ADVISING THE ADVISOR

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ESTATE LITIGATION

Table of Contents

1) Introduction

Financial abuse of the elderly, misuse of powers of attorney for property, an increase in disputes arising from complex family relationships, misbehaving estate trustees – 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 cognizant of these societal and legal issues. Any professional who works with older adults or deals with trust and estate planning, administration, or litigation should be mindful of these concerns and developments in this area.

This paper will examine issues that give rise to estate and family law litigation, warnings and red flags, and how to potentially avoid long litigious and costly disputes. This is but a brief overview, rather than an in-depth discussion, of a variety of topics including powers of attorney, undue influence, claims that can arise from complex family units such as dependant support claims and disputes over joint accounts, financial abuse issues and estate trustee roles and responsibilities. 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,

[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

and exploitation. Also,

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

Importantly, our high rate of separation and divorce; increasing prevalence of unmarried, cohabiting partners, particularly amongst older adults; recognition in the equality of same-sex partnerships/unions, in addition to common law developments giving rise to what constitute spousal, and 'spousal-like' relationships have resulted in an increase in family and estate disputes arising out of such relationships. As an adjunct to such unions, children, step-children, adopted children, genetically procured children, add to the complexity associated with estate and succession planning.

These societal issues are a distinctly modern development. The volume of court decisions involving blended, complex or fractured family units, where a spouse has remarried or entered

[3] Statistics Canada, Seniors: http://www.statcan.gc.ca/pub/11-402-x/2011000/chap/seniors-aines/seniors-aines-eng.htm Accessed on September 24, 2014.
[4] Statistics Canada, Seniors: http://www.statcan.gc.ca/pub/11-402-x/2011000/chap/seniors-aines/seniors-aines-eng.htm Accessed on September 24, 2014.
[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 September 24, 2014.
[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 September 24, 2014.

into a new common-law relationship, with children from multiple relationships, has exploded over the last several decades in the changing cultural climate following the liberalization of matrimonial laws. As the population ages rapidly, it is ever more important to consider these relationships from the perspective of effective estate planning and litigation prevention.

Competing spousal claims were comparatively rare as recently as the late 1960's, likely because divorce was less common and re-partnership outside of marriage did not necessarily result in new legal rights, particularly property rights, for new partners.

Before the passage of the *Divorce Act*, 1968, obtaining a divorce was difficult. In Ontario, the primary grounds for divorce were adultery, cruelty or abandonment. The *Divorce Act,* 1968, somewhat liberalized the grounds for divorce. Still, a complete, no-fault divorce, based on one year of separation and without a trial, was not available until the passage of the *Divorce Act, 1985*.

Similarly, a common-law partner was not entitled to make a claim for dependant's support in Ontario until 1977.[10] Because divorce was uncommon, so too was remarriage and, as a result, support claims by new partners/spouses were relatively rare.

It has only been 46 years since the *Divorce Act,* 1968, and 29 years since the *Divorce Act, 1985,* came into force. A Canadian who is 79 years old today – just under the current average lifespan in Canada – would have been approximately 34 years old at the advent of the initial wave of liberalized divorce. The same Canadian would have been 51 years old when the path to divorce was broadened in 1985. In other words, people dying at an average old age this past year were already, or were approaching, middle age when these rights arose; they have had less time in their lives to develop the legal obligations arising out of re-partnership than a person who coming of age under this regime.

Canadians who reached the age of majority in the era of common-law dependants' support legislation are 55 years old or younger in 2014. Those who reached the age of majority in the

[10] *Succession Law Reform Act*, 1977, S.O. 1977, c. 40, which replaced the prior *Dependants' Relief Act*, R.S.O. 1970, c. 126. Also see *Butt, Re*, 1986 CarswellOnt 655, 22 E.T.R. 120, 53 O.R. (2d) 297 at para. 21.

era of no-fault divorce are approximately 45 years old and younger in 2014. This younger cohort will be the first group of Canadians who have, for their entire adult lives, had the opportunity to develop a web of competing spousal claims. This generation will reach their average lifespan in about 25 to 35 years. It therefore seems likely that, even if the growth of remarriage and re-partnership were to stabilize in the very near future, the legal system should expect a continued influx of spousal disputes as death catches up with the social arrangements that this generation has adopted in life. Recent statistical data suggests that the numbers have in fact not yet stabilized. Growth in the number of complex families continues. The 2011 Census on families, households, and marital status data shows that people are choosing family structures that create more complicated personal and legal relationships:[11]

- Between 2006 and 2011, the number of common-law couples rose 13.9% to nearly 3 million couples. This was more than four times the increase for married couples, which was only 3.1%;
- Same-sex couples account for 64,575 families in Canada, an increase of 42.4% from 2006. 43,560 of these couples are in common-law relationships;
- Of the 3,684,675 Canadian couples with children, 12.6% of them, or 464,269 families, are stepfamilies with one or more children not biologically related to one of the parents;
- 41% of stepfamilies are “complex” stepfamilies, where there is at least one child of both parents as well as at least one child of one parent only; and
- Married couples declined from 91.6% of all families in 1961 to 67.0% in 2011.

These trends demonstrate an increase in competing family interests. Notably, common-law spouses are much less likely than married spouses to consult a lawyer following the breakdown of a relationship. While 58.2% of separating spouses and 76.0% of divorcing spouses sought advice, only 25.3% of separating common-law spouses did the same.[12]

It is important for professional advisors to be aware of, and to stay current on the legal consequences arising out of these complex family structures.

[11] Statistics Canada, Portrait of Families and Living Arrangements in Canada, 2011 Census, http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm, accessed September 12, 2014.
[12] Statistics Canada, *General Social Survey - Cycle 20: Family Transitions Survey 89-625-XWE - Navigating Family Transitions: Evidence from the General Social Survey. http://www.statcan.gc.ca/pub/89-625-x/2007002/t/4055015-eng.htm.[Archived]* Accessed September 12, 2014.

Litigation Arising from Complex Family Relationships

There are many types of disputes arising after death where complex, fractured family units existed, for example, issues arising from:

- Intestate succession;
- *Family Law Act* Elections/Applications;
- the enforcement of spousal support orders and domestic contracts;
- dependant's support claims (*Succession Law Reform Act*);
- unjust enrichment and its legal and equitable remedies, including equitable compensation, constructive trust, resulting trust, unjust enrichment, and *quantum meruit*;
- proprietary estoppel;
- pensions, legislation and planning initiatives;
- predatory marriages; and
- disputes regarding the ownership of property, including jointly held property.

2) Sophisticated Planning: Co-ordination of Estate and Family Law Initiatives and Planning for Incapacity

Below is a brief overview of the role of both estate and family law lawyers, and the relevant issues, in completing estate planning and planning for incapacity. This overview can also provide guidance to all professionals involved with older adults, or in estate planning and/or administration:

- Family lawyers have a major role to play in estate planning. Their separating clients may have outdated wills, property held in joint tenancy that should be severed, and non-traditional assets (RRSPs, insurance policies, pensions) that need special care to ensure fall into the right hands on death. Their pre-nuptial clients may, among other arrangements of their affairs on death, consider whether to make any provision for severing joint title or confirming the right of survivorship in property held in joint tenancy on death.

- It is crucial to get copies of all domestic agreements, including cohabitation agreements, marriage contracts (pre-nuptial and post-nuptials agreements) and separation agreements. It is equally crucial to get copies of any support orders, support variation orders, and support termination orders, including orders to secure support with life insurance or other vehicles

- It is necessary to identify all insurance policies, RRSPs and other similar vehicles with beneficiary designations. It is not always sufficient to revoke and make new beneficiary designation in a will because the revocation may be ineffective where a designation was made irrevocable.

- In jurisdictions where a surviving spouse can make a claim for a division of matrimonial property from the deceased spouse's estate, the estate planner might need to roughly calculate the potential outcome of a property division between the spouses, including an assessment of the various exclusions, marriage date deductions, and identification of difficult valuation issues (e.g. interests in private businesses), to determine if the estate plan will be sidetracked by a spouse's election.

- An estate planning lawyer should determine what legislation might be operative upon death and whether the deceased and their partners are spouse for purposes of the different definitions of "spouse" in family law, succession law, pension, tax, banking and other legislation. At common law, a person is not limited to having only one spouse at a time.

- It is important for separated spouses to obtain a divorce, especially where the spouse has a pension governed by the *Pension Benefits Act*, or plan around this issue.

- The existence and status of children is not always obvious. A child estranged for many years may not be mentioned. There might be doubt about whether a child or their issue are biologically related or adopted, which could cause unexpected results or litigation over the issue. Special care should be taken to identify all intended beneficiaries by

name rather than class as far as possible and to probe into the existence and lineage of children and other issue.

- It is important to consider, if the client is in a common law relationship, whether the client and his or her spouse are engaged in a joint family venture with the potential for an unjust enrichment claim against the estate or other equitable claims.

And of course, it is also important to ensure independent instructions are directly received from clients and to be aware of and avoid suspicious circumstances arising on instructions and execution.

Also be mindful of issues concerning incapacity, dependency/vulnerability and susceptibility to undue influence (discussed further below).

