152.

<sup>254</sup> *Vout v Hay*, [1995] 2 SCR 876 (SCC).

<sup>255</sup> Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.



## **Burden of Proof for Suspicious Circumstances**

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly “*free and unfettered*.”<sup>256</sup>

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

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

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.<sup>257</sup>

## **Lawyer’s Checklist of Circumstantial Inquiries**

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

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

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

### **Checklist**

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client’s family?

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<sup>256</sup> Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

<sup>257</sup> Kimberly Whaley, “Estate Litigation and Related Issues”, October 18, 2007, Thunder Bay CLE Conference at 33, <http://whaleystatelitigation.com/blog/published-papers-and-books/>

- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- If the client is isolated, does he/she live with one particular individual?
- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.
- Have numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

***Involvement of Professionals***

- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?
- Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

***Substantive Inquiries***

- Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- Is the client making a marked change in the planning documents as compared to prior documents?
- Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependant on another?
- Is the client vulnerable?

## **Guidelines for Lawyers to Avoid and Detect Undue Influence**

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

- Interview the client alone;
- Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.
- Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;
- Address recent health changes;
- Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations ...?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

## Practical Tips for Drafting Lawyers

### Checklist

- Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;
- Determine Intentions;
- Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);
- Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;
- Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;
- Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer,<sup>258</sup> and

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<sup>258</sup> For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", <http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf>

\* For other related resources, see WEL "Publications, Website": [www.whaleyestatelitigation.com](http://www.whaleyestatelitigation.com)

- ❑ Be mindful of the *Rules of Professional Conduct*<sup>259</sup> which are applicable in the lawyer's jurisdiction.

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

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<sup>259</sup> *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>