ELDER ABUSE CONFERENCE,

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Table of Contents

1) Introduction

Financial abuse of the elderly, misuse of powers of attorney for property, a rise in "predatory marriages", fraud, theft and abuse of older adults, these are just some of the issues which lawyers in the estates area are dealing with regularly. However, it is not just lawyers who should be aware of these issues. Anyone who interacts with older adults should be mindful of these concerns and developments in this area.

This paper is but a brief overview, rather than an in-depth discussion, of a variety of topics including powers of attorney, undue influence, predatory marriages, and financial abuse issues as related to older adults. Appended to the paper are also some helpful tools, resources and "Checklists".

First, we will examine context, recent statistics, and the impact of Canada's changing demographics.

Ageing Statistics and Changing demographics

The statistics confirm that our population is ageing rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability.[1] There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. Other factors affecting capacity include, normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.[2] These sorts of issues unfortunately invite opportunity for abuse, elder abuse, and exploitation. Also,

- By 2036 it is estimated that there will be between 9.9 and 10.9 million seniors in

[1] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. http://www.canadalawbook.ca
[2] *Ibid* at 1

Canada;[3]

- 14 % of our population is already over 65;[4]
- Life expectancy is at an all-time high with women expected to live until the age of 83 and 80 for men;[5]
- In 2011, 747,000 Canadians were living with cognitive impairment, including dementia, which is 14.9% of Canadians 65 and older;[6]
- 1 in 11 Canadians over the age of 65 currently has Alzheimer's or related dementia;[7]
- In the US, Alzheimer's disease is the 6th leading cause of death with no cure-worldwide and there is another reported case every 69 seconds.[8]

Another telling statistic is that in 2011, family caregivers spent 444 million unpaid hours per year looking after someone with dementia.[9]

2) Overview of Power of Attorneys

The Power of Attorney document (the "**POA**") has long been viewed as one way in which a person can legally protect their health and their financial interests by planning in advance for when they become ill, infirm or incapable of making decisions.[10] The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. In certain circumstances, however, POA documents may cause rather than prevent conflict.

In our practice, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. We have also seen it used as a means of protection against

[3] Statistics Canada, Seniors: http://www.statcan.gc.ca/pub/11-402-x/2011000/chap/seniors-aines/seniors-aines-eng.htm Accessed on May 19, 2015.
[4] Statistics Canada, Seniors: http://www.statcan.gc.ca/pub/11-402-x/2011000/chap/seniors-aines/seniors-aines-eng.htm Accessed on May 19, 2015.
[5] Ibid.
[6] Alzheimer Society of Canada, Facts About Dementia: http://www.alzheimer.ca/en/About-dementia/Dementias/What-is-dementia/Facts-about-dementia
[7] Alzheimer Society (Toronto) – Statistics: http://www.alzheimertoronto.org/ad_Statistics.htm Accessed on May 19, 2105.
[8] Ibid.
[9] Alzheimer Society of Canada, "A New Way of Looking at the Impact of Dementia in Canada": http://www.alzheimer.ca/en/About-dementia/Dementias/What-is-dementia/Facts-about-dementia Accessed on May 19, 2015.
[10] This section of the course book is adapted from a paper authored and presented by Kimberly A. Whaley at the CCLA Solicitors Conference in May of 2013, "Financial Abuse, Risks and Abuse of Power of Attorney Documents." See Kimberly Whaley's Checklist for Attorneys at Appendices B and C of this course book. To view and download additional resources, visit www.whaleyestatelitigation.com, click on "Our Blog," scroll down to "Firm Documents" on the right-hand toolbar and click on "Checklists."

predators, of which there is a very real risk. Unfortunately, we have also seen these documents used abusively, causing the grantor harm through fraud, neglect, and depletion of wealth.

i. Continuing Power of Attorney for Property Validity Requirements

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

Pursuant to the *Substitute Decisions Act ("SDA")*, a POA for Property is a CPOAP if:

(a) the document states that it is a continuing power for attorney; or

(b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

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

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal criteria for capacity to give or revoke a CPOAP is different from that of capacity to manage property to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property (discussed in more detail below, under "Capacity").

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

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

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

ii. Who to Appoint as Attorney for Property

While a POA document can be used for the good of a vulnerable adult or an incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document. More often than not it becomes apparent that the grantor never fully understood and/or put much thought into the extent of the powers being bestowed, whether the chosen attorney truly had the ability to do the job and fulfill his/her duties, or whether the attorney chosen could truly be trusted to act in an honest and trustworthy manner. Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

One of the primary ways of diminishing the chances of abuse of a POA document is to choose the right attorney. The *SDA* requires that an attorney be over the age of 18 in order to exercise decisional authority.[11] Before naming an attorney in a POA document, it is important to consult the person in question and ensure that he or she is willing to act. Some individuals will choose to appoint a trust company as an attorney. Such companies perform the services of an attorney for a fee. They are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

[11] *Substitute Decisions Act, 1992*, SO 1992, c-30 [*SDA*], s. 5.

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

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together, or enable each attorney to act separately on their behalf. Unless it is specified in the POA document that attorneys are allowed to act separately, statutory law assumes that jointly appointed attorneys must make decisions together.[12]

It is also possible to assign different responsibilities to separate attorneys.[13] 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.[14] It is important, when deciding whether to appoint more than one attorney, to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to a grantor's personal and financial well-being.

A person who is a grantor's health care provider may not be appointed to be his or her attorney for personal care unless the person is the grantor's spouse, partner or relative. Similarly, a person who provides residential, social, training or support services for compensation may not be appointed his or her attorney for personal care unless that person is the grantor's spouse, partner or relative.[15]

Although the Public Guardian and Trustee ("PGT") may act as an attorney of last result in certain cases, it is important to note that the PGT cannot be named in a POA document unless her approval is obtained beforehand.[16]

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[12] *Supra note 14.*, s. 7(4), 46(4).
[13] See e.g. *ibid.* at s. 7(6), 46(7).
[14] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>; see *SDA, supra* note 2 at s. 7(2) and 46(2).
[15] *SDA, supra* note 2, s 46(3).
[16] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>.

For more information on the Duties and Liabilities of Attorneys for Property, see Kimberly Whaley's Attorney for Property Checklist at Appendix "B".

Case: McMaster v. McMaster

In this case[17] Mary McMaster was 80 years old and in good health but had some symptoms of forgetfulness. She sought assistance with estate planning and executing a continuing power of attorney for property and appointed her two sons as joint attorney for her CPOAP. In 1994 one of her sons, Malcolm, started managing her financial affairs. Her other son, Graeme, did not know he was named as a joint attorney for property with Malcolm, and neither Mary nor Malcolm informed him of his joint role.

In 2002 Mary and her sons incorporated a family business with a net worth of $2 million.
Between 2002 and 2009, Mary's symptoms of forgetfulness progressed to late stage Alzheimer's.

In 2004, Malcolm transferred significant funds from the family corporation to a corporation he controlled. He invested those funds in another enterprise, which floundered, and then he used more of Mary's money to sue the floundering enterprise. In 2006 Malcolm used Mary's funds to purchase, through his own company, a building for $300,000 which he renovated and sold for $500,000 in 2012.

In 2012 Malcolm took steps to obtain a mortgage on Mary's house. Graeme objected to Malcolm's plans in this regard, and in the course of his communication with his Malcolm he found out for the first time he was a co-attorney for property for Mary. That same year, 2012, Mary's accountant informed both brothers that Mary's personal and corporate taxes had not been filed since 2008 and the family corporation had an outstanding line of credit in the amount of $65,000.