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.[13] The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. In certain circumstances, however, POA documents may cause rather than prevent conflict.

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

[13] 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."

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 *Substute 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 test of capacity to give or revoke a CPOAP is different from that of capacity to manage property to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property. Much to the surprise of many 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.[14] 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.

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

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

POA document that attorneys are allowed to act separately, statutory law assumes that jointly appointed attorneys must make decisions together.[15]

It is also possible to assign different responsibilities to separate attorneys.[16] 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.[17] 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.[18]

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.[19]

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[20] 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

[15] *Supra note 14.*, s. 7(4), 46(4).
[16] See e.g. *ibid.* at s. 7(6), 46(7).
[17] 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).
[18] *SDA, supra* note 2, s 46(3).
[19] 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>.
[20] *McMaster v. McMaster*, 2013 ONSC 1115.

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:

> *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.*[21]
> …
> *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.*[22]

[21] *McMaster* at para. 56.
[22] *McMaster* at para. 63.

Malcolm was removed as attorney for property, and at the time of writing, the litigation is ongoing.[23]

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 testing capacity for managing property and giving or revoking a CPOAP, the *SDA* also provides a the criterion required for the capacity to make personal care decisions and give or revoke a POAPC. Again, the *SDA* specifically provides that a person may be capable of giving or revoking a POAPC even if he or she is mentally incapable of making personal-care decisions.

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

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

[23] See amended costs decision 2014 ONSC 2545.

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.

In the case of ***Friedberg et al v. Korn***[24] an elderly woman suffered cardiac arrest while on vacation in Florida which caused severe brain damage and left her in a persistent vegetative state. She was transported to a hospital in Toronto where she was put on life support with a feeding tube and a tracheostomy (a tube was inserted in her windpipe to provide an airway and remove secretions). Her doctor subsequently became aware of a POAPC which the woman had executed ten years earlier. The POAPC contained an "end of life" clause which stipulated that where there was "no reasonable expectation" of her recovery that she should not be kept alive by "artificial or heroic measures". Her doctor applied to the Consent and Capacity Board

[24] 2013 ONSC 960.

("CCB") pursuant to the *Health Care Consent Act, 1996* S.O. 1996, c.2, Schedule A, for directions with respect to her capacity to consent to treatment and her wishes set out in her POAPC, specifically the "end of life" clause. The doctor's position was that the patient was not capable of consenting to treatment, she had no reasonable expectation of recovery, and that the feeding tube and tracheostomy were both artificial and heroic measures which were contrary to the patient's wishes and should be removed.

The patient's children argued that the feeding tube and tracheostomy should remain in place. They testified that their mother had strong Orthodox Jewish religious beliefs, including the belief that all medical interventions available to prolong life must be performed unless the person is in extreme pain. The patient's Rabbi also testified at the hearing and corroborated the children's testimony. The children argued that their mother must not have understood the "end of life" clause when she executed her POAPC as she would never adhere to a clause that directly conflicted with her strong religious beliefs.

The lawyer who drafted the POAPC was a specialist in the area of trusts and estates. She testified at the hearing before the CCB that she had no specific recollection of discussing with the patient the POAPC and had no specific notes in her file about the "end of life" clause. Instead, the drafting lawyer was able to speak about her "general practice" of completing a clause-by-clause review of all POAPCs with her clients. Her practice was to explain the "end of life" clause as an "expression of wishes", and advised her clients to speak to a health practitioner about "extreme measures". However, the evidence also showed that the primary reason for the meeting was for the patient to revise her will and not specifically to execute a POAPC. Furthermore, the "end of life" clause in the POAPC was the drafting lawyer's firm's boilerplate clause that was presented to every client without prior instructions. It was presumed that the majority of clients wanted such a provision in their POAPCs. The drafting lawyer also testified that she would not have discussed religion with her client and there were no notes in her file about her client's Orthodox Jewish faith.

The CCB found that the patient's intentions and wishes as contained in the POAPC were clear and unambiguous and that she knew and approved of the contents of the POAPC including the "end of life" clause. The CCB placed significant weight on the testimony of the drafting solicitor

regarding her usual practice of completing a clause-by-clause review. However, on appeal to the Ontario Superior Court of Justice, Justice Carole Brown disagreed with the CCB's findings. Relying on *Babulov v. Cirone*,[25] the Court considered whether there was any evidence to rebut the presumption that the patient knew and approved of the contents of the POAPC. Justice Brown concluded that there was such evidence, taken as a whole, including among other things, that the "end of life" clause was contrary to the patient's orthodox beliefs, that the "end of life" clause was not adequately explained to the client, the lawyer's general practice testimony was not corroborated by her notes, and that the patient had language comprehension difficulties.

Another interesting case in this area is the recent case of ***Cuthbertson and Rubenfeld v. Rasouli***[26] where the Supreme Court of Canada confirmed that when a substitute decision maker (such as an attorney under a POAPC) refuses to provide consent to withdrawing treatment (i.e. removing a patient from life support) doctors cannot unilaterally withdraw treatment. The recourse available to the doctors is to apply to the CCB if so inclined, to challenge the refusal.

3) Financial Abuse of Older Adults and Others

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.[27] 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.[28] 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.[29] Often the financial abuse is at the hands of a family member who the older adult is dependent upon and who has influence or control over the victim.[30] Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust.[31]

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[25] 2009 CanLII 15889 (ONSC).
[26] 2013 SCC 53.
[27] Department of Justice, *Backgrounder Elder Abuse Legislation*, online: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32716.html
[28] *Ibid*.
[29] 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.
[30] Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*, online: http://www.opp.ca/ecms/files/250363255.6.pdf
[31] 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

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."[32]

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
    - 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.[33]

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;

[32] http://www.who.int/ageing/projects/elder_abuse/en/ [Accessed on September 10, 2014]
[33] 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]

- 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.[34]

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).

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, all of which:

- Giving instructions for and to execute a will or trust ("Testamentary capacity");
- Making other testamentary dispositions;
- Contracting;
- Managing property;
- Managing personal care;

[34] *Supra* note 33.

- 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.[35]

Below we discuss in more detail testamentary capacity as it relates to Wills and other testamentary dispositions, and the capacity to grant or revoke Continuing Powers of Attorney for Property.

Applicable Criteria for Determining 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:

1. The nature of the act of making a Will (or testamentary document) and its effects;
2. The extent of the property of which he or she is disposing of; and
3. The claims of persons who would normally expect to benefit under the Will (or testamentary document).[36]

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;

[35] 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."
[36] *Banks v. Goodfellows* (1870) LR 5 QB 549 (Eng QB).

- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.[37]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption, which is described as follows:

> *"If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by the testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity."*[38]

Courts have acknowledged the possibility that a person could conduct herself in a very rational manner and make a rational will, and yet still be motivated and governed by insane delusions. For that reason, if there is evidence that the testator suffered from delusions at the time of executing the will, the court is to look "below the surface" and determine if in fact the will is the result of a free and capable testator.

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act*[39] 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.

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[37] 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* 92003) 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)

[38] *Vout v. Hay*, [1995] 7 ETR (2d) 209 209 (SCC) at p 227

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

A testamentary disposition may arguably include designations as part of an Estate Plan in a Will. For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others may qualify as testamentary dispositions.[40] A testamentary disposition may also include the transfer of assets to a testamentary trust.[41] The criterion to be applied in either scenario is that of testamentary capacity.

The capacity required to create an *inter vivos* trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, 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*[42], 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[43].

[40] S.51(10) of the *Succession Law Reform Act*
[41] S1(1)(a) of the *SLRA*
[42] R.S.O. 1992, c.30, as amended
[43] *SDA*, subsection 8(2)

If a grant or 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.[44]

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[45]

Capacity to Grant or Revoke a Continuing Power of Attorney for Personal Care ("CPOAPC")

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:

- 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,[46] 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

[44] *SDA*, subsection 9(1)
[45] *SDA*, subsection 9(2)
[46] *Laszlo v. Lawton*, 2013 BCSC 305 (CanLII).

(although it should be noted that there was also some evidence that she was confused and forgetful at times).

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

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

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

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

The court also made interesting observations on the fluidity of capacity. As a generality, in the elderly, capacity will often emerge and worsen over time. However, capacity in any given case is not static. It can fluctuate slightly or wildly. There may be periods of incapacity interspersed

with periods of lucidity. Appearances can be deceiving since a person who seems rational may not have capacity and a person who seems compromised may be capable. A diagnosis of dementia is not equivalent to a finding of testamentary incapacity; testamentary capacity is a legal concept rather than a medical one and both medical and lay evidence feature importantly.

5) Overview of Possible Legal Claims and Issues

i. 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.[47]

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."[48]

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

[47] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[48] *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).

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. [49]

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.[50]

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.[51] 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.[52]

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.[53]

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

[49] *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.
[50] 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.
[51] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[52] 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.).
[53] *Juzumas v Baron*, 2012 ONSC 7220.

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. [54]

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.[55]

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.[56]

Indicators of Undue Influence

[54] *Covello v Sturino*, 2007 CarswellOnt 3726.
[55] 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.
[56] *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.

