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LEGAL CONSIDERATIONS IN ELDER CARE

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INTRODUCTION

By Kimberly A. Whaley

Older adults have experienced full lives, have worked, raised families or travelled the world, experienced joys and sorrow, and have probably settled down to spend their final years in peace. No one expects or plans for their final years to be filled with family fights, anger, and emotional turmoil. Unfortunately, however many older adults find that their final years are far from peaceful. Families inherently have some level of dysfunction and sometimes this dysfunction erupts into conflict between older parents and adult children, between sisters and brothers, and even grandparents and grandchildren. Or issues arise when, through normal aging, disability, incapacity or illness, older adults become incapable of managing their own financial circumstances and their own personal care. Often they must rely on others for assistance. This in turn can make them vulnerable to abuse, undue influence, or exploitation. Or, disputes may arise amongst family members as to who should have control over decision-making on behalf of the older adult. Often, had proper or any planning been put in place, these disputes may have been avoided. So too, perhaps any abuse an older adult may suffer could also have been avoided.

This paper will look at some of the legal issues affecting older adults including decisional capacity considerations, issues of undue influence, power of attorney disputes, guardianship, elder abuse, and an overview of the potential risks involving joint assets between parents and adult children. We provide some real life case scenarios for illustrative purposes and some useful tools and resources which are referenced at the end of this paper.

POWER OF ATTORNEY DISPUTES / BREACH OF DUTIES

The Power of Attorney document (the “POA”) generally, 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 my practice, I have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. I have also seen it used as a means of protection against predators, of which there is a very real risk. Unfortunately, I have also seen these documents misused and abused, causing the grantor harm through fraud, neglect, and depletion of wealth. This is accompanied by negligence in the provision of necessary care requirements and obligations.

That POA's 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"). Indeed it is often the case that these fiduciaries are completely unaware of the legislative guiding principles, whether they adhere to them as they are obligated to, or not.

While a POA document can be used for the good of a vulnerable adult or a decisionally incapable person, there can be a dangerous aspect 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 has the ability to do the job and fulfill mandated duties; or whether the attorney chosen could truly be trusted to act in an honest manner. Consequently, there exists a significant risk 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 office, in my estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

One of the primary ways of diminishing the chances of abuse of a POA document is to choose the right attorney. Secondly, understanding the different types of POA documents as well as their powers and provisions can ensure that all parties are clear on the legal relationship they are entering into. Thirdly, a review of the duties and responsibilities will help inform the choice 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 subsequent unremitting incapacity. Proper, thoughtful, preparation allows the grantor to require the appointed 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 (the "POA");
(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.

Choosing the right attorney is perhaps the most important decision a person can make in order to protect one's property or person in the event that the grantor is unable to. In choosing an attorney, a grantor should consider whether a potential attorney has the values of honesty, integrity and accountability.

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together, or enable each attorney to act separately 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.

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

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

- The attorney must 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.

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

- Manage a person's property in a manner consistent with decisions for the person's personal care;
- Explain to the incapable person the Attorney's powers and duties;
- Encourage the incapable person's participation in decisions;
- Consult with the incapable person from time to time as well as family members, friends and other Attorneys;
- Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will; and

[1] 1998 CanLII 14926 (ONSC).

- 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.

POA Fraud and Abuse

There is a very real risk of fraud and abuse being perpetrated through POA's. Because such documents do not necessarily require the services of a lawyer to draft them, and they are readily available on the internet, this means as long as the document is compliant with the legislative requirements of witnessing, then the document could be, or appear to be, a valid document. A power of attorney document fraudulently procured from a vulnerable or physically dependant grantor by an individual with improper motives, as a result of exerting undue influence, or in a situation of suspicious circumstances, for the sole purpose of abuse, exploitation, and personal gain, is a very real risk.

Similarly, even if the power of attorney document is validly granted, it can be fraudulently or imprudently used, for the sole purposes of self-interest of the attorney, and are used in a way that constitute a breach of fiduciary duty or in other words, a breach of trust. The attorney may make unauthorized, questionable or even speculative investment decisions. Often we see that an attorney inappropriately deals with jointly held assets and accounts, having the effect of interfering with a grantor's estate plan. An attorney has the ability to misappropriate assets.

The use of fraudulently obtained power of attorney documents is an increasing concern. Older adults are particularly highly susceptible to such fraud. Identity theft and fraud is also on the rise. Fraudsters seeking monies through scams are also targeting older and vulnerable adults. The incidence of mortgage fraud by means of fraudulent power of attorney documents has risen sharply in recent years.