The court did not make a finding as to whether Mary was capable of managing her property since 2000, although there was evidence to suggest that capacity was an issue. Instead, the court found that:

[17] *McMaster v. McMaster*, 2013 ONSC 1115.

> *Mary is the embodiment of an individual who needs protection of the court, otherwise she is a pawn in the investment schemes of her son. The concept of parens patriae can be relied upon by the court to critically assess … the stewardship of Malcolm.*[18]
> …
> *The fiscal stewardship of Malcolm has been a disaster for his mother. He has literally blown through at least $2,000,000. If there was ever a case for removal of an attorney this is it. It will prevent the further haemorrhaging of his mother's assets.*[19]

Malcolm was removed as attorney for property, and at the time of writing, the litigation is ongoing.[20]

iii. Powers of Attorney for Personal Care

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

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

When making decisions on an incapable person's behalf, the Attorney for Personal Care is required to make those decisions in accordance with the *SDA*. Further guidance respecting

[18] *McMaster* at para. 56.
[19] *McMaster* at para. 63.
[20] See amended costs decision 2014 ONSC 2545.

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

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

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

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

3) Financial Abuse of Older Adults and Others: Red Flags and Indicators

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.[21] However, the Department also stated that it is difficult to estimate the prevalence and incidence of elder abuse in Canada due to factors such as under-reporting.[22] Financial abuse can include anything from procuring and using joint accounts, to forgery or abuse involving a Power of Attorney document, to sharing an older adult's home without paying a share of the expenses, to misusing or stealing an older adult's assets.[23] Often the financial abuse is at the hands of a family member whom the older adult is dependent upon and who has influence or control over the victim.[24] Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust.[25]

According to the World Health Organization, "elder abuse" is described as: "A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person."[26]

The National Initiative for the Care of the Elderly ("N.I.C.E.") defines older adult financial abuse as "Theft or exploitation of person's money, property or assets."

Examples include:

- misusing a Power of Attorney;
- stealing a senior's money, pension cheques, or possessions;
- committing fraud, forgery or extortion;
- sharing a senior's home without paying a fair share of the expenses;
- unduly pressuring a senior to:
    - Sell personal property
    - Invest or take out money
    - Buy alcohol or drugs

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[21] Department of Justice, *Backgrounder Elder Abuse Legislation*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html
[22] *Ibid*.
[23] Government of Canada, Seniors Canada, *Facts on Financial Abuse of Seniors*, online: http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=158.
[24] Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online: http://www.opp.ca/ecms/files/250363255.6.pdf
[25] Government of Canada, Seniors Canada, *Facts on the Abuse of Seniors*, online http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&cid=155
[26] http://www.who.int/ageing/projects/elder_abuse/en/ [Accessed on September 10, 2014]

- Make or change a will
- Sign legal documents they do not understand
- Give money to relatives, caregivers or friends
- Engage in paid work to bring in extra money.[27]

Indicators of financial abuse include:

- changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without senior's permission;
- unexplained or sudden inability to pay bills;
- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison with the seniors' assets;
- changes in banking patterns due to pressure;
- changes in the senior's appearance;
- controlling a senior's spending;
- confusion or lack of knowledge about financial situation and signing of legal documents;
- being forced to sign multiple documents at once;
- being coerced into a situation where a senior is being overworked and underpaid;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in a senior's power of attorney;
- necessities of life denied or not provided by a senior's attorney under a POA (food, medication, assistive devices)
- being overcharged for services or products by sales people or providers; or
- denying a senior his or her right to make independent financial decisions.[28]

The most frequent perpetrators of financial abuse on older adults are adult children, service providers, strangers, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit).

[27] NICE – Tools for Preventing and Intervening in Situations of Financial Abuse, http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario [Accessed September 12, 2014]
[28] *Supra* note 33.

Below will be discussed issues that may lead to the vulnerability of financial abuse including lack of capacity and undue influence. The paper also discusses both civil and criminal proceedings arising out of financial abuse of older adults.

4) Capacity

What is "capacity"? In law, one is presumed capable unless and until this presumption is rebutted. There is no one single definition of capacity, nor is there a general "test" or criteria to apply for establishing capacity, mental capacity, or competency. Instead, the law prescribes a different standard of capacity depending on the context or decision being made. The following is a list of decisions-making contexts:

- Giving instructions for and to execute a will or trust ("Testamentary capacity");
- Making other testamentary dispositions;
- Contracting;
- Managing property;
- Managing personal care;
- Granting or revoking a Continuing Power of Attorney for Property;
- Granting or revoking a Power of Attorney for Personal Care;
- Consenting to treatment decisions in accordance with the *Health Care Consent Act*;
- Gifting or selling property;
- Instructing a lawyer; and
- Marrying.

Legal capacity is decision, time and situation specific. Thus, testamentary capacity differs from the capacity to grant a power of attorney for property, which differs from the capacity to marry, and so on. Capacity can fluctuate over time – it can fluctuate week to week or even over the course of a day – so the relevant time period for considerations of capacity is the time at which the relevant decision is made.[29]

[29] See Appendices G and H of this course book for Kimberly Whaley's "Capacity Checklist Re: Estate Planning Context" and "Summary of Capacity Criteria." For further reading on capacity see: Estates, Trusts & Pension Journal, Volume, 32, No. 3: "*Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity*" by Kimberly Whaley and Ameena Sultan. To view and download a number of checklists and charts on various capacity criteria, visit www.whaleyestatelitigation.com, click on "Our Blog," scroll down to "Firm Documents" on the right-hand toolbar and click on "Checklists."

Capacity to Grant or Revoke a Continuing Power of Attorney for Property

Pursuant to section 8 of the *Substitute Decisions Act*[30], 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[31].

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 criterion for capacity for granting that CPOAP at the time the CPOAP was made.[32]

If, after granting a CPOAP, the grantor becomes incapable of giving a CROAP, the document remains valid as long as the grantor had capacity at the time it was executed[33]

Capacity to Grant or Revoke a Continuing Power of Attorney for Personal Care

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:

[30] R.S.O. 1992, c.30, as amended
[31] *SDA*, subsection 8(2)
[32] *SDA*, subsection 9(1)
[33] *SDA*, subsection 9(2)

- The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- The appreciation that the person may need to have the proposed attorney make decisions for the person.

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

Case: *Laszlo v. Lawton*

In this 2013 British Columbia decision,[34] the deceased believed that she could communicate telepathically with objects by touching them; that characters on television were communicating with her; and that unidentified individuals had stolen significant amounts of money from her, among other irrational beliefs. However, these delusions were not obviously connected to her decision to disinherit her husband's family who, on the evidence, were her previously-named beneficiaries and deserving of her generosity.

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

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

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

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

> *It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator's mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.*
> *…*
> *In my view, consideration of non-vitiating delusions in this broader sense where the evidence suggests that all or some of the testator's delusions accompany a progressive degenerative brain disease like Alzheimer's does not run afoul of the rule in Banks or its lineage.*

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

5) 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. The law has been developed to allow the courts to assist parties where the testator has been victimized by another person. Undue influence, in the context of testamentary dispositions, is the exercise of one person's will over that of the will of the testator. Undue influence itself has been explained as the ability of one person to dominate the will of another, whether through manipulation, coercion, and outright or subtle abuse of power.