The Court in the 2013 decision of ***Gironda v Gironda***[57] 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.[58]

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.[59] 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.[60]

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, 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

[57] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[58] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[59] 2013 ONSC 4133.
[60] *Ibid* at para. 178.

of proceedings. According to Supplemental Reasons released on October 18, 2013[61] this decision was under appeal, however Vito has since died[62] and no appeal decision has been released.

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.[63]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[64]

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*,"[65] the more recent SCC case of *C(R) v McDougall*[66] 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*[67] 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.*[68]

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

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[61] 2013 ONSC 6474.
[62] 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]
[63] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[64] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[65] *Vout v Hay* at para 24.
[66] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[67] (1993), 90 Man R (2d) 245 (Man QB) at para 38.
[68] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*

of intention, that the transaction was made as a result of the donor's "*full, free and informed thought*."[69]

In the case of ***Buccilli et al v. Pillitteri et al***,[70] the Court found that a widow's relationship with her sister-in-law and brother-in-law gave rise to a presumption of undue influence in the context of setting aside a transfer agreement. The widow was emotionally distraught after the death of her husband and relied on her sister-in-law and brother-in-law to look after her financial affairs and those of her late husband. 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*.[71]

In this case the sister-in-law and brother-in-law did not meet the onus of establishing that the widow entered into the transfer agreement freely.[72]

Capacity and Undue Influence

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.[73]

In *Leger v Poirier*,[74] 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.

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[69] *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.
[70] 2012 ONSC 6624, upheld 2014 ONCA 337.
[71] *Buccilli, ibid.* at para. 139.
[72] *Buccilli*, *ibid.* at para. 145.
[73] 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.
[74] *Leger v Poirier*, [1944] SCR 152.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important. Suspicious circumstances 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.[75]

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.[76]

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.*"[77] 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

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

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.[78]

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

ii. Dependant's Support

Part V of the Ontario *Succession Law Reform Act* provides for the support of dependants in situations where a deceased person, prior to death, was providing support or was under a legal obligation to do so immediately before death, but failed to make adequate provision for the proper support of his/her dependant on death.[79] In those circumstances, the court is empowered to make an order for such provision as it considers adequate be made out of the estate of the deceased.[80]

The factors to be considered by the court on an application under section 58 are set out in section 62.[81] When examining all of the circumstances of an application for dependants' relief,

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[78] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/
[79] *SLRA*, s. 57.
[80] *Ibid.*, s. 58(1).
[81] 62.(1) In determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,
(a) the dependant's current assets and means;
(b) the assets and means that the dependant is likely to have in the future;
(c) the dependant's capacity to contribute to his or her own support;
(d) the dependant's age and physical and mental health;
(e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;
(f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
(g) the proximity and duration of the dependant's relationship with the deceased;
(h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;
(i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;
(j) a contribution by the dependant to the realization of the deceased's career potential;
(k) whether the dependant has a legal obligation to provide support for another person;
(l) the circumstances of the deceased at the time of death;
(m) any agreement between the deceased and the dependant;
(n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;

the court must consider, a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and, b) what moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances.[82] Either or both of these types of obligations fit into the factors in subsection 62(1).[83]

The Supreme Court of Canada in *Tataryn v. Tataryn Estate* reviewed the considerations to be applied to the term "proper and adequate support". [84] The Court concluded that the broad language of the B.C. *Wills Variation Act* was intended to allow Courts to make orders which are just in the specific circumstances of a case and in light of contemporary standards. B.C.'s *Act* differs significantly from the SLRA but, nevertheless, the Ontario Court of Appeal declared in *Cummings v. Cummings* that the principles of *Tataryn*[85] with respect to the moral obligations owed by testators to their spouses and children apply equally in Ontario.

After a divorce or the death of a first spouse, new relationships may not be as formalized and publicly acknowledged. Therefore, as we discuss in one of the case studies below, the question sometimes arises about whether the relationship was one between spouse, roommates, or friends.

Furthermore, adult children of a deceased can succeed in an application for dependent support in the following circumstances:

(1) where the deceased was providing support to the adult child immediately before death; or

(2) where the deceased had a legal obligation to support the adult child. [86]

(o) the claims that any other person may have as a dependant;
(p) if the dependant is a child,
(i) the child's aptitude for and reasonable prospects of obtaining an education, and
(ii) the child's need for a stable environment;
(q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
(r) if the dependant is a spouse or same-sex partner,…and
(s) any other legal right of the dependant to support, other than out of public money.

[82] *Cummings v. Cummings*, 2004 CanLII 9339 at 50 (ON CA) [*Cummings*].
[83] *Cummings* at 51.
[84] *Tataryn v. Tataryn Estate* 1994 CanLII 51 (SCC), (1994), 116 D.L.R. (4th) 193.
[85] *Ibid*.
[86] Section 57, *SLRA*. See also D.C. Rosenbaum, Dependant Support Claims by Adult Children Under Succession Law Reform Act, 6th Estates & Trusts Summit (Law Society of Upper Canada: pp. 3-9)

An estate planning interview should take all steps necessary to identify potential claimants of dependant relief so that the client can be cautioned against planning measures that leave their estate vulnerable to such claims.

Case: *Lukic v. Zaban*

In this case,[87] Ms. Lukic had met the deceased Mr. Zaban, a successful businessman, in 2007 after his wife of 46 years passed away and after a serious car accident left him disabled. While they did not live in the same city, a relationship ensued between them. A few years after their meeting, Ms. Lukic opened a lingerie store which was completely funded by the deceased and owned by a corporation incorporated by the deceased and Ms. Lukic. Ms. Lukic owned 49% of the corporation and the deceased 51%. In 2009 the Ms. Lukic moved to the same town as the deceased and rented an apartment. At the same time the deceased gave Ms. Lukic exclusive use of a BMW that he owned, fully funded the lingerie business and assisted her with cash gifts. For a period of about eight months the Ms. Lukic moved into the deceased's home. This was short-lived because the deceased's children evicted her from their father's home. Shortly after their father's death in 2011, the children took steps to seize the BMW by calling the police and unilaterally closed down the lingerie shop, which was Ms. Lukic's only source of income.

The deceased had left nothing to Ms. Lukic in a will that was drafted a few days before he passed away. Ms. Lukic however produced two "gift letters" which were signed by the deceased in December of 2010 and purport to gift the BMW and house to her.

The main question in the case was whether Ms. Lukic, satisfied the definition of "spouse", which was a threshold question for any order of support. The definition of "spouse" in the SLRA includes persons who have cohabited continuously in a conjugal relationship for a period of not less than three years. To determine whether the applicant was a spouse, the court applied the factors in *Molodowich v. Pentinnen*:

> *In simplest terms the characteristics of a conjugal relationship include 'shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple.' These elements may be present in varying degrees and not all need be present for the relationship to be found to be conjugal.*

[87] *Lukic v. Zaban*, 2012 CarswellOnt 14165, 2012 ONSC 6078 (Master).

Although the relationship lasted for over three years, the court was not convinced that the parties had cohabited in a conjugal relationship for that time. Several facts contributed to this finding. The deceased's capacity and ability to care for himself was in steady decline, making him dependent on caregivers. His neighbours, friends, children and personal care workers were not aware of any intimate relationship. There was no evidence of a sexual or romantic relationship. The court found that there were some indicators of a close relationship, including the provision of financial support and a short term sharing of shelter, but that the evidence as a whole was equivocal, uncorroborated and highly contested. There was therefore no *prima facie* claim for interim dependants' support.

Interestingly, Ms. Lukic was successful in obtaining an order for the interim preservation of the vehicle that the deceased had given her. The court held that there was a strong *prima facie* claim that it had been a gift.

This case may highlight the desirability of taking steps in the course of estate planning to clarify the status of a relationship, either with the potential claimant or with the world at large. By fostering a secretive and dependent relationship, the deceased assured his estate trustees and beneficiaries difficulty in administering the estate.

iii. Proprietary Estoppel

Proprietary estoppel protects a person who detrimentally relied on a property owner's promises, actions, or inaction that caused the person to believe that he or she was the true owner of the property and where it would be unjust to permit the owner to later turn around and assert title.

In *Schwark v. Cutting* in 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel:[88]

> *(i) An equity arises where:*
>
> > *(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;*
> >
> > *(b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and*
> >
> > *(c) O then seeks to take unconscionable advantage of C by denying him the right*

[88] *Schwark v. Cutting*, 2010 ONCA 61 at para. 34 citing *Eberts v. Carleton Condominium No. 396 et al.,* [2000] O.J. No. 3773 (Ont. C.A.) at para. 23.

> *or benefit which he expected to receive.*
>
> *[…]*
>
> *(iv) The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O to either grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.*[89]

Since *Schwark v. Cutting*, proprietary estoppel has been argued successfully in Ontario in the context of at least three family disputes. In *Spadafora v. Gabriele*,[90] an older woman moved in with her adult daughter and son-in-law and conveyed her own home to them in 2004. They had promised her that she could live there until she died. As it turned out, the daughter and son-in-law died before the mother.

