

Advising the Advisors:  
Incapacity, Powers of Attorney & Abuse  
*The Financial Advisors Association of  
Canada-ADVOCIS*

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# Introduction

- Understanding of capacity issues, potential for undue influence and financial abuse
- Public policy: fundamental rights, autonomy, presumption of capacity
- Balanced w/ societal demand of protecting vulnerable

# Statistics



**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 IS COMPLEX

Identifying and Managing Clients with Diminished Capacity



# Capacity

- **Presumption that a person is capable** of making decisions until presumption rebutted
- Reminder of importance of older adult's **autonomy** and decision making ability
- Competent individual's decisions must be **respected even when they conflict** with what others believe to be reasonable

# Capacity

- Capacity is **decision** specific
- Capacity is **time** specific
- Capacity is **situation** specific



# Capacity

## Capacity to Manage Property

- Ability to understand the information that is relevant in making a decision in the management of one's property; **and**
- Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision

# Capacity Assessments



- Not conducted informally
- Designated assessors
- Found incapable: attorney or guardian



# Capacity

## **Two circumstances deemed incapable to manage property:**

- 1) Admitted to psychiatric facility – *Mental Health Act*
- 2) Assessment completed by authorized assessor, unless ordered by court, right to refuse

# Capacity

## **Grant & Revoke POA for Property**

- a) Knowledge of property and approx. value;
- b) Awareness of obligations owed;
- c) Knowledge of what attorney can do;
- d) Knowledge that attorney must account;

Cont.

# Capacity

- e) Knowledge that if capable may revoke;
- f) Appreciate that unless managed prudently property value may decline; and
- g) Appreciate possibility attorney may misuse

# Capacity

## Enter into Contract

- Ability to understand the nature of the contract;  
**and**
- Ability to understand contract's specific effect in the specific circumstances

# Capacity

## **To Make a Gift (Wealth Transfer)**

- Depends on size and nature of gift
- Generally same as capacity to contract
- However, if significant in value in relation to size of donor's estate: likely, factors for determining testamentary capacity

# Capacity

## **To Make a Will (Testamentary Capacity)**

- Must have ability to understand:
  - Nature and effect of making a Will
  - Extent of property in question; and
  - The claims of persons who would normally expect to benefit under a Will of the testator

# Capacity

Testamentary Capacity also required to

- Revoke a Will
- Make codicils, testamentary designations, & trusts
- But *inter vivos* trusts, less clear

# Diminished Capacity: Indications

- memory / hearing / vision problems / language barriers
- cannot readily identify assets / family members
- brings written instructions but cannot articulate them
- defers to others
- lack of investment exp. / reliance on bank manager or advisor
- recent emotional or physical upheaval: loss of loved one / hospitalization



# Capacity

**Client's capacity is in question: Do you get family members involved?**

- Remember presumption of capacity
- Confidentiality and older adults is challenging
- Should adhere to duties of confidentiality, except with permission to divulge information
- Attorney under a POA?

# Capacity

- Be proactive
- Before a client becomes incapable – have the conversation!
- If POA – make note of who the attorney is
- If no POA – recommend seeing a lawyer to discuss granting one



# UNDUE INFLUENCE

Intersection of capacity and undue influence

# Undue Influence

- Equitable principle to set aside certain transactions including gifts and wealth transfers
- Two classes:
  - 1) Direct or actual; and
  - 2) Presumed or by relationship;

# Undue Influence

## Indicators:

- Dependence
- Socially isolated
- Recent family conflict
- Recent bereavement
- Use of lawyer or advisor chosen by giftee/beneficiary
- Instructions conveyed by giftee/beneficiary etc.

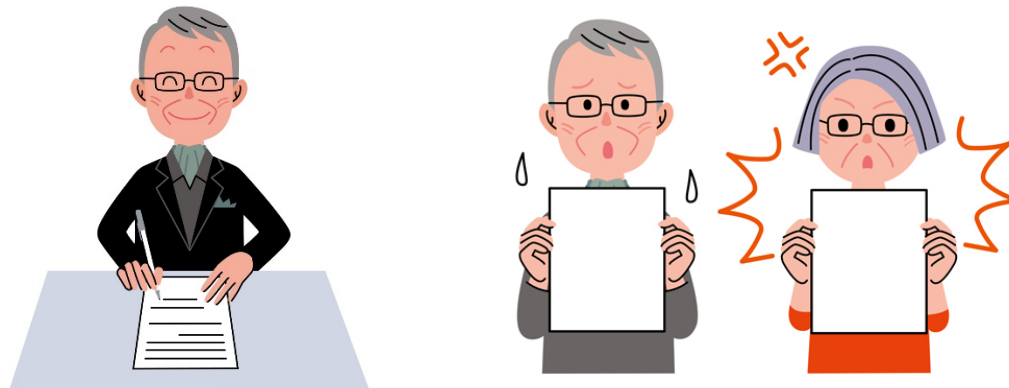
# Undue Influence

## **Best Practices/Guidelines:**

- Meet client alone
- Comprehensive notes
- Determine relationships
- Be mindful of capacity issues
- Ask probative, open-ended questions
- One person overly involved?
- **Follow your instincts!**