The most common forms of title fraud involve fraudsters using stolen identities or forged documents to transfer a registered owner's title to himself/herself without the registered owner's knowledge. The fraudster then obtains a mortgage on this property and once the funds are advanced on the mortgage, he/she disappears. The incidence of financial fraud with respect to elderly victims is on the increase, not just in Canada. Statistics tell us that more than two-thirds of the victims defrauded were defrauded by someone close to them.

Case Example #1

While a husband was abroad, his wife and son used a forged power of attorney to sell a residential property that he owned. The wife and son used another forged power of attorney to withdraw funds from the husband's RRSP and bank account. The wife then used the proceeds from the sale of the first house to purchase two subsequent houses. The only means by which this could be remedied was an action commenced by the husband. This case is a sober reminder that these documents are very powerful. The legislation authorizes an attorney under a power of attorney for property document to do anything on behalf of the grantor of the power of attorney but make a Will.[2]

Case Example #2

A married couple separated. The wife had suffered from multiple sclerosis for 15 years and was confined to a wheel chair. She was only able to walk short distances with a walker. Each retained lawyers and negotiations commenced with a view to resolving the property and support issues as between them. The lawyer for the wife forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In turn, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the mechanisms of legislation addressing incapacity. A hearing was held before the Consent and Capacity Board in Ontario (the "CCB"). The CCB adjudged the wife to be incapable of managing her financial affairs and incapable of consenting to a placement in a care facility. In the end, only on appeal, the CCB's decision was set aside, the court having found that the CCB erred in law.[3]

[2] *Dhillon v. Dhillon* 2005 BCSC 1903.
[3] *Koch (Re)* 1997 CanLII 12138 ONSC

Case Example #3

A widow and her son each owned 50% of the widow's residence. At a time when she was being treated for Alzheimer's and was experiencing memory loss, her son took her to a lawyer and had a continuing power of attorney for property granted in his favour, which took effect on the date of execution. Thereafter, her son transferred her ownership in the property to himself. Indeed, his mother's Will divided her assets equally amongst her five children. Had court action not been initiated, the estate would have been depleted since her interest in her property extinguished by the son illegally under a power of attorney.[4]

Case Example #4

A daughter accompanied her mother to her mother's lawyer's office where she had her mother execute powers of attorney appointing the daughter as her attorney. Before executing the documents, the daughter translated the documents to her mother, whose primary language was Vietnamese. The other children later sought a declaration that the powers of attorney were invalid on the basis that the daughter, with whom the mother lived with at the time and on whom the mother was substantially dependant, exercised undue influence over her. Not only was the daughter the only person to have translated both documents, but she also translated the lawyer's advice about those documents.[5]

Case Example #5

A husband put certain property into his wife's name without her knowledge for the purposes of defeating his creditors. The husband had a general power of attorney over his wife's property. A disagreement developed between them and the husband, using the power of attorney document, transferred the property into his own name. The wife sued to have the property re-transferred to her. At first instance, the judge dismissed the action, and only on appeal did the Court of Appeal reverse the action, finding that the transfer by the husband to himself transgressed the principles of the law of agency, and was void.

For more information please see the attached checklists "Duties of an Attorney under a Power of Attorney for Property" and "Duties of an Attorney under a Power of Attorney for Personal Care" at Appendix A and Appendix B of this paper.

[4] *Covello v. Sturino* 2007 CarswellOnt 3726.
[5] *Nguyen- Crawford v. Nguyen* 2010 ONSC 6836.

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CAPACITY AND UNDUE INFLUENCE

Capacity

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

There is no single legal definition of "capacity". The *Substitute Decisions Act, 1992*[6] (the "SDA") which addresses various types of capacity, simply defines "capable" as "mentally capable", and provides that "capacity" has a corresponding meaning. What does this mean?

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

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[7]

Decisional capacity is determined upon factors of mixed law, medicine and fact by applying the evidence available to the applicable capacity consideration as at the

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

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

relevant time.[8] Often reference is made to a capacity 'test', notably however, there is no 'test' so to speak, rather, there are different criteria to consider and apply in determining decisional capacity.

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

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

Capacity is *decision*, *time* and *situation*-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. A person is not globally "capable" or "incapable" and there is no specific standard to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision and at a moment in time.

Capacity is Decision-Specific

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

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one's property or personal care. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, to separate or to divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making personal care decisions, but not capable of managing property, or capable of granting a power of attorney document, but, not capable of making a Will. The possibilities are unlimited as each task or decision undertaken has its own specific factors to consider in its determination.

