
# LITIGANTS WITH CAPACITY ISSUES

**By**

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**in the Courtroom, Mediation and Beyond**

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## 1. INTRODUCTION

Current and evolving statistics confirm that our population is aging rapidly. With age and longevity can come an increase in the occurrence of medical issues affecting cognitive functioning in the brain. Certain diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, related cognitive disorders and other conditions involving reduced functioning and capability, also can become more prevalent with age and longevity.[1] There are a wide variety of disorders that may affect decisional capacity and in turn, increase an individual's susceptibility to becoming vulnerable and dependent. Factors affecting decisional capacity can include, normal aging, disorders such as depression, which can often remain 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 the opportunity for abuse, elder abuse, and exploitation.

A client's capacity, vulnerability, and susceptibility to undue influence should always be a live issue for lawyers, not just estates, trusts and elder law lawyers, as some may assume.

Lawyers are obligated to ensure in *any retainer* that clients have the requisite decisional capacity to: 1) retain counsel, and, 2) give instructions to counsel to execute any documents necessary to resolve the specific matter for which counsel is retained. In the litigation context, a person must also have the requisite capacity to commence a lawsuit.

## 2. BRIEF SUMMARY: LEGAL CAPACITY

You may be asking: What are the signs of diminished capacity? What steps can I take to proactively ensure I don't miss any signs of diminished capacity? What do I do once I notice signs? These are all good questions, however, in order to recognize the "red flags"

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

and understand the warning signs of having a client with diminished capacity, one must first understand what "capacity," or correspondingly, "incapacity" really means.

It is an understatement to suggest that issues of capacity are complex.

First, it is important to remember that capacity is defined or determined upon factors of mixed law and fact, and by applying the evidence available to the applicable factors/criteria for decision specific capacity. Notably, there is no test for a finding of incapacity, as much as there is a standard to be applied to be considered in an assessment of requisite mental capacity to make a certain decision at a particular time.

There is also no single legal definition of capacity. Each particular task or decision undertaken has its own corresponding capacity characteristics. However, it is important to remember that, in general, all persons are presumed or deemed capable of making decisions at law.

With this presumption, is a reminder of the importance of respecting the presumption of an older adult's autonomy and decision-making capability. Autonomy, or "self-determination," refers to the ability of competent individuals to make decisions over their own lives. For autonomy to be meaningful, a competent individual's decisions should be respected even when those decisions conflict with what others believe to be reasonable. Autonomy includes, but is not limited to, having the freedom to make decisions about one's own health care, finances, and living arrangements.

The relevant period to assess capacity is the time at which a decision in issue is made.[3] Legal capacity can fluctuate over time. Capacity is situation-specific, in that the choices that a person makes in granting a power of attorney, or, making a Last Will & Testament are considered by a court in its determination of capacity.[4] For example, if a mother appoints her eldest child as an attorney under a Power of Attorney document, this choice may be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.[5]

[3] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 46.
[4] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 48.
[5] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 48.

## 3. WHEN YOUR CLIENT SHOWS SIGNS OF DIMINISHED CAPACITY: ETHICAL CONSIDERATIONS

You have an older client in the middle of litigation who has started to forget recently learned information such as meeting dates, or is asking for the same details repeatedly and is not remembering the details later. The client may be on medication, or have hearing and vision problems, or has recently suffered emotional/physical upheaval, or loss of a loved one. The client has started having challenges keeping track of monthly bills. She has also stopped engaging in her usual social activities and is not as chatty as she once was when she visits you and has frequent changes in mood with an increase in confusion, suspicion, depression, fear, and anxiety.

Some capacity considerations:

### a) Does the client have the requisite capacity to instruct you?

While there is a rebuttable presumption that an adult client is capable of instructing counsel, it is important to note that the requisite capacity to instruct counsel involves the ability to understand the financial and legal issues at hand. As a lawyer, you will have to make a delicate and complex determination requiring careful consideration and analysis.