On the day before the daughter's death in 2009, the daughter transferred the house to her three children as tenants-in-common. A dispute between these children resulted in one of them bringing an application for partition and sale of the house. The Court noted that, pursuant to the *Partition Act*, partition would only be available if the person applying for it was entitled to immediate possession of the property. The issue was whether the grandmother's continued residence in the house gave her the right to possession and therefore prevented the *Partition Act* applicant's right to immediate possession.[91]

The Court found that the grandmother had been induced or encouraged to believe that she would enjoy the right, or at least the benefit, of residing in the house until her death.[92] This belief, the Court noted, was initiated by the daughter and son-in-law and continued by their children. The children had been given a house, "that bore the burden of their parents' promise to their grandmother."[93] It was a promise they were fully aware of and, in fact, they too had honoured, having permitted their grandmother to reside there for several years after their mother's death. The grandmother had relied on this agreement to her detriment by conveying away her own home. In the Court's view, to permit the sale and effectively evict the

[89] *Supra* note 88 at para. 23.
[90] 2011 CarswellOnt 14702 (Ont. S.C.J.).
[91] *Ibid.* at para. 16.
[92] *Ibid.* at para. 20.
[93] *Ibid.* at para. 23.

grandmother against her will would be unconscionable.[94] As such, the Court refused to grant the order for partition and sale.

Case: *Clarke v. Johnston*

Mr. Clarke and his wife built a cottage on an island owned by the wife's family. The wife's family advanced some of the funds to build the structure and eventually forgave the loan. The marriage came to an end in 1991 and the wife stopped using the cottage. Mr. Clarke, often with the children from their marriage, continued to use the cottage with the wife's family's permission. On an ongoing basis, Mr. Clarke paid for all of the maintenance and improvements to the property. Twenty years later, a dispute arose and the wife's family issued a trespass notice to Mr. Clarke. He sued on the basis of proprietary estoppel and/or unjust enrichment and sought the continued occupation of the property.

The court held that Mr. Clarke was successful on the basis of both unjust enrichment and proprietary estoppel. With respect to unjust enrichment, Mr. Clarke was instrumental in constructing the cottage and paid its expenses for twenty years. This enriched the wife's family and, if he were forbidden from accessing the cottage, would amount to a corresponding deprivation to him, especially since he reasonably expected the use of it until he died. The court rejected the wife's family's defence that there was no deprivation because they advanced the funds for the original construction. First, the loan to Mr. Clarke had been forgiven, so there was no actionable debt to recover it. Second, the original construction price is far exceeded by the value of the whole property at the date of trial. There was no juristic reason for the deprivation.

The court then relied on the three-part test for proprietary estoppel that the Ontario Court of Appeal set out in *Schwark Estate v. Cutting*.[95] The court found that the wife's family induced, encouraged or allowed Mr. Clarke to believe that he would enjoy the right to the property until he died. Mr. Clarke relied on this belief when he made significant contributions to the maintenance and improvement of the property. It would be unconscionable to allow the wife's family vacant possession, which would give her the right to use it herself or rent it out.

[94] *Supra* note 93.
[95] 2010 ONCA 61.

This case will be especially helpful to parties who claim an interest in recreational property because of this rather romantic observation in the reasons:

> The attachment between a person and his or her camp is unique and not easily described. Over time there comes to be an emotional attachment borne of the surrounding beauty, the investment of sweat equity, and the memories of times spent with family and friends. When one has been allowed to develop that attachment over the course of decades, and has directed personal and financial resources to the property in the reasonable belief that it would continue, it is unconscionable to deny that benefit.

The court crafted an interesting remedy. It found that a monetary remedy would be inadequate given the link between the Mr. Clarke's contribution and the property itself. It awarded Mr. Clarke a constructive trust over the property. However, this took the form of a personal licence to occupy the property for life on condition that it be kept in a state of good repair, that he pay all taxes and costs, and that he not materially alter the nature or quality of the property. After his death or the breach of the conditions, the property would revert to the wife's family.

Recently, the Ontario Court of Appeal dismissed an appeal of this matter and upheld the trial judge's finding of proprietary estoppel and unjust enrichment.[96] Justice Pepall, writing on behalf of the court, provided a helpful summary of the historical and modern approaches to proprietary estoppel.[97] In commenting on the trial judge's remedy, Justice Pepall had this to say:

> He was mindful of the context of the case that unfolded before him over the course of a three-day trial and strove to accommodate the parties' expectations. His choice of remedy represented the minimum equity to do justice in the circumstances. The respondent would not be entitled to the rights of an owner including the right to devolve the camp as part of his estate. Rather, consistent with expectations, he could regulate use during his lifetime or until he could no longer attend at the camp.[98]

Case: *Cowderoy v. Sorkos Estate*

Gus Sorkos had no children of his own.[99] He considered his first spouse's grandchildren to be his own and they considered him to be their grandfather. He promised them that if they worked to maintain his farm and cottage, whenever and however he asked, that he would leave these

[96] *Clarke v. Johnson*, 2014 ONCA 237
[97] *Clarke v. Johnson*, 2014 ONCA 237 at paras. 40-53
[98] *Clarke v. Johnson* 2014 ONCA 237 at para. 81
[99] *Cowderoy v. Sorkos Estate*, 2012 CarswellOnt 6857 (Ont. S.C.J.).

properties to them in his will. The evidence showed that the grandchildren carried out their end of the bargain: they were available whenever asked and carried out extensive work on the farm and cottage over the course of many years. They had also helped Gus with his business ventures. The Court found, for example, that one of the grandchildren had put in over 2000 hours of unpaid work to help Gus with one of his businesses.

In 2001, Gus's wife, the grandmother of the grandchildren, died. In 2002, Gus remarried a woman he had known in his youth in Greece. His will had previously left the bulk of his estate to the grandchildren. However, after he remarried, he reduced the bequests to the grandchildren to token legacies.

Gus made representations and the grandchildren relied on them in ordering their lives to their detriment. Having received the benefit of his promises, the withdrawal of the benefit was considered by the court to be unconscionable. *Quantum meruit* would not adequately compensate the grandchildren. They were entitled to the farm and cottage properties on the basis of proprietary estoppel.

The Ontario Court of Appeal recently released its appeal decision in this case. The Court held that the trial judge erred in requiring the Estate to convey the properties to the grandchildren. Instead, the trial judge ought to have ordered that the promise was to be enforced, and the bequest deemed to have been in the deceased's Will. Consequently the properties should have been deemed to be part of the Estate, albeit subject to the term that they were to go to the grandchildren. The Court of Appeal also found that the farm and cottage properties may be used to secure any order for dependant support relief in favour of the deceased's wife.[100] The Court "reluctantly" concluded that a new trial was required to determine the dependant support claim based on new evidence.

The lessons from these cases are simple to state and difficult to apply. Simply put, people will be held to their promises to make testamentary gifts (at least with respect to land), if the promises induce detrimental reliance and the promised gifts are unconscionably withdrawn.

[100] *Cowderoy v. Sorkos Estate* 2014 ONCA 618 at para. 58.

From a planning perspective, individuals who have made these kinds of promises may think that they still have the discretion about whether to make good on them. When making a Will, they may not think to disclose the circumstances to their lawyer. Perhaps the simple question: "have you already told anyone that they can expect to get something from you when you die?" might elicit an answer that the estate planner could probe.

iv. Joint Interests

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 Tenancies

In the recent case of *Hansen v. Hansen Estate*, the Ontario Court of Appeal clarified the law with respect to the severance of joint tenancies.[101] In particular, the court clarified the third of the "three rules" of when a joint tenancy will be severed. The first rule provides that a joint tenancy can be severed by a unilateral act affecting title, such as selling or encumbering the interest. The second rule provides that the parties may explicitly agree to sever the joint title. Both of these rules can be used effectively for planning purposes.

The third rule provides that a joint tenancy will be severed by something less than an explicit act of severance. Specifically, joint title will be severed by, "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."[102] The Court held that this rule operates in equity.[103] It is meant to prevent the title passing by way of survivorship when to do so would cause an injustice. This rule does not require a specific act

[101] *Hansen Estate v. Hansen*, 2012 CarswellOnt 2051, 2012 ONCA 112, [2012] W.D.F.L. 1985, [2012] O.J. No. 780, 109 O.R. (3d) 241, 16 R.P.R. (5th) 1, 212 A.C.W.S. (3d) 854, 288 O.A.C. 116, 347 D.L.R. (4th) 491, 75 E.T.R. (3d) 19, 9 R.F.L. (7th) 251.
[102] *Ibid*. at para. 34.
[103] *Ibid*. at para. 35.

or any explicit agreement. What the party asserting severance must prove is that the co-owners have all acted as though their respective shares in the property were no longer an indivisible, unified whole.[104]

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

[104] *Supra* note 103. at para. 39.

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*,[105] 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".[106] 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 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

[105] *Sawdon Estate*, 2012 ONSC 4042.
[106] *Sawdon Estate*, 2012 ONSC 4042 at para. 23.

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.[107]

Appeal Decision

The Watch Tower appealed and the Court of Appeal just recently released its decision.[108] 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.

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

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

[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][109]

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.[110]

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."[111] Basically, once the trial judge found that the two sons were obliged to hold the 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.[112]

109 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 67.
110 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 69.
111 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 70.
112 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 72.