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.[35]

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

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."[36]

Power Imbalance

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. [37]

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.[38]

Language

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[39] 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.[40]

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[36] *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).
[37] *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.
[38] 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.
[39] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[40] *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

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.[41]

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. [42]

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 favorable manner.[43]

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.

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[41] *Juzumas v Baron*, 2012 ONSC 7220.
[42] *Covello v Sturino*, 2007 CarswellOnt 3726.
[43] 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.

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.[44]

Indicators of Undue Influence

The Court in the 2013 decision of ***Gironda v Gironda***[45] 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.[46]

In ***Gironda,*** the grantor of a Power of Attorney for Property in 2005, Catarina, named one of her three sons, Vito, as her attorney for property.[47] Her other two sons brought an application seeking their appointment as guardian of property of Catarina and challenging, *inter alia*, the 2005 power of attorney documents and the validity of certain transfers of Catarina's property to Vito in 2008 and 2009. Vito lived in Catarina's house with her until she was hospitalized for a fall in 2011. In 2008, Vito transferred Catarina's residential property to himself for two dollars, and in 2009 he transferred $175,000 of Catarina's funds to himself and took $19,400 of that money for his own purposes.[48]

[44] *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.
[45] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[46] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[47] 2013 ONSC 4133.
[48] *Ibid* at para. 178.

The Court found that both transfers were invalid by reason of Catarina's lack of requisite capacity as at the relevant times. Regarding the transfer of Catarina's real property, the court also found that Vito exercised undue influence on Catarina. The court found that the 2005 power of attorney for property was valid and that Caterina was incapable of managing her property; nevertheless the Court prohibited Vito form acting in his capacity as attorney for property and granted the applicants' application for guardianship. The Court granted judgment against Vito in respect of the $19,400.00 and ordered him to pay Catarina market rent and back rent to the date of Catarina's incapacity to manage her property. This case is noteworthy respecting the court's treatment of undue influence, a factor that is often present in these types of proceedings. According to Supplemental Reasons released on October 18, 2013[49] this decision was under appeal, however Vito has since died[50] and no appeal decision has been released.

Recently in *Tate v. Guegguegirre*,[51] the Ontario Divisional Court added the following list of "significant evidence" that suggested undue influence in the context of the execution of a Will:

- the increasing isolation of the testator;
- the testator's dependence on the respondent (the alleged undue influencer);
- the substantial pre-death transfers of wealth from the testator to the respondent;
- the testator's expressed yet apparently unfounded concerns that he was running out of money;
- the testator's failure to provide a reason or explanation for leaving his entire estate to the respondent and excluding his daughters from it;
- the material changes in circumstances between the time of the first Will and the time of the final Will that would undermine the testator's earlier reasons for favouring his son in his Will;
- the move by the testator out of his home city to the respondent's city, increasing his isolation and the control over him by the respondent;
- the circumstances of the making of the Will including:
    - using a lawyer previously unknown to the testator and chosen by the respondent;

[49] 2013 ONSC 6474.
[50] The Toronto Star, December 28, 2013 http://www.thestar.com/news/crime/2013/12/28/christmas_death_a_murder_police.html [accessed September 19, 2014]
[51] 2015 ONSC 844 (Div. Ct).

- the respondent conveying instructions to the lawyer concerning the contents of the Will;
- the respondent apparently receiving a draft of the Will before it was executed by the testator and then the respondent taking the testator to the lawyer to sign the Will;

- the testator's documented statements that he was afraid of the respondent.[52]

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.[53]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[54]

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*,"[55] the more recent SCC case of *C(R) v McDougall*[56] 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.

Where the capacity of an individual 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.[57] 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;

[52] 2015 ONSC 844 (Div. Ct.) at para. 9.
[53] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[54] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[55] *Vout v Hay* at para 24.
[56] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[57] 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.

- 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.[58]

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.[59]

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

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity. The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[61]

[58] *Vout v Hay,* [1995] 2 SCR 876 (SCC).
[59] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.
[60] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).
[61] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

See Kimberly Whaley's Undue Influence Checklist at Appendix "A" for more information and for practical tips on identifying undue influence and suspicious circumstances.

6) Jointly Held Assets and Potential for Abuse

Beneficiaries may find themselves defending challenges to property passing to them from the Deceased by right of survivorship. We see these challenges arising most often in cases involving remarriage and re-partnership scenarios, or where the deceased parent held joint accounts with one of their children. In the first scenario, expectant heirs often have an incentive to try to prevent the deceased's portion of a jointly held asset from passing by right of survivorship to the surviving spouse. In the latter scenario, where the deceased's children would otherwise share equally in the estate, a right of survivorship designation on a joint account held by one of the deceased's children practically invites estate litigation.

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.

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.

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.

Case: *Sawdon Estate*

In the Ontario case of *Sawdon Estate*,[62] the deceased had seven bank accounts at various financial institutions that were jointly held, with a right of survivorship, with two of his five children. The funds in the accounts totalled just over $1 million. The father had some history and understanding of joint accounts when his wife passed away, and according to his lawyer, understood that when he transferred the bank accounts into "joint accounts with a right of survivorship" the funds would "be accessible to his two sons immediately upon his death".[63] At the same time he made the accounts joint, the deceased executed a new Will which divided his estate into five parts, for each of his five children and their issue. Should one of his children die without issue, that particular child's share would go to the charity, Watch Tower Bible and Tract Society of Canada (the "Watch Tower").

The deceased, despite understanding the "right of survivorship" of joint accounts, advised his sons that upon his death they were to divide the money in the joint accounts equally amongst their siblings. The sons agreed to and understood this request.

Subsequently, the deceased revised his Will, whereby the Watch Tower would receive certain shares of his corporation "Sawdon Holdings" and the residue of his estate. Upon his death, his sons argued that the joint accounts were "gifted" to them and passed outside of his estate. The

[62] *Sawdon Estate*, 2012 ONSC 4042.
[63] *Sawdon Estate*, 2012 ONSC 4042 at para. 23.

Watch Tower argued that the gift failed because the deceased did not gift the "beneficial interest" in the joint bank accounts and therefore the funds in the accounts formed part of the residue of the estate.

Justice Ricchetti applied *Pecore* and found that the sons successfully rebutted the presumption of resulting trust. The direct evidence showed that the deceased understood how joint accounts operated and specifically wanted the funds to pass to his children outside of his estate. His Honour also relied on the bank documents setting out that the accounts were subject to the right of survivorship, the tax treatment of the funds, and that there was no evidence of any reservation of interest by the deceased. The gift of the joint bank accounts was not a testamentary disposition as the gift was intended to be and was effective immediately upon opening of the joint bank accounts.

His Honour also went on to find that there was no intention by the deceased to retain a "beneficial" interest in the joint accounts as suggested by the Watch Tower. The beneficial interest in the joint bank accounts was transferred to all of the deceased's children. The deceased had no intention to reserve any beneficial interest for himself.

Justice Ricchetti found the bank documents to be clear on their face and that the deceased's sons had control and use of the funds if they wanted. Justice Ricchetti also opined that another way to approach the deceased's actions was that he made a gift of the legal and beneficial interest in the joint bank accounts to the two sons subject to them holding those monies upon receipt in trust for their siblings. In other words, that the sons were bare trustees for their siblings, when and if they received any monies from the joint bank accounts.[64]

Appeal Decision

The Watch Tower appealed and the Court of Appeal just recently released its decision.[65] Justice Gillese, with Justices Hoy and Strathy agreeing, upheld the trial judge's conclusion that all of the children were beneficially entitled to the funds in the bank accounts. However, Justice Gillese, on behalf of the Court, arrived at that conclusion using a different legal analysis.

