

# STEP

Canada

ADVISING FAMILIES ACROSS GENERATIONS

## 20TH NATIONAL CONFERENCE

# **Powers of Attorney for Property and Personal Care: The Good, the Bad and the Ugly**

# Creation, Anatomy, and Attacking

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# Authority and Supervision

- Attorney draws authority

See generally Carmen Theriault “Powers of Attorney – Some Fundamental Issues” (1999) 18 E.T.P.J. 227.

- From judge made law, not statute law
- Law of agency

- Validity of PoA assessed at common law

- Dual supervision of attorney

- Common law courts – is given action *ultra vires*
- Chancery – protection of wards, is given action conscionable



# Statutory Overlay

- Common law was limited
  - Commercial tool
  - Expired with incapacity
- Legislatures expanded and adapted
  - Allowed enduring
  - Allowed springing

## Form of Document

- General practice is single original
  - Supplemented by multiple notarial copies
  - Some lawyers execute multiple originals
- No “codicils”
- Severance appears possible

Denzil Lush, “Severance of Ineffective Provisions in Lasting Powers of Attorney” 2013 Eld. L. J. 3(2), 144-152
- Should PoA be sealed?

*Powell v. London and Provincial Bank*, [1893] 2 Ch. 55 (Eng. C.A.),  
*Royal Bank v. Bauman* (1986), 72 A.R. 89 (Q.B.)

# Capacity Test to Grant

- Test originated *Ball v. Mannin* (1829)

*Ball v Mannin* (1829), 3 Bli NS 1, 4 E.R., 1241, HL, 33 Digest (Repl) 592  
(Irish Court of Exchequer)

- Codified across Canada in most PA Acts
- Adjusted in Ontario, Sask, BC, NWT, and NFLD
- Elaborated in case law

*K(Re)* [1988] 1 Ch. 310 (Eng. Ch. D),

*Dubois v. Wilcosh* (2007) CarswellMan 26 (Man. Q.B.)

*Egli (Committee) v. Egli* 2005 CarswellBC 3014, 20 ETR (3<sup>rd</sup>) 159 (BCCA)

*Pirie v. Pirie* 2017 CarswellAB 635, 27 ETR (4<sup>th</sup>) 136 (ABQB)

## Impact Where No Capacity

- Void, not voidable, for lack of capacity, and all actions taken are void as a result

*Hill Estate v. Chevron Standard* 1992 CarswellMan 153, [1993] 2 W.W.R. 545 (Man C.A.)

- Presumption of capacity operative

*Re W (Enduring PoA)* [2001] 4 All E.R. 88 (Eng. C.A.)

*Young v Paille*, 2012 MBQB 3, 2012, CarswellMan 12 (Man. Q.B.)

# Attacking PoA Document

- No capacity – void
- No intention – void
- Common law coercion – voidable
- Equitable Undue influence –voidable
  - Equitable UI applicable – England  
*Drew v Daniel* (2005) EWCA Civ 507, (2005) W.T.L.R. 807, 2005 WL 1033533 (Eng. C.A.)
  - Not applicable in Canada?  
*Vanier v. Vanier*, 2017 CarswellOnt 10058, 28 ETR (4<sup>th</sup>) 200 (Ont. C.A.)

# Limitations on Authority

- Must serve best interests of donor

See generally Carmen Theriault “Powers of Attorney – Some Fundamental Issues” (1999) 18 E.T.P.J. 227. Also see C.D. Freedman “Misfeasance, Nonfeasance, and the Self Interested Attorney” (2011) 30 E.T.P.J. 303.

- Some actions too personal to delegate

*Clauss v. Pir*, [1987] 2 All E.R. 752 (Eng. Ch.D)

- Directorship
- Trusteeship
- Attorneyship
- Swearing affidavit
- Child rearing

## Limitations - Continued

- No testamentary dispositions

Chichester Diocesan Fund v. Simpson, [1944] A.C. 341 (Eng. H.L.)

- Wills and codicils
- Beneficiary designations changing route

- Destination vs. Route

- Alter ego trusts

*Banton v. Banton*, 1998 Carswell Ont 3423, 164 D.L.R. (4<sup>th</sup>) 176, 66 O.T.C. 161 (Ont. Gen. Div.), additional reasons 1998 Carswell Ont 4688, 164 D.L.R. (4<sup>th</sup>) 176 at 244 (Ont. Gen. Div.)