Capacity is Time-Specific

Capacity is *time*-specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for "good" and "bad" days where capacity can and does fluctuate depending on the cause. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. Even in situations where an individual suffers from a non-reversible and/or progressive disorder, that person may not be permanently incapable, and may have decisional capacity at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a Will can vary over time.[9]

The factor of time-specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may have less probative value than the evidence of, for instance, a drafting solicitor who applies a legal analysis in determining requisite capacity commensurate with the time that instructions are received.[10]

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[9] *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton,* all *supra* note 8.
[10] *Palahnuk Estate, supra* note 8 at para. 71

Capacity is Situation-Specific

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

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

The 2003 Supreme Court decision in *Starson v. Swayze*[11] is helpful in understanding and determining decisional capacity. Although this decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act*, *1996,* [12] (a statute which is not addressed in this paper) the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, per Major J: The presence of a mental disorder must not be equated with incapacity since the presumption of legal capacity can only be rebutted by clear evidence.[13]

Major J., emphasized that the ability to understand and process information is key to capacity. It requires the "cognitive ability to process, retain and understand the relevant information."[14] Then, a person must "be able to apply the relevant information to the

[11] *Supra* note 9.
[12] S.O. 1996, c. 2, Sched. A as am.
[13] *Starson v. Swayze, supra* note 9 at para. 77. This case was most recently applied in the Ontario Court of Appeal case of *Gajewski v. Wilkie* 2014 ONCA 897 which deals with statutory guide for capacity to consent to treatment under the *Health Care Consent Act, 1996*, S.O. 199, c.2. Sched.A.
[14] *Ibid.* at para. 78

circumstances, and be able to weigh the foreseeable risks and benefits of a decision or lack thereof." [15]

A capable person requires the "ability to appreciate the consequences of a decision", and not necessarily an "actual appreciation of those consequences".[16] A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if that person possesses the ability to comprehend the information and consequences of a decision.

Major J. also made note that the subject matter of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.[17] A capable person is entitled to be unwise in decision-making. In the oft-cited decision of *Re. Koch*,[18] Quinn J. wrote as follows:

It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA.* The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...[19]

Capacity with Respect to POAs

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

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

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

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

[15] *Ibid.* at para. 78
[16] *Ibid.* at paras. 80-81 [emphasis in original]
[17] *Ibid.* at para. 79
[18] 1997 CanLII 12138 (ON S.C.) [hereinafter *Re. Koch*]
[19] *Ibid.* at para. 89

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

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

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

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

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

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

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

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

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

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

For more information on capacity, please see "Summary of Capacity Criteria" and "Capacity Checklist Re: Estate Planning Context" at Appendix C and Appendix D of this paper.

Predatory Marriages

Exploitation, financial abuse, and undue influence of older adults can also occur in the context of marriage. For example, civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry, of providing consent to marry and to enter into a contract of marriage—perhaps because of illness or dependency.[20] Indeed, unscrupulous opportunists too often get away with preying upon in particular, older adults with diminished reasoning ability purely for financial gain. An appropriate moniker for this type of relationship is that of the 'predatory marriage'.[21] Given that marriage brings with it a wide range of property and financial entitlements, the descriptive, 'predatory' does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.[22] Older adults may also be prone to abuse or pressure to co-habit for unscrupulous reasons.

Predatory marriages are on the rise, irrespective of country or culture. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, such unions are usually characterized by one spouse who is significantly advanced in age and, because of a number of factors (which include loneliness consequent to losing a long-term spouse, or illness, incapacity, dependency, or vulnerability) is susceptible to exploitation. These unions are more often than not, clandestine. Common characteristics of these unions are alienation, secrecy, sequestering from friends, family and loved ones being an obvious red flag that the relationship is not above board.

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[20] *Ibid*.
[21] *Ibid*.
[22] *Supra* note 2 at 70

Case Example #6

An 88 year old man entered into a retirement home after his wife died. A 31 year old waitress at the home took the man out of the home one day and they were married. Two days after the marriage, the couple instructed a lawyer to draft a new Will for the husband, leaving all of his property to his new young wife. The Court found that the husband's judgment was severely impaired and that there was persuasive medical evidence, including a capacity assessment to conclude that the Will was invalid for lack of testamentary capacity and undue influence by the wife. However, the Court was unable to set aside the marriage, and found that it was a valid union. Since the marriage was valid and the husband had no valid will, the wife still benefited financially under the law of intestate succession![23]

Undue Influence

The doctrine of undue influence is an equitable principle, employed by the courts to set aside transactions that have been procured by undue influence, or coercion. 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.