[64] *Sawdon Estate*, 2012 ONSC 4042 at paras. 80-83.
65 Sawdon Estate v. Sawdon, 2014 ONCA 101.

Her Honour found that when the father transferred the bank accounts into joint names with his two sons he created a trust, and legal title vested immediately upon transfer. The sons became legal owners on the understanding that they were to divide the funds in the accounts equally amongst all of the children upon their father's death. Therefore, Gillese J. held that "in legal terms, when the [b]ank [a]ccounts were opened [the father] made an immediate *inter vivos* gift of the beneficial right of survivorship to the [c]hildren. Thus, from the time that the [b]ank [a]ccounts were opened, those holding the legal title to the [b]ank [a]ccounts *held the beneficial right of survivorship in trust* for the [c]hildren in equal shares."[emphasis added][66]

Her Honour explained that this analysis differed from the trial judge's in two significant respects. Firstly, Her Honour disagreed with the trial judge's suggestion that all of the children were beneficially entitled to *the contents* of the bank accounts from the time the accounts were opened. Instead, Gillese J. found that the children were entitled to the beneficial *right of survivorship* from the time the bank accounts were opened. There is a significant difference in these two findings, Gillese J. explained:

> The question of beneficial entitlement on [the father's] death is a question of who owns the right of survivorship, whereas the question of beneficial ownership generally would encompass the period form the time that the [b]ank [a]ccounts were opened. . .[O]n the trial judge's findings of fact, [the father's] intention and instructions related only to the former, namely, beneficial entitlement upon death.[67]

Secondly, Gillese J.'s legal analysis differed from the trial judge's in that the trial judge also founded the children's entitlement on the alternative bases of gift or trust. The trial judge found that, alternatively, the father made a "gift" of the legal and beneficial interest to his two sons but they were to hold whatever funds they received from the bank accounts in trust for their siblings. Gillese J. held that "one cannot find that a gift of the beneficial right of survivorship has been made and, at the same time find that the recipient held it in trust for others. When the legal title holder of property is obliged to hold the property for the benefit of another, a trust has been created."[68] Basically, once the trial judge found that the two sons were obliged to hold the

66 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 67.
67 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 69.
68 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 70.

beneficial right of survivorship for all of the children in equal shares he found that a trust had been created, and therefore a gift analysis was no longer available.

Although Her Honour used a different legal analysis, Justice Gillese stated:

> I hasten to reiterate that the legal analysis I offer in no way detracts from the correctness of the trial judge's conclusion that on [the father's] death, the [c]hildren became entitled to the monies in the [b]ank [a]ccounts in equal shares. In my view, that conclusion is not only correct in light of the trial judge's findings, it is inescapable.[69]

On appeal, the Watch Tower also attempted to argue that the father had created a "secret trust" when he asked his two sons to distribute the funds equally to all of his children upon his death. The Watch Tower argued that the secret trust failed for lack of certainty of objects and the funds in the bank accounts must revert back to the estate, or the beneficiaries of the secret trust are the beneficiaries of the father's Will.

Justice Gillese held that as this was a new issue raised first on appeal, she "would decline to entertain it" and that "in any event, without deciding the matter, it seems to me that the secret trusts argument is doomed to fail. Even if the secret trusts doctrine could apply to a situation such as this,. . .there can be no problem with the certainty of objects requirement because, on the findings of the trial judge, the objects of the 'secret trust' are indisputably the children."[70]

6) When It All Goes Wrong: Litigation for Financial Abuse

When financial abuse of older adults or others has been detected, remedies can be found in provincial legislation (such as legislation governing property, guardianship and capacity, health, and social services), under the *Criminal Code* of Canada, and through civil proceedings or common law.

a) Civil Proceedings/Common Law

Unfortunately there have been, and are, too many civil cases before the courts dealing with financial abuse of older adults through the misuse and abuse of power of attorneys for property, undue influence, fraud etc. Below is an overview of some recent cases:

69 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 72.
70 *Sawdon Estate v. Sawdon*, 2014 ONCA 101 at para. 76.

i. Inadvertent Transfer of Wealth

Case: *Servello v. Servello*

In this case,[71] shortly after the death of his father, a son attended a registry office with his mother and with the assistance of a conveyancer, the title to the mother's house was transferred to himself and his mother as joint tenants. The mother's first language was Italian and her comprehension and reading in English was limited. Her understanding at the time was that she was attending a court house so that her son could sign a document which would give him the power to look after her as she grew older.

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that he son had acquired a right of survivorship in her home. She sought an order from the court restoring her as the property's sole owner.

The son on the other hand claimed he did not realize that he was creating a right of survivorship and never had the intention of creating a joint tenancy. However, he still refused to restore title to the property to his mother as sole owner. The son argued that he had invested time and money into the property and wanted a declaration from the court that he held a legal or equitable interest in the property or, in the alternative, that his mother, pay him a sum of money which reflects his contribution. He argued that the laws of proprietary estoppel, unjust enrichment and constructive trust applied.

The Court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that *non est factum*, mistake and undue influence applied in the circumstances. Justice Koke stated that:

> At the time Antonio took his mother to the registry office, he was living in her house. She was recently widowed. English is not her first language, and the family had always used Mr. Sinicrope as their lawyer when they engaged in real estate transactions. Mr. Sinicrope knew the family and the family history, and he could speak Italian. However, Antonio chose not to take Rosina to Mr. Sinicrope's office, but instead he took Rosina directly to the registry office where he arranged for a conveyancer to arrange for the transfer of the home property to him. The conveyancer did not speak Italian, and she

[71] 2014 ONSC 5035.

> was a stranger to Rosina, who signed the deed without the benefit of independent legal advice. Antonio, who received the benefit of the transaction, was by her side throughout. . .
>
> This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina did not receive independent legal advice, and accordingly the two deeds which gave Antonio an interest in the land should be set aside on this basis as well.[72]

As for the son's counterclaim, while the Court found that the son had contributed approximately $68,000.00 to the property, his counterclaim in unjust enrichment and proprietary estoppel failed as he did not come to court with "clean hands", among other reasons.

ii. Financial Abuse through Acquiring Beneficiary Status: Predatory Marriages

Predatory marriages are where unscrupulous opportunists prey upon older adults with diminished reasoning ability purely for financial profit. Given that marriage brings with it a wide range of property and financial entitlements, predators will marry someone of limited capacity solely in the pursuit of these advantages. The overriding problem with such marriages today, is that they are not easily challenged, as the criteria to form the requisite capacity to contract marriage is anything but rigorous to meet. This means that capacity is likely found by a court, even in the most obvious cases of exploitation.

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. Cases involving such fact scenarios include: *Hart v. Cooper*,[73] *Barrett Estate v. Dexter*,[74] *Feng v. Sung Estate*,[75] *Hamilton Estate v Jacinto,*[76] and *A.B. v. C.D.*[77]

[72] 2014 ONSC 5035 at paras. 47 & 49.
[73] *Hart v. Cooper,* 1994 CanLII 262 (BCSC)
[74] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII)
[75] *Feng v Sung Estate,* 2003 CanLII 2420 (ON S.C.).
[76] *Hamilton Estate v. Jacinto*, 2011 BCSC 52.
[77] *AB v. CD* 2009 BCCA 200.