# Rules for Gifting

- By Attorney
  - Prohibited
  - No pre-inheritances
  - “A gift by any other name”
  - Special permission
    - From legislation, or from document - Possible
    - From Court -- Unlikely
- By Ward
  - Rule under court order

*Rourke v. Halford*, 1916 CarswellOnt 301, 31 D.L.R. 371 (Ont. C.A.)
  - Applicable under PoA?

John E. S. Poyser, *Capacity and Undue Influence* (Carswell, Toronto, 2014), at p. 410



# Express Permissions

- Provisions in common use
  - Gifts to charity
  - Gifts to avoid US estate tax
  - Support for disabled family member
  - Freezes and reorganizations
  - Settling trusts

- Never extended to wills

- Does distinction hold?
  - English approach may prohibit both wills and gift

“Traps for the Unwary – Lasting Powers of Attorney” (2013), Angahard Palin, P.C.B 2013, 6, 310-313.

## Core Obligations

- Serve best interests of ward
- Protect property
- Keep books and records

## Helper vs. Attorney

- Rules differ in two roles

See generally C.D. Freedman “Misfeasance, Nonfeasance, and the Self Interested Attorney” (2011) 30 E.T.P.J. 303.

- No obligation for *agent* to account
- No prohibition for *agent* to self-gift

*Day v. Harris* [2013] EWCA Civ 191, [2013] 3 W.L.R. 1560 (Eng. C.A.)

- Other distinctions

- Liability threshold fluctuates

- Agent vs. fiduciary
- The “imprecise divide” as one role blends into other

## **Tax Issues**

- No impact on tax residency
- But associated/related issues
- FBAR requirements
  - US citizen handling account outside of US
  - One FBAR to be filed with each account
  - Paper work, and fees, but no special tax

**Thank you.... Questions?**

Tradition  
**LAW** llp estates & trusts

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## 20TH NATIONAL CONFERENCE

# **Powers of Attorney for Property**

**Predatory Marriages**

**Albert H. Oosterhoff**

## Predatory Marriages

- Where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit
- Not easily challenged – issue of standing





## Predatory Marriages

- Problematic as marriage still automatically revokes a Will. See, e.g., Succession Law Reform Act, RSO 1990. c. S.26, ss. 15(a), 16
- Also problematic due to property rights and other entitlements. See e.g. Family Law Act, R.S.O. 1990, c. F.3, ss. 5, 6



## **Predatory Marriages**

- Legislation and court processes not well-equipped
- Public policy perspective:
  - balance autonomy & presumption of decisional capacity with protecting the vulnerable

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**16.9%**  
**POPULATION**  
**+65**


**12** million  
**SENIORS**  
BY 2061

AVERAGE LIFE EXPECTANCY

**89**



**86**

**3/4**   
million  
**LIVING WITH**  
**COGNITIVE**  
**IMPAIRMENT**

**1** in **11**  **>65**  
**CURRENTLY HAS ALZHEIMER'S**  
**OR RELATED DEMENTIA**



## Capacity in General

- No single legal definition for “capacity”
- No single “test” for capacity, not really a test
- Certain factors are to be considered in an assessment of requisite mental capacity to make a certain decision/undertake a certain task at a particular time



## Capacity to Marry

- Not easily challenged
- Centuries old understanding for “capacity to marry” as developed at common law is that the contract to marry is a “simple one”
- “does not require a high degree of intelligence to comprehend”



## Historical Themes

- Equivalent to capacity to contract
- Marriage has distinct nature of rights, responsibilities, obligations that must be appreciated
- Contract of marriage is a “simple one”
- Factors for determining capacity to marry are the same as capacity to manage property, or require one having capacity to manage the person and property

Predatory Marriages

# MODERN CASE LAW



## Banton v Banton

- 84 years old and 31 year old waitress
- Terminally ill, married at her apartment
- New power of attorney and wills
- Court: lacked testamentary capacity but had capacity to marry





## **Juzumas v Baron**

- 89 year old plaintiff, “caretaker” who was a younger woman, befriended him
- Married with promise not to send him to nursing home
- Day before wedding older adult executed a Will
- Lawyer did not see older adult alone
- After wedding – caretaker and son devised plan to transfer older adult’s home into son’s name