In the context of gifts, even where there is no 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. 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."[24]

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

In cases where a client has limited mastery of the language used by the lawyer in the drafting and execution of legal documents, courts have sometimes considered such

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

limitation to be an indicator of undue influence. For instance, where the only translation of the planning document was provided to the grantor by the grantee and a relationship of dependence exists, undue influence may be found.[25]

In a recent Divisional Court case,[26] the Court highlighted some indicators or red flags for undue influence in the context of executing testamentary or planning documents:

- Was there an increasing isolation of the testator?;
- Is the testator dependent upon anyone?;
- Have there been any substantial *inter vivos* transfers of wealth by the testator?;
- Is there any failure to provide a reason or explanation for excluding someone who would have an expectation to inherit under the Will?;
- Any material changes in circumstances between the time of the first Will from that of the final Will that would undermine the testator's earlier reasons for favouring his son in his Will?;
- Has the testator been moved from his home?;
- Is the lawyer unknown to the testator? Was the lawyer chosen by someone other than the testator?;
- Who provided the instructions to the lawyer? The testator or someone else?;
- Did someone else receive a draft of the will before it was executed?;
- Did the lawyer meet with the testator alone?; and
- Any evidence that the testator's documented statements that he was afraid of the respondent.[27]

Case Example #7

This case involved a 92 year old widow and her unemployed son who lived with her. The son had lived with his parents (and then just his mother when his father passed away) for his entire life. The mother also had two

[25] *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[26] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct).
[27] See *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para. 9 and *Gironda v. Gironda* 2013 ONSC 4133 at para.77.

other sons. The mother spoke Italian and only a little bit of English and had relied on her husband (when he was alive) to look after the finances of the house. The son took his mother to a lawyer and the mother transferred her house into her son's name for $2. A year later she transferred $175,000.00 into an account in her son's name, from which he withdrew approximately $19,000.00. The son continued to live with the mother until she fell and had to be hospitalized. The mother suffered from some cognitive impairment at the time of the transfer of her house and monetary gift. This impairment became worse. The mother's other two sons brought an application. The Court found that both transfers were invalid by reason of the mother's lack of requisite capacity as at the relevant times. Regarding the transfer of the mother's real property, the court also found that the son had exercised undue influence on his mother.[28]

ELDER ABUSE

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

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

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

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[28] *Gironda v. Gironda* 2013 ONSC 4133.

> " … a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."[29]

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

> "Mistreatment of older adults refers to actions and/or behaviors, or lack of actions and/or behaviors that cause harm or risk of harm within a trust relationship. Mistreatment includes abuse and neglect of older adults."[30]

Financial abuse has also been defined by NICE as:

> "an action or lack of action with respect to material possessions, funds, assets, property, or legal documents, that is unauthorized, or coerced, or a misuse of legal authority; or where someone tricks, threatens or persuades older adults out of their money, property or possessions."

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

Civil Proceedings

The most common civil proceedings to remedy elder abuse concern powers of attorney (including removal of attorneys for misuse or abuse), guardianship, and breach of fiduciary duty claims. These proceedings often involve disputes between siblings, families, friends, strangers and predators intent on financial abuse. Such proceedings can also involve disputes over the personal care of the older adult. These can include disputes over care cost, the nature and extent or type of care required, and end-of-life and treatment disputes.

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

[30] National Initiative for the Care of the Elderly, Defining and Measuring Elder Abuse and Neglect: Synthesis of Preparatory Work Required to Measure the Prevalence of Abuse and Neglect of Older Adults in Canada (Synthesis Report), online: http://www.nicenet.ca/detail.aspx?menu=52&app=234&cat1=709&tp=2&lk=no> [Defining and Measuring Elder Abuse].

Criminal Proceedings

The Canadian Criminal Code plays a role directly and indirectly, in protecting older adults from financial abuse and exploitation. Select criminal offences can be, if used, helpful in deterring and penalizing perpetrators of abuse. Fairly new sentencing provisions now provide our courts with additional factors that can be considered to increase the severity of sentencing where appropriate, when the victims of these crimes are older and vulnerable.[31]

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

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

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[31] *Protection of Older Adults Act* S.C. 2012, c. 29.

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.

Case Example #8

A daughter was appointed attorney under her mother's power of attorney for property and personal care. The daughter moved the mother out of her own house and into the daughter's house. She then sold her mother's house using the power of attorney for property. The daughter used the proceeds of the sale of her mother's house (and her mother's investments) to support herself financially without ever telling her mother. Even worse than this, each day the daughter forced the mother out of the 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 was charged and convicted of failing to provide necessities of life. She was sentenced to 22 days of imprisonment.[32]

Case Example #9

An older adult who suffered from early stages of dementia and who was living alone after his wife moved into a long-term care home was approached by a young man offering to wash his windows and clean his eaves troughs. The older adult was grateful for the assistance and eventually allowed the young man to live in his residence in exchange for assistance around the house. The young man started to call himself the older adult's caregiver. However, eventually a relative of the older adult discovered that the young man was defrauding the older adult by making $500.00 a day withdrawals on his credit cards. The older adult's home was also in disarray and he was malnourished and had to be hospitalized. The young man was convicted of fraud over $5000.00 and was sentenced to 4 years in prison.[33]