Overall, in order to have the capacity to instruct counsel, the client must be able to:

1) understand the context of the decision: what one has asked the lawyer to do and why; and

2) know one's own specific choices: be able to understand and process the information, advice and options the lawyer presents to them; and,

3) appreciate the consequences of one's choices: i.e. appreciate the pros, cons, and potential results of the various options.[6]

It is up to the lawyer to make the assessment, and decide if the client has the capacity to instruct counsel**.**

[6] See Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", www.archdisabilitylaw.ca/?q=notes-capacityinstruct-counsel-0

**b) Does the client have the requisite capacity to litigate?**

If a party does not have the requisite capacity to litigate, a litigation guardian may need to be appointed. Litigation guardians are necessary to protect parties "under disability," [7] but also to protect opposing parties and court procedures. The test for whether a litigation guardian is required under Rule 7 of the *Rules of Civil Procedure* is:

i) The person must appear to be mentally incapable with respect to an issue in the case and,

ii) As a result of being mentally incapable, the person requires legal representation to be appointed by the Court.[8]

Jurisprudence has established the following additional factors to be considered when determining whether a person is capable of commencing an action (or continuing an action):

a) A person's ability to know or understand the minimum choice or decisions required to make them;

b) An appreciation of the consequences and effects of one's choices or decisions;

c) An appreciation of the nature of the proceeding;

d) A person's ability to choose and keep counsel;

e) A person's ability to represent oneself;

f) A person's ability to distinguish between relevant and irrelevant issue; and,

g) A person's mistaken beliefs regarding the law or court procedures.[9]

[7] See Rule 7 of the *Rules of Civil Procedure* RRO 1990, Reg. 194.
[8] *Huang v Braga* 2016 ONSC 6306 at para 18 and *Hengeveld v Ontario (Transportation)* 2017 ONSC 3600 at para
[9] *Carmichael v Glaxosmithkline Inc*. 2019 ONSC 2037 at para 40.

If a client does not have, or no longer has, the capacity to litigate, a litigation guardian will likely need to be appointed.[10]

This paper only addresses the standards, or, factors applied to determine or establish the requisite capacity to instruct counsel and litigate. Other decisions also have their own standards or factors to be applied, for example, to enter into a contract, to execute a Will, to transfer property, to execute a Power of Attorney document, etc. For a more fulsome list of the standards or factors applied for each decision see the checklist on my website: Summary of Capacity Criteria.

### c) Should you require/recommend a capacity assessment?

If a lawyer is uncertain about the capacity of one's own client to make a decision, then the lawyer may wish to decline the retainer or discuss with the client the merits and risks of undergoing a capacity assessment of the client's decisional capacity with respect to the particular task/decision contemplated.

A lawyer should take care to provide information on whether, and in what ways the assessment will assist and whether an assessment is recommended/warranted in order to take on or fulfill a given retainer since a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider and requiring a capacity assessment must be reasonable in the circumstances.

Some ethical considerations:

### d) Should you get the client's family members involved?

First, remember that it is presumed that every person has the legal capacity to make decisions in their own interest. Mental incapacity must be proven before a person is deprived of this decision-making power.

[10] Also, a note on "Section 3 Counsel": Section 3 of the Substitute Decisions Act provides that in cases where an individual whose ***capacity is in issue*** in ***proceedings under the legislation*** does not have counsel, the Office of the PGT may be directed by the Court to arrange legal representation for that person (otherwise referred to as "Section 3 Counsel)".

Second, remember your duty of confidentiality. The issue of confidentiality and older adults is challenging. Often older adults have family members who are highly involved with and assist them. However, a lawyer must adhere to the duty of confidentiality, except where the client gives permission to divulge information to particular individuals.

It is essential when dealing with older adult clients to ensure that privacy rights are not compromised because of age, despite the otherwise well-meaning intentions of family members or other individuals.

**e) Has the client executed a Power of Attorney document and appointed an attorney?**

Proactive advice is always helpful. *Before* a client becomes incapable, or shows signs of diminished capacity, it is a good idea to have a conversation with the client to find out if the client has executed a Power of Attorney document and determine who the appointed attorney is. Or, if the older adult does not have the capacity to grant one, a family member can apply for a court order appointing that family member as a guardian.