## **Elder Estate v Bradshaw**

- Caregiver and older adult – joint accounts
- Suspicious circumstances
- However, solicitor took necessary precautions
- And, independent witnesses support caregiver's testimony

## **Devore-Thompson v Poulain**

- Niece brought claim after death of aunt
- Predator met her at local mall
- Consistent campaign to access aunt's funds post-marriage
- Marriage set aside as void ab initio, lack of requisite capacity to marry

## Hunt v Worrod

- Father suffered catastrophic brain injury in accident
- Sons held power of attorney
- Former girlfriend kidnapped father and married him
- Court decided father lacked capacity to marry
- Extensive medical evidence supported decision

## Chuvalo v Chuvalo

- Retired boxer suffered significant cognitive decline
- Separated from wife. She kidnapped him and said he wanted to reconcile with her.
- Children contested
- Issue: did he have capacity to decide to reconcile?
- Court relied on medical evidence and held he did not

# **EQUITABLE & OTHER REMEDIES**

## Undue Influence

- Often relied on to set aside a will or *inter vivos* gift
- Arguably, may be used to set aside predatory marriage – the consequences of marriage effectively results in a gift to the predator



## **Doctrine of Unconscionability**

- Need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him or her in the power of the stronger party and proof of substantial unfairness
- Results in presumption of fraud
- Stronger party must rebut presumption - proof bargain was fair, just and reasonable



## **Statute as an Instrument of Fraud**

- Marriage is based on, sanctioned by, legislation
- Predator relies on statute to enforce a claim
- Claim is fraudulent – persuaded spouse by devious means to enter into marriage
- Court of equity should not allow the statute to be used in this way and should restore property to the rightful heirs

## **No One Shall Profit From Wrongdoing**

- Challenge predator spouse's right to inherit
- Based in public policy
- Beneficiary won't inherit where he or she intentionally kills, perpetrated fraud, or coerced testator
- Property does not pass to beneficiary – equity imposes constructive trust

## In the Matter of Berk & Campbell v Thomas

- New York
- Similar facts – caretaker used position of power to secretly marry an older adult where capacity in issue
- Relied on ‘fundamental equitable principle’ to deny predator’s claim
- Predator spouse should not benefit from wrongful conduct



## Unjust Enrichment

- Factors:
  - enrichment
  - corresponding deprivation
  - lack of juristic reason
- Should be available to invalidate a predatory marriage in Canada and restore property to rightful heirs
- Existence of marriage should not be considered juristic reason to deny relief

## **Civil Fraud / Tort of Deceit**

- Predator spouse induces older adult to marry by perpetrating a false representation that the marriage will be a “real” marriage (which the predator knows is false, a trick a misrepresentation)
- While in immigration cases, courts are reluctant to set aside on basis of fraud, predatory marriages are distinguishable

## **Ex Turpi Causa Non Oritur Actio**

- A defence to bar plaintiff's claim where seeking profit from acts that are anti-social, illegal, wrongful or of culpable immorality in both contract and tort
- Predatory spouse should not be entitled to financial gain arising from the anti-social act of a predatory marriage

## Conclusion

- Capacity is complicated
- No clear hierarchy
- Simply “different”
- Absence of clear legislation defining requisite capacity to marry, common law remains unclear

## **Conclusion cont.**

- Until factors to determine requisite capacity to marry are refined (such that it takes into consideration financial implications) those with diminished capacity will remain vulnerable to exploitation through marriage
- Likely increasing problem
- Perhaps equitable approaches will gain traction



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- THANK YOU!
- Questions?



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## 20TH NATIONAL CONFERENCE

# People of Faith and Substitute Decision-Making

Charles B. Wagner



# Overview of discussion

- This presentation deals with advising people of faith regarding issues arising from powers of attorney for personal care, advance health care directives, personal directives and “living wills”
- It is based on a paper I prepared with my partner Brendan Donovan and my associate Aaron Pearl for this conference entitled, “**People of Faith and Substitute Decision-Making**”
- I want to thank David Wagner and Kimberly Gale who are associates with the firm for their assistance in preparing this article

# Overview of discussion

- Time permitting, these are the questions I hope to address:
  - How does one draft a POA to best ensure that the grantor's end-of-life wishes will be complied with?
  - What advice should we provide when conflict arises about end-of-life questions?
  - What advice should we provide to attorneys who seeks to protect the grantor from inappropriate sexual relationships?