An older but still important predatory marriage case, *Banton v Banton*,[78] as well as two recent cases, *Juzumas v. Baron*[79] and *Ross-Scott v. Potvin*[80], are discussed below and all address the issues of predatory marriage, yet each has a different outcome.

Case: *Banton v. Banton*

This is one of the more widely known cases of a predatory situation. In this case[81], when Mr. Banton was 84 years old, he made a will leaving his property equally amongst his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent.

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Muna Yassin, and a will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, and shortly after the new identical documents were prepared, a further capacity assessment was preformed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Banton's children raised a number of issues before the Court, including the following: whether Mr. Banton had capacity to make wills in 1994, and 1995; whether the wills were procured by undue influence; and, whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton lacked the testamentary capacity to make the Wills in 1994 and 1995, and that the Wills were obtained through the exertion of undue influence. In spite of

[78] 1998, 164 D.L.R. (4th) 176.
[79] 2012 ONSC 7220.
[80] 2014 BCSC 435.
[81] *Banton v. Banton* 1998, 164 D.L.R. (4th) 176.

these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry, thereby finding that Ms. Yassin would benefit from Mr. Banton's estate through intestacy legislation, as his valid spouse.

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[82]

Despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, somewhat surprisingly on its face, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and declined to find the marriage invalid or void. Even more, Justice Cullity made this determination in spite of the fact that he found at the time of Mr. Banton's marriage to Ms. Yassin, that Mr. Banton's "*judgment was severely impaired and his contact with reality tenuous*." That said, there was no known expert evidence either retrospective or commensurate of the capacity of Mr. Banton to marry. Justice Cullity may not have had the evidence to consider any other result.

Case: *Juzumas v. Baron*

The facts in this case[83] have all the hallmarks of a predatory marriage. Mr. Juzumas is an older adult who comes into contact with an individual who, under the guise of "*caretaking*", takes steps to fulfill more of the latter part of that verb. The result: an older person is left in a more vulnerable position than that in which they were found.

Mr. Juzumas, the plaintiff in this case, was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years.[84] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being

[82] *Ibid.* at para.136
[83] *Juzumas v. Baron*, 2012 ONSC 7220
[84] *Supra* note 131 at para 1.

downcast and "downtrodden.[85] The defendant's infiltration in the plaintiff's life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator.

The defendant "*befriended*" Mr. Juzumas in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the Mr. Juzumas's initial reluctance. The defendant was aware that he lived in fear of being forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property. She promised to live in the home after they were married and to take better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared.[86] Ms. Baron testified that Mr. Juzumas had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, but Justice Lang found otherwise. Ms. Baron, who had been married approximately 6-8 times (she could not remember the exact number), had previous *"caretaking"* experience: prior and concurrent to meeting Mr. Juzumas, she had been caring for an older man who lived in her building. She had expected to inherit something from that man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that Ms. Baron was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable**.**

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. A Will executed in contemplation of marriage is not subject to the provision in the SLRA that revokes a Will upon marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the Mr. Juzumas's house

[85] *Ibid.* at paras 39 and 56.
[86] *Juzumas* at para.28.

($600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet Mr. Juzumas without Ms. Baron being present. After the wedding ceremony, which took place at the defendant's apartment, Ms. Baron dropped Mr. Juzumas off at a subway stop so that he could take public transit home.

Despite the Ms. Baron's promise that she would provide better care if they married, testimonies from Mr. Juzumas's tenant and neighbour, which were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "*'abusive', 'controlling' and 'domineering'*".[87]

After the wedding, Ms. Baron and her son devised a plan, in consultation with the same lawyer who drafted the Will, to transfer Mr. Juzumas's house into Ms. Baron's son's name. They drafted an "agreement" that acknowledged that Mr. Juzumas did not want to be admitted to a nursing home. Justice Lang found that even if the "agreement" had been shown to Mr. Juzumas, his English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of real estate.[88] The lawyer's notes indicated that Mr. Juzumas was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that Mr. Juzumas was "acceding to someone else's direction," and not a wilful and active participant to the transaction.[89] In addition, Justice Lang found that Mr. Juzumas had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The court found that this over-medication may have been the result of Ms. Baron drugging Mr. Juzumas's food.[90] Sometime after the meeting, Mr. Juzumas's neighbour explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbour's assistance, Mr. Juzumas attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "*wife"* would appear. The lawyer explained that the transfer could not be reversed because it was "*in the computer*."[91]

[87] *Juzumas*, at para. 54.
[88] *Juzumas*, at paras.68-69.
[89] *Ibid.* at paras. 91.
[90] *Ibid.* at paras. 63 and 92.
[91] *Ibid* at para. 97.

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

As for the doctrine of unconscionability, Lang J., stated that the doctrine *"gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power.*" The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case. Substantial costs were awarded in favour of Mr. Juzumas.

Case: *Ross-Scott v. Potvin*

In *Ross-Scott v. Potvin,*[92] the Court examined the issue of predatory marriages but also cautioned that it may not be appropriate to interfere in the love lives of older adults as personal autonomy to make decisions must be respected.[93] In this case, the only surviving relatives of the deceased (his niece and nephew) sought an order annulling their uncle's marriage to a much younger woman on the grounds of undue influence or, in the alternative, lack of requisite capacity. They also argued that various *inter vivos* transfers and testamentary instruments were invalid on the same grounds. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, in spite of compelling medical evidence of diminished capacity and vulnerability. Justice Armstrong noted that:

> The heavy burden on the plaintiffs exists to ensure that [the deceased's] autonomy is respected. A court should only reject a person's autonomy in the clearest of cases where an individual lacks a "clear free and personal choice"[94]. . . In this case, the plaintiffs' evidence was not strong or compelling. The evidence does not establish that [the deceased] was terrified, coerced, threatened or did not understand what he was doing. Additionally, no evidence demonstrates that [the deceased's] decision resulted from the defendant's coercive power. The witnesses to the marriage ceremony observed nothing

[92] *Ross-Scott v. Potvin* 2014 BCSC 435.
[93] *Ibid* at para. 184 & 187.
[94] *Ibid* at para. 188.

> about [the deceased] to suggest he lacked an awareness of what he was doing or did not understand the event taking place or that he was coerced or influenced by [the defendant].[95]

iii. POAs fraudulently-procured, for the sole purpose of abuse

Case: *Covello v. Sturino*

In *Covello v. Sturino*,[96] a widow owned 50% ownership in her house; her son owned the remaining half. She also owned property in Italy. In 2001, the widow made a will which would divide her assets equally among her five children. Her doctor's notes indicate that she began experiencing memory loss in 2004, and began treatment for Alzheimer's in January of 2005. In the summer of 2005, her son took his mother to his own lawyer, and, on that same day, his mother executed a Continuing Power of Attorney appointing him as her attorney, which took effect on the date of execution, and transferred her ownership property in her home and in certain property in Italy to the attorney/son, for nominal consideration/as a gift. Almost a year later, and pursuant to a court order, the mother underwent a capacity assessment that found her incapable of managing her own affairs.