In a scenario where your client lacks the requisite capacity to litigate and a guardian has been appointed with the express authority to act as a litigation guardian, section 7.01(1.1)(a) of the *Rules of Civil Procedure* states that the guardian *shall* act as the litigation guardian. Or, if there is no guardian, an attorney under a Power of Attorney with the express authority to act as a litigation guardian shall act as the litigation guardian pursuant to section 7.01(1.1)(b) of the *Rules of Civil Procedure*.[11]

**f) Remember: who is the client?**

Some conflicts that can arise when dealing with an older adult client: conflicts involving spouses and their wishes versus the older adult's wishes and interest; conflicts involving family members from different generations and their wishes versus the older adult's

[11] The initial appointment of a litigation guardian for a plaintiff or applicant occurs without a court order upon the filing of an affidavit with the court setting out the information outlined in Rule 7.02(2). Where the party under a disability is a defendant or respondent to a proceeding, Rule 7.03(1) states that a litigation guardian must be appointed by motion to the court unless the exceptions set out in Rule 7.03(2), (2.1), or (3) apply. See also the *Substitute Decisions Act, 1992*, SO 1992, c 30 at section 59(2).

interests; and conflicts involving a fiduciary (such as an attorney under a power of attorney or guardian) who may have interests that are different than the older adult.

In situations of conflict of interest, it is important to remember the duty owed to the client, as well as the presumption that the client has the capacity to make decisions. Where the capable older adult is being bullied into making legal decisions by a spouse or adult child, the lawyer's duty is to the older adult client.

Family members may have good intentions when assisting an older adult with legal issues, but lawyers must be aware of, and cognizant of red flags in respect of undue influence, incapacity issues, and potentially financial abuse when dealing with older adult clients.

The most frequent perpetrators of financial abuse of older adults are unfortunately family members, including adult children, 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). Remember who the client is and protect the clients' interests resolutely.

**g) What if the older adult client requests to take a legal position that you believe is not in their best interests?**

Notably, one must remember a person is capable until deemed incapable.

Clients can make whatever decision they want, even if it seems unreasonable or foolish. A capable person is entitled to be unwise in one's decision-making. Lawyers can provide advice as to why the legal position may not be a wise one, however, ultimately the decision belongs to the client.

## 4. GUIDANCE FROM THE *RULES OF PROFESSIONAL CONDUCT*

The *Rules of Professional Conduct* provide some guidance to a lawyer facing clients with potential capacity challenges.

In particular, Rule 3.2-9 provides some guidance to lawyers acting for clients with diminished capacity. This rule (and accompanying commentary) provides that a lawyer in

dealing with a client who may have compromised capacity, is required to maintain as much of a regular or "normal" solicitor-client relationship as possible. This presumes that the client in question has the requisite capacity to retain and instruct counsel such that the lawyer may be retained and act on his/her behalf.[12]

This Rule, requiring maintaining a "normal" solicitor-client relationship with a client who may have some capacity challenges, would also require that a lawyer be bound by the Rule respecting confidentiality as the duty of confidentiality is owed "to every client without exception." The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them. [13]

Rule 3.7 requires a lawyer to only withdraw from representing a client "for good cause."[14] If a lawyer has ascertained that the client is capable of instructing the lawyer, and undertaking the particular transactions, then the lawyer should continue to act. As for situations where capacity later becomes an issue, there are options short of withdrawal, including seeking a litigation guardian (as set out in Rule 2.02 (6)).

Rule 5.1 requires that a lawyer act honestly and ensure fairness in representing clients. This holds for clients who have potential capacity challenges as well.

While clients with potentially compromised capacity pose challenges for their lawyers, a lawyer who acts for a client is still required to abide by all the duties as set out in the *Rules of Professional Conduct*.

## 4. RED FLAGS & BEST PRACTICES FOR LAWYERS

When meeting with a client, it is advisable for lawyers to consider indicators of incapacity and develop their own protocol for detecting such indicators. While these items are not determinative of a person's capacity or incapacity, below are some "red flags" and best practices to keep in mind.

[12] The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.2-9
[13] The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.3-1.
[14] The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.7.