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."[113]

Case: *Lowe Estate v. Lowe*

Justice Reid introduced this dispute[114] over a joint bank account by commenting that the funds in the bank account were "not large, and arguably not nearly enough to justify the time and expense of this litigation. However, as is often the case in estate litigation, the court process is the means by which a dysfunctional family has chosen to wage battle, and proportionality is a casualty of the early skirmishes."[115]

In his Will, the deceased appointed his wife as the sole executor and trustee, with his son as the alternate. The debts of his estate were to be paid and the wife was the residual beneficiary, with the residue to be divided equally between his two children should the wife predecease him.

In 2008 after being diagnosed with pancreatic cancer, the deceased separated from his spouse and became estranged from his son. He relocated to Ontario and lived with his sister. He became close with his nephew. They visited regularly. In 2009 the deceased made his bank account joint with a right of survivorship with his nephew. At the same time, the deceased advised the nephew that upon his death he wanted a portion of the money in the joint account to be distributed to his *alma mater* university and to his granddaughter, with the rest to go to his son, and signed a note to this effect. The deceased stated that he did not trust his son to carry

113 *Sawdon Estate v. Sawdon*, 2014 ONCA 101 at para. 76.
[114] 2014 ONSC 2436
[115] *Lowe Estate v. Lowe* 2014 ONSC 2436 at para.1

out these instructions and expressed that it was his understanding that the funds did not form part of his estate. Upon his uncle's death, the nephew made the payments out of the joint account as requested, but held the payment to the son while the litigation was ongoing. The son argued that the joint account formed part of the Estate and all funds should have been distributed according to the will.

Justice Reid concluded that in effect:

> Lawton Lowe set up a trust with [his nephew] as the trustee when he added [his nephew] as legal title holder to the joint bank account. Lawton Lowe's granddaughter, *alma mater* and son Garry were the beneficiaries. Ultimately, the combination of the banking documents, the written instructions, the prior use of joint banking for estate planning purposes, the confirmation that [the nephew] would see that 'everything is paid', and the lack of direct reliable evidence that the funds were to be treated as estate funds leads me to conclude that the respondent's onus to rebut the presumption of resulting trust has been met.[116]

A unique aspect of the joint account case, as noted by the Court, was the respondent nephew's total lack of personal benefit, as he agreed he was to receive no money from the account. Justice Reid found that this also supported the evidence rebutting the presumption of resulting trust.

v. *Inter Vivos* Transfers and Fraudulent Conveyances[117]

An estate plan intent on depleting one's assets and therefore one's estate prior to death so as to avoid providing for a dependant spouse, child, creditor or other may amount to a fraudulent preference or conveyance. Remedies in that event may include the use of the *Fraudulent Conveyances* Act[118] (the "*FCA*"), and the *Succession Law Reform Act* [119] (the "*SLRA*") to claw back into the Estate those assets that the testator/debtor may have gifted/transferred away. Fairly recent court decisions suggest that certain transfers of real or personal property may be set aside as void under Section 2 of the *FCA* which provides as follows:

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[116] *Lowe Estate v. Lowe*, 2014 ONSC 2436 at paras.37-38.
[117] This material was presented by on June 4, 2013 to the B'NAI BRITH CANADA CLE for Lawyers & Accountants by Kimberly Whaley and Deb Stephens in their paper, "FRAUD AND ESTATE LITIGATION: WHEN DOES ESTATE PLANNING CROSS THE LINE AND BECOME A FRAUDULENT PREFERENCE." To view and download the whole paper, visit http://whaleyestatelitigation.com/resources/WEL_Estate_Planning_Fraudulent_Conveyance_June_4_2013.pdf
[118] *Fraudulent Conveyances Act,* R.S.O. 1990, c.F.29
[119] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 [*SLRA*].

> *2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.*

Improvident transfers of property may attract the remedies set out in the *FCA*, in particular Section 2, in circumstances where estate planning ousts the statutory rights of certain beneficiaries and/or dependants, protected under the provisions of the *Family Law Act*[120] *(the "FLA")* and the *SLRA*. The relevant sections of this legislation are discussed in more detail below.

i. The Family Law Act

The *FLA* frames marriage as a form of partnership, which permits spouses "*to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership*".[121] This 'breakdown' can occur as a result of separation, divorce, or death on the day one of the spouses dies, leaving the other spouse surviving.[122]

In circumstances where a spouse depletes his or her net family property, section 5(3) of the *FLA* provides a spouse with the ability to seek an equalization payment in the absence of marital breakdown.

A surviving spouse can choose to elect under the *FLA*. *Section* 6(1) permits the surviving spouse on death to make application for an equalization of net family property:

> *6.(1). When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.*

Essentially, the *FLA* election provides a surviving "*spouse*,"[123] with the right to bring an application against the estate of the deceased spouse so as to elect in favour of an equalization of the couples' respective net family properties ("NFP") and to forego entitlement (if any) under the deceased's Will and/or pursuant to the provisions of the *SLRA* respecting intestate

[120] *Family Law Act* R.S.O. 1990 c.F.3.
[121] *FLA supra* note 4 preamble.
[122] S.4(1) *FLA* – "valuation date".
[123] as defined in Part 1 of the *FLA.*

succession. While a surviving spouse can pursue equalization after the death of his or her spouse, the relief prescribed under section 5(3) of the *FLA* by contrast can only be pursued during the lifetime of the spouse.

ii. The Succession Law Reform Act

As discussed above, the *SLRA* provides for the support of "*dependants*," in situations where a deceased, prior to death, was providing support to legislatively prescribed family members, or was under a legal obligation to do so immediately before death, but failed to make adequate provision for the proper support of a dependant spouse, child and/or other dependant(s) on death.

Unlike section 5(3) of the *FLA*, the *SLRA* does not specifically provide dependants' with a legal remedy in circumstances where the testator has recklessly depleted assets and hence the estate during his lifetime. However, section 72 of the *SLRA* provides that the value of certain transactions effected by the deceased before death shall be clawed back in and deemed to form part of the estate for the purpose of satisfying any orders made by the Court directing payments to a dependant.[124]

iii. The Fraudulent Conveyance Act

If a Court determines that a transfer was effected with the "*intent to defeat, hinder, delay or defraud creditors or others….*"[125] it will be declared void as against such creditors. The conveyance can however be saved if the transferee provides consideration for the transfer, and if it can be shown that the transferee was acting in good faith and had no notice of the transferor's intent to defeat the rightful claims of creditors.[126]

The words "*creditors and others*" have been judicially considered by the Courts. The Court has held the words to be interpreted as including not only actual 'judgment creditors', but also persons who have actions pending against the transferor in which it is clear that they are certain to recover damages.[127]

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[124] S.63(2) and S.72, *SLRA.*
[125] *FCA, supra* note 4, section 2.
[126] *FCA, supra* note 4, sections 3 and 4.
[127] *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 (C.A.) at 211.

Notably, the *FLA* and *SLRA* provide spouses and dependants alike with certain claims and remedies on marriage breakdown and on death. Certain questions can be considered: Where an individual transfers one's property to others in an effort to defeat such claims, can those who are affected turn to the *FCA to right the wrong suffered;* Are they to be considered "*creditors and others*" within the meaning of the *FCA;* At what point does an individual's right to deal with or dispose of one's property as one chooses cross the line from a valid estate plan and trigger the provisions of the *FCA*?

The application of the *FCA* when used to recapture *inter vivos* dispositions for the benefit of a spouse and/or dependants claiming under the *FLA* and the *SLRA*, respectively, has been regarded as somewhat speculative.[128] However, more recently our Courts have indicated a willingness to apply the *FCA,* to set aside certain transactions where the evidence is clear that the intent of the transferor/testator was to prevent legitimate claimants from having access to such assets (transferred).

It certainly could be argued that the *FCA* should not apply in appropriate circumstances to *inter vivos* transfers. These types of transfers can arguably be implemented as part of an effective estate plan. If an individual learns that he or she has only a short time left to live, it makes sense to transfer assets to intended beneficiaries to allow them to take control over the assets at an earlier date, rather than to perhaps wait for a grant of probate, and, potentially, to reduce or eliminate estate administration taxes. However where it can be shown that the deceased was aware that the effect of the transfers might be to deny or frustrate the claims of "*creditors or others"* who would expect to benefit from the deceased's estate, the application of the *FCA* should be considered as a viable remedy.

Much, of course, will depend on the deceased's rationale for effecting the transfer(s).

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,

[128] Berend Hovius & T.G. Youdan, *The Law of Family Property* (Toronto: Carswell, 1991)

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:

i. Inadvertent Transfer of Wealth

Case: *Servello v. Servello*

In this case,[129] 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.

[129] 2014 ONSC 5035.

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 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.[130]

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.

Case: *Juzumas v. Baron*

The facts in this case[131] 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.

[130] 2014 ONSC 5035 at paras. 47 & 49.
[131] *Juzumas v. Baron*, 2012 ONSC 7220

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.[132] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden.[133] 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.[134] 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.

[132] *Supra* note 131 at para 1.
[133] *Ibid.* at paras 39 and 56.
[134] *Juzumas* at para.28.

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 ($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*".[135]

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.[136] 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.[137] 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.[138]

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

[135] *Juzumas*, at para. 54.
[136] *Juzumas*, at paras.68-69.
[137] *Ibid.* at paras. 91.
[138] *Ibid.* at paras. 63 and 92.