## Can we ensure that grantor's end-of-life wishes will be complied with? – legislative background

- Purpose of HCCA, s. 1 - to enhance the autonomy of persons for whom treatment is proposed
- **First step** - health practitioner who proposes a treatment must seek consent of the person's substitute decision-maker (SDM), s. 10(1)(b)
- **Second step** - if the SDM does not consent and the doctor believes the SDM did not comply with s. 21, the doctor can refer the matter to the Consent and Capacity Board (CCB), s. 37(1)

## Can we ensure that grantor's end-of-life wishes will be complied with? – legislative background

- **Third step** - CCB may substitute its opinion and give directions applying s. 21
- **Fourth step** – either SDM or doctor may appeal CCB decision to Superior Court of Justice on a questions of law or fact or both, s. 80
- The key to addressing this conflict is s. 21

## Can we ensure that grantor's end-of-life wishes will be complied with? – HCCA, s. 21

- Does SDM know of a wish applicable to the circumstances expressed while capable? If so, SDM **shall** give or refuse consent in accordance with the wish, s. 21(1)1
- But, if SDM does not know of a wish expressed while capable, or if it is impossible to comply with the wish, the person shall act in the incapable person's **best interests**, s. 21(1)2



## Can we ensure that grantor's end-of-life wishes will be complied with? – what are “best interests”?

- Patients, SDMs and doctors might all have their own personal definitions of “bests interests”
- As lawyers we have to advise how the HCCA defines best interests
  - **First factor** - the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;

## Can we ensure that grantor's end-of-life wishes will be complied with? – what are “best interests”?

- **Second factor** - any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1), *i.e.*, wishes expressed prior to the age of 16, wishes expressed while incapable or wishes that are impossible to comply with

## **Can we ensure that grantor's end-of-life wishes will be complied with? – what are “best interests”?**

- 21(1)(2)(c) list 4 factors that essentially deal with quality of life and the likelihood of recovery

## Can we ensure that grantor's end-of-life wishes will be complied with? – the crisis for the person of faith

- Common argument is that POA did not address this specific end-of-life issue so under s. 21, so best interests govern
- grantor's values and beliefs **ONLY ONE FACTOR CCB OR COURT CONSIDERS**
- Some people of faith believe that even one additional moment of life is of infinite value. "Everyone will die eventually. Medical intervention is just postponing the inevitable."

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- How does the drafting solicitor and/or litigator address the challenge that the POA lacks sufficient specificity, *i.e.*, it does not express a wish applicable in the circumstances because the patient could not have contemplated the situation now being experienced?

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- The case of Mary Grover underscores the dilemma
- Her POA stated that, in the event she became seriously ill with a life threatening condition, everything possible should be done to cure her including heroic measures.

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- At the age of 81, after suffering three strokes, Mrs. Grover was left confined to the intensive care unit at the London Health Sciences Centre on a feeding tube and ventilator. She was quadriplegic and non-communicative.
- Her treating physicians recommended withdrawal of life support and Mrs. Grover's attorney, her daughter, refused.

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- The CCB held that Mrs. Grover had not made a wish applicable under the circumstances because
  - the comments attributable to G were not precise and lacked particularity.
  - no evidence of statements meant that she should be kept alive despite any levels of pain, loss of autonomy or personal dignity.



## Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma

- Would not mechanically or literally apply words in POA
- CCB felt grantor did not contemplate these circumstances and they would not disregard her changes in her circumstances.
- **The Ontario Superior Court of Justice** dismissed the appeal because “[e]ven wishes expressed in categorical or absolute terms must be interpreted in light of the circumstances prevailing at the time the wish was expressed.”