Consider whether your client is:

- Showing signs of intellectual impairment, memory problems, disorientation, poor attention?
- Unaware of risks to self and others?
- Irrational behaviour, reality distortion, delusions?
- Unresponsive and an inability to make a decision?
- Cannot easily identify assets or family members?
- Accompanied to appointments by an individual who appears significantly involved in the legal matter? And, if so, what the nature of the relationship between the individual and your client is?

Consider what are the familial circumstances of your client?

- Is the client 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?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the person's estate planning document(s) or corporate management? 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?
- Have different lawyers been involved? If so, why has the client gone back and forth between different lawyers?

- Does the substance of the corporate transaction or legal or litigation steps the client is asking you to do seem rational?

- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?

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

- Are there 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?

- Interview the client alone and ask probative open-ended questions;

- Take detailed notes;

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

- Be mindful of your rules under the *Rules of Professional Conduct*.

## 5. CONCLUDING REMARKS

It is easy to see the difficulty for lawyers to balance the various duties they owe to their clients when vulnerability, capacity, and undue influence are at issue in a retainer.

In every case, a lawyer has the ultimate duty of ensuring that his or her client has the requisite capacity to retain and instruct counsel, as any defence or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of incapacity, but a lawyer must always be satisfied that they can act for a given client and fulfill all the duties and obligations owed to that client.

***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.***

***Kimberly A. Whaley, Whaley Estate Litigation Partners, November 2019***

## APPENDIX A: 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*[15] *("SDA"),* s. 6 | (a) Ability to understand the information that is relevant in making a decision in the management of one's property; and<br>(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<br>(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;<br>(b) Awareness of obligations owed to his or her dependants;<br>(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;<br>(d) Knowledge that the attorney must account for his or her dealings with the person's property;<br>(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;<br>(f) Appreciation that unless the attorney manages the property prudently its value may decline; and<br>(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her. |
| **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 |

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

| CAPACITY<br>TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| | | (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<br>(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<br>(b) Ability to understand the specific effect of the gift in the circumstances.<br><br>*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**<br><br>***Testamentary Capacity*** | Common law | (a) Ability to understand the nature and effect of making a Will;<br>(b) Ability to understand the extent of the property in question; and<br>(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<br>(b) Ability to understand the trust`s specific effect in the specific circumstances.<br><br>*In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)* |
| **Capacity to Undertake Real Estate Transactions** | Common law | (a) Ability to understand the nature of the contract; and<br>(b) Ability to understand the contract's specific effect in the specific circumstances. |

| CAPACITY TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| | | *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)* |
| **Capacity to marry** | Common law | Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children.<br><br>Also possibly required: capacity to manage property and the person<br><br>Dr. Malloy[16] 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)[17]. |
| **Capacity to divorce** | Common law | Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[18]. |
| **Capacity to reconcile** | Common Law | More than just expressing a desire to live with someone. Must have:<br>a) Ability to understand the information relevant to making the decision (relevant facts); and<br>b) Ability to understand the consequences of a decision to reconcile with spouse (such as changing the financial status quo between them, changing the date of separation for the purposes of the *Divorce Act*, the emotional impact if the attempted reconciliation fails, etc.)[19] |

[16] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[17] *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*]
18 *Calvert*
[19] See *Chuvalo v Chuvalo* 2018 ONSC 311 at paras 33 and 61-62.

| CAPACITY<br>TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| **Capacity to instruct counsel** | Common law | (a) Understanding of what the lawyer has been asked to do and why;<br>(b) Ability to understand and process the information, advice and options the lawyer presents to them; and<br>(c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[20] |
| **Capacity to sue** | Common Law | (a) A person's ability to know or understand the minimum choices or decisions required to make them;<br>(b) An appreciation of the consequences and effects of his or her choices or decisions;<br>(c) An appreciation of the nature of the proceeding;<br>(d) A person's ability to choose and keep counsel;<br>(e) A person's ability to represent himself or herself;<br>(f) A person's ability to distinguish between relevant and irrelevant issue; and<br>(g) A person's mistaken beliefs regarding the law or court procedures[21] |
| **Capacity to give evidence** | *Evidence Act*, [22] 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).*<br>***Challenge, examination***<br>*(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).*<br>***Exception***<br>*(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).*<br>***Witness whose capacity is in question*** |