Case Example #10

An only child of an elderly widow used a POA his mother granted him to deplete her of all her assets, leaving her penniless and living in a

[32] *R. v. Kos-Rabcewics-Zubkowski*, 2010 ONCJ 780.
[33] *R. v. Bernard* 2015 BCPC 0107

homeless shelter. The mother had over $1 million in assets, including several properties. The son used the powers under the Continuing Power of Attorney for Property to mortgage all of her properties for his own benefit and then defaulted on all of the mortgages. He also drained her bank and investment accounts. The son was charged criminally for his actions. At trial, the judge noted that "in jail, [the son] would be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm". The son was sentenced to 10 years in prison but this sentence was reduced to 8 years on appeal.[34]

GUARDIANSHIPS

Guardianship is one means, often a choice of last resort, to manage the affairs of those under disability. In the context of adults under disability, "guardian" can refer to a "guardian of the person" or a "guardian of property". The duties, powers and obligations of a guardian is essentially the same as those of an attorney under a power of attorney. The major difference is in how each is appointed. An attorney is often a trusted family member, friend, or professional that a person appoints while capable to look after his/her finances or personal care and treatment decisions in the event of decisional incapacity. A guardian is someone appointed after a person has been declared incapable of making decisions respecting property or personal care or both, usually, but not always because the person never made a power of attorney.

Guardians of Property

A guardian of property is someone who is court-appointed to manage the financial affairs of a person who is declared mentally incapable of doing so. Pursuant to s. 6 of the Substitute Decisions Act, 1992, S.O. 1992, chapter 30 (the "SDA") a person is incapable of managing property if:

> The person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack decision.

A guardian for property may, upon application, be appointed by the Court for a person who is declared incapable of managing property, pursuant to s.22 of the *SDA*. The Court shall not appoint the Public Guardian and Trustee ("PGT") as a guardian under

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[34] *R. v. Kaziuk* 2012 ONCJ 34, aff'd in part 2013 ONCA 217.

s.22 unless the application proposes the PGT as guardian; the application is accompanied by the PGT's written consent to the appointment; AND there is no other suitable person who is available and willing to be appointed.

The PGT may be appointed as a "statutory guardian" of property, pursuant to s.15 or s.16 of the SDA. If a certificate issues under the *Mental Health Act* certifying that a person who is a patient of a psychiatric facility is incapable of managing property, the PGT is the person's statutory guardian (s.15 of the SDA). Under s.16, if the person is not a patient in a psychiatric facility anyone can request that a capacity assessor perform an assessment of the person to determine if the person is capable of managing property. If the person does not refuse to be assessed and the capacity assessor finds the person incapable of managing property, the prescribed forms are forwarded to the OPGT and the PGT thereafter automatically becomes the person's statutory guardian of property.

When the PGT is acting as statutory guardian for an incapable person it can, in turn, appoint certain people to act in its place. A relative, spouse or partner of the incapable person may, for example, be appointed by the PGT. Applications can be made to replace the PGT as statutory guardian.

A guardian for property can do anything the incapable person could normally do in relation to his/her own property. This includes collecting and depositing income, paying bills, making purchases, selling assets, handling investments, managing real estate and looking after legal matters. The only matter of a financial nature that a guardian of property cannot do is make, or change, a Will on behalf of the incapable person.

A guardian's authority ends if and when the person under guardianship dies. The estate trustee named in the person's will is authorized to administer the estate. If there is no Will, authorized next of kin, or others can ask the court for authority.

Guardians of Personal Care

A guardian of the person will be appointed where an individual is incapable of personal care. Under s.45 of the *SDA*, a person is incapable of personal care if:

> *The person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*

Upon an application, the Court may appoint a guardian of the person for a person who is incapable of personal care decisions pursuant to s.55 of the *SDA*. The Court shall not appoint the PGT as guardian under s.55 unless the application proposes the PGT as guardian, the application is accompanied by the PGT's written consent and there is no suitable person who is available and willing to be appointed.

A person who is paid to provide services to the incapable person is generally prohibited from being the guardian of the person.

Guardians must keep accounts the contents of the accounts are prescribed by legislation (O.Reg 100/96 under the *SDA*). The format of accounts for the passing of the guardian's accounts is outlined in Rule 74.17 of the Rules of Civil Procedure.

Guardians must also act in accordance with the Management Plan or Guardianship Plan in place, as approved by the Court or the PGT.