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- **There is no way to draft POA to absolutely ensure client's end of life wishes will be complied with**
- **Let's review some attempts to address the situation**

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- See Vaad Harabonim of Toronto's proposed POA attached as schedule "B" to our paper
- It provides for as much specificity as the drafter could envision and a formula ("ask the Rabbi") outside HCCA to pre-empt the argument that the grantor did not contemplate the end-of-life situation

## **Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma**

- Our paper presents an alternative to: (a) listing of all the end-of-life situations being contemplated, or (b) providing a formula for decision-making outside the contemplation of the HCCA
- It builds on s. 1 of the HCCA and the idea of patient autonomy. It relies on s. 21 of the HCCA premise that the SDM must comply with the wishes of the person expressed while capable. This alternative builds on the mission statement of the HCCA – the autonomy of the individual to accept or refuse treatment

## Can we ensure that grantor's end-of-life wishes will be complied with? – the drafting dilemma

- Here are the key points made
  - Belief in the primacy of life
  - Express wish that all possible steps be taken to extend life as long as possible unless the level suffering and/or pain makes it a prolongation of dying
  - Express wish that treatment as much as possible, for it to be done in accordance with Jewish religious law ("*Halacha*")

## **So how does drafting solicitor ensure end-of-life wishes complied with?**

- Express wish that, notwithstanding anything to the contrary in the HCCA, the judgment and decision of SDM be honoured
- Express declaration of absolute trust in the judgment of SDM and articulation of belief that SDM knows grantor best and understand what his wishes and best interests would be in every instance

## **So how does drafting solicitor ensure end-of-life wishes complied with?**

- Express wish of not wanting any doctor, court or CCB to make those decisions or to determine what is in his best interest

## **So how does drafting solicitor ensure end-of-life wishes complied with?**

- Section 21(1)1 requires that the SDM make the decision to give or refuse consent in accordance with any known wish applicable in the circumstances that the incapable person expressed while capable
- Does the express provision that the SDM knows best what the grantor would want to do in every circumstance suffice?



## **So how does drafting solicitor ensure end-of-life wishes complied with?**

- If the adjudicator determines that the grantor's wish under these circumstances is unknown, does the express wish that the SDM's view of best interests be complied with suffice?
- Would a choice of formula outside HCCA be considered off-side as an attempt to oust jurisdiction
- Maybe – Maybe not.

## The role of the attorney in protecting the vulnerable incapable person

- One of the lawyers I know and respect recently consulted me about a client SDM whose mother resides in a long-term care facility
- The client was having sex with six different residents in the home
- She was, prior to the onset of Alzheimer's Disease, a believer in monogamy, and adverse to the concept of adultery

## **The role of the attorney in protecting the vulnerable incapable person**

- SDM sought out advice on how to protect his mother
- There are those who suggest that
  - seniors are no less sexual beings then the rest of us
  - for an SDM or family member to interfere with the senior citizens' sexual activity is to infantilize them
  - the law should not permit the attorney or SMD to interfere because this is neither a personal care nor treatment decision

## The role of the attorney in protecting the vulnerable incapable person

- Arguably interfering with the grantor's decisions about sex contravenes his or her rights under relevant human rights legislation and the *Charter*
- I understand the argument – but for people of faith who believe they knew best what their mother or father believed, they cannot accept that this is what their parents wanted

## The role of the attorney in protecting the vulnerable incapable person

- The fundamental issue a lawyer advising a person of faith has to address is *whether the person in question lacks the capacity to consent to sex*
- Let's look at the case law

## The role of the attorney in protecting the vulnerable incapable person

- *R v. Comeau*
  - Janitor at a continuing care facility acted on sexual advances from a resident
  - Doctor's conclusions that complainant did not have the capacity to consent to sex was adopted by court

## The role of the attorney in protecting the vulnerable incapable person

- No capacity to consent to sex because **she lacked insight, judgment and reasoning necessary to make a safe decision to engage in sexual activity. She had no short-term memory and her midterm memory was impaired.**

## The role of the attorney in protecting the vulnerable incapable person

- No capacity to consent to sex because **she lacked insight, judgment and reasoning necessary to make a safe decision to engage in sexual activity. She had no short-term memory and her midterm memory was impaired.**
- For there to be capacity, it must be the consent of a conscious and operating mind with the ability to understand the potential consequences of the activity



## The role of the attorney in protecting the vulnerable incapable person

- *R v. Comeau* seems to stand for the proposition that a higher level of awareness is essential to the capacity to consent to sex. It suggests that a person must understand all of the potential consequences of engaging in sexual behaviour, and this might include the social, cultural and religious consequences.