[20] Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel*", www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0*
[21] *Huang v. Braga* 2016 ONSC 6306 at para 19 and repeated in *Hengeveld v. Ontario (Transportation)* 2017 ONSC 6300 at para 21 and *Carmichael v Glaxosmithkline Inc* 2019 ONSC 2037 at para 40.
[22] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)

| CAPACITY<br>TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| | *Canada Evidence Act*,[23] s. 16(1) | *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*<br>*(a) whether the person understands the nature of an oath or a solemn affirmation; and*<br>*(b) whether the person is able to communicate the evidence* |

*This summary of capacity criteria is intended for the purposes of providing information and guidance only. This summary of capacity criteria is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*
*Kimberly A. Whaley, WEL PARTNERS 2019*

23 R.S.C. 1985, c.C-5, S. 16(1)

# APPENDIX B: CAPACITY CHECKLIST

*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.[24]
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.[25]
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).[26]

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;

[24] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 Wl 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calver*t [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

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

[26] *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. [27]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[28]:

> *"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.[29]

***Capacity to Make Testamentary Dispositions other than Wills***

The *Succession Law Reform Act* [30] 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.[31] Therefore, capacity is determined on the criteria applied to determining testamentary capacity

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[27] 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)

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

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

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

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

- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.[32] The criteria to be applied, is that of testamentary capacity.

- The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

***Capacity to Grant or Revoke a Continuing Power of Attorney for Property ("CPOAP")***

Pursuant to section 8 of the *Substitute Decisions Act,* [33] 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.[34]

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.[35]

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.[36]

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32 S 1(1)(a) of the SLRA

33 R. S.O. 1992, c 30, as am.

34 *SDA,* subsection 8(2)

35 *SDA*, subsection 9(1)

36 *SDA,* subsection 9(2)

***When an Attorney should act under a CPOAP***

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* [37]

***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. [38]

*A person may be incapable of managing property, yet still be capable of making a Will.*[39]

[37] R.S.O. 1990, c. M.7

[38] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)

[39] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

***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.[40]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[41]

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.[42]

***When an Attorney should act under a POAPC***

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

***Capacity to Make Personal Care Decisions***

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

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

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

*Capacity under the Health Care Consent Act, 1996*[43]

[40] *SDA*, subsection 47(1)

[41] *SDA*, subsection 47(3)

[42] *SDA*, subsection 47(2)

[43] 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.[44]
A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[45]
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.[46]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[47] 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.[48] 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."[49]

[44] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).

[45] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859

[46] *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

[47] *SDA, supra* note 2

[48] *SDA,* subsection 2(1)

[49] *SDA*, subsection 2(3)

*Capacity to Gift*

In order to be capable of making a gift, a donor requires the following:

(a) The ability to understand the nature of the gift; and

(b) The ability to understand the specific effect of the gift in the circumstances.[50]

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.[51]

*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,[52] 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.[53]

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*

[50] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

[51] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487

[52] 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)

[53] *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

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.[54]
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.[55]
Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[56]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[57]

*Capacity to Instruct Counsel*

Capacity to instruct counsel is derived from case law including the case of *Lengyel v TD Home and Auto Insurance*[58] where the Court's view towards evaluation of capacity to instruct counsel was stated as follows:

> Therefore, in reading Rule 1.03 together with sections 6 and 45 of the SDA, a party to litigation is "under disability" where they are unable to understand information that is relevant to making decisions concerning issues in the proceeding or are unable to appreciate the reasonably foreseeable consequences of making or not making decisions in the proceeding. Simply put, in order to have capacity for the purposes of litigation a person must meet both the "understand" and "appreciate" components of the test.