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*."[139]

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.

An example of a predatory marriage is in the case of *Juzumas v. Baron*, discussed above under "Undue Influence", where a younger "caregiver" took advantage of an older vulnerable adult and his fear of being placed in a "nursing home". Fortunately the Court was able to provide a remedy for the older adult before it was too late.

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

Case: *Covello v. Sturino*

In *Covello v. Sturino*,[140] 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

[139] *Ibid* at para. 97.
[140] 2007 CarswellOnt 3726 (SCJ).

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 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[141] 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

[141] 2010 ONSC 6836.

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.

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*[142], 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 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.

[142] 2010 ONSC 6002.

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

Case: *Fiacco v. Lombardi*

Fiacco v. Lombardi[143] was a case involving an elderly woman named Maria Lombardi who suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

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

The Court found the respondents' behavior unacceptable and in contravention of the Order and the SDA. As stated by the Court: "The Order could not have been clearer - the respondents were required to account for their dealings with Maria Lombardi's property. The SDA is equally clear- the property of an incapable person must be delivered to a guardian "when required by the guardian."" 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.

[143] 2009 CarswellOnt 5188 (SCJ).

Case: *Zimmerman v. McMichael Estate*[144]

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 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

[144] 2010 CarswellOnt 5179.

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

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

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr.

Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And, there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs. Mr. Zimmerman has since deceased.

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.[145]
This past year 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.

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.[146] Courts are afforded significant discretion with respect to the sentencing of individuals who are guilty of such *Criminal Code* offences.[147] 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.[148]

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[145] *Protection of Older Adults Act* S.C. 2012, c. 29.
[146] *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).
[147] Kent Roach, *Essentials of Canadian Criminal Law*, 3d ed (Toronto: Irwin Law Inc., 2004), p.19.
[148] *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].

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.[149] In March of 2013, Bill C-36, the *Protecting Canada's Seniors Act*, came into effect.[150] 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."[151] 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.[152] No known reported case citing this new sentencing provision exists as at the date of this chapter, and as such it will be interesting to follow new developments, if any, in the coming months.

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*[153], the Court considered the lengthy sentence of an individual found guilty of committing both theft and fraud.[154] 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*".[155]

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[149] *Ibid*. at s. 718.2 (a) (i) and (iii).
[150] *Protecting Canada's Seniors Act,* R.S., c. C-46.
[151] 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
[152] *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.
[153] *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).
[154] *R. v. Kaziuk*, 2012 ONCJ 34 (CanLII) at para. 1.
[155] *Ibid*, at ¶ 3.

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 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 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.*[156]

Mr. Kaziuk appealed. The Court of Appeal dismissed the conviction part of the appeal, but held that the sentence proffered "*was excessive"* having regard to the fact that the trial judge referenced in the sentencing considerations another offence that was not proven at trial, and *"having regard to sentences imposed in similar cases, and the fact that the appellant had some 39 months left to serve on a prior offence*."[157] 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.*"[158]

[156] *Ibid.* at ¶ 85, 86, 96, and 102.
[157] *Kaziuk* ONCA*, supra* note 9 at ¶ 3 and 4.
[158] *Ibid* at ¶ 4.

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.[159] 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 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.*[160]

Leave to appeal was granted, but was ultimately dismissed.[161]

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[159] *R. v. Taylor*, 2012 ONCA 809 (CanLII).
[160] *Ibid* at ¶ 36.
[161] *Ibid* at ¶ 37.

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.[162] The advanced age and vulnerability of his victims was considered as an aggravating factor in the court's sentencing.[163] 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.[164] Mr. Cousineau's appeal related only to the monetary components of his sentence.[165] Interestingly, leave appears to have been granted on the basis of a technicality. Mr. Cousineau was self-represented on his application for leave to appeal. The Crown took the position that his appeal lacked merit, and the Court agreed. However, the Crown neglected to request an order refusing leave to appeal, so leave was granted.[166] Regardless, it would be surprising if Mr. Cousineau succeeds on appeal.

Case: *R.v.Owen*

In *R. v. Owen*[167] 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*

[162] *R. v. Cousineau*, 2013 BCCA 289, 107 WCB (2d) 487 [*Cousineau* BCCA].
[163] *R. v. Cousineau*, 2013 BCSC 947 at 11 and 25 [*Cousineau* BCSC].
[164] *Ibid* at 59; *Cousineau* BCCA, *supra* note 18 at 9.
[165] *Cousineau* BCCA, *supra* note 18 para 7.
[166] *Ibid*. at para 9 and 15.
[167] 2014 ONSC 748.

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)
- 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)

7) Preventing and Remedying Financial Abuse and Red Flags: Advising in a Changing Climate

The following are tips provided to estate and trust planning professionals to prevent the likelihood of, and remedy cases of, financial abuse. A review of these tips may provide some insight for financial advisors as well:

- Report crimes to the police.
- Be cautious about recommending the use of joint bank accounts.
- Consider use of deeds of gift / detailed memorandum.
- Consider recommending that your clients tell their attorneys that they have been appointed as such in Powers of Attorney and that they provide their named attorneys with a list of the duties and obligations of attorneys.
- If possible, avoid the appointment of a new spouse or children of a former relationship as an estate trustee where there will be a temptation for the estate trustee to not act neutrally.
- It is necessary to identify all people who may make a claim under the applicable dependant's support legislation

- Determine if the client had any former common-law spouses, or spouses of sort, especially relationships that ended without the involvement of lawyers, and status of each.
- Determine children and obligations to children of the relationship(s) and ages and extended family. Existence and status of children is not always obvious.
- Determine what legislation might be operative upon death and whether the deceased and his or her partners are "spouses": in family law, succession law, pension, tax, banking, and other legislation. At common-law, a person is not limited to having only one spouse at a time.
- Also look at:
    - Insurance policies
    - Joint account holdings
    - Title in real property
    - RSP/RIF designations
    - Designations of all property /assets
    - Prior Wills/codicils
    - Domestic agreements
    - Corporate holdings and structures
    - Succession planning
    - Capacity planning / POAs
- Important for separated spouses to obtain a divorce, especially where the spouse has a pension governed by legislation and whether it coincides with the "plan".
- Special care ought to be taken to identify all intended beneficiaries by name rather than class as far as possible and to probe the existence and lineage of children and other issue.
- Obtain copies of, and review, all domestic agreements and any support orders
- Where a surviving spouse can make a claim for a division of matrimonial property might need to roughly calculate the potential outcome of a property division between the spouses: evince full and frank financial disclosure
- Family lawyers have a major and inescapable role to play in estate planning

- Separating clients may have outdated Wills, property held in joint tenancy that should be severed, and non-traditional assets (RRSPs, insurance policies, pensions) that need special care to ensure they fall into the right hands on death
- Consider timing of advice and interim planning pending divorce, etc.
- If the client is in a common-law relationship, whether the client and spouse are engaged in a joint family venture with the potential for an unjust enrichment claim, or other equitable claim, against the estate.

8) Estate Trustees

Role of the Estate Trustee

Fiduciary law has evolved over many years and involves the faithfulness or loyalty of a person upon whom trust or confidence has been bestowed. Essentially, fiduciary law renders enforceable the expectation of fidelity arising from such intimate or co-operative relationships. Fiduciary law deals solely with the behaviour of persons in positions of trust or confidence.

Estate trustees are fiduciaries; an estate trustee hold title to and control of property for the exclusive benefit of the beneficiaries of the estate. The *Ontario Law Reform Commission Report on the Law of Trusts* describes the obligation of a trustee as a requirement to "perform his tasks personally, with care, and with the sole interests of the beneficiaries in mind." The basic duties of a trustee are threefold:

(i) a trustee must carry out his task with due care and attention, as well as honestly;

(ii) a trustee must not delegate to another responsibilities entrusted to him; and

(iii) a trustee must not permit his own interest to conflict in any way with his duty to the beneficiary whom he serves.

Duties and Liabilities of a Trustee

As fiduciaries, estate trustees are ultimately subject to all fiduciary duties which attach to the position. Consequently, estate trustees,

1. Must exercise ordinary care and prudence;
2. Must follow the directions contained in the Will or other governing document (unless the court authorizes changes or the beneficiaries consent);

3. Must treat all beneficiaries impartially and with an even hand unless otherwise directed in the governing document;
4. May not delegate her authority to make decisions in connection with the administration of the trust property to anyone else;
5. May not personally profit as a trustee from her dealings with the trust property or with the beneficiaries;
6. May not place herself in or perceive to be acting in conflict with the best interests of a beneficiary;
7. Must keep and maintain records and produce accounts upon reasonable notice; and
8. Must not unreasonably delay the estate's administration.

Although the duties and liabilities of an estate trustee do not change as a result of rapidly rising or falling asset values, time-pressures and complexity can interfere with the benefits of consulting with advisors and beneficiaries, as well as documenting those consultations.