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

Although the Court found that the medical evidence strongly suggested that the grantor did not have sufficient legal capacity to execute the Continuing Power of Attorney at the time it was granted and it should, therefore, be declared invalid, it noted that, even if one were to find that the grantor did have sufficient legal capacity, the lack of independent legal advice and the

[95] *Ibid* at para.237.
[96] 2007 CarswellOnt 3726 (SCJ).

presence of undue influence from her son Giovanni, still worked together to invalidate the document. In fact, it did more. The Court's finding that the son exercised undue influence and always acted in his own best interests, rather than the interests of his mother, sufficiently disentitled him to be appointed as guardian of her property.

Case: *Nguyen-Crawford v. Nguyen*

In this case[97] a daughter accompanied her mother to her mother's lawyer's office where her mother executed powers of attorney appointing her daughter as her attorney. Before executing the documents, the daughter translated them to her mother, whose primary language was Vietnamese. The siblings later sought a declaration that the powers of attorney were invalid on the basis that the daughter, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her and was the only person who translated both the documents and the lawyer's advice concerning them.

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

[97] 2010 ONSC 6836.

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

Case: *Johnson v. Huchkewich*

In *Johnson v. Huchkewich*[98], one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as "a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets. During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother, in Polish; and no one else in the room understood Polish. Shortly after that and as stated by the Court "'before the ink had dried'", the daughter used the power of attorney to transfer $200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant cost associated therewith, and a number of orders were made against the attorney/daughter, including:

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

Interestingly, and somewhat disappointingly, these facts and orders were brought to light in the context of a will challenge by the same sister who had misappropriated her mother's funds. This

[98] 2010 ONSC 6002.

application, however, was dismissed as not even being a "close call" and costs submissions were requested.

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

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

Case: *Fiacco v. Lombardi*

Fiacco v. Lombardi[99] was a case involving an elderly woman named Maria Lombardi who suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

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

[99] 2009 CarswellOnt 5188 (SCJ).

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

Case: *Zimmerman v. McMichael Estate*[100]

The deceased were husband and wife and founders of extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executors of their estates. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made. The husband died on November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her will. The trust deed contained

[100] 2010 CarswellOnt 5179.

terms that differed from will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were a granted certificate of appointment of estate trustee with will.

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

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

thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

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

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 particularly useful in deterring and penalizing perpetrators of financial abuse. Indeed, a new 2013 sentencing provision now provides 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.[101]

2014 also revealed the Courts of Appeal in Ontario and in British Columbia considering the severity of sentencing decisions arising from the conviction of individuals found guilty of financial abuse of older adults. These appeals evince the judiciary's recognition of the importance of addressing elder abuse, and suggest that our courts are prepared to sentence perpetrators accordingly.

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

The *Criminal Code* does not itself provide for the specific offence of "elder abuse", or "financial abuse." Instead, the *Criminal Code* provides for in or about ten separate offences under which such a perpetrator could be charged.[102] Courts are afforded significant discretion with respect to the sentencing of individuals who are guilty of such *Criminal Code* offences.[103] The fundamental purpose of sentencing is to impose sanctions that meet a number of objectives, including denouncing unlawful conduct and deterring would be offenders from committing such offences.[104]

Section 718 of the *Criminal Code* references a wide range of aggravating factors considered by the Court in determining appropriate sentencing principles. The presence of certain aggravating factors may result in a lengthier sentence if motivated by age or disability, and evidence exists that the offender abused a position of trust or authority in relation to the victim.[105] In March of 2013, Bill C-36, the *Protecting Canada's Seniors Act*, came into effect.[106] It expanded the *Criminal Code's* list of aggravating factors with a view to ensuring "…that sentencing for crimes against elderly Canadians reflects the significant impact that crime has on their lives."[107] Section 718.2(a)(iii) now includes subsection (iii.1) which provides that "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation" can be taken into consideration during sentencing.[108] The recent case of ***R. v. Bernard***[109] applies this section of the Criminal Code in its sentencing of a perpetrator of fraud upon an elderly victim.

Case: *R. v. Bernard*

In this case, Joseph Bernard was convicted of defrauding a 79 year old man of over $10,000.00 by making unauthorized withdrawals of $500.00 a day from a visa card. The older adult had no surviving children and his wife had just been moved into a care home the previous year. He also

[102] *Criminal Code*, R.S.C., 1985, c. C-46, s. 331 (Theft by a Person Holding a Power of Attorney, s. 322 (Theft), s.336 (Criminal Breach of Trust (Conversion by Trustee)), s. 366 (Forgery), s. 346 (Extortion), ss. 386 – 388 (Fraud), s. 215 (Failure to provide the necessaries of life, and s. 219 (Criminal Negligence).
[103] Kent Roach, *Essentials of Canadian Criminal Law*, 3d ed (Toronto: Irwin Law Inc., 2004), p.19.
[104] *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].
[105] *Ibid.* at s. 718.2 (a) (i) and (iii).
[106] *Protecting Canada's Seniors Act,* R.S., c. C-46.
[107] The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, as quoted in Department of Justice Canada, "Government Introduces Legislation to Better Protect Canada's Seniors," News release, Toronto, 15 March 2012 online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32715.html
[108] *Protection of Older Adults Act* S.C. 2012, c. 29; Department of Justice, *Backgrounder: Protecting Canada's Seniors Act*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html.
[109] 2015 BCPC 0107.

suffered from early stages of dementia and other forms of "degenerative mental conditions" at the time of the offence.[110] The fraudster came to the victim's house asking to wash his windows and eave troughs. After that the older adult offered to allow the fraudster to live in his house in exchange for assistance around the house and other tasks. The fraudster took on the role of "caregiver" of the older adult. It was in this role that he defrauded his victim. Not only did he steal from the older adult, at the time the fraud was discovered by the older adult's sister-in-law, the house was in a "deplorable state', there was no food in the refrigerator, and the older adult was malnourished and had to be taken to the hospital.

The Crown sought a sentence of four and half years in jail. In determining the appropriate sentence, the Court noted:

> [32] Section 718.2(a)(iii) and (iii.1) provide that a sentencing court consider evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, and evidence that the offence had a significant impact on the victim, considering their age or other personal circumstances, including their health and financial situation, to be aggravating factors.
>
> . . .
>
> [47] The present case involves a breach of trust of certainly a very high nature. Mr. Crouter [the older adult] had confidence in Mr. Bernard [the fraudster], not only to live in his house and share living space without defrauding him, but to assist him in the necessary tasks which were difficult or impossible for Mr. Crouter to do himself. When he was "befriended" by Mr.Bernard, Mr. Crouter was living alone after his wife had recently moved into a care home. His only family support was from the family in Calgary. His physical and mental health were failing, and it appears from Mr. Bernard's own evidence that Mr. Crouter was not able to properly physically care for himself. Mr. Bernard purported to be Mr. Crouter's friend and caregiver at a time when Mr. Crouter desperately needed both. Mr Crouter invited Mr. Bernard into his home in shared quarters and Mr. Bernard assisted Mr. Crouter to drive him to various visits to his wife and run other errands. He was to make sure that Mr. Bernard was taking his insulin. Mr. Bernard convinced Ms. Etchison [the sister-in-law] that he was a benevolent caregiver and that he had had prior experience with assisting other elderly persons in need.

The Court considered all of the principles of sentencing and concluded that the primary factors involved in this case were the "denunciation" of the conduct and "general deterrence so that others do not participate in similar activities".[111] The Court noted that the perpetrator "preyed

[110] 2015 BCPC 0107 at para. 7.
[111] Ibid. at para. 64.

upon a vulnerable, isolated, elderly victim and a significant sentence [was] required to reflect society's abhorrence for such conduct".[112] The fraudster was sentenced to four years in custody.[113]

The Ontario Court of Appeal recently considered two sentencing appeals that arose from convictions of perpetrators of financial abuse of older adults under the *Code* for fraud and theft.