## The role of the attorney in protecting the vulnerable incapable person

- The relatively recent Ontario case of *Salzman v Salzman* is instructive
- 93-year-old woman with severe dementia began a sexual relationship with a man nearly 30 years her junior
- Son/SDM concerned for her safety

## **The role of the attorney in protecting the vulnerable incapable person**

- 93-year-old woman was resolute in her position that she be allowed to continue dating boyfriend
- Based on the evidence of the doctor, the court found the woman did not have capacity to consent to sex and granted an injunction keeping boyfriend away

## **The role of the attorney in protecting the vulnerable incapable person**

- Court accepted finding of physician that the woman lacked insight to understand potential risks of any sexual behaviour such as infectious diseases or trauma.
- In addition, increased risk of traumatic injury from sexual activity due to her frailty (she was 93 years old) and her chronic aspirin use which inhibits blood clotting putting her at increased risk of significant bleeding.

## **The role of the attorney in protecting the vulnerable incapable person**

- Lawyers advising the individual SDM - steps to be taken include
  - Provide assessor with legal definition of capacity to consent to have sex
  - have the grantor assessed

## **The role of the attorney in protecting the vulnerable incapable person**

- If incapable, take whatever practical or legal steps available to prevent further sexual encounters.
- These might include:
  - moving incapable person's location
  - seeking injunctive relief

## **The role of the attorney in protecting the vulnerable incapable person**

- I have had the opportunity to review Ms. Kimberly Whaley and Professor Albert Oosterhoff's STEP paper on Predatory Marriages
- It is an excellent

## The role of the attorney in protecting the vulnerable incapable person

- Their perspective that the capacity to marry is tied to the capacity to manage property was supported by the Ontario Superior Court of Justice in *Hunt v. Worrod*
- Justice Koke approached the test for capacity to marry with the financial and legal duties that marriage creates, and the capacity to understand those duties, firmly in mind



## The role of the attorney in protecting the vulnerable incapable person

- This is very different than the test Justice Cullity applied in *Banton v. Banton*
- My reading of *Banton* is that Justice Cullity believed that there is an equally compelling argument that marriage is more than just about property

## The role of the attorney in protecting the vulnerable incapable person

- As stated by the Court of Appeal for Ontario in *Halpern v. Canada*
  - Marriage is, without dispute, one of the most significant forms of personal relationships.
  - ... basic element of social organization in societies around the world.

## **The role of the attorney in protecting the vulnerable incapable person**

- Through this institution, society publicly recognize expressions of love and commitment between individuals, granting them respect and legitimacy as a couple.
- This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.

## The role of the attorney in protecting the vulnerable incapable person

- This can only enhance an individual's sense of self-worth and dignity
- So I pose the question, do we really want to preclude people who understand the simple contract of marriage and the commitment it entails from getting married because they are incapable of managing property or their personal care?"

## **The role of the attorney in protecting the vulnerable incapable person**

- These might include people without capacity to manage property and/or personal care but still understand the contract of marriage. For example, people with
  - neurodevelopmental disorders like mild intellectual disability,
  - Autism spectrum disorders and even specific learning disorders

## The role of the attorney in protecting the vulnerable incapable person

- Major neurocognitive disorders (used to be called dementia), like Alzheimer's Disease, vascular dementia, and traumatic brain injury
- schizophrenia
- **IF YOU REMEMBER ONE THING FROM THIS SEMINAR – IT'S THIS SAGE ADVICE:**
- Whenever I have a difficult question like this I take this first step
- I ...

- Ask Albert Oosterhoff
- Albert, what do you think?



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**Thank you**



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## 20TH NATIONAL CONFERENCE

# **Powers of Attorney**

## **Weapons of Mass Destruction or Useful Tools**

Nancy L. Golding, Q.C., TEP  
**Borden Ladner Gervais LLP**

1. **Legislation**
2. **Jurisprudence**
3. **Remedies / Drafting**
4. **POAs and Planning**
  - *Banton v. Banton*
  - *Easingwood v. Cockcroft*
  - *Hollander v. Mooney*
  - *Testa v. Testa*
  - *Tarantino v. Galvano*
5. **Liability**

# Legislation

- **Alberta:**
  - *Powers of Attorney Act*
  - *Personal Directive Act*
  - Sparse and general
- **British Columbia:**
  - *Representation Agreement Act*
  - *Power of Attorney Act*
  - *Wills and Succession Act*
  - Detailed and planning Allowed
- **Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia & Ontario:**
  - No planning allowed