Duty to Inform and Account

One of the most important duties of an estate trustee is to maintain accurate and complete records showing your dealings with the Estate of the Deceased, including real and personal property and estate money. The reason for this is that, in law, the beneficiaries of the trust have an absolute right to request from the trustee a detailed account of his or her dealings at any time throughout the duration of the administration of the estate. As such, a trustee has a duty to afford all reasonable facilities for inspection and investigation of his or her accounts.

Increasingly so, our case law is leaning towards transparency and though there are instances where documents may reasonably be held in confidence by trustees, most information relating to the administration of a trust is compellable, including:

- All bills, receipts, and invoices;
- All banking records, such as bank statements, passbooks, cancelled cheques;
- Legal advice;
- Accounting advice;

We would strongly encourage estate trustees to keep a detailed record and ledger showing all receipts and disbursements and all investments made and reasons for making same in respect of the trust and estate.

Passing of accounts

An application by a fiduciary to pass accounts, (also referenced herein as a "passing of accounts", "passing" and "accounting") is not strictly, in legal terms, a mandatory requirement. Rather, an estate trustee, trustee, attorney, guardian or otherwise—the fiduciary, may choose to pass its accounts, or alternatively, may be compelled to do so by those legally entitled to request a passing. The legal duty is in the maintenance of the accounts as fiduciaries. The right to compel an accounting is not an absolute right, regardless of the circumstances, rather it remains within the discretion of the court to either grant or refuse such an order.

A "passing of accounts" is the process whereby a trustee presents his or her accounts, in "court format," with the aim of obtaining the court's approval for the relevant period of administration. Put summarily, "court format" means that the accounts be composed of up to 10 separate statements. The fiduciary must bring an application before the court. The application is accompanied by the accounts, verified by affidavit, a copy of the Certificate of Appointment of Estate Trustee or Probate, and a copy of any previous judgment on passing. The applicant on an application to pass accounts also serves the court's Notice of Application and files proof of service on all interested parties with the court, including, if required, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee.

The statements required, in accordance with the form of the accounts, include a list of the assets, capital and revenue receipts, capital and revenue disbursements, the investment account, unrealized assets, closing statements with respect to money investments, liabilities and, finally, a statement of the compensation proposed or claimed.

Applications to pass accounts may be contested by a beneficiary. A beneficiary must file a Notice of Objection and can object formally to any transaction made or seek further information from the trustee or contest the amount of compensation he or she may be requesting.

On July 1, 2014 a new "Practice Direction for matters on the Estates List in the Toronto Region" came into effect and Part V(B) deals with the practice of Passing of Accounts Applications.[168]

Once an application to pass accounts is made, section 49(2) of the *Estates Act*, R.S.O. 1990, c. E.21, permits the court to "make full inquiry and accounting of" an estate trustee's accounts. In addition, section 49(3) enables a court to inquire into any complaint or claim of misconduct, neglect or default on the part of the estate trustee occasioning financial loss to the estate or trust fund and to award damages in the case of financial loss or, in some cases, to reduce compensation which is otherwise payable to the trustee in relation to the administration of the estate.

Trustees are well-advised to obtain court approval of their accounts in the following scenarios:

- There is not sufficient funds to pay out all of the legacies;
- There are unascertained creditors;
- Where releases are not executed; and
- Where there has been litigation.

Compensation

Estate trustees, like other trustees are entitled by statute to be compensated for their services and the compensation may be fixed on the passing of accounts.

The right to compensation is derived from Section 23(2) and Section 61 of the *Trustee Act*.

Section 61 entitles the trustee to compensation based on a "fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate." Section 23(2) confers the right on a trustee to be compensated on a passing of accounts. For a trustee there is no statutory guidance stating how compensation is to be calculated and no tariff mandated by statute. Instead, the procedure for assessing compensation has evolved mainly from the cases of *Laing Estate v. Laing Estate*;[169] *Flaska Estate*;[170] *Gordon Estate*;[171] and *Jeffery Estate*.[172] The

[168] Consolidated Practice Direction Concerning The Estates List in the Toronto Region: http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates
[169] (1998)113 O.A.C. 335 (C.A.).
[170] (October 20, 1998), Doc. CA C29542 (Ont. C.A.).
[171] (October 20, 1998), Doc. CA C30225 (Ont.C.A.).
[172] (1990), 39 E.T.R. 173 (Ont. Surr. Ct.)

case law sets out what developed as the usual percentages and the tariff guidelines to be applied and how the process is to be approached. The case of *Re Toronto General Trust v. Central Ontario Railway Co.*[173] sets out the five factors to be considered as follows:

(1) the size of the trust;

(2) the care and responsibility involved;

(3) the time occupied in performing the duties;

(4) the skill and ability shown; and

(5) the success resulting from the administration.

The five factors approach relies on the consideration of the factors first, followed by a determination of what is fair and reasonable compensation in accordance with s. 61(1) of the Trustee Act. The discretion of the court is quite broad. The five factors approach has been criticized in that it affords a great deal of discretion in the determination of compensation.

The percentages approach originated in or about the same time as the five factors approach by the case of *Farmers' Loan and Savings Company*.[174] The current percentage guidelines are:

(1) 2.5% charged on capital receipts;

(2) 2.5% charged on capital disbursements;

(3) 2.5% charged on revenue receipts;

(4) 2.5% charged on revenue disbursements; and

(5) if the estate is not immediately distributable, an annual care and management fee of two-fifths of 1% of the average value of the gross assets under administration per annum.

In or about 1988, the Ontario Court of Appeal released its judgment in three compensation cases: *Re Laing Estate; Re Gordon Estate; and Re Flaska Estate*. These cases provide the foundation for the judgments that have followed and still prevail in determining compensation. There are comprehensive resources on the historical development of executor's compensation and its current application.[175]

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[173] (1905), 6 O.W.R. 350 (H.C.) at p.354.
[174] (1904), 3 O.W.R. 837 at p.389.
[175] *Executors' Compensation* by Jordan Atin (1999), 19 E.T.P.J..1 ; "*Estate Litigation*" by Schnurr, B.A., Estate Litigation, 2nd ed. (Toronto: Carswell), Chapter 5.7; and Jennifer J. Jenkins and H. Mark Scott, "*Compensation and Duties of Estate Trustees, Guardians & Attorneys*" Part 1, Compensation for Estate

The three Court of Appeal cases established that a two-step process in effect would take place where the usual percentages are first applied and then the appropriateness of the result checked against the five factors. Sometimes a special fee is sought as part of a compensation claim, but generally speaking, is rarely awarded except in exceptional cases where there has been for example, protracted litigation or ongoing management and/or litigation concerning for instance, a business. Similarly, the court is sometimes asked to reduce compensation where the percentages approach would have the result of over-compensation having regard to the size of the estate.[176]

The court's jurisdiction and discretion is not absolute and exceptions apply where compensation is fixed by statute, or the instrument itself, for example the Will, Trust, Power of Attorney document, guardianship order, or otherwise by agreement, or contract.

The conduct of the estate trustee can and will impact compensation referenced in Section 49(2) of the *Estates Act*.[177] The court may reduce compensation for the failure to discharge fiduciary duties and for improper conduct.

Requests for the reduction and the increase of compensation, account for many of the applications brought before the court on passings of account. The request for reduction of compensation often relate to the conduct of the trustee. The requests for increased compensation not only relate to the complexity of the proceedings, but often the conduct of the beneficiaries where the estate or trust has involved litigation.

The Prudent Investor Rule

Subsection 27(5) of the *Trustee Act*, R.S.O. 1990, c. T.23, provides insight to estate trustees when deciding whether and how to invest assets. It mandates that a trustee must take into consideration the following 7 criteria when planning the investment of trust property:

1. General economic conditions;
2. The possible effect of inflation or deflation;
3. The expected tax consequences of investment decisions or strategies;

Trustees, Chapters 1 through 4; Oosterhoff, A. "*Indemnity of Estate Trustees as Applied in Recent Cases*" The Advocates Quarterly, April 2013, a revised version of Professor Oosterhoff's paper delivered at the STEP Toronto Branch Conference on January 9, 2013, para6.2 and 6.3.

[176] *Re Kilgore Estate* (April 25, 1984) Doc. 25014/47 (Ont. Surr. Ct.).

[177] *Estates Act*, RSO 1990, c E.21.

4. The role that each investment or course of action plays within the overall trust portfolio;
5. The expected total return from income and the appreciation of capital;
6. Needs for liquidity, regularity of income and preservation or appreciation of capital; and
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Subsection 27(6), requires that a trustee diversify the investment of trust property to an extent that is appropriate to, (a) the requirements of the trust; and (b) general economic and investment market conditions. Subsection 27(7) and (8) are important in that they not only permit a trustee to obtain advice in relation to the investment of a trust property (subsection 27(7)), but they also free a trustee from liability for relying on such advice, "if a prudent investor would rely on the advice under comparable circumstances."

Protections Afforded to the Trustee

Section 28 of the *Trustee Act* protects a trustee from liability to the trust arising from the investment of trust property "if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances."

At the end of the day, the best advice that can be offered to the trustee is to document, in writing, that the decision made by him or her was well-reasoned, made in good faith, and in adherence to the considerations set out in sections 27 and 28.

Expert Advice

In addition to the investment-related guidance provided to estate trustees by section 27 of the *Trustee Act*, it is always open to an estate trustee to seek expert advice.