Case: *R. v. Kaziuk*

In *R. v. Kaziuk*[114], the Court considered the lengthy sentence of an individual found guilty of committing both theft and fraud against his elderly mother.[115] The case is interesting because although section 331 was enacted as long ago as 1984, this is the only reported decision in Canada citing s. 331 in the context of abuse of older adults, and in the end, the accused was not even charged under 331. Instead, he was charged under the regular theft and fraud provisions. That said, Justice Baldwin "*found that the s.331 offence had been proven by the Crown beyond a reasonable doubt*" and that even though the accused was not charged with this offence it was an "*aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code*".[116]

The facts of the case are unfortunately becoming more commonplace and of an increasing societal concern. The accused, Mr. Kaziuk, was the only child of Ms. Kaziuk, a widow who was 88 years old at the time of trial. When her husband died a few years earlier, Ms. Kaziuk held assets and property well in excess of one million dollars; yet, at trial she was penniless and living in a homeless shelter. Her son had mortgaged her various properties under a Power of Attorney for Property. He subsequently defaulted on the mortgages and Ms. Kaziuk lost everything.

The Crown sought a total sentence of only 3-4 years' incarceration. However, Justice Baldwin sentenced Mr. Kaziuk to the maximum 10 year sentence for theft over $5000.00, and ordered a

[112] 2015 BCPC 107 at para. 65.
[113] 2015 BCPC 107 at para. 66.
[114] *R. v. Kaziuk*, 2013 ONCA 217 (CanLII) [*Kaziuk* ONCA]; application for leave to appeal dismissed, *Roman Kaziuk v. Her Majesty the Queen*, 2013 CanLII 64666 (SCC).
[115] *R. v. Kaziuk*, 2012 ONCJ 34 (CanLII) at para. 1.
[116] *Ibid*, at para. 3.

concurrent 10 year sentence for fraud. Baldwin J., made the following further comments in the sentencing decision:

> *This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim.…The victim was his elderly Mother who was extremely vulnerable to him as her only child. …Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could … In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm.*[117]

Mr. Kaziuk appealed. The Court of Appeal upheld the conviction, but determined that the sentence proffered "*was excessive"* having regard to the fact that the trial judge referenced in the sentencing considerations another offence that was not proven at trial, and *"having regard to sentences imposed in similar cases, and the fact that the appellant had some 39 months left to serve on a prior offence*."[118] The Court accordingly reduced the 10-year sentence to 8 years, but in doing so, observed, "*[w]e agree with the trial judge's observations about the offender.*"[119]

Case: *R. v. Taylor*

The case of *R. v. Taylor* is another notable example of an abuse of trust and an aggravating factor considered in sentencing.[120] Ms. Dokaupe, now deceased, was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable. She employed a caregiver whom she relied upon for her daily needs. At the caregiver's suggestion, Ms. Dokaupe executed a power of attorney for property in her favour. Ms. Dokaupe also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the attorney for property to obtain a bank card for Ms. Dokaupe's savings account. She then drained the bank account of $126,000, leaving only $17,000. The caregiver used that money for her own benefit.

The caregiver subsequently left Ms. Dokaupe's employment, and when Ms. Dokaupe's new caregiver read Ms. Dokaupe's bank statements, she told Ms. Dokaupe what she saw and called the police. The police charged the caregiver with fraud and obtained expert reports confirming

[117] *Ibid.* at paras. 85, 86, 96, and 102.
[118] *Kaziuk* ONCA, *supra* note 9 at paras. 3 and 4.
[119] *Ibid* at para. 4.
[120] *R. v. Taylor*, 2012 ONCA 809 (CanLII).

that Ms. Dokaupe was capable of managing her property throughout the period in question, and during her discussions with police. Unfortunately, Ms. Dokaupe died before the trial took place. In her absence, the Crown relied on Ms. Dokaupe's witness statements which had been recorded by the police. The judge accepted Mrs. Dokaupe's evidence and the expert's evidence and sentenced the accused to 21 months in prison.

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

> *…this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over $126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.*[121]

Leave to appeal was granted, but was ultimately dismissed.[122]

The British Columbia Court of Appeal granted leave to appeal the sentence of Mr. Cousineau, who was convicted of three counts of fraud under section 380(1), and was sentenced to 18 months in jail and two years' probation.[123] The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.[124] Mr. Cousineau was employed by a seniors' facility to market the residence. On three occasions he met with potential residents and pocketed their rent deposits. In addition to the penal sentence, the court at first instance also ordered Mr. Cousineau to repay $7,357.00 and to pay victim surcharges in the amount of $300.00.[125] Mr. Cousineau's appeal related only to the monetary components of his sentence.[126] Interestingly, leave appears to have been granted on the basis of a technicality. Mr. Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order

[121] *Ibid* at ¶ 36.
[122] *Ibid* at ¶ 37.
[123] *R. v. Cousineau*, 2013 BCCA 289, 107 WCB (2d) 487 [*Cousineau* BCCA].
[124] *R. v. Cousineau*, 2013 BCSC 947 at 11 and 25 [*Cousineau* BCSC].
[125] *Ibid* at 59; *Cousineau* BCCA, *supra* note 18 at 9.
[126] *Cousineau* BCCA, *supra* note 18 para 7.

refusing leave to appeal, so leave was granted.[127] Regardless, it would be surprising if Mr. Cousineau succeeds on appeal.

Case: *R.v.Owen*

In *R. v. Owen*[128] a son was sentenced to 18 months incarceration for defrauding his elderly mother who suffered from Alzheimer's, by forging a deed and transferring a condo parking spot into his own name (he thought he was transferring the whole condominium but inadvertently he transferred only the parking spot). The Court stated:

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

These cases serve as solid precedents for lengthier sentences. Similarly, that sentences may be increased where there is evidence that the offender abused a position of trust, the victim was older, vulnerable, or had a mental or physical disability. Notably, both *Kaziuk* and *Taylor* involved financial abuse of an older adult through the misuse of a legal document that is widely available in Ontario: the Continuing Power of Attorney for Property.

Recent Developments: Victim's Rights Bill

Bill C-32 is the *Victims Bill of Rights Act* which was introduced and read in the House of Commons on April 3, 2014. This Bill of Rights sets out rights in four major areas – information, protection, participation and restitution. These rights include the:

- Right to have the court consider making a restitution order for all offences for which there are easy-to-calculate financial losses
- Right, on request, to information about the status and outcome of the investigation into the offence and the location of the proceedings in relation to the offence, when they will take place and their progress and outcome (s. 7 of the Bill)
- Right to request testimonial aids when appearing as a witness in proceedings relating to the offence (s. 13 of the Bill)

[127] *Ibid*. at para 9 and 15.
[128] 2014 ONSC 748.

- Right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered (s. 15 of the Bill)

APPENDIX A – 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):[129]

> *"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*,[130] 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*."[131]

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

[129] (1968) LR 1 P&D.
[130] *Craig v Lamoureux*, [1919] 3 WWR 1101.
[131] *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

Developing/Modern Application of Undue Influence

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

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[132]

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."[133]

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. [134]

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.[135]

Language

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[136] 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.[137]

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[132] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[133] *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).
[134] *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.
[135] 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.
[136] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[137] 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.).