# POWERS OF ATTORNEY

Issues and Risks



# Continuing POA for Property (CPOAP)

*Check the authenticity of the document-Substitute Decisions Act* for CPOAP validity requirements:

- States that it is *continuing* POA; **or**
- Express intention that the authority given may be exercised during grantor's subsequent incapacity to manage property



# CPOAP

- Must have **TWO witnesses** who are **NOT**:
  - Spouse of grantor or attorney
  - Child of grantor
  - Less than 18
  - Someone under guardianship
- **Effective immediately on signing** unless provision or triggering mechanism

# CPOAP

## **When presented with a POA for Property:**

- Check if properly executed
- Check for conditions / restrictions
- Valid beyond capacity?
- If more than one attorney: how do they exercise powers (jointly, severally or by majority)?

# POA Issues & Risks

- Very important to choose the right attorney
- Grantor should consult the proposed attorney – willing to act?
- Competing POA documents: two or more attorneys argue validity, contentious court proceedings
- Jointly appointed attorneys must make decisions together

# POA Issues & Risks

## Real Life Example: *McMaster v. McMaster*

- 80 yr old mother in good health
- Appoint two sons jointly as attorneys BUT failed to tell one of them
- Son (who knew he was attorney) managed her affairs after Alzheimer's diagnosis & lost over **\$2 million of her money** by investing in go-kart companies



# POA Issues & Risks

Attorney is fiduciary w/ common law duties, including:

- Stay w/n scope of authority delegated
- Exercise reasonable care & skill
- Must not make secret profits
- Cease to exercise authority if POA revoked, cont.

# POA Issues & Risks

Duties cont.

- Must not exercise POA for personal benefit
- Cannot assign or delegate authority to another person
- Cannot make/change/revoke a **Will** on behalf of donor

# Change beneficiary designation?

- “Will” includes “any other testamentary disposition”
- Several cases: beneficiary designation = testamentary disposition, *ultra vires* attorney
- However, may be “work around”, especially where RRSP converted to RRIF

# POA Issues & Risks

## **Duties specific to an Attorney for Property:**

- Manage property in a manner consistent with decisions for personal care
- Explain to incapable person the powers & duties
- Encourage incapable person's participation in decisions – consult



# POA Issues & Risks

## **Duties of Attorneys for Property cont.**

- Preserve the property bequeathed in Will
- Make expenditures as reasonably required for incapable person, his or her dependants, support, education & care
- “best interests” of grantor / has discretion
- Detailed records & keep accounts

# POA Abuse

## **Real Life: *R. v. Kaziuk***

- Only child of widow, attorney for property
- Mortgaged her properties & defaulted
- Mother lost over \$1million & was penniless in homeless shelter
- 10 year sentence reduced on appeal to 8 years

# ETHICAL ISSUES

There are many and they are complicated



# Ethical Dilemmas

- Financial advisors may have possible common law fiduciary duty
- Especially where elderly, unsophisticated client places his or her retirement savings in hands of investment advisor

# Conflicts of Interest

- In conflicts of interest situations – remember duty to your client
- Also presumption your client is capable
- If an attorney breaches fiduciary duty – steps might be taken to have them removed

# Financial Abuse

- Family Members often have good intentions when assisting older adults
- BUT must be aware of red flags for undue influence, incapacity issues AND financial abuse
- Frequent perpetrators are family members

# Financial Abuse

## **Examples of Older Adult Financial Abuse:**

- Misusing a POA
- Stealing pension cheques, money, etc.
- Forgery or extortion
- Sharing older adult's home w/o paying rent
- Pressuring older adult to sell property, invest money, give money etc.

# Financial Abuse



## **Red Flags:**

- Unexplained or sudden: inability to pay bills or withdrawal of money
- Poor living conditions compared to assets
- Changes in banking patterns
- Changes in appearance
- Confusion or lack of knowledge about finances



# Financial Abuse

## **Managing the Risk:**

- Know your client
- Take steps to ensure client understands & can give instructions
- Set stage for meeting with client
- Meet at times when client is alert, cont.

# Financial Abuse

- Avoid leading questions
- Ensure client is aware of effects of a transaction, especially risk of loss and impact on portfolio
- Keep detailed notes
- Follow up with letter of confirmation

# Financial Abuse

- Update Know Your Client form on regular basis as appropriate
- Meet with client alone or even with a colleague to act as witness
- If instruction of client is contrary to your advice: document it
- Check validity of POA

# Summary / Conclusion

THANK YOU!