The Office of the Public Guardian and Trustee is a corporation under the *Public Guardian and Trustee Act*, R.S.O. 1990, c.P-51. The PGT has many roles and responsibilities. For example, the PGT will act as a guardian of property and personal care of *last resort only* for incapable adults under the *SDA*. The PGT will also conduct an investigation into allegations of risk of serious adverse effects to incapable adults under the *SDA*. The PGT also reviews and comments upon private applications to the Ontario Superior Court of Justice for guardianship under the SDA, taking a formal

position in a proceeding if necessary. The PGT will also act as litigation guardian or legal representative of *last resort* of incapable adults in litigation.

Guardianship Disputes

Like Power of Attorney disputes, family members can get involved in disputes over who shall be the guardian of a loved one and competing guardianship applications may be before the court. One real life example is below:

Case Example #11

A son brought an urgent motion before the court on the ground that he had been compelled to remove his mother from her home on the basis of information received from her care giver that she was not being fed. Competing guardianship applications were issued amongst feuding siblings struggling for control of their mother's financial and personal care decisions. In the end, the court appointed a trust company to manage the financial affairs, and appointed one of the family members to manage the personal care affairs. The court was very critical of the actions of one or more of the children, and described one of the issues as follows: "*it is difficult to find words to describe adequately his [the grandson's] misconduct. Suffice it to say, by, in effect, kidnapping his grandmother, he demonstrated that he was not prepared to work within the legal framework of a guardianship…*".[35]

POTENTIAL EXPLOITATION THROUGH JOINT ASSETS

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

[35] *Chu v. Chang* 2010 ONSC 294.

Joint Bank Accounts

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

At common law there is a presumption of advancement that applies to gratuitous *inter vivos* transfers from parents to their minor children (children under 18 years of age); these transfers, in other words, are assumed to be gifts. This presumption does not apply to situations of gratuitous transfers by a parent to an adult child. Rather, the law presumes that the adult child is holding the property in trust for the parent (a "resulting trust"). This presumption can be rebutted with evidence that speaks to the grantor's intentions when he or she granted status of joint bank account holder to his or her adult child. See the case of *Pecore v. Pecore* [2007] 1 S.C.R. 795.

It is relatively easy to attach "rights of survivorship" to a joint account; often it's only a matter of checking the appropriate box on a banking agreement. Checking that box does not necessarily rebut the presumption of resulting trust, but it can be used as evidence that the deceased parent had intended the funds in that account to pass to the adult child / joint account holder outside of the estate. Regardless, section 72 of the *Succession Law Reform Act* provides that funds held jointly by the deceased and another can be clawed-back into the estate for the purpose of satisfying claims against the estate.

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

Joint Tenancies

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

Case Example # 12

A retired and older woman purchased a house after her husband died. The woman and her daughter held title to the property as joint tenants even though the mother used her life savings for a down payment and she paid all mortgage payments and bills for the house. The mother was older and wanted her daughter to look after the property in trust for her as she progressed in age. She insisted that the beneficial interest of the house remain with her. The daughter and her boyfriend moved in with the mother. Shortly thereafter the relationship between the mother and daughter soured and she asked her and her boyfriend to move out. The daughter and boyfriend refused. The daughter claimed she owned the house too and that she had every right to live there. The mother took them to court to have them vacate the house and have title transferred back to her name only. While the daughter at the last minute consented to the order sought, the Court advised that it would have granted a vesting order in favour of the mother placing all legal and beneficial ownership in the name of the mother, and an order requiring the daughter and boyfriend to vacate the property and give sole possession to the mother.[36] The Court would have granted these orders based on the fact that the evidence supported a finding of resulting trust in favour of the mother based on *Pecore v. Pecore*.[37]

CONCLUSION

While not all family disputes, abuse or exploitation of older adults can be avoided, having proper planning in place may reduce the extent of those disputes involving older adults and/or the costs of litigation. Perhaps some of these disputes in our case

[36] *Jones v. Jones* 2014 ONSC 787 at para.13.
[37] *Jones v. Jones* 2014 ONSC 787.

examples could have been avoided if the families knew in advance the wishes and plans of the older adult. Communication is the key in planning for older adults. Also, determining the best people to act as your substitute decision maker is also important. How will one daughter react when the brother is appointed? Can all three children work together? Before putting that daughter on your joint bank account, is there another way? Perhaps children are not the best choice; there could be a family friend or neighbour. Sibling rivalry can be costly, and evinces bad behaviour amongst siblings including alienation, kidnapping, and other forms of abuse. Once these disputes arise, the cost is large, both emotionally and financially and often it is the older adult's assets that are depleted in litigating these disputes. There are many legal issues that can arise in one's later years of life. This paper is simply a highlight of some of the common issues in elder law affecting older adults currently. The paper also acts as a reminder to those not in the final stages of our lives but who are still in a position to plan for those years. Our paper has set out many stories of abuse, fraud, and tragedy that may come when an older adult has not planned for their future. To that end, it is evident that planning for the future is within an individual's control and should not be dismissed. It is important to exercise planning in a cautious manner, being vigilant, aware and alert to the possibilities of abuse. Enquiries should be made. Professionals should be consulted.