In the corporate context, trustees may consult with senior directors or officers of the corporation that forms part of the Estate.

In the legal context, trustees may choose to meet with the beneficiaries, or, if there are charitable interests, disabled, actual or contingent beneficiaries and minors, the Office of the Children's Lawyer or the Public Guardian and Trustee may provide guidance.

A trustee may seek the advice and direction of the court pursuant to Rule 14.05(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as well as subsection 60(1) of the *Trustee Act*.

Regardless of the choice made, a trustee should keep careful and detailed records of any steps taken and all consultations. Keeping careful notes of one's decisions made at the time they are made and the reasons for such decisions, could help the trustee later if that decision is called into question.

Delegation Principles

Subsection 27.1(1) of the *Trustee Act* permits a trustee to delegate functions relating to investment of trust property to an "agent," "to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function." However, to delegate such functions, a trustee must prepare a written plan or strategy that (a) complies with section 28 of the Act;[178] and (b) is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust.

The trustee must also execute a written agreement with the agent which includes: (a) a requirement that the agent comply with the plan or strategy in place from time to time; and (b) a requirement that the agent report to the trustee at regular stated intervals.

The trustee must exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms (subsection 27.1(4)). This includes compliance with any regulation made under section 30 and prudence in monitoring the agent's performance by

(i) reviewing the agent's reports;

(ii) regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and

[178]Section 28 provides that "A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances."

assessing whether the plan or strategy is being complied with;

(iii) considering whether directions should be provided to the agent or whether the agent's appointment should be revoked; and

(iv) providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.

Once an agent is authorized to exercise a trustee's functions relating to investment of trust property he or she has a duty to do so, (a) with the standard of care expected of a person carrying on the business of investing the money of others; (b) in accordance with the agreement between the trustee and the agent; and (c) in accordance with the plan or strategy of investment (subsection 27.2(1)).

An agent who is authorized to exercise a trustee's functions relating to investment of trust property is prohibited by statute from delegating that authority to another person (subsection 27.2(2)).

It is important to note that, although delegation, in some instances, is permissible, through the application of common law principles of agency and vicarious liability, trustees are also accountable for any contracts entered into or torts committed by their agents in the exercise of their duties. A trustee will be found liable in instances where any action or omission of the trustee would in itself constitute a breach of trust. One example is where the trustee actively participates alongside the agent in a breach of trust. Another example is a situation involving improper delegation of authority, or failure to properly supervise the agent in the course of carrying out his or her functions. Thus, in sum, a trustee must exercise prudence in the choice of agent, and in monitoring the agent's performance to ensure compliance with the terms of delegation.

Exculpatory Clauses

Will or Trust documents may provide powers and protections to estate trustees. According to Professor Donovan Waters, Canadian courts would likely adopt the following principles relating to the enforceability of exculpatory provisions contained within a trust document:

1. An exculpatory clause cannot excuse liability for acts of gross negligence;
2. An exculpatory clause cannot excuse liability for willful defaults or intentional wrongdoing;
3. An exculpatory clause cannot excuse liability for acts of fraud or dishonesty; and
4. An appropriately drafted exculpatory clause will be effective to relieve a trustee from liability for breaches of lesser culpability than acts of gross negligence, intentional wrongdoing and bad faith.

Application for Advice or Direction

Another way for an estate trustee to avoid possible claims for breach of trust, is to obtain the sanction of the court. Subsection 60(1) of the *Trustee Act* provides that a trustee may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate. And, provided the trustee has not been guilty of fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction of the court. He or she shall be deemed to have discharged that his or her duty as such trustee in the subject-matter of the application, in acting upon such opinion, advice or direction given.

Good Faith Reliance Defense

Subsection 35(1) of the *Trustee Act* provides some further relief to estate trustees and trustees when something goes wrong. This provision provides that if in a proceeding affecting a trustee or trust property it appears to the court that the trustee is or may be personally liable for any breach of trust, but the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same. Notably, the protections afforded by this section do not apply to liability for a loss to the trust arising from the investment of trust property.

Who to appoint

Given the responsibilities and potential liabilities of estate trustees, the decision as to who your client should appoint is an important one.

If the proposed estate trustee is also the proposed attorney for property, you should have some discussion with your client regarding the potential for conflict of interest arising from this dual role. The misfeasance of an attorney for property is often uncovered by the estate trustee; it follows that where the attorney for property is also the estate trustee, there may be less of an opportunity to uncover any wrongdoing.

Some testators appoint more than one estate trustee as a safe-guard. If the co-trustees are meant to serve as a check and balance for each other, some thought should be given to whether or not the appointed co-trustees are all able and willing to fulfill their role and work cooperatively with their co-trustees.

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

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Kimberly A. Whaley October 2014

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):[179]

> *"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*,[180] 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*."[181]

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

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[179] (1968) LR 1 P&D.
[180] *Craig v Lamoureux*, [1919] 3 WWR 1101.
[181] *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.[182]

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."[183]

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. [184]

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.[185]

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.[186] 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.[187]

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[182] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[183] *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).
[184] *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.
[185] 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.
[186] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[187] 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.[188]

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. [189]

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.[190]

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.[191]

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[188] *Juzumas v Baron*, 2012 ONSC 7220.
[189] *Covello v Sturino*, 2007 CarswellOnt 3726.
[190] 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.
[191] *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*[192] 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.[193]

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.[194]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[195]

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*,"[196] the more recent SCC case of *C(R) v McDougall*[197] 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*[198] 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*

[192] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[193] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[194] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[195] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[196] *Vout v Hay* at para 24.
[197] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[198] (1993), 90 Man R (2d) 245 (Man QB) at para 38.

> *had been said, the will must be "the offspring of his own volition and not the record of someone else's."*[199]

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*."[200]

See also *Buccilli et al v. Pillitteri et al*,[201] 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*."[202]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[203] recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

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

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[204]

In *Leger v Poirier*,[205] 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

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[199] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*
[200] *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.
[201] 2012 ONSC 6624, upheld 2014 ONCA 337.
[202] *Buccilli, supra* note 248 at para. 139.
[203] *Shrader v Shrader, [2013] EWHC 466 (ch)*
[204] 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.
[205] *Leger v Poirier*,[1944] SCR 152.

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.[206]

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.[207]

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.*"[208]

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.

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

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

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[209]

Lawyer's Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?

- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?

- ❑ Is there conflict within your client's family?

- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

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

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

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

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

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

- ❑ 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;[210] and

- ❑ Be mindful of the *Rules of Professional Conduct*[211] 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 October 2014

[210] 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
[211] *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

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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.

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

Kimberly A. Whaley, Whaley Estate Litigation October 2014

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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

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

Kimberly A. Whaley, Whaley Estate Litigation October 2014

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.[212]

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.[213]

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).[214]

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;

[212] *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
[213] Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013
[214] *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.[215]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[216]:

> *"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.[217]

Capacity to Make Testamentary Dispositions Other Than Wills

The *Succession Law Reform Act* [218] 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.[219] 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.[220] The criteria to be applied, is that of testamentary capacity.

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[215] 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)

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

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

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

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

[220] 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,* [221] 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.[222]

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.[223]

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.[224]

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

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

[222] *SDA,* subsection 8(2)
[223] *SDA*, subsection 9(1)
[224] *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* [225]

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. [226]

A person may be incapable of managing property, yet still be capable of making a Will.[227]

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.[228]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[229]

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.[230]

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

[225] R.S.O. 1990, c. M.7
[226] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[227] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291
[228] *SDA*, subsection 47(1)
[229] *SDA*, subsection 47(3)
[230] *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.[231]
A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[232]

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.[233]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[234] 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.[235] 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."[236]

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

[231] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
[232] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859
[233] *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
[234] *SDA, supra* note 2
[235] *SDA,* subsection 2(1)
[236] *SDA*, subsection 2(3)

(b) The ability to understand the specific effect of the gift in the circumstances.[237]

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.[238]

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,[239] 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.[240]

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.[241]

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.[242]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[243]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[244]

Capacity to Instruct Counsel

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[237] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[238] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487
[239] 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)
[240] *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
[241] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[242] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[243] *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
[244] *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.[245] 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.[246]

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[247]
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;[248]
- 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 [249]

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.[250]
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.[251]

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[245] Staff lawyer at ARCH Disability Law Centre.
[246] At page 3
[247] *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.
[248] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162
[249] *Wingrove v. Wingrove* (1885) 11 P.D. 81
[250] *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)
[251] *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. [252]

Psychological pressures creating fear may be tantamount to undue influence.[253]

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."[254]
Undue influence must be corroborated. [255]

Suspicious circumstances will not discharge the burden of proof required.[256]

* 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.[257]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[258]

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

[252] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)
[253] *Tribe v Farrell,* 2006 BCCA 38
[254] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[255] 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
[256] *Vout v Hay*, at p. 227
[257] *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.)*
[258] *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*[259] *("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.

[259] 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[260] 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)[261].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[262].
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.[263]

[260] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[261] *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*]
[262] *Calvert*
[263] 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*,[264] 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,[265] 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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[264] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)
265 R.S.C. 1985, c.C-5, S. 16(1)