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.[138]

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. [139]

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.[140]

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.[141]

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[138] *Juzumas v Baron*, 2012 ONSC 7220.
[139] *Covello v Sturino*, 2007 CarswellOnt 3726.
[140] 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.
[141] *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.

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*[142] 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.[143]

In Tate v. Gueguegirre[144] 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 an previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary tool the testator to the lawyer to have it excuted;
- There were documented statements that the testator was afraid of the beneficiary.

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.[145]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[146]

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[142] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[143] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[144] *Tate v. Gueguegirre*, 2015 OSC 844 (Div. Ct.) at para.9.
[145] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[146] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

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*,"[147] the more recent SCC case of *C(R) v McDougall*[148] 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*[149] 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."*[150]

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention, that the transaction was made as a result of the donor's "*full, free and informed thought*."[151]

See also *Buccilli et al v. Pillitteri et al*,[152] 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*."[153]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[154] 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

[147] *Vout v Hay* at para 24.
[148] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[149] (1993), 90 Man R (2d) 245 (Man QB) at para 38.
[150] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*
[151] *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.
[152] 2012 ONSC 6624, upheld 2014 ONCA 337.
[153] *Buccilli, supra* note 248 at para. 139.
[154] *Shrader v Shrader, [2013] EWHC 466 (ch)*

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.[155]

In *Leger v Poirier*,[156] the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing mind and memory*" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

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

Suspicious Circumstances

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

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[157]

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.[158]

[155] 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.
[156] *Leger v Poirier*,[1944] SCR 152.
[157] *Vout v Hay,* [1995] 2 SCR 876 (SCC).
[158] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[159]

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

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

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[160]

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?

[159] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).
[160] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

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

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

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

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

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

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

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

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

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

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

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

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

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

Involvement of Professionals

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

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

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

Substantive Inquiries

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

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

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

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

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

- ❑ Is the client physically dependant on another?

- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

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

- ❑ Interview the client alone;

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

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

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

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

- ❑ Address recent health changes;

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

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

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

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

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

Practical Tips for Drafting Lawyers

Checklist

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

- ❑ Determine Intentions;

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

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

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

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

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[161] and

- ❑ Be mindful of the *Rules of Professional Conduct*[162] which are applicable in the lawyer's jurisdiction.

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

Kimberly A. Whaley, Whaley Estate Litigation March 2015

[161] 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
[162] *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

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ESTATE LITIGATION

APPENDIX B – ATTORNEY FOR PROPERTY CHECKLIST

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

An Attorney MUST...

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

- Be 18 years of age

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

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

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

- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:
    - Is the grantor aware of the scope of property possessed?
    - Is the grantor aware of the approximate value of property possessed?
    - Is the grantor aware of obligations owed to dependants?
    - Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
    - Is the grantor aware that an attorney has a duty to account for all actions taken?
    - Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
    - Is the grantor appreciative of the risks of entrusting property to the attorney?

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

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

- Be aware of the statutory obligations of resignation

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

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

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

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

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

- Facilitate contact between the grantor and relatives or friends

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

- Keep accounts of all transactions

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

    - Ordinary prudence v. Professional prudence

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

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

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

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

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

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

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

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

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

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

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

- **Duties**

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

- **Personal comfort and well-being**

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

- **Personal care**

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

- **Exception**

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

- **Explanation**

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

- **Participation**

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

- **Family and friends**

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

- **Consultation**

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

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

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

- **Accounts**

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

- **Standard of care**

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

- **Same**

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

- **P.G.T.**

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

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

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

- **Amendment of plan**

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

- **Application of Trustee Act**

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

- **Liability of guardian**

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

- **Same**

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

- **Exception, corporate directors**

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

- **Breach of duty**

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

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

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

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

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

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

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

- ❑ An Attorney may settle an "*Alter Ego Trust"* similarly certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor's last Will and Testament, or otherwise if the ultimate beneficiary(s) consent and it is in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. Tax considerations must be factored into any planning.

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

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

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

Kimberly A. Whaley, Whaley Estate Litigation October 2014

WHALEY
ESTATE LITIGATION

APPENDIX C – ATTORNEY FOR PERSONAL CARE 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

APPENDIX D – CAPACITY CHECKLIST RE: 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.[163]

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.[164]

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).[165]

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

- A "*disposing mind and memory*" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;

[163] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161
[164] Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013
[165] *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

- 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. [166]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[167]:

> *"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.[168]

Capacity to Make Testamentary Dispositions Other Than Wills

The *Succession Law Reform Act* [169] defines a "Will" to include the following:

> (a) a testament,
>
> (b) a codicil,
>
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) any other testamentary disposition. ("testament")

- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.[170] 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.[171] The criteria to be applied, is that of testamentary capacity.

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[166] 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)

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

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

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

[170] S.51(10 of the Succession Law Reform Act

[171] S 1(1)(a) of the SLRA

- 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,* [172] 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.[173]

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.[174]

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.[175]

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

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

[173] *SDA,* subsection 8(2)
[174] *SDA*, subsection 9(1)
[175] *SDA,* subsection 9(2)

- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* [176]

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. [177]

A person may be incapable of managing property, yet still be capable of making a Will.[178]

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.[179]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[180]

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.[181]

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

[176] R.S.O. 1990, c. M.7
[177] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[178] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291
[179] *SDA*, subsection 47(1)
[180] *SDA*, subsection 47(3)
[181] *SDA*, subsection 47(2)

(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 S.O. 1996, C.2 Schedule A
Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

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

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

Capacity to Contract
A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[182]
A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[183]

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.[184]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[185] 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.[186] 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."[187]

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

[182] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
[183] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859
[184] *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
[185] *SDA, supra* note 2
[186] *SDA,* subsection 2(1)
[187] *SDA*, subsection 2(3)

(b) The ability to understand the specific effect of the gift in the circumstances.[188]

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.[189]

Capacity to Undertake Real Estate Transactions
Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[190] 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.[191]

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.[192]

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.[193]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[194]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[195]

Capacity to Instruct Counsel

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[188] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[189] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487
[190] 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)
[191] *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
[192] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[193] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[194] *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
[195] *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.[196] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

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

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

(c) Appreciate the advantages, disadvantages and potential consequences of the various options.[197]

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[198]
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;[199]
- 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 [200]

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.[201]
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.[202]

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[196] Staff lawyer at ARCH Disability Law Centre.
[197] At page 3
[198] *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.
[199] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162
[200] *Wingrove v. Wingrove* (1885) 11 P.D. 81
[201] *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)
[202] *Wingrove v. Wingrove* (1885) 11 P.D. 81

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. [203]

Psychological pressures creating fear may be tantamount to undue influence.[204]

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."[205]
Undue influence must be corroborated. [206]

Suspicious circumstances will not discharge the burden of proof required.[207]

* 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.[208]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[209]

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.

Whaley Estate Litigation October 2014

[203] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)
[204] *Tribe v Farrell,* 2006 BCCA 38
[205] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[206] 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
[207] *Vout v Hay*, at p. 227
[208] *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.)*
[209] *Laszlo v Lawton, 2013 BCSC 305 (CanLII)*

APPENDIX E – 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*[210] *("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.

[210] 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	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Transactions		effect in the specific circumstances. *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children. Also possibly required: capacity to manage property and the person Dr. Malloy[211] 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)[212].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[213].
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.[214]

[211] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[212] *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*]
213 *Calvert*
[214] 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*,[215] 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,[216] 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.

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