TOOLS AND RESOURCES

Attached are the following checklists which can also be found online at: http://whaleyestatelitigation.com/blog/checklists-for-attorneys-and-guardians/

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

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

Appendix "C": Summary of Capacity Checklist

Appendix "D": Capacity Checklist – Estate Planning Context

Appendix "E": Undue Influence Checklist

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 "<u>Continuing</u>" 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, <u>except make a Will</u>

Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:

- Is the grantor aware of the scope of property possessed?

- Is the grantor aware of the approximate value of property possessed?

- Is the grantor aware of obligations owed to dependants?

- Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?

- Is the grantor aware that an attorney has a duty to account for all actions taken?

- Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?

- Is the grantor appreciative of the risks of entrusting property to the attorney?

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

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

Be aware of the statutory obligations of resignation

- Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable

- Notify persons previously being dealt with on the grantor's behalf

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

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

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

Facilitate contact between the grantor and relatives or friends

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

Keep accounts of all transactions

Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs

- Ordinary prudence v. Professional prudence

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

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

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

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

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

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

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

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

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

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

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

- **Duties**

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

- **Personal comfort and well-being**

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

- **Personal care**

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

- **Exception**

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

- **Explanation**

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

- **Participation**

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

- **Family and friends**

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

- **Consultation**

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

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

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

- **Accounts**

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

- **Standard of care**

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

- **Same**

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

- **P.G.T.**

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

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

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

- **Amendment of plan**

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

- **Application of Trustee Act**

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

- **Liability of guardian**

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

- **Same**

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

- **Exception, corporate directors**

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

- **Breach of duty**

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

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

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

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

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

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

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

- An Attorney may settle an "*Alter Ego Trust*" or *inter vivos* trust. Similarly, certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the

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

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

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

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

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 2015

APPENDIX "B"

ATTORNEY CHECKLIST

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

An Attorney MUST...

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

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

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

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

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

Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority

- Is the power to be exercised solely or jointly?
- Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?

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

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

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

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

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

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

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

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

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

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

Be aware the statutory requirements concerning resignation

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

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

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

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

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

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

Facilitate contact between the grantor, relatives and friends

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

Facilitate the grantor' independence

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

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

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

Maintain comprehensive records

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

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

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

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

This checklist is intended for the purposes of providing information and guidance only. This 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 2015

APPENDIX "C"
SUMMARY OF CAPACITY CRITERIA

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

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

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Grant and revoke a POA for Personal Care	*SDA,* s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; and (b) Ability to understand the specific effect of the gift in the circumstances. *In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.*
Make a Will ***Testamentary Capacity***	Common law	(a) Ability to understand the nature and effect of making a Will; (b) Ability to understand the extent of the property in question; and (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; and (b) Ability to understand the trust`s specific effect in the specific circumstances. *In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to Undertake Real Estate Transactions	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances.

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

[2] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[3] *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998 [hereinafter *Calvert*]
[4] *Calvert*
[5] Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel*",* *www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0*

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

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

Kimberly A. Whaley, Whaley Estate Litigation 2015

[6] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)
7 R.S.C. 1985, c.C-5, S. 16(1)

APPENDIX "D"

CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

Capacity Generally

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

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[8]

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.[9]

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

Testamentary Capacity

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

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

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

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

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[10]

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

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[8] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 Wl 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

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

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

- A "*disposing mind and memory*" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. [11]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[12]:

> *"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.[13]

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act* [14] 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")

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

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

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

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

- 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.[15] Therefore, capacity is determined on the criteria applied to determining testamentary capacity
- A testamentary disposition may arguably include the transfer of assets to a testamentary trust**.**[16] 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,* [17] 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.[18]

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.[19]

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

[17] R. S.O. 1992, c 30, as am.
[18] *SDA,* subsection 8(2)

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.[20]

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* [21]

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. [22]

A person may be incapable of managing property, yet still be capable of making a Will.[23]

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.[24]

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[19] *SDA*, subsection 9(1)
[20] *SDA,* subsection 9(2)
[21] R.S.O. 1990, c. M.7
[22] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[23] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291
[24] *SDA*, subsection 47(1)

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[25]

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.[26]

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.

Capacity under the Health Care Consent Act, 1996[27]

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

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

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

Capacity to Contract

[25] *SDA*, subsection 47(3)
[26] *SDA*, subsection 47(2)
[27] S.O. 1996, C.2 Schedule A

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.[28]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[29]

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.[30]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[31] 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.[32] 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."[33]

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.[34]

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.[35]

Capacity to Undertake Real Estate Transactions

[28] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
[29] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859
[30] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6
[31] *SDA, supra* note 2
[32] *SDA,* subsection 2(1)
[33] *SDA*, subsection 2(3)
[34] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[35] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[36] 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.[37]

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.