It should be noted that there exists a rebuttable presumption that an adult client is capable of instructing counsel.
As stated in *Torok v. Toronto Transit Commission*[59], at para. 40: The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision in the litigation includes the ability to consider a reasonable range of possible outcomes, including those that are unfavourable. This ability is essentially the capacity to assess risk, which requires consideration of a variety of results, both positive and negative."
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

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

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

[56] *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

[57] *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

[58] *Lengyel v TD Home and Auto Insurance* (2017) ONSC 2512, 278 ACWS (3d) 830

[59] *Torok v. Toronto Transit Commission 2007 CarswellOnt 2834*

Montigny.[60] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

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

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

(f) Appreciate the advantages, disadvantages and potential consequences of the various options.[61]

***Capacity to Sue***

The factors to be considered in determining whether a party is capable of commencing an action (or is in need of a litigation guardian) are set out in case law:

(a) A person's ability to know or understand the minimum choices or decisions required to make them;
(b) An appreciation of the consequences and effects of his or her choices or decisions;
(c) An appreciation of the nature of the proceeding;
(d) A person's ability to choose and keep counsel;
(e) A person's ability to represent himself or herself;
(f) A person's ability to distinguish between relevant and irrelevant issue; and
(g) A person's mistaken beliefs regarding the law or court procedures.[62]

On a related note, Section 7 of the *Limitations Act, 2002* SO 2002 c 24 Sch B provides that the basic two year limitation period does not run during any time in which the person with the claim is "incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological conditions".[63]

**Issues Related to Capacity**

*Undue Influence*

Undue influence is a legal concept where the onus of proof is on the person alleging it.[64] Case law has defined "undue influence" as any of the following:

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[60] Staff lawyer at ARCH Disability Law Centre.

[61] At page 3

[62] *Huang v. Braga* 2016 ONSC 6306 at para 19 and repeated in *Hengeveld v. Ontario (Transportation)* 2017 ONSC 6300 at para 21.

[63] See *Carmichael v Glaxosmithkline Inc*. 2019 ONSC 2037

[64] *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.

- 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;[65]
- 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 [66]

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.[67]
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.[68]
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. [69]
Psychological pressures creating fear may be tantamount to undue influence.[70]
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."[71]
Undue influence must be corroborated. [72]

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[65] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

[66] *Wingrove v. Wingrove* (1885) 11 P.D. 81

[67] *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)

[68] *Wingrove v. Wingrove* (1885) 11 P.D. 81

[69] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)

[70] *Tribe v Farrell,* 2006 BCCA 38

[71] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58

[72] 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

Suspicious circumstances will not discharge the burden of proof required.[73]
* 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.[74]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[75]



[73] *Vout v Hay*, at p. 227

[74] *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.)*

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

# APPENDIX C: UNDUE INFLUENCE CHECKLIST

## UNDUE INFLUENCE: SUMMARY

- The doctrine of undue influence is used by courts to set aside certain *inter vivos* gifts/wealth transfers, transactions, and planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent. 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.[76]

## TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires **coercion**. It is only where the will of the person who becomes coerced into doing that which he or she does not desire to do, that it is undue influence.[77] Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". Persuasion is allowed, but 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 will be found.[78]

- ***Burden of Proof****:* 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.[79]

- ***Standard of Proof****: C(R) v McDougall*[80] 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. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.[81]

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

[77] *Wingrove v Wingrove* (1885) 11 PD 81 at 82

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

[79] Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.

[80] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

[81] *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38

- ***Indirect Evidence***: In the U.K. case of *Schrader v Schrader*[82], 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.

- ***Relationship***: Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develops health issues it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[83]

- ***Multiple Planning 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.[84]

- ***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.[85] For instance, where the only translation of the planning document was

[82] *Shrader v Shrader, [2013] EWHC 466 (ch)*

[83] See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 65: a brother who was close to his sister could have accessed her fuds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

[84] 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.

[85] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[86]

- ***Indicators of Testamentary Undue Influence***: The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*[87] 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.[88]

    In *Tate v. Gueguegirre*[89] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

    - Increasing isolation of the testator, including a move from his home to a new city;
    - The testator's dependence on a beneficiary;
    - Substantial pre-death transfers of wealth from the testator to the beneficiary;
    - The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
    - The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
    - The beneficiary conveyed the instructions to the lawyer;
    - The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
    - There were documented statements that the testator was afraid of the respondent.[90]

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[86] *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.).

[87] *Gironda v Gironda*, 2013 CarswellOnt 8612.

[88] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

[89] 2015 ONSC 844 (Div. Ct.)