## Predatory Marriage



## Jurisprudence

- No case law where stated Attorney or Agent starting action

## Legislation

- **Alberta**
  - “with whom a person may live and associate”
- **Nunavut**
  - Can commence divorce
- **British Columbia:**
  - Excludes divorce

## Remedies / Drafting for Issues

- **No Cookie Cutter / Bespoke Documents**
  - Notification
  - Accounting
  - Use of Funds



## Specific Powers and Authority - Planning

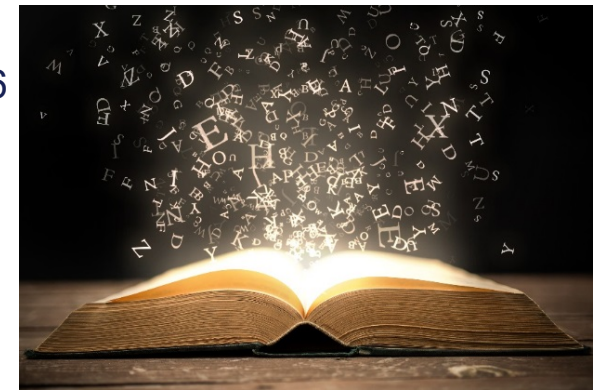
***Banton v. Banton*** 1988 Carswell Ont. 3423, (1998) 164 D.L.R. (4th) 176

***Easingwood v. Cockroft*** 2011 BCSC 1154, aff'd 2013 BCCA 182

***Hollander v. Mooney*** 2012 BCSC 1972, 2012 CarswellBC 4091

***Testa v. Testa*** 2015 ONSC 2381, 2015 CarswellOnt 5146

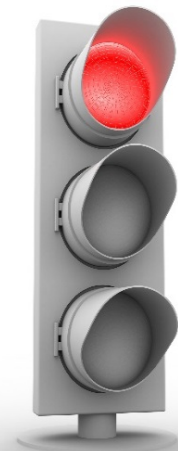
***Tarantino v. Galvano*** 2017 ONSC 3535





## ***Banton v. Banton (Ont)***

- 88 year old Banton
- 31 year old Yassin
- Married / money withdrawn
- Children – used POA to transfer money to trust
  - income and capital to Banton
  - after death of Banton to children



## ***Banton – cont'd***

- Marriage valid
- POA wording “can do anything by an attorney”
- Wide enough to settle *inter vivos* trust
- ? Set aside trust as breach of Fiduciary Responsibility
- ? Trust for the benefit of the Donor
- ? Did Trust deprive Donor of his rights
- Gift of remainder to Banton’s issue went beyond what was required



## ***Easingwood v Cockroft (BC)***

- Marriage to second wife
- Children of first marriage worried about *Wills Variation Act* claim of wife
- Children used POA to transfer property in alter-ego trust
- To estate after death
- Result - property unavailable to wife



## ***Easingwood – cont'd***

- Generally attorney cannot make testamentary disposition
- Cannot delegate testamentary capacity
- Trust established before death, not dependant on death for existence, so no testamentary disposition
- *Powers of Attorney Act* and *Wills, Estates and Succession Act* allow “planning”
- Attorney can replace beneficiary designations
- Must be same as existing or estate
- ? Court approval - different beneficiary ?

## ***Testa v Testa (Ont)***

- 2 sons were attorneys
- Set up a trust and transferred property into it
- Mortgaged property
- Court held attorneys are fiduciaries
- Must exercise power for benefit of incapable person
- Can create *inter vivos* trust
- Not valid – trust not used in a way that materially benefited mother



## ***Tarantino v. Galvano (Ont)***

- Daughter - EPA
- Transferred 75% of mother's interest in land and pension to herself
- Court held:
  - Guardian of property is a fiduciary
  - Decisions have to be for benefit of incapable person
  - EPA allows for dispositions contrary to a Will
  - Must be reasonably necessary for mother's care
  - Not reasonably necessary

# Drafting to Allow Attorney to Transfer Assets

- Create joint interests
- Create trust
- Corporate powers consolidate, merge, freeze

## Other Remedies

- Health and Living Plan
- Alter Ego Trust



# Liability Clauses

- Exculpatory
- Indemnity
- Delegation / Majority Rules



**THANK YOU**

**and**

**QUESTIONS?**