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.[38]

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.[39]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[40]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[41]

Capacity to Instruct Counsel

[36] 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)

[37] *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

[38] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)

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

[40] *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

[41] *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

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.[42] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

(d) Understand what they have asked the lawyer to do for them and why,

(e) Be able to understand and process the information, advice and options the lawyer presents to them; and

(f) Appreciate the advantages, disadvantages and potential consequences of the various options.[43]

<u>Issues Related to Capacity</u>

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[44] 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;[45]
- 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 [46]

[42] Staff lawyer at ARCH Disability Law Centre.
[43] At page 3
[44] *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon,* 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.
[45] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162
[46] *Wingrove v. Wingrove* (1885) 11 P.D. 81

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

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[47]
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.[48]

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. [49]

Psychological pressures creating fear may be tantamount to undue influence.[50]

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."[51]
Undue influence must be corroborated. [52]

Suspicious circumstances will not discharge the burden of proof required.[53]

* See Undue Influence Checklist

Suspicious Circumstances

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

(a) circumstances surrounding the preparation of the Will;

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

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[54]

[47] *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)
[48] *Wingrove v. Wingrove* (1885) 11 P.D. 81
[49] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)
[50] *Tribe v Farrell,* 2006 BCCA 38
[51] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[52] S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; Orfus Estate v. Samuel & Bessie Orfus Family Foundation, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224
[53] *Vout v Hay*, at p. 227
[54] *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.)*

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[55]

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

Kimberly A. Whaley, Whaley Estate Litigation 2015

[55] *Laszlo v Lawton, 2013 BCSC 305 (CanLII)*

APPENDIX "E"

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):[56]

> *"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*,[57] 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*."[58]

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

[56] (1968) LR 1 P&D.
[57] *Craig v Lamoureux*, [1919] 3 WWR 1101.
[58] *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

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

Developing/Modern Application of Undue Influence

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

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[59]

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."[60]

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. [61]

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.[62]

Language

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[59] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

[60] *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).

[61] *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.

[62] 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.

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.[63] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[64]

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.[65]

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. [66]

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.[67]

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[63] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[64] Nguyen Crawford v Nguyen, 2009 CarswellOn 1877; Grewal v Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[65] *Juzumas v Baron*, 2012 ONSC 7220.
[66] *Covello v Sturino*, 2007 CarswellOnt 3726.
[67] 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.

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

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[68]

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*[69] 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.[70]

In *Tate v. Gueguegirre*[71] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;

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[68] *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.
[69] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[70] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[71] 2015 ONSC 844 (Div. Ct.).

- The beneficiary received a draft Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.[72]

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.[73]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[74]

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*,"[75] the more recent SCC case of *C(R) v McDougall*[76] held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*[77] 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.*"[78]

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

[72] Tate v. Gueguegirre 2015 ONSC 844 (Div. Ct.) at para.9.
[73] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[74] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[75] *Vout v Hay* at para 24.
[76] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[77] (1993), 90 Man R (2d) 245 (Man QB) at para 38.
[78] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*

evidence of intention, that the transaction was made as a result of the donor's "*full, free and informed thought*."[79]

See also *Buccilli et al v. Pillitteri et al*,[80] 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*."[81]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[82] recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

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

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.[83]

In *Leger v Poirier*,[84] 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.

[79] *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.
[80] 2012 ONSC 6624, upheld 2014 ONCA 337.
[81] *Buccilli, supra* note 248 at para. 139.
[82] *Shrader v Shrader, [2013] EWHC 466 (ch)*
[83] 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.
[84] *Leger v Poirier*,[1944] SCR 152.

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.[85]

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.[86]

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.*"[87]

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.

[85] *Vout v Hay,* [1995] 2 SCR 876 (SCC).
[86] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.
[87] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

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

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[88]

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?

- ❑ 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?

[88] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

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

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

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

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

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

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

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

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

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

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

Involvement of Professionals

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

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

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

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- ❑ Is the client making a marked change in the planning documents as compared to prior documents?
- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- ❑ Does the client have a physical impairment of sight, hearing, mobility or other?
- ❑ Is the client physically dependent on another?
- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

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

- ❑ Interview the client alone;
- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.
- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

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

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

- ❑ Address recent health changes;

- ❑ Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

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

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

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

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

Practical Tips for Drafting Lawyers

Checklist

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

- ❑ Determine Intentions;

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

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including

health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[89] and

- ❑ Be mindful of the *Rules of Professional Conduct*[90] which are applicable in the lawyer's jurisdiction.

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[89] 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

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