[90] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

## INTERPLAY WITH CAPACITY AND SUSPICIOUS CIRCUMSTANCES

- 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.[91] Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[92]

- *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.[93]

  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

[91] 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. In *Leger v. Poirier*, [1944] SCR 152 the Supreme Court of Canada 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.

[92] *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

[93] *Vout v Hay,* [1995] 2 SCR 876 (SCC).

- Physical, psychological or financial dependency by the testator on beneficiaries.[94]

## *INTER VIVOS* GIFTS: UNDUE INFLUENCE

- ***Distinct from Testamentary Undue Influence*:** Testamentary undue influence arose from common law courts while *inter vivos* gift undue influence was developed by the courts of equity in the 1700s and 1800s. It is available against a broader spectrum of conduct and renders the gift of wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void).

***Two Classes of Undue Influence: Actual and Presumed***

- ***Actual Undue Influence***: Has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[95] Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.

- ***Presumed Undue Influence*:** This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being abused.[96] These relationships are determined by a "smell test": does the potential for domination inhere in the relationship itself?

  Relationships where presumed undue influence has been found include: **solicitor and client**, **parent and child**, and **guardian and ward**, "as well as other relationships of dependency which defy easy categorization". However even close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination.

  *Shift in Evidentiary Burden*: Once a presumption of undue influence is established there is a shift in the onus to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden not a legal one. The legal burden is always on the person alleging undue influence.

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[94] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

[95] *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181

[96] *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

The presumption of undue influence can be rebutted by:

- No actual influence was used in the particular transaction or the lack of opportunity to influence the donor;
- The donor had independent legal advice or the opportunity to obtain independent legal advice;
- The donor had the ability to resist any such influence;
- The donor knew and appreciated what she was doing; or
- There was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

## LAWYERS' CHECKLIST

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?

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

- ❑ Is the client physically dependant on another? Is the client vulnerable?

- ❑ 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?

**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. 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;

- ❑ Address recent health changes and 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;[97] and

- ❑ Be mindful of the *Rules of Professional Conduct*[98] 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 Partners 2019

[97] 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

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

# APPENDIX D: ILA CHECKLIST: "RED FLAGS" FOR DECISIONAL INCAPACITY IN THE CONTEXT OF A LEGAL RETAINER

In general, and particularly given our current demographics, it is advisable for lawyers to be familiar with and attuned to issues associated with decisional incapacity. When taking on a new client, providing independent legal advice, or when witnessing a change in an existing client, lawyers must be equipped with the tools to know their client and be alive to certain indictors of incapacity so as to facilitate the development of protocol. While indicators are not determinative of a person's capacity or incapacity, there are some "red flags" and suggested 'best practices' which may assist in the navigation of this complex concept of capacity. For information on the factors criteria to determine requisite decisional capacity in select areas see WEL's Capacity Checklist: Re Estate Planning Context and Summary of Capacity Criteria.

## RED FLAGS FOR INCAPACITY

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place

- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension

- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)

- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns

- Comprehension problems: difficulty repeating simple concepts and repeated questions

- Calculation or financial management problems, i.e. difficulty paying bills

- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.

- Intellectual impairment

- Cannot readily identify assets or family members
- Experienced recent family conflict
- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.
- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependant and vulnerable
- Poor living conditions in comparison with the client’s assets
- Changes in the client’s appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client’s instructions 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?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation

- Keep in mind issues related to capacity including, **undue Influence**. See WEL's Undue Influence Checklist

- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag[99]

- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives[100]

- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia[101]

- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia[102]

- A deathbed will where there is a strong likelihood that the testator may be delirious[103]

[99] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

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[103] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

- Complexity or conflict in the milieu of a vulnerable individual[104]

**BEST PRACTICES:**

- Be alert to the signs of incapacity and always ask probing questions not leading questions
- Interview the client alone and take comprehensive, detailed notes
- Use open-ended questions to confirm or elicit understanding and appreciation
- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client
- Have clients re-state information in their own words and revert back to earlier discussions
- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken
- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege
- Be mindful of the Law Society of Upper Canada, *Rules of Professional Conduct*, http://www.lsuc.on.ca/lawyer-conduct-rules/, particularly the Rules related to capacity

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**2019**

[104] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre