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CONTENTIOUS ESTATES UPDATE

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CONTENTIOUS ESTATES UPDATE*

INTRODUCTION*

Every year in Canada, a significant increase in the number of estate claims is reported by practitioners, courts, and other stakeholders. In 2018, the Lawyers Professional Indemnity Company (LawPRO), reported "real growth" in the proportion of wills and estates claims. In that year, approximately 11.5 percent of all claims were wills and estates.[1] In 2020, only two years later, LawPRO reported that the wills and estate claims had risen to 14 per cent of all claims.[2] These numbers may only continue to rise as more Canadians reach the age of retirement. This paper will explore the nature of these often-contentious estate claims in several important areas including rising costs awards in contentious proceedings, how courts address complex allegations of elder abuse, and whether to admit testamentary documents that fail to meet the formal provisions. As law clerks, it is important to understand the complex nature of capacity and how it relates to issues surrounding vulnerability and predation. To that end, this paper will also provide a thorough background on capacity before exploring legislative amendments that speak specifically to the capacity to marry. Additionally, this paper will address the requisite capacity to enter into a retainer and instruct counsel. Finally, the following will provide an update on electronic wills, remote witnessing, and highlight new legislation in British Columbia, declaring electronic wills as valid.

*Paper originally prepared for the Canadian Lawyer Webinar on May 18, 2022, and presented by Kimberly Whaley of WEL Partners and Ian Hull of Hull & Hull LLP.

[1] Anita Balakrishnan, "LawPRO sees spike in claims from family law, wills" May 31, 2019, *Law Times News*, online: https://www.lawtimesnews.com/practice-areas/real-estate/lawpro-sees-spike-in-claims-from-family-law-wills/.

[2] Lawyers Professional Indemnity Company, "Annual Report" 2020, online: https://www.lawpro.ca/wp-content/uploads/2021/04/FINAL-AODA-2020-Annual-Report-WEB.pdf.

Background

Based on projections and recent national census data, seniors aged 85 and over are one of the country's fastest growing demographic. Accordingly, it has been reported that the number of people over 85 has more than doubled since the 2001 census.[3] What's more, the recent census data also indicates that "more than 20 per cent of the working age population is now between the ages of 55 and 64."[4] As a result of increased longevity leading to vulnerability and risk of later life illnesses, estate plans are more frequently compromised leading to challenges based on testamentary incapacity or undue influence. While estate claims are clearly on the rise, it is also vital to try and understand what is motivating some of the conflict that frequently drives parties to litigation.

One of the major driving factors in the increase of estates litigation is financial conflict. In 2014, a study created by BMO Investorline highlighted the emergence of the largest inter-generational transfer of wealth in Canadian history, from those born in the 1930s and 40's to the baby boomers. According to the study, "about one trillion dollars will change hands in this country over the next two decades."[5] Laura Tamblyn Watts, CEO of CanAge explained to the CBC in 2014 how the baby boomers are "the most indebted generation that Canada has ever had,"[6] leading to an entitlement to 'spoils,' and thus, relying on generous inheritance to help pay debts and meet financial goals. According to Tamblyn

[3] Michael Ranger and The Canadian Press, "Canada faces rapidly aging population, record retirements: 2021 census" April 27, 2022, *CityNews*, online: https://toronto.citynews.ca/2022/04/27/statistics-canada-2021-census-data/

[4] *Ibid*.

[5] Talin Vartanian, "Inheritance 'tension': Why more families may be headed for court" November 23, 2014, *CBC News*, online: https://www.cbc.ca/news/canada/inheritance-tension-why-more-families-may-be-headed-for-court-1.2840370.

[6] *Ibid*.

Watts, “We’re seeing a tension between their parents … the saving generation, and their children, who are coming into retirement in debt.”[7] Tamblyn Watts argues that adults are living longer, requiring expensive care, leading to financial conflicts between children and other family members.

Where it concerns inheritance, in British Columbia, the unique legislation in the *Wills, Successions and Estates Act*,[8] allows adult children to make a claim against the estate. Here, while there is no legal obligation, if there are sufficient assets in the estate, a court may compel a testator to provide for a disinherited child based on moral obligations. The following two cases from British Columbia represent some of the difficulties with succession and inner family conflict.

In *Sandwell v Sayers*[9] the plaintiff was the 91-year-old father of the defendant, who is his youngest daughter and a realtor in the Fraser Valley. The plaintiff lives alone in his Kelowna home with no mortgage valued at approximately $464,000. In 2008, the plaintiff had previously executed a transfer of his home to his son, Floyd Tayler for $1.00. When his daughter learned of this, she convinced the plaintiff he was in danger of losing his home. In December 2020, he transferred an interest in his home to his daughter, making them joint tenants. The Court upheld the transfer but not before concluding that “the circumstances here are unfortunate. It would always be preferable for disputes between

[7] *Ibid*.

[8] *Wills, Estates and Succession Act*, SBC 2009 c 13 [*WESA*].

[9] 2022 BCSC 605 [*Sandwell*].

parents and children to be resolved privately, but sadly that is often not the case. This and many other cases are proof."[10] The decision then went on to say that:

> The evidence of the parties reveals a troubled and, at times, estranged relationship over the years. The transaction occurred in what appears to have been a brief reconciliation period between the parties. In her oral submissions, the defendant expressed a desire for there to be respect for her father's wishes. That is contrary to her position in this litigation that ignores what her father's wishes currently are, in favour of earlier wishes that benefit her.[11]

Another contentious case out of British Columbia, *Yu (Re)*[12] dealt with competing petitions between Ms. Ying Wong Yu's eight children for declarations that Ms. Yu is incapable. Among the children there was disagreement about who should act as committee in the event of a declaration that Ms. Yu is incapable.[13] The Petitioners are Ms. Yu's children Annie, Diana, and Pong who sought joint appointment and an order that they may sell, encumber, or otherwise dispose property in Vancouver. Three other children (Shirley, Mimi, and Amy) provided written consent to this application.[14] Two of Ms. Yu's sons, Joe, and Wayne, oppose the application and allege there is evidence consistent with elder abuse. The PGT investigated these claims and provided their own detailed response, also opposing the application.[15] It was determined that all the children had accepted gifts totalling $880,000. The petitioners, as attorneys were in conflicts of interest. Ultimately, the court appointed the PGT to act as committee of Ms. Ying Wong Yu.

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[10] *Sandwell*, *supra* note 9 at para 68.

[11] *Ibid*, at para 69.

[12] 2021 BCSC 1793 [*Yu*].

[13] *Ibid*, at paras 1-2.

[14] *Ibid*, at para 3.

[15] *Ibid*, at para 5.

1. RISING COSTS AWARDS IN ESTATES LITIGATION

As the occurrence of estate litigation increases, so too, does the number of significant costs awards for questionable and even reprehensible conduct by parties to the litigation. In *Salter v Salter Estate,*[16] Justice Brown scolded the parties to the litigation for treating the assets of the estate "as a kind of ATM bank machine for which withdrawals automatically flow to fund litigation."[17] Justice Brown in *Salter* described the need to bring discipline to parties in contentious estates claims, arguing that "given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of 'loser pays' in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes."[18]

The purpose of a costs award is indemnification - whether fully or partially, to indemnify the successful party for the expenses incurred in hiring counsel to defend or enforce their legal rights. When we talk about indemnification, we are referring to compensation for harm or loss or security against liability for one's actions or conduct.

In the decision in the case of *British Columbia (Minister of Forests) v Okanagan Indian Band*,[19] the Supreme Court of Canada (SCC) reaffirmed that the traditional purpose of costs awards remains indemnification and that a regular costs award has four standard characteristics:

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[16] (2009), 50 ETR (3d) 227 (Ont SC) [*Salter*].

[17] *Ibid,* at para 6.

[18] *Ibid*.

[19] [2003] 3 S.C.R. 371.

1. They are an award to be made in favour of a successful or deserving litigant, by the loser.
2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
3. They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
4. They are not payable for the purpose of assuming participation in the proceeding.[20]

Indemnity, however, is not the exclusive governing principle in determining a costs award. In fact, the decision in the case of *Fellows, McNeil v Kansa General International Insurance Co.*[21] outlined the three other main justifications in determining a costs award:

1) the encouragement of settlement;
2) the prevention of frivolous or vexatious litigation; and,
3) the discouragement of unnecessary steps in proceedings.

Where it concerns the determination of a costs award in estate litigation, dating back to the 1800's, it was practice in English courts to award costs of all parties payable out of the assets of the estate. English courts would award costs of all parties to be paid out of the estate where litigation arose because of:

1) An ambiguity or omission in the testator's Will, or other conduct; or,
2) There were reasonable grounds upon which to question the Will's validity.

However, the approach to costs awards in estates litigation has evolved, especially with courts recognizing that with the guarantee that a litigant's costs would be paid through the assets of the estate, there was no incentive for parties to act reasonably or

[20] *Ibid*, at paras 20-21.

[21] (1997), 37 O.R. (3d) 464 at 475 (Gen. Div.)

proportionately. Therefore, to deter improper behavior, courts have taken a 'modern approach' to costs in estate litigation by implementing the usual 'loser pays' approach in civil litigation.

This modern approach was first implemented in 2005 in the case of *McDougald Estate v Gooderham*,[22] where Gillese J.A. held that the modern approach permits courts at first glance to scrutinize the litigation and, unless the court found that one or more of the public policy considerations applied, costs rules in civil litigation would follow. The modern approach allows the courts to ensure that only valid Wills executed by competent testators are propounded and to protect estates from being depleted by unwanted litigation. The governing principles on modern cost orders in estate litigation were set out in the decision in the case of *Neuberger v York*[23] which held that "in deciding the quantum of costs, the award must be fair and reasonable in all the circumstances, with due consideration for the parties' reasonable expectations."[24] The *Neuberger* decision also held that a comparison of the respective costs of appeal can be useful when considering what the parties' reasonable expectations are. Also, *Neuberger* held that the historical approach to costs, in Ontario at least, has been displaced in favour of one in which the costs rules apply at first instance and on appeal, unless the court finds that one of more of the relevant public policy considerations dictate that costs (or some of the costs) should be

[22] (2005) 255 DLR (4th) 435; 199 OAC 203; 17 ETR (3d) 36; 2005 CanLII 21091 (ON CA) [*McDougald Estate*].

[23] 2016 ONCA 303 [*Neuberger*].

[24] *Ibid*, at para 17 citing *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.), at para 38.

paid out of the assets of the estate.[25] In *McDougald Estate*, the Court held that, "gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation." There are inherent public policy considerations at play in estate litigation. These are primarily of two sorts:

1. Where the difficulties and ambiguities that give rise to the litigation are caused, in whole or in part, by the testator; and,
2. The need to ensure that estates are properly administered.

To this extent, the decision in *Neuberger* also endorsed the use of a blended costs award "in which a portion of costs is payable by the losing party and the balance is payable out of the estate."[26] Interestingly, in the recent decision of *McGrath v Joy*,[27] the Ontario Court of Appeal held that:

> this approach is not a balancing of the public policy considerations against the rationale for cost rules that ordinarily apply to civil litigation. Rather, it is a sequential analysis, the first step of which is to determine whether one or more of the public policy considerations apply. If so, generally the parties' reasonable costs should be payable from the estate. A departure from this principle requires justification on the part of the court.[28]

In Ontario, in addition to common law, costs awards are a product of legislation. Section 131 of Ontario's *Courts of Justice Act*,[29] "bestows discretion to the court to determine by

[25] *Ibid*, at para 24 citing *McDougald Estate* at para 80; also, *Sawdon Estate v. Sawdon* (2014), 119 O.R. (3d) 81, [2014] O.J. No. 573, 2014 ONCA 101, 370 D.L.R. (4th) 686, at para 101.

[26] *Neuberger*, *supra* note 23 at para 25 citing *Sawdon*, at paras 93-100 and 107.

[27] 2022 ONCA 119 [*McGrath*].

[28] *Ibid*, at para 95.

[29] R.S.O. 1990, c. C.43.

whom and to what extent the costs of a proceeding shall be paid."[30] A court in Ontario, making a determination of costs, may also have regard to the factors found in Rule 57 of the *Rules of Civil Procedure*[31] where "the court may make a costs award for a fixed amount, a percentage, or rather, that no costs be awarded to any party to a litigation. A percentage of costs is determined by a set costs grid enacted under the *Rules*."[32] These percentages pertain to 'partial indemnity' and 'substantial indemnity' costs.

In Ontario, substantial indemnification is appropriate in two situations:

1. Where there has been an offer to settle under Rule 49.10 (where an award of substantial indemnity costs are explicitly authorized); and,
2. Where the unsuccessful party engaged in behaviour worthy of sanction.

In the decisions in the cases of *Lyons v Todd,*[33] and *Apotex Inc. v Egis Pharmaceuticals,*[34] the court clarified that costs on a substantial indemnity scale are generally reserved for cases where the court wishes to display disapproval of party conduct. In *Hamilton v Open Window Bakery Ltd,*[35] the Supreme Court of Canada ("SCC") held that unfounded allegations of fraud or improper conduct may warrant a costs award on a substantial indemnity basis.

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[30] WEL Partners, "Costs of Litigation" Whaley Estate Litigation Partners Resources, online: https://welpartners.com/resources/courtcosts.

[31] R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE [*Rules*].

[32] *Ibid*.

[33] 2019 ONSC 2269 at para 30.

[34] [1991] 4 OR (3d) 321 (Gen Div) at para 12.

[35] 2004 SCC 9 at para 26 [*Hamilton*].

Rule 57.01 (4)(d) of the *Rules of Civil Procedure* provides the court the tools to award costs in an amount representing a full indemnity. Full indemnity is not a defined term but is generally considered to be a complete reimbursement of all amounts a client has had to pay their lawyer in relation to the litigation. In making such an assessment, the court must still consider the overriding principles that a costs award must be fair and reasonable and that the reasonable expectations of the unsuccessful party are one of the factors in determining what is fair and reasonable. In the case of *Davies v Clarington (Municipality),*[36] the Ontario Court of Appeal held that full indemnity should only be employed when there is a clear finding of reprehensible conduct on the part of the party against which the costs award is being made. Pursuant to the decision in *Davies*, misguided litigation does not equal censure, however, malicious counter-productive conduct or harassment of the opponent by futile claims may merit an elevated order of costs. The case of *Zimmerman v McMichael Estate,*[37] held that full indemnity costs are reserved for those exceptional circumstances where justice can only be done through complete indemnity. The Court in this case held that this is an exceptionally high bar.

In British Columbia, parties may be entitled to 'uplift costs' as a recognition of the possibility that 'unusual circumstances' might make ordinary costs 'grossly inadequate or unjust. This 'inadequacy' is not in regards to a disparity between ordinary costs and actual expense but rather "the suggestion… is that the unusual circumstances resulting in the

[36] 2009 CarswellOnt 6185, 2009 ONCA 722, [2009] O.J. No. 4236, 100 O.R. (3d) 66, 182 A.C.W.S. (3d) 291, 254 O.A.C. 356, 312 D.L.R. (4th) 278, 77 C.P.C. (6th) [*Davies*].

[37] 2010 ONSC 2947.

inadequacy of the costs award will most often be tied to the conduct of the costs payor."[38] Some examples of when uplift costs were granted in British Columbia include situations where a litigation is raising issues that unnecessarily made the proceeding more complex than otherwise would have been,[39] and raising serious allegations against an opponent that are found to be completely without merit.[40]

But how does the court determine between full and partial indemnification?

2021 – Bayford v Boese - ON

In the recent case of *Bayford v Boese,*[41] the Ontario Court of Appeal released a decision which signals to litigants, constraints on recovering costs on a full indemnity basis on an appeal. The case involved a Will in question which was signed after the testator passed away. The Appellant was seeking costs on the appeal on a full indemnity basis in the amount of $113,500. The Appellant argues, in essence, "that the respondent attempted to perpetrate a fraud upon the court."[42] The Court, pursuant to the decisions in the cases of *Young v Young,*[43] and *Mars Canada Inc. v Bemco Cash & Carry Inc.,*[44] held that costs on a substantial indemnity basis may be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."[45] The Court carefully

[38] CLE BC, "A Primer on Ordinary Costs: Entitlement and Manner of Assessment" Costs 2020 Paper 1:1, online: https://www.hdas.com/wp-content/uploads/2020/09/A-Primer-on-Ordinary-Costs.pdf.

[39] *On Call Internet Services v Telus Communications Co.*, 2010 BCSC 1031.

[40] *Allen v. Ainsworth Lumber Co.*, 2012 BCSC 213; *Nardulli v. C-W Agencies Inc.*, 2013 BCSC 44; *380876 B.C. Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209.

[41] 2021 ONCA 533, 69 ETR 4th 216 [*Bayford*].

[42] *Ibid*, at para 3.

[43] 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 at 134 [*Young*].

[44] 2018 ONCA 239, 140 O.R. (3d) 81, at para 43.

[45] *Young*, *supra* note 43 at para 1.

looked at the note of caution that was expressed in *Net Connect Installation Inc. v Mobile Zone Inc.,*[46] which held that "substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs."[47] A series of recent cases demonstrates the type of conduct that is worthy of sanction.

2022 – Estate of Felice Pipito (Re) - ON

In *Estate of Felice Pipito (Re)*,[48] Justice Dunphy made a determination on the legitimacy of a joint tenancy. In *Pipito*, Dunphy J. dismissed the Applicant's claim with costs, citing the negative behaviour of the Applicant over the course of the litigation. A background to this case can be found in the trial decision. In *Estate of Felice Pipito (Re); Rita Harrison v Rita Pipito,*[49] Felice Pipito passed away on January 4, 2016, leaving behind one material asset; his interest in his home of 29 years in Etobicoke that he shared with his granddaughter and great-grandson (the Respondent). When Felice died, the home was mortgage-free and registered in the name of all three as joint tenants. The application, involving a determination of the rightful owner of the house, was "dismissed in its entirety with costs payable to the respondents."[50] In *Pipito*, S.F. Dunphy J., issued judgment on December 23, 2021. After the close of the trial, parties were directed to file costs outlines, however, neither side were able to follow those directions precisely. In awarding

[46] 2017 ONCA 766, 140 O.R. (3d) 77 at para 8.

[47] *Bayford*, *supra* note 41 at para 5.

[48] 2022 ONSC 1802 [*Pipito*].

[49] 2021 ONSC 8430.

[50] *Ibid*, at para 3.

substantial indemnity costs to the Respondent, S.F. Dunphy J., made three observations about the conduct of the Applicant. First, the Court noted that:

> I have rarely seen a litigant as clearly driven by spite, venom and antipathy to the opposing party as I observed in the case of Ms. Harrison. Her animus against her niece – the principal respondent in this case – was palpable and clearly influenced almost every phase of the litigation including the decision to launch it. The vicious but entirely unproved personal attacks made by her on her opponents deserve sanction.[51]

Second, the Court recognized that in the case of self-represented litigants such as Ms. Harrison, the Applicant, while "it is fair to observe that costs … are generally going to be somewhat higher due to the inherent difficulties of efficiently prosecuting litigation with a party who has no familiarity with the process, Ms. Harrison's conduct of this litigation tended to place it on the outer edge of that continuum."[52] Finally, in *Pipito* the Court noted that the Respondent made two offers to settle, "both of which would have resolved this case on better terms for Ms. Harrison and at substantial savings to both in terms of time and aggravation."[53] In the end, the Respondent was awarded $60,000, despite claiming $66,081.21, however, because the Respondent provided the Court with what was "more in the nature of a document dump than an actual outline of costs," the Court had to estimate and rounded down the costs claim significantly.

This is not the first time in Ontario a self-represented litigant was faced with a significant costs award because of conduct in litigation. In *De Cruz Lee v Lee,*[54] the Court concluded that it would use "the hammer of a cost's award"[55] to address self-represented litigants

[51] *Pipito*, *supra* note 48 at para 6.

[52] *Ibid*, at para 7.

[53] *Ibid*, at para 8.

[54] 2015 ONSC 2012 [*Lee*].

[55] *Ibid*, at para 29.

whose aim it is to advance outrageous claims without the evidence to support them. In *Lee*, Justice Myers awarded two solicitors their full indemnity costs.

2021 – Toller James Montague Cranston (Estate of) - ON

In *Toller James Montague Cranston (Estate of)*,[56] Philippa Baran, trustee of the estate of Toller Cranston, was compelled to bring an application to pass her accounts for the period from January 23, 2015, to April 31, 2018 by two other beneficiaries to Toller's Estate, Guy and Goldie Cranston. In *Cranston*, "Guy and Goldie raised over 300 objections to various expenses paid by Philippa personally to administer Toller's estate in Mexico."[57] Despite the objections, they were only successful on a total of five. Guy and Goldie also alleged and maintained their allegations that Philippa had committed fraud and stolen several hundred thousand dollars of estate funds, without evidence to support their claims.[58] The Court in *Cranston* looked at the complex and important job that Philippa had as trustee of the estate. Toller Cranston died in Mexico without a will. He owned approximately $6 million in assets located in Mexico, including 400 very valuable paintings, over 18,000 non-Toller art and decorative items and two houses on the same lot in San Miguel de Allende, Mexico.[59] As trustee, Philippa was required to personally pay the ongoing expenses to value and conduct a sale of the 18,000 non-Toller items, take careful steps to maintain, sever and sell two real estate properties in Mexico and identify, value and divide 400 original Toller paintings (which included packing and shipping them to

[56] 2021 ONSC 3704 [*Cranston*].

[57] *Ibid*, at para 1.

[58] *Cranston*, *supra* note 56 at para 4.

[59] *Ibid*, at para 11.

Canada).[60] In looking at the reasonable expectations in a costs award, the Court in *Cranston* held that "the respondents … acted unreasonably by bringing an application to have the Trustee pass her accounts only 3 ½ months after she was appointed as the Estate Trustee in Ontario."[61] The Court also admonished the respondents' "insistence on exchanging affidavits of documents, conducting examinations for discovery and spending 3 days cross-examining the Trustee on her affidavits, conducting additional written discoveries, and ultimately, turned what should be a summary proceeding into a complicated hearing."[62] In determining the reasonable expectations, the Court looked at the decision in *Boucher v Public Accountants Council for the Province of Ontario (2004)*,[63] where the Ontario Court of Appeal in deciding what was a fair and reasonable costs award, held that "the expectation of the parties concerning a costs award is a relevant factor."[64] In *Cranston*, the respondents were well aware that their lawyer spent over 352.9 hours and that the Trustee would be expected to have spent more time to respond to over 300 expense objections. The Court awarded Phillipa costs of $325,000 on a substantial indemnity basis.

2021 – Rudin-Brown et al. v Brown AND Brown v Rudin-Brown et al. - ON

Another case which saw a significant costs endorsement which factored in the conduct of one of the parties was *Rudin-Brown et al. v Brown AND Brown v Rudin-Brown et al.*,[65]

[60] *Ibid*, at para 12.

[61] *Ibid*, at para 16.

[62] *Ibid*, at para 17.

[63] 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.) at para 26 [*Boucher*].

[64] *Cranson*, *supra* note 56 at para 27.

[65] 2021 ONSC 6313 [*Rudin-Brown*].

a case which dealt with the significant estate of Carolyn Emily Brown, valued at approximately $1.2 million. Carolyn was the mother of the opposing parties, Missy and Gordon and Jeanne's sister-in-law. Missy and Jeanne say that Gordon acted in an abusive manner and advanced a position that had no merit and ran up the cost of the litigation unnecessarily. The decision of Justice H.J. Williams looks at the determination of costs in *Substitute Decisions Act* cases.

Missy and Jeanne referred the Court to the decision of Price J. in *Arvanitis v Levers,*[66] which considered principles applicable to costs in cases involving incapable individuals and the *Substitute Decisions Act.*[67] In *Arvanitis*, Price J. held that the principles the court articulated for determining liability for costs in estate litigation apply equally to proceedings under the *SDA*:

> In proceedings under the *Substitute Decisions Act*, the public policy objectives that must be considered and balanced are to give effect to the intentions of persons, when competent, to name those who, in the event of future incapacity, are to be entrusted with their personal care and property, and to ensure that those they choose as their attorneys for property administer their estates properly.[68]

Price J. went on to say that in an *SDA* proceeding, "the central issued to be addressed when dealing with costs … is, 'when a parent is declared incapable and a guardian appointed over her property, to what extent must the incapable parent's assets bear the costs of controlling litigation amongst her disputatious children?"[69] In *Rudin-Brown*, H.J.

[66] 2017 ONSC 3758 [*Arvanitis*].

[67] 1992, S.O. 1992, c.30 [*SDA*].

[68] *Arvanitis v. Levers*, 2017 ONSC 3758 at paras 70 and 81.

[69] *Arvanitis*, *supra* note 64 at para 82 citing *Fincco v. Lombardi*, 2009 ONSC 46170 at para 1.

Williams J. looked at the trial decision in which Gordon's conduct justifies an order for costs on a substantial indemnity basis.[70]

H.J. Williams was clear in concluding that Gordon's conduct "added to the length and expense of the litigation."[71] In the trial decision, H.J. Williams J. found that the relationship of Carolyn and Gordon at the time the powers of attorney were signed in September 2016 triggers the presumption of undue influence, H.J. Williams J. also held that "there was evidence from Carolyn Mossman that Gordon was verbally abusive toward Carolyn."[72] There was ample evidence that the 2016 power of attorney documents were not a product of Carolyn's full, free and informed thought. The Court also took notice of Gordon's recorded conversations between himself and Carolyn, submitted as evidence, remarking how, "One of the recorded conversations between Gordon and Carolyn as they reviewed Missy and Jeanne's application record was as revealing as it was uncomfortable to listen to." The decision then went on to say that on one recording "Carolyn says she wants to telephone Missy and asks Gordon if she is putting herself in danger if she calls her. Somewhat ironically, Gordon replies by telling Carolyn that she is in danger of being manipulated by Missy."[73]

One factor that raised the potential for a substantial costs award is the fact that Gordon failed to respond to any settlement offers. In addition to that, "Gordon also failed or refused to follow some of Kershman J.'s case management orders, including an order to

[70] See *Rudin-Brown et al. v. Brown AND Brown v. Rudin-Brown et al.*, 2021 ONSC 3366 [*Brown*].

[71] *Rudin-Brown*, *supra* note 65 at para 32.

[72] *Brown*, *supra* note 70 at para 156.

[73] *Ibid*, at para 162.

stop recording Carolyn's conversations."[74] H.J. Williams J. even noted that even in his costs submissions, "Gordon continued his attack on Missy and Jeanne (whom he had described at trial as having 'something reptilian about her'), accusing them of an 'ongoing attempt to defraud the Court and extort the Respondents' and of waging a defamation campaign."[75] Missy and Jeanne sought all-inclusive (fees, disbursements and HST) substantial indemnity costs of $238,004.08. Having received $50,000 under Kershman J.'s January 15, 2020 order, Williams J. awarded a costs order against Gordon in the amount of $150,000.00 ($200,000 minus the previous $50,000 awarded).[76]

2021 – Dewaele v Roobroeck - ON

The bad conduct of estate trustees can also be sanctioned through a substantial costs award. In *Dewaele v Roobroeck*,[77] the Applicant commenced an application for directions and other relief respecting the administration of her parents' estates. The parties to the application are the beneficiaries and co-estate trustees of the estate of their late parents, Rose-Marie Margaret Roobroeck and Eric Cyriel Roobroeck. Eric died on August 23, 2016 and Rose-Marie died on January 25, 2018.[78] As a background to the December 4, 2020 decision which removed the respondents as co-executors and trustees of Rose and Eric's estates, the decision in *Dewaele v Roobroeck*, 2020 ONSC 7534, concluded that:

> the brothers had refused to take any meaningful steps to facilitate the realization of the estate assets. They had not fulfilled their obligation as co-estate trustees, to the detriment of the beneficiaries of the estate. They had

[74] *Rudin-Brown, supra* note 65 at para 36.

[75] *Ibid*, at para 35.

[76] *Ibid*, para 39.

[77] 2021 ONSC 1604 [*Dewaele*].

[78] *Ibid*, at paras 1-2.

> not complied with court orders … their behaviour had brought the administration of the estate to a standstill and was likely to continue.

In *Dewaele*, the Court established that in Ontario, the starting point for fixing costs is s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended, which provides that "subject to the provision of an Act or rules of court, costs are in the discretion of the court, which may determine by whom and to what extent costs shall be paid."[79] The Applicant asked for substantial indemnity costs from the respondents. The Court held that "such an award is authorized under Rule 57.01 (4) (c) of the *Rules of Civil Procedure* and, pursuant to *Davies v Clarington (Municipality)*,[80] may be awarded "where the losing party has engaged in behavior worthy of sanction."[81] As previously discussed in the *Bayford* decision, the Court in *Dewaele* noted that elevated costs should only be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one the parties."[82] After clarifying the law, the Court concluded that "the respondent's conduct is worthy of sanction and can be characterized as reprehensible and outrageous," awarding costs on an elevated scale. The Court held that the applicant was entitled to be fully indemnified to the amount of $73,802.63, $60,821.50 of which to be paid by the respondents with the balance of the applicant's costs ($17,981.13) paid from the estate of Eric and/or Rose as determined by the applicant.[83]

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[79] *Dewaele*, *supra* note 77 at para 13.

[80] 2009 ONCA 722, 100, O.R. (3d) 66, at para 28 [*Davies*].

[81] *Ibid*, at para 16.

[82] See *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134.

[83] *Dewaele*, *supra* note 77 at para 22.

2021 – Malacek v Young - BC

Finally, a recent case in British Columbia highlights the dangers of making unsubstantiated allegations in high stakes and emotional estate litigation. In *Malacek v Young*[84] the British Columbia Supreme Court held that a weak argument could constitute misconduct. On June 4, 2021, in reasons for judgment the Court looked at two petitions, the first brought by David Young, the Executor of the Estate of Olaf Hall Leiran and the second, from the four daughters of the deceased from a prior marriage. The common issue was whether Mr. Hall and Carol Leiran, his wife of 37 years, had separated prior to his death. The issue was raised by the daughters who sought leave pursuant to s.151 of the *Wills, Estates and Succession Act*[85] to file a family law claim on behalf of Mr. Hall's estate against Carol for a division of family property under Part 5 of the *Family Law Act.*[86]

The Court in *Malacek* declined to grant leave to the daughters to commence a proceeding citing overwhelming evidence indicating a marital relationship at the time of death and that "… it was 'scandalous' for the daughters to have made allegations concerning a relationship between Carol and a friend, Alice Fisher."[87] As a result of the allegations, the Executor and Carol requested an order awarding special costs. In the alternative, the executor requested an award of partial special costs and partial uplifted party-and-party costs.[88] Pursuant to the decision in *Smithies Holdings Inc. v RCV Holdings Ltd.*,[89] the

[84] 2021 BCSC 2219 [*Malacek*].

[85] S.B.C. 2009, c.13 [*WESA*].

[86] S.B.C. 2011, c. 25.

[87] *Malacek*, *supra* note 84 at para 4.

[88] *Ibid*.

[89] 2017 BCCA 177 [*Smithie*].

British Columbia Court of Appeal noted that the types of conduct that attract special costs, "such conduct includes reprehensible conduct, conduct from which the court seeks to dissociate itself, conduct deserving of reproof or rebuke, and conduct that is scandalous or outrageous."[90] Relying on strong authority, the Court then held that "special costs may also be awarded where the plaintiff's case was so weak it amounts to misconduct."[91] In *McLean*, Madam Justice Mackenzie clarified this line of reasoning at paras. 29-30:

> The grounding of a weakness of claim was summarized in *Webber v. Singh*, 2005 BCSC 224 at para. 28:
>
> a) Special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient;
> b) Special costs may be ordered to punish careless conduct; and,
> c) Special costs may be ordered where a party pursues a meritless claim and is reckless about the truth.

In *Malacek*, several factors warranted a special costs award. The daughters' allegations that Carol and close friend Alice were romantic or intimately involved particularly troubled the Court, which found, "… the daughter's position today to be wholly disingenuous."[92] Additionally, one of the daughter's visited Alice Fisher at her place of work while another sent a cryptic Facebook message to Carol. The Court held that the "two incidents constitute bullying and disclose conduct that is reprehensible, outrageous, scandalous, and deserving of rebuke."[93] The Court was especially dismayed with the reckless disregard for the truth in attacking a 37-year marriage, holding that the Executor and Carol

[90] *Malacek*, *supra* note 84 para 5, citing *Smithie* at paras 56 to 57.

[91] *Ibid*, at para 10 citing *Solex Developments Co. v. Taylor (District) (1998)*, 1998 CanLII 5104 (BC CA), 60 B.C.L.R. (3d) 53 (C.A.) and *McLean v. Gonzalez-Calvo*, 2007 BCSC 648.

[92] *Malacek*, *supra* note 84 at para 13.

[93] *Ibid*, at para 15.

are entitled to special costs of the two petitions to be assessed by the registrar and special costs for the applications and appearances.

The issue of awarding special costs was also explored in the 2017 British Columbia case of *Hadley Estate (Re)*[94] which held that:

> In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.[95]

2. ADMITTING TESTAMENTARY DOCUMENTS THAT DON'T MEET THE FORMAL REQUIREMENTS

While British Columbia has also addressed this question in earlier jurisprudence, Ontario courts were recently tasked with the proposed admission of holograph wills that don't meet the formal requirements for a valid will. In both cases, the decedent committed suicide and there is a suggestion of mental illness and/or substance issues which brought the testamentary capacity of the decedent into question. As a recent study has demonstrated, however, suicide notes containing potential testamentary instruments may not be as uncommon as once believed.

[94] 2017 BCCA 311 [*Hadley*].

[95] *Ibid*, at para 47.

2022 – McGrath v Joy – Ontario

The Ontario Court of Appeal recently ruled on the admission of a holograph will pursuant to s.6 of the *Succession Law Reform Act,*[96] and Rules 74.04 (1)(d) and 75 of Ontario's *Rules of Civil Procedure* in the case of *McGrath v Joy*.[97] In *McGrath*, the Court was asked to revisit the determination of testamentary capacity where there are suspicious circumstances surrounding the preparation of a will and the principles governing cost orders in estate litigation.

In the case of *McGrath*, the decedent wrote a suicide note which met the requirements for a holograph will, shortly before committing suicide. The issue was raised as "he had been drinking and using drugs the day before his death. The sole issue for the court was whether the deceased had testamentary capacity when he wrote the suicide note."[98] A lower court decision concluded he did not, however, this ruling was reversed on appeal.

Joseph Philip Joy died on the morning of July 13, 2019, and according to the evidence, "he spent the day before his death working on his boat, drinking alcohol, and smoking hash oil cigarettes."[99] The Appellant in this case is Michael Ronald McGrath, Mr. Joy's stepson. Mr. McGrath brought an application to have the Suicide Note declared Mr. Joy's valid will. The requirements for a holograph will in Ontario are set out in s.6 of the *SLRA* which holds that "a testator may make a valid will wholly by his or her own handwriting and signature, without formally, and without presence, attestation or signature of a

[96] R.S.O. 1990, c. S.26 [*SLRA*].

[97] 2022 ONCA 119 [*McGrath*].

[98] *Ibid*, at para 1.

[99] *McGrath*, *supra* note 97 at para 4.

witness."[100] The Appellant submitted the export report of Dr. Mark Sinyor, Psychiatrist at Sunnybrook Health Sciences Centre in Toronto, an expert in the field of suicidality. Dr. Sinyor was ultimately "unable to make a definitive pronouncement on whether Mr. Joy was intoxicated by alcohol and/or cannabis when he wrote the Suicide Note or whether that potential intoxication might have made him incapable of making a will."[101] The Court in *McGrath* reviewed the legal principles for determining testamentary capacity are long-standing and established in the SCC in *Skinner v Farquharson*[102] in reliance on the seminal case of *Banks v Goodfellow*:

> a) Understand the nature and effect of a will
> b) Recollect the nature and extent of his or her property
> c) Understand the extent of what he or she is giving under the will;
> d) Remember the people that he or she might be expected to benefit under his or her will; and,
> e) Where applicable, understand the nature of the claims that may be persons he or she is excluding under the will.[103]

The Court looked at whether Mr. Joy understood the nature and effect of a will and referenced the preparation of his 2014 and 2016 Wills in addition to the Suicide Note. In the Suicide Note, the Court felt Mr. Joy clearly thought he was writing a will – "he implored Steve Ramsundarsingh – the person whom he had named as executor under his 2016 will – to carry out his last wishes."[104] He provided instructions for a funeral and the spreading of his ashes, and he used language commonly found in wills. The Court also looked at whether Mr. Joy recollected the nature and context of his property. In finding that he did, the Court referenced the fact that Mr. Joy was in financial difficulty but was

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[100] *Ibid,* at para 3.

[101] *Ibid*, at para 8.

[102] 1902 CanLII 87 (SCC), 32 S.C.R. 58

[103] *McGrath*, *supra* note 97 at para 50.

[104] *Ibid*, at para 53.

aware of this and was aware of his assets including a $600,000 insurance policy. In his 2016 Will, Mr. Joy bequeathed the after-tax proceeds of that policy to Ms. Joy. In the Suicide Note, Mr. Joy states that anything he gave to Ms. Joy in that will was void. The Court held that "He had to have recollected that asset when he wrote the Suicide Note for him to declare that his previous disposition of it was void."[105] In the Suicide Note, Mr. Joy left "everything" to his stepson and grandson. The Court found that not including Ms. Joy and, "the absence of a bequest to Ms. Joy in the Suicide Note does not mean that Mr. Joy failed to remember her. In fact, Mr. Joy did expressly remember her in the Suicide Note but chose to disinherit her."[106]

The Court of Appeal in *McGrath* held that the case law is clear, "to make a valid will, a testator must have a sound disposing mind." The Court then went on to say that "a testator has a sound disposing mind, if he or she: understands the nature and effect of a will; recollects the nature and extent of what he or she was giving under the will; remembers the people that the testator might be expected to benefit under the will; and, understands the nature of the claims that might be brought by persons excluded from the will."[107] In concluding the Court held, "… instead of applying this test to determine whether Mr. Joy had testamentary capacity at the time he wrote the Suicide Note, the application judge decided that matter largely on the basis of Mr. Joy's use of drugs and alcohol, in general and on the day before he died."[108]

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[105] *Ibid*, at paras 58-59.

[106] *Ibid,* at para 61.

[107] *McGrath*, *supra* note 97 at para 66.

[108] *Ibid*, at para 67.

2022 – Ontario's New Validating Provision

Ontario's *SLRA*, which was first enacted in 1977, originally made many important changes in the law of succession. However, as Professor Albert Oosterhoff argues, "the statute is more than 40 years old and, although there have been some minor changes to it over the years, it is long overdue for a complete overhaul."[109] The COVID-19 pandemic demonstrated the need for overhaul by revealing serious defects in the *SLRA* including "difficulty in attending to the execution of wills and other estate planning documents when lawyers were (and are) required to maintain a physical distance from their clients."[110] Listening to the recommendations of practitioners and advocates, the Honourable Doug Downey, Ontario's Attorney General, consulted with the estates bar. The culmination of these consultations was the introduction of Bill 245, *Accelerating Access to Justice Act, 2021* ("*AAJA*"). Schedule 9 of the Bill adds new provisions to, and repeals existing provisions in the *SLRA*. Section 5 of the *AAJA* introduces a new section to the *SLRA*: section 21, a validating provision that exists in most of the other Canadian wills statutes that states that:

> **21.1** (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.
>
> (2) Subsection (1) is subject to section 31 of the *Electronic Commerce Act, 2000*.[111]

[109] Albert Oosterhoff, "Welcome Amendments to Ontario's Succession Law Reform Act" February 20, 2021, *WEL Partners Blog*, online: https://welpartners.com/blog/2021/02/welcome-amendments-to-ontarios-succession-law-reform-act/.

[110] *Ibid*.

[111] Succession Law Reform Act, R.S.O. 1990, c. S.26, s.21.1 [*SLRA*].

Professor Oosterhoff has written on Canadian validating provisions.[112] The first provision in Canada, which most others are modelled off, came from Manitoba in s.23 of the *The Wills Act*.[113] There has been some confusion and as Professor Oosterhoff recently explained, "it is true that early statutory provisions in some common law jurisdictions that permitted the court to probate a will even though it did not comply fully with the statutory formalities were substantial compliance provisions because they permitted the court to grant probate if the will in question complied substantially with the statutory formalities."[114] Professor Oosterhoff then went on to say that this was a problematic approach because "courts need to determine how much compliance is necessary before they can act. In effect the court must determine in each case what the word 'substantial' means." This problem was evidenced when Manitoba first introduced the legislation in 1983. In *Langseth Estate v Gardiner*, the Manitoba Court of Appeal held that s.23 required the court be satisfied that the document embodied the testator's testamentary intentions, *and* that there had been some compliance with the formal requirements. This second requirement, Professor Oosterhoff explains, would have turned s.23 into a substantial compliance provision. Instead, the Manitoba Law Reform Commission wrote to the Minister of Justice and Attorney General that the legislation should be amended to make it clear that s.23 conferred a general dispensation power on the courts. The Commission "recommended that section 23 be amended to insert the words 'any or' before the word

[112] Albert Oosterhoff, "Canadian Will Validating Provisions and Their Application" October 29, 2021, *WEL Partners Blog*, online: https://welpartners.com/blog/2021/10/canadian-will-validating-provisions-and-their-application/.

[113] C.C.S.M. c. W150.

[114] Albert Oosterhoff, "Validating Powers and Rectification Powers" March 3, 2022, *WEL Partners Blog*, online: https://welpartners.com/blog/2022/03/validating-powers-and-rectification-powers/.

'all' in the clause 'was not executed in compliance with all the formal requirements imposed by the act.'"[115] The section was amended in 1995 to incorporate those words.

2021 – Bishop Estate v Sheardown – BC

In British Columbia, pursuant to the *Wills, Estates and Succession Act*,[116] a court can cure defects with a will that does not comply with the formal requirements for making a will. Under s. 58, a court can order such record, document, or writing to be fully effective. For this to happen, the court must be satisfied of two elements:

1. The document must be authentic, and
2. The document must represent the will-maker's deliberate or fixed and final intentions regarding the disposal of his or her property on death.[117]

In the case of *Bishop Estate v. Sheardown*,[118] the Court looked at whether to admit an unexecuted will to probate. The petitioner in this action was James Thrower, executor of Ms. Marilyn Bishop's estate through her previous will executed on June 27, 2014. The 2014 will named Ms. Bishop's now deceased husband as sole beneficiary and respondent Kelowna General Hospital Foundation as beneficiary if her husband predeceased her. The other respondents, Robert Sheardown and Deborah Sheardown, are Ms. Bishop's nephew and niece-in-law whom she named executors and primary beneficiaries of her unexecuted 2020 will.

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[115] *Ibid*.

[116] SBC 2009, Ch. 13, s. 58 [*WESA*].

[117] *Ibid*.

[118] 2021 BCSC 1571 [*Bishop*].

Ms. Bishop was married to John Bishop. They had no children. After John passed, Ms. Bishop sold their acreage outside Kamloops and moved into a mobile home in town. The Sheardown's moved to Kamloops in 2016 and visited Ms. Bishop often. They became close and helped with her illness.[119] In late December of 2019, Ms. Bishop was admitted to hospital for complications with her illness. She stayed with the Sheardown's until moving into a care home in February 2020. Within three days, on February 3, 2020, Ms. Bishop met with solicitor, Matthew Livingstone, a lawyer from the same firm that drafted her 2014 will.[120] Mr. Livingstone prepared a draft will sent to Ms. Bishop for her review on February 12, 2020. Ms. Bishop responded with a hand-written note, delivered on March 3, 2020. Mr. Livingstone had a final draft ready and set an appointment with Ms. Bishop for March 20, 2020. However, on March 19, 2020, Ms. Bishop called and cancelled this appointment. Due to COVID-19, no visitors were allowed into Ms. Bishop's home, and Ms. Bishop could only leave for medical appointments.[121] Ms. Bishop passed four months after the cancelled appointment. In assessing whether the undocumented will was authentic and represented Ms. Bishop's "deliberate or fixed and final intentions regarding the disposal of his or her property on death,"[122] the Court reviewed previous jurisprudence.

[119] A rare autoimmune disease called dermatomyositis. This required monthly intravenous treatment to help strengthen her immune system. These treatments lasted two days and left Ms. Bishop feeling tired and depleted afterwards.

[120] *Ibid*, at para 19.

[121] *Ibid*, at para 26.

[122] *Ibid*.

In *Bishop*, the Court found assistance in Manitoba caselaw on a similar curative provision and set out the analytical framework under s.58 in *Estate of Young*[123] stating that:

> As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first in [sic] an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions."[124]

The British Columbia Court of Appeal adopted the *Young* decision framework in *Hadley Estate (Re,)*[125] where Dickson J.A. elaborated on evidence that courts may consider on a s.58 application. In that decision, the Court cited *Langseth Estate v Gardiner (1990),*[126] which held that extrinsic evidence of testamentary intent is admissible on the inquiry, including evidence of events that occurred before, when and after the document was created. The Court therefore concluded that "based on the evidence, it is unsurprising that Ms. Bishop would wish to name the Sheardowns' as the executors and primary beneficiaries of her estate and to remove Kelowna General Hospital Foundation as a beneficiary."[127] The Court found that the unexecuted will represents Ms. Bishop's fixed and final intention as of March 17, 2020, when she called to book an appointment to execute it. The question that remained, was whether the failure to execute the will over the subsequent four months indicates a change in Ms. Bishop's intentions.

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[123] 2015 BCSC 182 at para 34 [*Young*].

[124] *Bishop*, *supra* note 118 at para 9.

[125] 2017 BCCA 311 at para 36.

[126] 1990 CanLII 7935 (MB CA), 75 D.L.R. (4th) 25 at 33 (Man C.A.).

[127] *Bishop*, *supra* note 118 at para 45.

The respondent Kelowna General Hospital Foundation argued that Ms. Bishop did not avail herself of British Columbia's remote execution procedures which were authorized as of May 19, 2020, more than two months before her death. Looking at the evidence, the Court found that Ms. Bishop was very concerned about the threat of contracting COVID-19. At 76-years-old, Ms. Bishop passed away on July 20, 2020. The Court concluded that her failure to execute the will either remotely pursuant to the May 19, 2020 order or on her own did not undermine her testamentary intentions. Ms. Bishop's will was found to be valid pursuant to s.58 of *WESA*.

2020 – Gregoire v Cordani – BC

In a case pre-dating the decision in *Bishop*, the Supreme Court of British Columbia used s.58 of *WESA* to validate an unwitnessed will; a suicide note. In the case of *Gregoire v. Cordani*,[128] Jean-Claude Gregoire and Nicola Cordani had been involved in a romantic relationship for several years as common-law partners. The couple met in 1999 while both were employed at Canada Post. The relationship began in 2000 and ended in 2009 due to Ms. Cordani's health challenges with anxiety and depression. In April 2015, Ms. Cordani attempted suicide. Afterwards, "Mr. Gregoire visited her once or twice a week. He then changed his shift at work so he could be with her more."[129] By mid 2016, Mr. Gregoire permanently moved into Ms. Cordani's apartment. Ms. Cordani's mental health significantly worsened, becoming manic and delusional – in February 2016 she was admitted to hospital for two weeks. On September 13, 2018, Mr. Gregoire returned home

[128] 2020 BCSC 276 [*Gregoire*].

[129] *Ibid*, at para 7.

from work to find Ms. Cordani had left. Three days later New Westminster Police informed Mr. Gregoire that Ms. Cordani's body had been found on the banks of the Fraser River in Ridge Meadows with a suicide note in her vehicle – the note was declared as her will.[130]

The Court in *Gregoire* looked at the purpose of s.37 of *WESA* and the formal requirements for the validity of a will, also recognizing that "section 58 of *WESA* is a curative provision and provides the court with discretion to order that a record that does not conform with s.37 is fully effective as a will."[131] The Court went on to say that in applying the curative provision, "the court must be satisfied on a balance of probabilities, first that the document is authentic, and second that the document records the deceased's deliberate or fixed and final expression of intention as to disposal of his or her property on death."[132] Finally, the Court held that, "the Note represents the fixed and final testamentary intentions of Ms. Cordani as to the disposal of her property on death, and that the Note is fully effective as to the will of Ms. Cordani."[133]

2015 – Dr. Mark Sinyor et. al

A 2015 study published in the British Journal of Psychiatry aimed to determine the frequency and details of will content in suicide notes. The study has important revelations including the suggestion that "for some people, will-making may not only be a sign of impending death by suicide but actually a part of the suicide act."[134] Dr. Sinyor's study

[130] *Ibid*, at paras 13-14.

[131] *Gregoire*, *supra* note 128 at para 32.

[132] *Ibid*, at para 33.

[133] *Ibid*, at para 41.

[134] Mark Sinyor et al., "Last wills and testaments in a large sample of suicide notes: implications for testamentary capacity." (2015) 206 *The British Journal of Psychiatry* 72 [*Sinyor*].

looked at coroner reports for 1565 deaths by suicide in Toronto between the years of 2003 to 2009. The data was reviewed for a) will content and b) presence of depression, psychotic illness, dementia, and intoxication prior to death. The study revealed that 59 out of 285 (20.7%) of available suicide notes had a will content.[135] The study is the first to demonstrate that holograph wills and/or will content are present in a substantial minority of suicide notes. Most importantly, the study demonstrated that people dying by suicide often think about beneficiaries and the fate of their assets. According to Sinyor et al., "the fact that some people bequeathed large sums of money or home/property makes the issue of testamentary capacity highly relevant."[136]

3. DEALING WITH ALLEGATIONS OF ELDER ABUSE

Elder abuse in Canada is arguably, a rising issue deserving of increased attention and focus. According to Statistics Canada, in 2019, the rate of police-reported violence against persons aged 65 to 89 was 227 per 100,000 persons. In Canada, there are no specific charges for elder abuse. The Criminal Code addresses 'Theft by Person Holding Power of Attorney' at section 331.[137] This charge relies on a specific type of property theft with an added element of breach of a fiduciary duty. Where it concerns the neglect of an individual, section 215 (1)(a),[138] Failing to Provide the Necessities of Life, places a parent or guardian under a legal duty to provide the necessities of life for a child under section

[135] *Ibid*, at p.73 where the study also revealed that of those who left a will, 43 (72.9%) had a major medical or psychological order, however, none had dementia. Additionally, 15 of 19 toxicology samples showed alcohol, sedative, hypnotic/benzodiazepine, opioid and/or recreational drugs present.

[136] *Sinyor*, *supra* note 134 at p.74.

[137] *Criminal Code*, R.S.C., 1985, c. C-46, s.331.

[138] *Criminal Code*, R.S.C., 1985, c. C-46, s.215 (1)(a).

16, however, this also applies to the necessities of a spouse or common-law partner and anyone else under that person's charge. Where it concerns what is considered a necessity of life, courts have held that these are the things that "tend to preserve life and not necessaries in their ordinary legal sense.[139] Courts have also concluded that necessities of life also include protection from harm.[140] These offences are especially important for the protection of older adults who are dependent on others for healthcare or supervision. Some of the cases below demonstrate severe punishment for neglect of older adults in care. These cases, however, are few and far between. Other negligence-based offences include failing to take reasonable steps to prevent bodily harm when directing another's work at section 217.1 and Criminal Negligence at sections 217 to 221.[141]

Offences dealing with psychological or emotional abuse are covered by the offence of uttering threats at section 264.1,[142] and intimidation at section 243.[143] These offences generally seek to protect individuals, including older adults, from situations where a perpetrator seeks to exert control over their autonomy in some way or another. This kind of behavior can often escalate which has created the need for offences dealing with physical or sexual violence. Physical harm of an older adult falls under assault at sections

[139] See Generally *R v JAR*, 2012 BCPC; *R v Brookes*, 1902 BCSC.

[140] *R v JF*, 2007 ONCA affirmed in *R v JF*, 2008 SCC.

[141] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 217–221.

[142] *Criminal Code*, R.S.C., 1985, c. C-46, s.264.1.

[143] *Criminal Code*, R.S.C., 1985, c. C-46, s.243.

265 – 268,[144] while sexual assault is covered under sections 271-273 and, finally forcible confinement at section 279 (2).[145] Also, "Sections 22.1 and 22.2 of the Code address when an organization, such as a long-term care provider, can be considered a party to an offence."[146]

Where it concerns offenders who have been charged with some form of elder abuse, section 718 (a)(i), Other Sentencing Principles, provide authority commonly used in the context of spousal assault cases but has wide application to cases involving age as a criterion for victim selection.[147]

2021 – Office of the Seniors Advocate British Columbia Report

The Office of the Seniors Advocate British Columbia has recently published a report examining the current legislative protections, assessing reporting practices, and existing data on abuse and neglect of British Columbia's seniors. The review indicates that reports of abuse and neglect of people aged 65 and over have increased significantly in the past five years. The report chronicles a 49 percent increase in reports of abuse, neglect, and self-neglect to authorities; a 69 percent increase in the number of victims of violent crime reported to the RCMP; an 87 percent increase in the number of reports of financial abuse

[144] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 265-268.

[145] *Criminal Code*, R.S.C., 1985, c. C-46, s.279 (2).

[146] *Ibid*.

[147] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 718.1, 718.2.

to the Vancouver Police; and a 30 percent increase of reports of abuse to the senior's hotline through the bc211.[148] The report offers five recommendations:

1. Establish provincial standards of practice, policies, and front-line training to respond to seniors' abuse and neglect;
2. Create province-wide public awareness initiatives and training on seniors' abuse and neglect;
3. Develop a central, single point of contact to report calls of concern of seniors' abuse and neglect;
4. Ensure consistent data collection, methods, and definitions to record, track and monitor abuse and neglect cases; and,
5. Undertake a full comprehensive review of the *Adult Guardianship Act.*[149]

The Report of the Office of the Seniors Advocate British Columbia also revealed an 87 percent increase in the amount of financial abuse cases reported to the Vancouver Police.

2021 – Canadian Securities Administrators Report

Earlier in the same year (2021), the Canadian Securities Administrators ("CSA") published a report on their findings that nearly 29 per cent of Canadians know a victim of financial elder abuse.[150] The report also revealed that 42 per cent of Canadians surveyed could not recognize the signs of financial abuse while only 47 per cent know where to report suspected cases of abuse. According to the CSA, "Financial abuse is the most

[148] Office of the Seniors Advocate British Columbia, "Hidden and Invisible Seniors Abuse and Neglect in British Columbia" December 8, 2021, online: https://www.seniorsadvocatebc.ca/app/uploads/sites/4/2021/12/Hidden-and-Invisible-Report.pdf

[149] *Ibid*, at p.41.

[150] Canadian Securities Administrators, "Securities regulators' study reveals many Canadians unaware of the signs of financial elder abuse" June 19, 2021, online: https://www.securities-administrators.ca/news/securities-regulators-study-reveals-many-canadians-unaware-of-the-signs-of-financial-elder-abuse/

common form of elder abuse, and it typically occurs over an extended period. Financial abuse of older adults can include the use and/or control of the individual's money or investments through undue pressure, illegal or unauthorized acts."[151] Louis Morisset, CSA Chair and President and CEO of the Auorité des marches financiers shares that, "Older Canadians are particularly susceptible to financial exploitation and fraud. Checking in regularly with the older adults in our lives about their finances – no matter their financial situation – is critical to raise awareness of financial abuse and ultimately help prevent it."[152] Among the other findings of the report include that 81 percent of Canadians recognize, when older an older adult is financially abused, its usually by someone close to them. Among Canadians with an older adult in their life, 91 per cent perceived barriers preventing the discussion of financial matters,[153] 61 per cent indicated that the older adult in their life would share if they were a victim to financial abuse, and 73 per cent indicated that they know who manages their finances.

2022 – R v Cvetas - ON

In *R v Cvetas*,[154] banking executive Nick Cvetas entered a guilty plea on September 1, 2021, for the charge of theft over $5,000. In *Cvetas*, "Mr.Cvetas admitted that in 2015 and

[151] *Ibid*.

[152] *Ibid*.

[153] The most common barriers were a belief that their loved one has their finances under control (38%), the belief that its not their place to talk about finances (37%), and one third of respondents said that finances don't come up in conversation (30%).

[154] 2022 ONSC 1640 [*Cvetas*].

2016 he took $317,000 from the bank account of his 81-year-old godmother, Nevenka Cemas."[155]

In the preceding years, Ms. Cemas lost her family and became quite close with Mr. Cvetas. In 2014, Ms. Cemas added Mr. Cvetas as a joint account holder on one of her bank accounts containing over $300,000 and updated her will. She also appointed Mr. Cvetas as Executor and Trustee of her estate, leaving the funds in the joint account and the residue of her estate to Mr. Cvetas. According to the evidence, "she was experiencing health problems and believed that it would make it easier for Mr.Cvetas to access her funds if she could not take care of herself."[156] In early 2015, Mr. Cvetas was appointed as attorney under a power of attorney for property and personal care for Ms. Cemas. At the time, Mr. Cvetas was employed as an executive at the Bank of Montreal and earned about $160,000 to $170,000 a year. His wife was also employed. By late 2015, Mr. Cvetas found himself in a precarious financial state. On December 1, 2015, he withdrew $35,000 from Ms.Cemas' account and deposited the funds into his own. On February 5, 2016, he withdrew $260,000 from her account. When a bank employee inquired, he responded that "he was moving the money to BMO Nesbitt Burns to get a higher interest rate deposited on account." On August 11, 2016, he withdrew $15,000, and on October 26, 2016, $7,000 for a total of $317,000. During this same period, Ms. Cemas only made three withdrawals for a total of $2,000.00.

[155] *Ibid,* at para 1.

[156] *Ibid*, at para 6.

In November of 2016, Ms. Cemas discovered there were insufficient funds in her account. She became distraught and called Mr. Cvetas who explained to her that the money was safe and had been invested and apologized for not telling her. By February 2017, with no money available to her, Ms. Cemas contacted a lawyer. Mr. Cvetas gave the same investment lie to the lawyer, so the police were contacted. On October 11, 2017, Mr. Cvetas was arrested and charged after turning himself in to police. Prior to sentencing, he made restitution of $317,000 to Ms. Cemas through his lawyer. While Mr. Cvetas was well-supported by a large amount of character letters (33 in total), the Court found their value was limited because many of the writers were unaware that Mr. Cvetas had been convicted for theft. His good character and reputation in the community was recognized, however, the Court held that "the minimization and justification of the offence apparent in many of the letters mean that they have little value in assessing the support in the community for Mr. Cvetas in his rehabilitation process."[157] The Court did, however, place emphasis on significant aggravating factors regarding the circumstances of the offence including the amount of money stolen over a period of 10 months, the lies and dishonesty, and the planning, but most importantly, the fact that "He abused the trust of a vulnerable person," resulting in a breach of trust under a power of attorney and in the relationship between godson/godmother. Some of the evidence that motivated the Court's decision also included the psychologist report of Dr. Sam Klarreich who reported that Mr. Cvetas was motivated to commit this crime to win his spouse's affection back after having an affair. In assuming he could buy her love back, Mr. Cvetas admitted that he took the money to complete renovations on the matrimonial home that his spouse wanted. In the

[157] *Cvetas*, *supra* note 154 at paras 24-26.

end, Mr. Cvetas told Dr. Klarreich that "my wife was indifferent, it didn't change our relationship."[158] There were some of mitigating factors including the fact that Mr. Cvetas entered a guilty plea, which is indicative of remorse, however, the Court concluded that this remorse was questionable, and they were troubled by the psychologists' report in which he minimizes his actions.

In determining an appropriate sentence, the Court held that, "the most important objectives in sentencing an offender who has abused a position of trust are denunciation and general deterrence."[159] The appropriate sentence the Court concluded, had to be one that accords with the principle of parity which demands a similar sentence imposed on similar offenders for similar offences in similar circumstances. To this end, the Court looked at several decisions in reaching its decision to sentence Mr. Cvetas to 12 months imprisonment, two-years probation with statutory conditions and with a condition prohibiting him from contacting Ms. Cemas. The Court also "imposed an order that limits Mr. Cvetas from having authority over the real property, money or valuable security, of another person except in the capacity of an employee of volunteer under the supervision of another adult, or for an immediate family member, for a period of five years."[160]

Several recent cases that deal with the abuse of seniors in care are also relevant to the trend of courts tackling complicated allegations of abuse. Often, individuals in care,

[158] *Ibid*, at para 29.

[159] *Ibid*, at para 40.

[160] *Cvetas*, *supra* note 154 at para 60.

especially those suffering from dementia or other cognitive impairments have difficulty expressing themselves and subsequently, in reporting abuse.

2022 – R v Murphy - AB

In *R v Murphy*,[161] an accused stood charged with two counts of assault contrary to s. 266 of the *Criminal Code of Canada* and one count of assault with a weapon, contrary to s. 267 (a).[162] The complainants were two residents on a dementia ward of a privately funded care home for seniors while the accused was a health care aid working on the ward. The actions of the accused were witnessed by two other employees. One employee complained that with one resident, the accused grabbed her face and told her to shut up while squeezing her cheeks together while with another resident she is accused of repeatedly flicking cold water in his face during morning toileting and care routine, grabbing his face and turning it away. One employee, "KM, testified that she did not immediately tell anyone about the incident because she was so surprised by what had happened and didn't know what to do."[163] The Court concluded that:

> As to the facts, both Resident A and Resident B were vulnerable. Both were elderly. Both suffered from dementia, and neither was able to clearly articulate, in words, what they needed. Both had mobility issues. Both were dependent on others for their care, and trusted others to provide for their daily needs, from getting out of bed, to toileting and bathing, to being taken for meals and/or being fed. Neither was able to consent to being touched, and when touched by the accused – intentionally or forcefully – both reacted with distress, either verbally, or visibly, or both.[164]

There has been no sentencing decision yet in this case.

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[161] 2022 ABPC 31 [*Murphy*].

[162] *Ibid*, at para 1.

[163] *Murphy*, *supra* note 161 at para 18.

[164] *Ibid*, at para 81.

2021 – R v Duffenais - NL

In *R v Duffenais*,[165] an accused in Corner Brook, Newfoundland was sentenced to three months of incarceration and one year of probation, having committed the offence of assault, contrary to section 266 of the *Criminal Code of Canada*. In the judgment of Gorman, P.C. J., the Court found Mr. Duffenais while employed as a caregiver at a nursing home, assaulted an elderly resident, Ms. A. according to the evidence, on March 15, 2020, "Mr. Duffenais and other caregivers were in Ms. A's room helping her to change her clothes. Mr. Duffenais picked her up from behind, placed his hands near her breasts and shook her. While doing so, he made a reference to 'flying titties.' The victim is eighty-four years of age."[166] In sentencing Mr. Duffenais, Gorman P.C. J. held that:

> Though the assault that occurred in this case did not constitute a significant application of force, it was committed by a person in a significant position of trust. In addition, it involved the commission of a degrading act against a very vulnerable victim and it constituted a serious violation of Ms. A's personal integrity. Those who are entrusted with the care of the elderly must understand that offences committed against such individuals will result in substantial penalties being imposed."[167]

2019 – R v Barker - NS

In *R v Barker*,[168] Beverly Ann Barker and David Anthony Barker were charged each with two counts of fraud exceeding $5,000, indictable offences pursuant to s.380 (1)(a) of the *Criminal Code of Canada*. The victim in this case is Mrs. Barker's elderly mother, RFM. Over nine months, the Barker's manipulated RFM (who was 83 at the time of their

[165] 2021 CanLII 53781 (NL PC) [*Duffenais*].

[166] *Ibid*, at para 2.

[167] *Ibid*, at para 5.

[168] 2019 NSPC 24 [*Barker*].

sentencing) into signing numerous lending and financing documents. RFM has severe cognitive impairment and suffers from dementia and dysphasia, requiring around the clock care. The Court concluded that "this lady had no capacity to enter into financial-services contracts but gave in to the pressure the Barkers laid upon her; she did not derive one cent of benefit from the deals she was coaxed and cajoled into signing."[169] Mr. Barker was enriched $36,000 while Mrs. Barker was enriched $15,519.55. Because Mr. Barker himself is 80 and the couple are in poor health and financial despair, the Court suspended the passing of a sentence on both, instead ordering three years of probation plus orders for restitution.

2021 – SF (Re) – Consent and Capacity Board - ON

Sometimes vulnerable adults are abused and unable to report this to anyone. In *SF (Re),*[170] an involuntary patient at Mount Sinai Hospital was found incapable of making decisions with respect to her property. The Consent and Capacity Board convened a hearing at SF's request to review the finding of incapacity. SF, a 78-year-old woman at the time of the hearing, lived in Toronto and was supported by her work pension. SF has a long history of bipolar disorder with admissions to various hospitals. On her current admission, SF was non-compliant with her medications for her mental condition. In *SF*, an exhibit of physician's documentation reported ongoing police involvement due to thefts from SF. The Board learned that SF had a financial advisor managing her inheritance, "as well there was a social work progress note included in the doctor's documentation. It was reported that the social worked had a conversation with Elder Abuse Ontario who

[169] *Ibid*, para 4.

[170] 2021 CanLII 85842 [*SF*].

reported that $200,000 had been taken from SF and that Elder Abuse Ontario suspected that the financial advisor was abusing SF." Perhaps even more alarming, "the panel thought that the evidence was that the person whom SF believed to be her financial advisor was not a financial advisor in fact but as the doctor's evidence was, he was an investment professional. The panel thought it was significant that Elder Abuse Ontario had concerns with respect to abuse by this person as well." The panel ultimately found SF incapable of managing her property.

2022 – Dunn v Baird Estate - BC

How do courts deal with unfounded allegations of elder abuse? The following case provides some guidance on how these claims are disposed of. In *Dunn v Baird Estate,*[171] Applicant sisters, Rhonda Dunn and Vandy Noble were seeking leave pursuant to s.151 of British Columbia's *WESA* to advance claims in the name of their deceased mother, Leona Baird's estate. The Application alleged misconduct on the part of their other sister, Barbara Moraitis in her personal capacity and her capacity as executor of Leona Baird's estate. In particular, the applicants alleged Ms. Moraitis misused her powers under power of attorney to convert the deceased's property for her own use, and therefore holds this property in trust for the estate, and owes the estate damages.[172] In *Baird*, the Applicant's allegations were based on several assertions about Ms. Moraitis.[173] Ms. Moraitis, however, testified that in 2019-2020, she started a new job with a new employer and that

[171] 2022 BCSC 498 [*Baird*].

[172] *Ibid*, at para 49.

[173] That Ms. Moraitis had new clothes, shoes and purse; had bought new furniture; had bought a new car; had gone on trips; and had made 'significant' cash withdrawals from the deceased's bank account.

she enjoyed a salary increase of 20 per cent. She bought herself a new wardrobe because her clothes no longer fit because of a new health regimen. The Court held that "even by the applicants' own admission, their accusations are based on nothing more than conjecture, suspicion, and mistrust of Ms. Moraitis. Again, the onus rests on the applicants to demonstrate litigation is justified. They have not."[174] The Court then looked at whether the applicants demonstrated that they are acting in good faith under s. 151 (3)(a)(iii) of *WESA*. In concluding that they were not, the Court awarded special costs against the Applicants because the allegations were made recklessly and based solely on conjecture and suspicion, holding that "special costs should be awarded against the applicants as a rebuke for bringing allegations of fraud without foundation."[175]

2020 – Franiel v Toronto-Dominion Bank - AB

Abuse against vulnerable older adults can be seen in rampant scams which target unsuspecting older adults. A prominent example was seen in *Franiel v. Toronto-Dominion Bank*,[176] where the Alberta Court of Queen's Bench heard the case of an 81-year-old Lethbridge TD customer who fell victim to 26 scams over the course of 10 months. On some occasions she had believed she won the lottery and on others she believed she owed tax money to the Canada Revenue Agency. Before her son had caught wind of this, she had lost $241,730. She argues that the face-to-face dealings at the bank should have

[174] *Baird*, *supra* note 171 at para 54.

[175] *Ibid*.

[176] [2020] AJ No 111, 2020 ABQB 66, at para 1.

raised red flags and sued the bank on the basis that the bank owes a duty of care to its customers to help prevent frauds like this.[177]

4. ISSUES SURROUNDING CAPACITY

Often, colloquially, we may speak of individuals as being "capable," or "incapable." However, a person cannot be globally "capable," or "incapable," and there is no "one size fits all" determination for establishing decisional capacity. In the legal context, there is no single definition for "capacity," or for "mental capacity."[178] Generally, capacity is determined on a case-by-case basis in relation to a particular task, or decision, and at a specific moment in time. Professor Gerald B. Robertson states in, *Mental Disability and The Law in Canada*, that "legal capacity is task specific, incapacity in one area does not necessarily mean incapacity in another."[179]

Importantly, all adults are deemed or presumed capable of making decisions at law. This presumption of capacity stands, unless, and until, that presumption of capacity is legally rebutted.[180] This presumption is found in both legislation across Canada and in case law. Alberta's *Adult Guardianship and Trusteeship Act*,[181] states: "an adult is presumed to have the capacity to make decisions until the contrary is determined."[182] Ontario's *Substitute Decisions Act, 1992*[183] states: "A person who is eighteen years of age or more is presumed to be capable of entering into a contract," and, "A person who is sixteen

[177] *Ibid*, at para 2.

[178] See chart, "Cross-Provincial Capacity Legislation"

[179] Gerald B Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Carswell 1994), at 179.

[180] *Palahnuk v Palahnuk Estate*, [2006] OJ No 5304 (QL), 154 ACWS (3d) 996 (SCJ); *Brillinger v Brillinger-Cain*,[2007] OJ No 2451 (QL), 158 ACWS (3d) 482 (SCJ); *Knox v Burton* (2004), 6 ETR (3d) 285, 130 ACWS (ed) 216 (Ont SCJ.) See also Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" ET & PJ 215- 250 (2013)

[181] SA 2008 c A-4.2

[182] *Adult Guardianship and Trustee Act*, SA 2008 c A-4.2 at s 2(a). See also, *KC (Re)* 2016 ABQB 202 at para 26 and *Dank (Re),* 2013 ABQB 112 at para 12.

[183] SO 1992 C 30.

years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care."[184]

Some lawyers and court decisions refer to "tests" to determine requisite decisional capacity. The term "test" simplifies the legal analysis for the layperson. However, it is important to understand that there are no actual "tests," but, rather standards to be applied, or factors, or criteria to be considered. In other words, capacity is determined on factors of mixed law and fact, and by applying the evidence available to those applicable factors in each set of unique circumstances. Accordingly, all references to "test" should be understood with this in mind.

Capacity is decision, time and situation-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances.

Capacity is decision-specific since for example, the requisite capacity to grant an enduring power of attorney for property is different than the requisite capacity to make a will. Or a person may be capable of making an *inter vivos* gift, but, may not be capable of entering into a marriage. The combinations are limitless since each task, or decision has its own specific capacity criteria.

Capacity is also time-specific due to the fluid nature of legal capacity. This fluidity allows for "good" and "bad" days where capacity can, and does, fluctuate.[185] For example, a person incapable of making personal care or property decisions and who is under guardianship, can regain decisional capacity and terminate the guardianship.[186] Any expert assessment or examination of capacity must clearly state the time of the assessment and address decisional capacity as at the time that the particular task was undertaken.

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[184] *Substitute Decisions Act, 1992*, SO 1992 c 30, s 2(1) & (2).

[185] See *Montreal Trust Company v Mackay*, 1957 CanLII 641 (ABCA), 21 WWR (ns) 611 at 613 *Klippenstein v Manitoba Ombudsman*, 2015 MBCA 15 at para 36, *Starson v Swayze*, 2003 SCC 32 at para 118.

[186] Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" ET & PJ 215-250 (2013).

Lastly, capacity is situation-specific in that under variable or differing circumstances, an individual may have capacity or have diminished capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, a person at home may have capacity that may not have been apparent in a lawyer's or doctor's office.

This next section will examine the various decisions that clients in a wills and estates, or elder law practice may make, and the necessary requisite capacity factors or standards to be applied to each of those decisions, including the capacity necessary to: make a will; make large or small *inter vivos* gifts, or transfers; grant a power of attorney or personal directive; marry, separate, divorce or reconcile; and retain and instruct counsel or commence litigation proceedings.

4.1 The Capacity to Enter a Legal Retainer/Contract

2021 - Guardian Law Group v. LS (Alberta)

In the case of *Guardian Law Group v. LS*,[187] the Honourable Mr. Justice C.M. Jones was tasked with answering a question of pure law: what are the requirements that must be met by counsel to be validly retained to represent an individual in the context of that individual's own capacity hearing?

In *Guardian*, Jones J.'s decision provides the criteria or, novel test for voiding a retainer agreement for incapacity. Further, Jones J.'s comments not only help clarify the criteria/test but also provide guidance to lawyers in approaching capacity issues. The sole issue in this case, a question of pure law, asks what is required of counsel to be satisfied the client has the necessary capacity to enter a Retainer Agreement.

[187] 2021 ABQB 591 [*Guardian*].

The facts of this case are uncontested. The older adult, ("RL") retained Guardian Law to represent him at a capacity hearing. The matter settled, resulting in his daughter, ("LS") becoming Guardian and Trustee.[188]

In 2013, RL signed an Enduring Power of Attorney ("EPOA") in favour of LS, which would take effect upon medical declaration of his lack of capacity to manage finances. In November of 2015, his physician declared RL incapable. A second medical declaration was provided in March 2018.[189]

In May 2018, RL became unhappy with LS' handling of his accounts and hired Guardian Law to represent him. Guardian Law retained a physician who concluded RL *did* have capacity to retain and instruct counsel and to manage financial affairs.[190]

In September 2018, Jones J. ordered an independent capacity assessment for RL in which a physician reported that RL lacked capacity. Guardian Law then retained a psychiatrist who reported that RL's capacity was borderline, but that his issues could be mitigated with proper support.[191] Out of concern for RL's capacity, Jones J. ordered a litigation guardian be appointed pursuant to Rule 2.11 of the *Alberta Rules of Court*, Alta Reg, 124/2010 (the "*Rules*").[192] On June 28, 2019, Guardian Law filed a "Brief of

[188] *Ibid,* at para. 1.

[189] *Ibid,* at paras. 6-7.

[190] *Guardian, supra* note 187 at paras. 8-9.

[191] *Ibid.* at paras. 10-11.

[192] *Ibid.* at para. 12.

Argument for Costs," claiming $92,789.00 in legal fees. LS opposed the application on grounds that RL lacked the capacity to retain Guardian.

There is a presumption that adults have the capacity to enter a contract. However, if a party lacks the requisite capacity, an otherwise valid contract can be defeated. In *Guardian*, Jones J. canvassed authority for whether a contract is voidable based on mental incapacity.

In *Bank of Nova Scotia v Kelly*[193], the test was illustrated as follows:

1) At time of contract, the party seeking relief was incompetent;
2) By reason of such incompetence, that party was incapable of understanding the terms of the contract and forming a rational judgment of its effect upon his or her interests; and
3) The other party had actual or constructive knowledge of such incompetence.[194]

Jones J. in *Guardian* recognized that for a contract to be voided for incapacity, it must be unfair to the party lacking incapacity. Pursuant to the decision in *RMK v NK,*[195] "Courts of equity will not interfere if a contract entered into with a mentally incompetent person is fair and was made in good faith, if the other party to the contract had no knowledge of his or her mental incapacity and did not take advantage of that person"[196]

[193] *Bank of Nova Scotia v. Kelly*, 1973 CanLII 1289 (PE SCTD), [1973] 41 DLR (3d) 273 (PE SCTD) at para. 10 [*Kelly*].

[194] *Guardian, supra* note 187 at para. 43.

[195] 2020 ABQB 328 [*RMK*].

[196] *Guardian, supra* note 187 at para. 44.

Jones J. held that the capacity to enter a retainer agreement was very closely connected to the capacity to instruct counsel. In *RMK*, Goss J. adopted the criteria required for the capacity to instruct counsel from the Ontario case of *Costantino.*

Jones J., adopting a particularization of the test for contractual capacity from *Kelly*, with elements specific to retainer agreements,[197] proposed the following criteria, or novel test for voiding a retainer agreement:

1) Did the client, at the time of entering into the retainer agreement, have the capacity to understand its terms and form a rational judgment of its effect on his or her interests?
2) Did the lawyer know that the client lacked capacity, and more specifically,

a) Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?
b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?[198]

Jones J. held that the sequence of the test (answering question 1 or 2 first) is not important since any order will work based on practical considerations.[199] What is important, is that it is up to the trier of fact to determine how to approach the order, based on the circumstances of each case.[200]

Analysis of the Criteria / Test

Part 1: Did the client have capacity**?**

Jones. J notes that most definitions share two common concerns:

[197] *Ibid.* at para. 58.

[198] *Ibid.* at para. 57.

[199] *Ibid.* at para. 59.

[200] *Ibid.* at para. 63.

1) Does the person understand the relevant information, and,
2) Does the person appreciate how the relevant information will affect him or her?

The essence of the inquiry should include, "whether the person can understand and appreciate the consequences of the retainer agreement."[201] The ability to understand and appreciate relevant information is captured in Alberta's definition of capacity found in the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2:

> 1(d) "capacity" means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of
>
> (i) a decision, and
>
> (ii) a failure to make a decision;

Part 2 (a): Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?

Jones J., ruled that the emphasis here is an analysis under the framework of the contract. In contract, parties have no duty to take positive steps, citing *Chitty on Contracts* at p. 876[202] - "absent information that alerts them to incapacity, they are entitled to rely on the presumption of capacity."[203]

In *Guardian*, Jones J. endorsed a non-mandatory, non-exhaustive list mostly captured from *RMK* and *Kozak Estate (Re)*[204] which may be helpful to the analysis:

1) The retainer pertains to proceedings which concern the client's capacity;

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[201] *Ibid.* at para. 69.

[202] *Chitty on Contracts*, (32nd ed, 2015), vol. 1, at p. 837 [Chitty].

[203] *Guardian, supra* note 187 at para. 70.

[204] *Kozak Estate (Re)*, 2018 ABQB 185 [*Kozak*]

2) Whether the client appreciates the nature of the proceedings;
3) A past history of being unable to keep and choose counsel;
4) Psychological or documentary evidence of incapacity;
5) How the client presents when meeting counsel;
6) Inability to communicate objectives and priorities clearly;
7) A repeated focus on irrelevant issues or facts;
8) Mistaken beliefs regarding court procedures;
9) Reliance on another party to communicate with counsel; or,
10) Increasing isolation from friends and family.

Lists may illustrate some of the different kinds of indicators of capacity or incapacity, however, they are not authoritative. For this reason, the Court in *Guardian* held that the analysis must proceed on a case-by-case basis. The fact-specific nature of capacity means there could be many relevant factors to consider; no single factor will necessarily lead to a finding either way.

Jones J. also clarified that medical evidence does not necessarily outweigh a lawyer or layperson's opinion regarding capacity holding that, "If suspicion cannot be made out, the inquiry ends, and the retainer agreement stands."[205]

Part 2 (b): If yes, did the lawyer take sufficient steps to ascertain capacity so as to rebut a finding of actual or constructive knowledge of incapacity to contract

If suspicion *is* made out, Jones J. held that the focus shifts to the actions of the lawyer. There are two ways to prevent a suspicion of incapacity from rising to the level of actual

[205] *Guardian, supra* note 187 at para. 76.

or constructive knowledge: mitigate the client's potential incapacity or make reasonable inquiries to confirm the client's capacity.[206]

Jones J., held that "where further action is taken that confirms the client's capacity, knowledge is rebutted," and the Court provided five reasonable steps a lawyer could take including:

1) Obtaining consent from the client to speak with his or her family doctor or psychologist;
2) Obtaining consent from the client to request their medical records;
3) Reviewing any capacity assessments that have been performed;
4) Speaking with family, friends, or close contacts for their opinion on the client's capacity; or,
5) Requesting a capacity assessment.[207]

Whether these steps (or any other reasonable steps chosen) will be considered reasonable will be "determined with reference to the lawyer's level of knowledge after they were completed."[208] If the court is satisfied, a lawyer ought to have known, the efforts will be considered insufficient. If the court is satisfied the lawyer's efforts led to a sufficient certainty the client had capacity, the inquiry ends, and the contract stands.

Where the lawyer's efforts led to uncertainty or doubt regarding capacity, the court must ask whether the steps taken constituted "reasonable care and diligence" or whether a

[206] *Ibid.* at para. 77.

[207] *Ibid.* at para. 82.

[208] *Ibid.* at para. 84.

reasonable lawyer would have looked further. It is critically important that the trier of fact assess the reasonableness of any steps taken.

Finally, the decision in *Guardian* looked at whether equitable considerations exist. Jones J. relied on *Waldock v. Bissett*,[209] which held that:

> In considering whether to cancel the contract for not being fair in its inception, the court, or now the registrar, may apply all the principles of equity which go to whether justice requires that a contract voidable for such things as breach of fiduciary duty or misrepresentation or duress should be rescinded even though it has been fully performed and, thus, *restitutio in integrum* in its strict sense is not possible.

4.2 The Capacity to Instruct Counsel/Litigate

Lawyers must be confident that a client has the requisite capacity to instruct on legal matters. Capacity to instruct is required in both litigation and non-litigation matters. The law has developed factors to review to determine whether a client has the requisite decisional capacity to commence a lawsuit. An incapable litigant may be required to have representation by a litigation guardian or guardian *ad litem* in litigation proceedings.

4.2.1 Capacity to Instruct

Lawyer, Ed Motingny, wrote a helpful paper, *Notes on Capacity to Instruct Counsel*, which succinctly sets out the capacity criteria for *instructing* counsel as follows:

1) An understanding of what the lawyer has been asked to do and why;

2) The ability to understand and process the information, advice and options the lawyer presents to them; and,

[209] 1992 CanLII 1002 (BC CA), [1992] 67 BCLR (2d) 389 (CA).

3) An appreciation of the advantages, disadvantages and potential consequences of the various options.[210]

Justice Price cited and applied these criteria in the case of *Costantino v Costantino,*[211] after canvassing the case law addressing this issue:

> The client should have the ability to understand that the retainer agreement will confer authority on the lawyer that will impose contractual liability. The client should understand the nature and effect of the transaction which the lawyer is being authorized to negotiate for the client. The client should be able to retain information on an ongoing basis so that they can interact meaningfully with counsel and retain information as the transaction proceeds.[212]

It is not necessary that a client understand *all* the details necessary to pursue their legal matter. Just as any person can hire an expert to handle complex affairs that are beyond their personal expertise, a client can rely on their lawyer or representative to understand the specific details and processes involved in their matter.[213]

The assessment of whether the client has capacity to instruct, must be done, at least implicitly, at every point at which the client interacts with the lawyer.[214] Master Graham noted in *Torok v Toronto Transit Commission,*[215] that the client's capacity to instruct counsel entails the ability to appreciate the reasonable foreseeable consequences of a decision or lack of decision, which is essentially the capacity to assess the comparative

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[210] Ed Montigny, "Notes on Capacity to Instruct Counsel*",* February 2011, online: https://cleoconnect.ca/ylr-files/files/resource_files/1299611679NotesonCapacitytoInstructCounsel-FINAL-Feb1111.pdf [accessed on February 10, 2020]. See also, Clare Burns & Anastasja Sumakova, LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at 40.

[211] 2016 ONSC 7279.

[212] Clare Burns & Anastasja Sumakova, LSO CLE, *Compelling Capacity and Medical Evidence*, October 2015 at 40.

[213] Ed Montigny, Notes on Capacity to Instruct Counsel, February 2011 at 2, online: https://cleoconnect.ca/ylr-files/files/resource_files/1299611679NotesonCapacitytoInstructCounsel-FINAL-Feb1111.pdf [accessed on February 10, 2020]

[214] *Costantino v Costantino*, 2016 ONSC 7279 at para 56(f).

[215] *Torok v Toronto Transit Commission*, 2007 CanLII 15479.

risk of alternatives, and a reasonable range of possible outcomes, both positive and negative.[216]

Justice Price explained the rationale behind the capacity to instruct counsel in litigation proceedings in the case of *Costantino v Costantino*:

> In determining a litigant's capacity to instruct counsel, the court is concerned with the person's decision making over the entire duration of the proceeding. The litigant must decide, at every point in the proceeding, whether to continue the proceeding or to offer to settle it. In making this decision, the litigant must consider the costs and benefits of settlement and of continuing to litigate. If at any time an offer to settle is received, the recipient must decide whether or not to accept it, and the longer a decision is deferred the greater the potential cost consequences.[217]

A lawyer who believes a person to be incapable of giving instructions should decline to act, unless doing so would cause "imminent and irreparable harm."[218]

4.2.2 Capacity to Commence Litigation

In the context of litigation, and ongoing legal proceedings, the client must have the capacity to sue or commence litigation or continue litigation on their own behalf. If found to be incapable of doing so, a litigation guardian or guardian *ad litem* will be appointed.

Individuals who are "under a disability" whether due to infancy (those under the age of 18) or due to mental incapacity, are unable to commence litigation. The English case of *Kirby v Leather,*[219] provides an oft-cited definition of "a person under disability" with respect to ability to instruct counsel in litigation proceedings:

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[216] *Torok v Toronto Transit Commission*, 2007 CanLII 15479 at para 40.

[217] *Costantino v Costantino*, 2016 ONSC 7279 at para 56(d).

[218] Law Society of Alberta, *Code of Conduct*, Rule 3.2-15, Commentary [2]

[219] [1965] 2 ALL ER 441 (CA).

> Whether the person in question is capable, aside from any disability established by law, such as infancy, to instruct counsel and to exercise judgment in relation to the claims in issue and the possible settlement, as a reasonable person would be expected to do.

Kirby has been cited with approval in cases across Canada.[220]

This rule regarding "persons under disability" is also codified across Canada in the provincial *Rules of Court* or *Rules of Civil Procedure*.

For example, in Alberta, under the *Alberta Rules of Court*,[221] Rule 2.11 provides that certain individuals must have a litigation representative to bring or defend an action or participate in an action or for an action to be brought or continued against them. This includes an adult who "in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions."[222] The *Adult Guardianship and Trusteeship Act* defines "capacity" as: the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of: i) a decision, and, ii) a failure to make a decision.[223]

Also, an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act*, "in respect of whom no person is appointed to make a decision about a claim" must also have a litigation representative.[224] These litigation representatives may

[220] See for example, *Boury v Iten*, 2019 BCCA 81 at para 47, *Pavlick v Hunt and Gagnon*, 2005 BCSC 285 at para 19, *Walker v Manufacturers Life Insurance Company*, 2015 BCCA 473 at para 29, *Kennedy v Saskatchewan Cancer Foundation*, 1990 CanLII 7806 (SK QB) at para 11, *Ms R v WA (Re Rule 60)*, 2000 ABQB 975 at para 11, *Chung v Dale*, 2018 ONSC 1820 at para 29, *Coffey v Bassett*, 2001 CanLII 3797 (NC SC)..

[221] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11.

[222] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11 (c).

[223] *Adult Guardianship and Trusteeship Act*, SA 2008, c A 4.2, s 1 (d).

[224] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11 (d).

be automatic,[225] self-appointed,[226] or court appointed.[227] The litigation representative does not become the party to the litigation, but are "more of a vehicle than a driver."[228]

Mental incapacity is frequently a basis upon which litigants oppose motions to enforce settlements. The procedural safeguards of appointing a litigation guardian are designed for the protection of not only the incapable litigant, but also the other parties to the litigation and to protect the integrity of the judicial process for all participants in the litigation including the court and court procedures.[229]

Further, Alberta's *Limitations Act,*[230] tolls or suspends the limitation period for a plaintiff during any time which that person is "under a disability." In *WP v Alberta (No 1),*[231] Justice Rooke cited *Wirtanen v British Columbia,*[232] for determining the requisite factors to determine whether an individual is "under a disability" and unable to commence litigation thereby tolling the limitation period:

a) Is the plaintiff cognizant of the facts giving rise to the cause of action? For example, is the plaintiff aware that there was a motor vehicle accident, injury suffered, and may be able to sue and collect money?

b) Does the plaintiff understand the nature and purpose of the proceedings, including the respective roles of the judge, jury and counsel?

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[225] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(a) and 2.13.

[226] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(b) and 2.14.

[227] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(c) and 2.15

[228] *Innes v Ferguson*, 2018 ABQB 959 at para 6.

[229] *626381 Ontario Ltd v Kagan, Shastri, Barristers & Solicitors*, 2013 ONSC 4114; *Murphy v Carmelite Order of Nuns*, 2004 CarswellOnt 9965, *Lico v Griffiths*, [2008] OJ No 1018 (SC); *Bilek v Constitution Insurance*, [1990] OJ No 3117 at para 2, *Costantino v Costantino*, 2016 ONSC 7279 at para 56(g).

[230] RSA 2000, c L-12, section 5.

[231] *WP v Alberta (No1),* 2013 ABQB 295, upheld, 2014 ABCA 404, leave to appeal to SCC dismissed 2015 CanLII 23005 (SCC).

[232] 1994 CanLII 888 (BCSC), [1995] 2 WWR 723 (BCSC).

c) Does the plaintiff comprehend the personal import of the proceedings? Is she able to form a rational judgment about the effect of the action on her interest? Specifically, she must be able to understand what costs mean and comprehend enough of the information provided to her to appreciate the consequences of winning and losing; and,

d) Is the plaintiff able to comprehend legal advice being given to her? Is she able to instruct counsel and make critical decisions on counsel's advice?[233]

In this decision, the parties appealed the dismissal of their claim, arguing that the ultimate limitation period (which otherwise would bar their action) was suspended under section 5 during any period of time that the claimant was a "person under disability." The appellants did not however, meet the definition of "person under disability." The appellants did not show that they were represented adults as defined in the *Adult Guardianship and Trusteeship Act,* or a person in respect of whom a certificate of incapacity is in effect under the *Public Trustee Act*, or an adult who is unable to make reasonable judgments in respect of matters relating to a claim. The Court of Appeal denied their appeal, stating:

> We note that, in addressing their lack of knowledge of and whether they were "person[s] under disability", the appellant relies largely on cases from other provinces, notably British Columbia and Ontario. Each province, however, can legislate its own policy preferences as to general limitations: *Castillo v Castillo*, 2005 SCC 83 at para 5, [2005] 3 SCR 870. We are obliged in this case to implement the expressed will of Alberta's Legislature, and no other. And, *Alberta's legislators chose to allow suspension of the running of the ultimate limitation period only in exceptionally narrow circumstances.* It is difficult – and they intended that it be difficult – for plaintiffs to persuade a court that the ultimate limitation period should not run for a period of time. It will be a rare case where deliberate concealment of the fact of an injury, or a condition which disables a claimant from making reasonable judgments, can be established within the meaning of sections. [emphasis added][234]

[233] *WP v Alberta (No 1)*, 2013 ABQB 295 at para 78, citing *Wirtanen v British Columbia*, 1994 CanLII 888 (BCSC), 98 BCLR (2d) 355 (SC) at paras 20-24.
[234] 2014 ABCA 404 at para 38.

Justice Schlosser in the Alberta case of *Innes v Ferguson*,[235] confirmed that the rules regarding the appointment of a litigation representative for a person under a disability to sue by their litigation representative does not detract from the fact that the claimant remains a person under a disability. The limitation period for a person under a disability remains open-ended and potentially perpetual despite the requirements under the new rules for a litigation representative.[236]

4.3 The Capacity to Marry

Traditional marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support. Yet, at the time of marriage, parties regularly, as a matter of course, fail to consider other relevant facets of the marital union; namely, the obligation to provide financial support, the enforced sharing of equity acquired during the marriage, and the impact it has on the disposition of one's estate.

All too often, civil marriages are being solemnized, even though one of the parties to the marriage may not possess the requisite decisional capacity to truly understand and appreciate their decision to get married. As a result, there has been an increase in the number of unscrupulous individuals who prey upon vulnerable older adults with diminished capacity. These relationships can be appropriately described as predatory marriages.

[235] 2018 ABQB 959.

[236] 2018 ABQB 959 at para 7.

Predatory marriages are particularly devastating to a vulnerable older adult for several reasons. First, these marriages are not easily challenged. The factors that are applied in determining the requisite capacity to marry are found in the common law, not statute, and are anything but rigorous. Cases which deal with claims to void or declare a marriage a nullity on grounds of incapacity often cite long-standing common law cases from England such as *Durham v Durham,*[237] for the principle, "the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend."[238] In Canada, to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.

Some Canadian provinces and territories have marriage legislation that contemplates the necessity of capacity to marry. For example, in Ontario pursuant to section 7 of the *Marriage Act,*[239] "no person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason." Manitoba provides that persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that the individual is able to understand the nature of marriage and its duties and responsibilities.[240]

A minority of provincial legislation in British Columbia, New Brunswick, and Quebec provides that a caveat can be lodged with an issuer or marriage licenses against the

[237] (1885), 10 P.D. 80 [*Durham*].

[238] *Ibid*, at 82.

[239] R.S.O. 1990, c. M.3

[240] *The Marriage Act*, CCSM c. M50, section 20.

issuing of a license to persons named in the caveat. Once lodged, the caveat prevents the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it.[241] In spite of the various legislation on commissioning a marriage, it appears there is no diligence in heeding the provisions since marriages continue to be convened where there is no apparent attention paid to capacity and consent. Once a marriage is solemnized, there are serious financial and property concerns for a vulnerable adult who is in a predatory marriage.

A valid marriage still automatically revokes a previous Will in many Canadian provinces and territories. This revocation of a Will upon marriage can raise serious consequential issues when a vulnerable adult marries, yet, lacks the requisite capacity to make a new Will thereafter or dies before a new Will can be executed. For example, the vulnerable adult, unaware or unable to make a new Will (especially because the requisite testamentary capacity is a much high threshold than that required to marry), will die intestate and the predator will likely inherit under provincial intestacy legislation. In Ontario, under the intestacy provisions of Part II of the *Succession Law Reform Act*,[242] when a person dies intestate in respect of property and they are survived by a married spouse without issue, that spouse is entitled to the property absolutely. Where a spouse dies intestate in respect of property having a net value of more than $350,000.00 and is survived by a spouse and one child, the spouse is entitled to the $350,000.00 absolutely

[241] *Marriage Act*, RSBC 1996 chapter 282, section 35; *Marriage Act*, RSNB 2011, c 188, section 19; *Civil Code of Québec*, CQLR c CCQ-1991, articles 372.

[242] *Succession Law Reform Act*, RSO 1990, c. S.26, ss.44-49.

(this is called the preferential share) while the remaining assets are split one half to the spouse and one half to the child. If the deceased had more than one child, the spouse will get the preferential share of $350,000.00, along with one third of the remaining estate funds.

Some provinces have now recognized this inequity as an issue and have enacted legislation to prevent revocation of Wills upon marriage. Marriage does not revoke a Will in Quebec. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage no longer revokes a will.[243] British Columbia followed suit by including the provision that a marriage will not revoke a prior will when drafting *WESA* which came into force on March 31, 2014.[244] In 2019, Saskatchewan introduced Bill 175, *An Act to amend The Marriage Act, 1995 and to make consequential amendments to The Wills Act*, *1996*. Under this act, which received Royal Assent on March 16, 2020, marriage no longer revokes a Will in Saskatchewan. Marriage also no longer revokes a Will in Yukon since Bill 12, *Amend the Wills Act, 2020*, came into force on May 1, 2021. Finally, Ontario's Bill 245, *Accelerating Access to Justice Act, 2021*, was tabled in February 2021 and included amendments which repealed the revocation of a Will by marriage. Changes to the *SLRA* came into effect on January 1, 2022.

The following cases address these issues of decisional capacity and the "capacity to marry" and involve similar fact situations: *Cadieux v. Collin-Evanoff*,[245] *Hart v. Cooper*,[246]

[243] *Wills and Succession Act*, SA 2010, c W-12.2.

[244] *Wills, Estates and Succession Act*, SBC 2009 c 13.

[245] *Cadieux v Collin-Evanoff*, 1988 CanLII 524 (QCCA)

[246] *Hart v. Cooper,* 1994 CanLII 262 (BCSC).

Banton v. Banton,[247] *Barrett Estate v. Dexter*,[248] *Feng v. Sung Estate*,[249] *Hamilton Estate v Jacinto,*[250] *A.B. v. C.D.,*[251] *Petch v. Kuivila,*[252] *Ross-Scott v. Potvin,*[253] *Juzumas v. Baron*,[254] *Elder Estate v. Bradshaw*,[255] and most recently, *Asad v. Canada (Citizenship and Immigration*)[256] *Devore-Thompson v. Poulain*,[257] *Hunt v. Worrod*,[258] *Chuvalo v. Chuvalo,*[259] and *Tanti v. Tanti*.[260]

1998 – Banton v Banton - ON

In the case of *Banton,* an 84-year-old man made a Will, dividing his property equally among his five children. He moved into a retirement home where he met Ms. Yassin, a 31-year-old waitress at the restaurant. Despite his condition as a terminally ill with prostate cancer, Ms. Yassin arranged their marriage at her apartment in 1994. Despite a persuasive medical assessment which found Mr. Banton incapable of managing property, Justice Cullity held surprisingly, that Mr. Banton had the requisite capacity to marry and declined to find the marriage invalid or void.

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[247] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244 [*Banton*].

[248] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).

[249] *Feng v Sung Estate,* 2003 CanLII 2420 (ONSC)

[250] *Hamilton v. Jacinto*, 2011 BCSC 52 (CanLII).

[251] *A.B.v. C.D.* 2009 BCCA 200.

[252] *Petch v. Kuivila* 2012 ONSC 6131.

[253] *Ross-Scott v. Potvin* 2014 BCSC 435.

[254] *Juzumas v. Baron* 2012 ONSC 7220.

[255] *Elder Estate v. Bradshaw* 2015 BCSC 1266.

[256] *Asad v Canada (Citizenship and Immigration)* 2017 CanLII 37077 (CA IRB).

[257] *Devore-Thompson v. Poulain*, 2017 BCSC 1289.

[258] *Hunt v. Worrod,* 2017 ONSC 7397.

[259] *Chuvalo v. Chuvalo*, 2018 ONSC 311 [*Chuvalo*].

[260] *Tanti v. Tanti*, 2020 ONSC 8063.

When Mr. Banton was 84 years old, he made a Will leaving his property equally among his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year-old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer and was castrated. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent. Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a power of attorney in favour of Ms. Yassin, and a Will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a power of attorney. However, in 1995, shortly after the new identical documents were prepared, a further capacity assessment was performed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Justice Cullity in *Banton* reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors to determine requisite testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care and capacity to marry according to the provisions of Ontario's *Substitute Decisions Act, 1992,* SO 1992, c 30.[261]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and,

[261] *Banton*, *supra* note 247 at para 33.

ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[262] Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions of whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[263] In reaching this conclusion, Cullity J. importantly, drew a significant distinction between the concepts of "consent" and of "capacity," finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[264] Importantly, there was no medical or expert evidence for the court to consider addressing requisite capacity to marry.

2017 – Hunt v Worrod - ON

In the 2017 case of *Hunt,* Kevin Hunt suffered a catastrophic brain injury in an ATV accident. Several days after returning from the hospital, his on-again, off-again romantic interest, Ms. Worrod, whisked him off to get married. His adult sons' contacted the police. The Court in *Hunt,* examined extensive medical evidence for the period surrounding the marriage and concluded Mr. Hunt could not understand the duties and responsibilities a marriage creates, declaring the marriage void *ab initio*.

[262] *Ibid,* at para 136.

[263] *Ibid.* In Canadian law, a marriage may be either void or voidable. It is void if either party lacks capacity to marry, in which case anyone with an interest, such as a child of a previous marriage, or the personal representative has standing to attack the marriage on that ground. In contrast, undue influence and duress render a marriage voidable only. In this case, only the parties have standing to contest the validity of the marriage and only while both parties are living. Other interested persons lack standing, although not all courts seem to be aware of the distinction.

[264] *Ibid.* at paras 140-41.

In this decision, the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, whether the marriage was *void ab initio*? Justice Koke started the court's analysis by citing *Ross-Scott v. Potvin* 2014 BCSC 435:

> A person is capable off entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.[265]

Evidence dealing with the issue of capacity was presented at trial. This evidence came both in the form of expert medical testimony and medical reports as well as the oral testimony of lay witnesses. Several medical professionals had found that prior to the marriage and shortly after, Mr. Hunt demonstrated the following severe cognitive and physical impairments:

- Significant impairments to his executive functioning, such as his ability to make decisions, organize and execute tasks;
- A neurologically based lack of awareness of his deficits and impairments, making it difficult for him to experience fully what is happening around him as well as to infer consequences of events which might jeopardize his personal safety;
- He demonstrated little emotional reactivity as well as apathy, demonstrated by a lack of initiation and motivation;
- He should not be left alone and continued to need supervision for safety reasons as well as to remind him to take his medications;
- His driver's license was revoked;
- He had difficulty initiating conversation and needed cuing to provide additional information; and,
- He had limited range of motion in his left shoulder, difficulties with balance, some residual left neglect, and his ability to walk was impaired when he performed more than one task at a time.

After reviewing extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite

[265] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para 177.

capacity to marry and declared the marriage to be *void ab initio*. Unlike the majority of predatory marriage cases which make it to trial, this case is markedly different since Mr. Hunt is not an older person and he is still living. This meant that, while clearly vulnerable, a consideration of his personal autonomy and his safety and wellbeing in the future was necessary.

2017 – Devore-Thompson v Poulain - BC

Also in 2017, the case of *Devore-Thompson*[266] saw the British Columbia Supreme Court set aside the marriage of Ms. Walker and Mr. Floyd Poulain. Ms. Walker, an older adult with Alzheimer's met Mr. Poulain in a local mall when he asked for five dollars, her address, and phone number. After making changes to her Will to his benefit in 2007, the two married in 2010. The Court found Ms. Walker lacked the requisite decisional capacity and declared the marriage void *ab initio*.

The Court also set aside two Wills based on the testator's lack of testamentary capacity. This lengthy decision had been the first case since the 2014 case of *Ross-Scott v. Potvin* to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry. Mr. Poulain claimed that he had no knowledge of Ms. Walker's health condition and that he never observed anything out of the ordinary in her behaviour. He testified that even in September of 2010 when Ms. Walker was admitted to the hospital, she was fine, there was no change in her memory or other cognitive function from the time that he knew her. The Court nevertheless found that the evidence

[266] 2014 BCSC 435 [*Devore-Thompson*].

showed a consistent campaign by Mr. Poulain to try to get access to Ms. Walker's funds post-marriage:

In the decision, Justice Griffin provided a thorough review of the evidence before her and ultimately concluded that Ms. Walker did not have the requisite decisional capacity to marry and as such the marriage to Mr. Poulain was *void ab initio*. Her Honour also found that, based on the evidence, Ms. Walker did not have capacity to execute a Will in 2009 or even in 2007, leaving the question of Ms. Walker's estate open for further inquiry. Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."[267] Referring to *Hart v. Cooper*, [1994] B.C.J. No. 159 (B.C.S.C.) at paragraph 30, Justice Griffin confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates." Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161 (S.C.C.), Justice Griffin observed:

> the common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the "lowest level of understanding" in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's

[267] *Ibid*, at para 43.

> future in that it will be an exclusive mutually supportive relationship until death or divorce.[268]

Relying on the evidence presented at trial, Justice Griffin concluded:

As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level. Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage. Finally, Griffin J. held that given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its implications at the time of the Marriage including: who she was marrying in the sense of what kind of person he was; what their emotional attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her life on a day to day basis and in future. It was concluded that Ms. Walker did not have the capacity to enter the Marriage. As a result, the Marriage is void *ab initio*. Because the Marriage is void *ab initio*, s. 15 of the *Wills Act* does not apply and, therefore, the Marriage does not revoke the prior wills.

With respect to the 2009 Will, the Court concluded that the circumstances surrounding the document were suspicious and held, based on the evidence presented, that Ms.

[268] *Ibid*, at paras 46-48.

Walker did not have testamentary capacity at the time the 2009 Will was purportedly signed.

The niece sought an order propounding the 2007 Will should she succeed on other issues. The original copy of the 2007 Will was unavailable. Forgoing the technical Probate Rules, Madam Justice Griffin found that here too, the practical and first issue to be decided was whether the deceased had capacity to make a Will. Relying on preceding evidence, her Honor concluded that on a balance of probabilities Ms. Walker lacked capacity to execute the 2007 Will. The Court declined to determine the future of Ms. Walker's estate as it had not been asked to do so.

2018 – Chuvalo v Chuvalo - ON

Finally, in the 2018 case of *Chuvalo* the Court dealt with the requisite capacity to reconcile in the case of George Chuvalo, former 5-time Canadian heavyweight boxing Champion. Mr. Chuvalo, in significant cognitive decline, was determined to lack the requisite capacity to reconcile with his ex-wife, Joanne. The Court in *Chuvalo* held that this determination is situation specific depending on the intentions and terms of the contemplated reconciliation.

George Chuvalo, now retired, was a legendary boxer who fought over 93 fights throughout his 22-year career. He was a five-time Canadian Heavyweight champion, a two-time world heavy weight challenger, and his accolades include two matches against the Great Muhammad Ali. His famed status as a boxer was achieved despite his losses to Ali. In their last fight George went the distance, all 14-rounds, rallying at the end and

withstanding knockout. Now, at 80 years old media articles[269] have reported on George Chuvalo's significant cognitive decline and his children's fight to have their father's expressed wishes recognized by a court. Specifically, over the last two years, Chuvalo's children have been in a fierce legal battle with Joanne Chuvalo, their father's spouse Joanne, however, seemingly seeks to reconcile and not divorce Chuvalo in spite of separation.

In their Application, the children, on behalf of their father, reportedly raised allegations of kidnapping, brainwashing, and extortion, reckless spending and alleged that Joanne preyed on George Chuvalo's vulnerable mental state to "extort cash money".[270] In her decision dated January 12, 2018, Justice Kiteley decided that Chuvalo "does not have capacity to decide whether to reconcile" with Joanne and further noted that she need not decide whether he has the capacity to divorce.[271]

Justice Kiteley began her analysis with a review of the decision in *Calvert v. Calvert*,[272] which dealt primarily with the issue of whether the applicant wife had the capacity to form the requisite intention to separate from her husband. In that case, the Court relied on the expert evidence of Dr. Molloy in finding that the applicant had the requisite capacity to separate from her husband. Dr. Molloy opined that to be competent to make a decision,

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[269] Mary Ormsby, "The Fight Over Boxing Legend George Chuvalo", The Toronto Star, November 3, 2017, online: https://www.thestar.com/news/canada/2017/11/03/the-fight-over-boxing-legend-george-chuvalo.html ; Mary Ormsby, "George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules", The Toronto Star, January 13, 2018, online: https://www.thestar.com/news/gta/2018/01/13/george-chuvalo-lacks-capacity-to-decide-on-his-marriage-judge-rules.html.

[270] *Ibid*.

[271] *Ibid*, at paras 16-17.

[272] *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON SC), aff'd 1998 CarswellOnt 494; 37 OR (3d) 221 (CA), leave to appeal to SCC refused May 7, 1998.

a person must: understand the context of the decision; know his or her specific choices; and appreciate the consequences of the choices.[273]

In addition, her Honour considered and cited, *Banton v. Banton*[274] and *Feng v. Sung Estate*,[275] in relying on the following principles: "an individual will not have the capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves";[276] and "a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[277] Justice Kiteley also relied on that espoused in the recent decision of *Hunt v. Worrod*:[278]

> The consensus of opinion from the medical experts and witnesses, evidence which I note was un-contradicted by other medical experts, is that Mr. Hunt lacked the ability to understand the responsibilities or consequences arising from a marriage, and that he lacked the ability to manage his own property and personal affairs as a result of the injuries he sustained on June 18, 2011. The Court concluded that the requirement for an individual to understand and appreciate the consequences of making or not making a decision to reconcile were consistent with the medical parameters outlined in Dr. Shulman's report as well as the jurisprudence (referenced).[279]

[273] *Chuvalo*, *supra* note 259 at para 52.

[274] 1998 CarswellOnt 3423, 1998 CanLII 14926, 164 DLR (4th) 176 (Ont Gen Div).

[275] (2003) 1 ETR (3d) 296, 37 RFL (5th) 441 (Ont SCJ), affd 11 ETR (3d) 169, 2004 CarswellOnt 4512 (ONCA).

[276] *Chuvalo*, *supra* note 200 at para 55.

[277] *Chuvalo*, *supra* note 200 at para 56.

[278] *Hunt v. Worrod*, 2017 ONSC 7397, para 91, para 58 of *Chuvalo*.

[279] *Chuvalo*, *supra* note 200 at para 59.

2020 – Tanti v. Tanti (Ontario)[280]

The Ontario case of *Tanti* involves an elderly man, Paul Tanti, who married his younger live-in companion, Sharon Joseph. The case raises questions about the referenced low threshold for the capacity to marry.

Paul and Sharon met in 2014 through a community organization where Paul was looking for help painting the exterior of his home. After this initial project, Paul and Sharon began traveling and socialising together. By 2017, the two referred to themselves as "companions" when speaking with family, friends, and professionals. By early 2018, Sharon moved into Paul's house. Eventually, Paul proposed, and the two were married in July 2019.

Professor Albert Oosterhoff has written, "witnesses who attended the ceremony testified that Paul was able to answer the minister's questions clearly and that Paul let them know that he loved Sharon and was happy to be married to her. A photo confirmed the couple's happiness."[281]

Paul's son, Raymond Tanti, disliked Sharon and on July 31, 2019, upon learning about the marriage, Paul became verbally abusive. On the same day of Raymond's tirade, Paul and Sharon attended the law office of Desmond Brizan where Paul met with the lawyer alone and provided instructions to draft a Power of Attorney in favour of Sharon. Mr. Brizan testified that Paul had sufficient capacity in providing these instructions.[282]

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[280] *Tanti v. Tanti*, 2020 ONSC 8063 [*Tanti* 2020].
[281] "Yet Another May-December Marriage," https://welpartners.com/blog/2021/01/yet-another-may-december-marriage/. Posted 22 January 2021.

[282] *Tanti* 2020, *supra* note 280 at paras. 25-26.

After meeting with the solicitor, Sharon departed for a two-week trip to visit family members in Grenada. Within days of her departure, Raymond met with Paul's banker who informed him that Sharon was now listed as Paul's Power of Attorney. Raymond then took Paul for an urgent assessment with a gerontologist, Dr. Varga. Dr. Varga found that, "Paul's cognitive reasoning was impaired and that he lacked the capacity to handle his financial and medical affairs."[283] Dr. Varga did not, however, provide an opinion on Paul's capacity to marry. Dr. Varga referred Paul for a second opinion. The second doctor reported that Paul lacked the capacity to grant a Power of Attorney but did not opine on his capacity to marry. Raymond then obtained a third opinion from another gerontologist "who opined that Paul lacked the capacity to marry, since he did not seem to recollect the marriage."[284]

On August 29, 2019, Raymond moved Paul to his home in Toronto. A week later, while Sharon was still out of the country, Raymond brought an application for support, alleging Paul had "become subject to manipulation and perhaps loss and misappropriation of funds at the hands of a hired caregiver, Sharon Joseph." In September 2019, Justice Harris granted Raymond's application. Upon her return, Sharon submitted a motion to set aside the order. Section 3 Counsel was also designated to Paul. While Paul's counsel took no position on the validity of the marriage, "everyone agreed that by this time Paul lacked capacity to instruct counsel or otherwise to participate in the application."

Raymond brought an application seeking:

- A declaration that Paul is incapable of managing property and personal care,

[283] *Ibid*, at paras. 29

[284] *Ibid.*

- Guardianship of Paul's property and personal care,
- Custody of Paul,
- An order permitting him to lease and eventually sell Paul's home,
- An order freezing all bank accounts jointly held by Paul and Sharon; and,
- An order suspending the Power of Attorney granted by Paul to Sharon.

Between November and December of 2020, Justice Mandhane presided over a video conference hearing and found no evidence to substantiate Raymond's claims. Mandhane J. referred to recent cases in discussing the law on capacity to marry while referring to well known principles and re-iterated that the test is simple, and capacity is fluid. Mandhane. J. held that pursuant to *Lacey v. Lacey (Public Trustee of)*, [1983] B.C.J. No. 1016 (S.C.), "understanding the content of the marriage contract does not require a high degree of intelligence; the parties must agree to live together and love one another to the exclusion of all others."[285]

Additionally, Mandhane J. held that pursuant to *Hunt v. Worrod*, in the face of a legal marriage, Raymond has the burden of satisfying that Paul lacked capacity to marry Sharon.[286]

Mandhane J. admitted opinions of three gerontologists, however, did not give this evidence much weight as the reports were retrospective (prior to Paul's decision to marry), and the doctors opinions were not contemporaneous with the marriage. Most of

[285] *Ibid*. at para. 43.

[286] *Ibid*. at para. 38.

the weight in the Court's decision was placed on direct evidence about Paul's capacity leading up to the marriage, considering the following factors:

a) The couple's relationship prior to the marriage;
b) Paul's cognitive capacity leading up [to] and immediately after the marriage;
c) Paul's understanding of the marriage ceremony and vows, and the obligations it created; and
d) Paul's interactions with professionals contemporaneous to the marriage.[287]

Professor Oosterhoff wrote: "The parties were in a long-term relationship that developed and deepened over a five-year period. Raymond's allegations of predation on the part of Sharon were not proved." Noting that, Paul's decision was ultimately rational and "the fact that Sharon stood to benefit financially from the relationship was irrelevant in the absence of duress."

Sharon's cost claims were discounted because her "approach to the litigation unreasonably increased her costs," however, she was awarded full-indemnity costs against Raymond because of his egregious conduct.

In the appeal of Mandhane J.'s 2020 decision, the Ontario Court of Appeal was tasked with examining the determination of capacity of a person to enter a marriage in *Tanti v. Tanti* (2021).[288]

On September 12, 2019, Paul's son Raymond sought a guardianship order of Paul's property and person. Justice Harris of the Superior Court of Justice granted this order.[289]

[287] *Ibid*. at para. 58.

[288] 2021 ONCA 717 [*Tanti* 2021].

[289] *Ibid*. at paras. 3-6.

The Office of the Public Guardian and Trustee then appointed counsel for Paul in November 2019. Ms. Joseph brough a motion to set aside the order granted to Raymond and Ms. Joseph was added as a party to the proceedings. On December 22, 2020, Justice Mandhane determined the marriage was valid.

On May 27, 2021, Justice Trimble of the Ontario Superior Court of Justice granted a stay of the guardianship proceedings pending the disposition of the appeal. The Ontario Court of Appeal ruled this was a procedural issue, holding that the only issue before the Court was Mandhane J.'s decision on the validity of marriage. The appeal was dismissed.

The Appellant, Raymond Tanti, raised five grounds of appeal:

1. The Trial Judge applied the wrong test to determine Paul's capacity to marry.
2. The Trial Judge relied on her own research without allowing parties to make submissions on the point.
3. The Trial Judge failed to accept certain evidence.
4. The Trial Judge accepted evidence of a lay witness without meaningful cross-examination.
5. The Trial Judge demonstrated a reasonable apprehension of bias necessitating a new trial.

The Court of Appeal found that the trial judge instructed herself on the relevant law regarding a person's capacity to marry. In reviewing the trial decision at paragraphs 40 to 46, the Court agreed with Mandhane J.'s determination of capacity as a fluid concept (decision, time, situation specific) and that requirements vary significantly and must be applied to a specific decision, act or transaction at issue. The Court held that Mandhane J.'s decision that Paul possessed the requisite capacity to marry was based on four days

of testimony from eight witnesses and that these facts were correctly applied to the capacity test outlined at paragraphs 40 to 46.[290]

While the Court agreed there was some indication of Paul's decline prior to the marriage, it found no persuasive evidence that at the time of marriage "his cognitive status had diminished to the point that he was unable to make decisions regarding his day-to-day affairs or living arrangements."[291] In reaching a conclusion, the Court found that Mandhane J. rejected or discounted evidence of several experts while relying on direct evidence of a lawyer Paul consulted and gave instructions to regarding a Power of Attorney over property at the time of the marriage.

The Court was satisfied Mandhane J. instructed herself properly on the test for validity of a marriage, holding that "She correctly stated that, for a marriage to be valid, the parties must understand the nature of the marriage contract and the duties and responsibilities that flow from it. She properly emphasized that the inquiry into the validity of a marriage is situation specific."[292] The Court also found that the trial judge did not err by rejecting expert evidence, holding that instead, there was a cogent explanation for not being persuaded: the expert evidence was not contemporaneous with the marriage.

From a historical perspective, it is apparent that there is no single or complete definition of marriage, or, of the requisite decisional capacity to marry, or even what the consent to marry involves. Rather, on one end of the judicial spectrum, there exists a view that

[290] *Ibid*. at paras. 11-12.

[291] *Ibid*. at para. 13.

[292] *Ibid.* at para. 21.

marriage is but a mere contract, and a simple one at that. Yet, on the other end of the spectrum, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property, or both, in order to enter into a valid marriage.

There are serious consequences that can arise from a finding of capacity to marry. This can be demonstrated by the potential for life-altering consequences flowing from a marriage and the increasing prevalence of "predatory marriages," which are a form of exploitation and abuse for financial profit.[293] Arguably, the requisite criteria for establishing capacity to marry were developed at a time when the financial consequences of marriage were not as significant as they are today. This notion, in conjunction with the observation that our society is aging at a rapidly accelerating rate, leads to the conclusion that the criteria for the capacity to marry, if left unchanged, will prompt an increase in the incidence of predatory marriage.

5. THE STATUS OF ELECTRONIC WILLS AND REMOTE WITNESSING

When the *Uniform Wills Act* of 2015 was created, it carried forward the policy on electronic wills adopted by the Uniform Law Conference of Canada in 2010: "That policy provided that an electronic version of a will could only be validated by a court exercising its power to approve a will which, while not meeting the formal requirements, nevertheless represented, by clear and convincing evidence, the final testamentary intentions of the

[293] Those interested in learning more about this topic may wish to refer to: Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70; Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 ETPJ 24; and Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

deceased."[294] The Uniform Law Conference of Canada (ULCC) adopted a new policy, "that accepts that electronic documents, including wills, are part of the main stream, and sets out the formal requirements for an electronic will to be valid, without a further court application." Now, both the 2020 *Uniform Wills Act* and the *Uniform Enduring Powers of Attorney Act* regularize provisions relating to the electronic format of wills and powers of attorney. However, the ULCC was careful to note that "even in 2020, there is still some reticence, usually articulated around the authenticity and reliability of electronic documents. Some have concerns about fraud or lack of authenticity of electronic documents, and therefore suggest that the statute should contain detailed provisions to address this."[295] The ULCC first looked at the built-in protections in the context of the wills and estates practice, holding that there are three important elements:

1) Framework statutes that set up basic norms relating to testamentary capacity, formal validity, revocation, intestate succession and estate administration;
2) Surrogate rules that prescribe the forms and their content, and fill in the details of how the evidence of estate administration takes place; and
3) Practice protocols for how a lawyer or notary goes about the business of creating wills and powers of attorney.

The ULCC found there were three primary issues related to concerns of electronic wills. The first asks, if there is a need for the Uniform Act to include provisions to ensure the authenticity of electronic wills? ULCC concluded no, but each jurisdiction may wish to develop regulations or practice protocols. The second issue, is an electronic document more likely to be subject to undetectable change? The ULCC held that, "the validity of an

[294] Uniform Law Conference of Canada, "Amendments to the *Uniform Wills Act* (2015) Regarding Electronic Wills (2020 Amendments)" Uniform Law Conference of Canada, Annual Meeting, August 2020, para 3 [ULCC].

[295] *Ibid*, at para 16.

electronic will can be attested to and challenged as part of the probate application," and that "electronic documents provide better information to parties entitled to notice, who may have an interest in challenging the authenticity of a will." The third and final issue, is the remote/electronic witnessing process more likely to be subject to fraud? The ULCC concluded that a prudent practitioner negates these worries and "it is noted that currently most provisions for remote signing and witnessing in jurisdictions in response to COVID-19 require a lawyer or notary to be involved in providing legal advice to the testator."

The province of British Columbia is the only jurisdiction in Canada which allows for a Will to be in electronic form, signed by an electronic signature. In 2020, British Columbia amended *WESA* through *Bill 21: Wills, Estates and Succession Amendment Act, 2020* ("Bill 21"), which received Royal Assent on August 14, 2020. This Bill amends *WESA* by providing new definitions and amending section 35.1 to allow for electronic form, signatures, and witnessing. The Bill also added section 35.2 to *WESA* which recognizes an electronic presence and section 35.3 which recognizes the use of an electronic signature. The Bill also adds procedures for altering and revoking an electronic Will.

Alberta

On June 26, 2020, the *Wills and Succession Act* was amended to allow for Wills to be signed and witnessed through an electronic mode of communication that enables parties to see, hear and communicate in real time. This amendment comes through the issuing of the *Remote Signing and Witnessing (Effective Period) Regulation* (Ministerial Order 47/2020) dated July 15. The Order, however, holds that a Will in Alberta can be signed and witnessed remotely until August 15, 2022. One of the witnesses must be an active

lawyer as defined in the *Legal Profession Act*.[296] It amends the following legislation in Alberta: *Personal Directives Act,*[297] *Powers of Attorney Act*[298] and *Wills and Succession Act*.[299]

British Columbia

During the pandemic, British Columbia enacted numerous ministerial orders under the *Emergency Program Act*.[300] These included Ministerial Order No. M162 (*Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements (COVID-19) Order)*. This Order allowed for and provided requirements for the remote witnessing of enduring powers of attorney and representation agreements.[301] This Order was repealed on July 10, 2020, when *Bill 19 – 2020: COVID-19 Related Measures Act*[302] came into force. Later that summer on August 14, 2020, Bill 21 received Royal Assent. Under that Bill, section 35.2 was added to *WESA*, allowing for the remote witnessing of wills. In British Columbia, "Remote witnessing is permitted where two or more individuals in different locations communicate simultaneously to an extent that is similar to communication that would occur if all the individuals were physically present in the same location."[303]

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[296] RSA 2000, c L-8.

[297] RSA 2000, c P-6.

[298] RSA 2000, c P-20.

[299] SA 2010, c W-12.2.

[300] [RSBC 1996] Ch. 111.

[301] *Ibid*.

[302] [SBC 2020] Ch. 8.

[303] *Ibid*.

Manitoba

Effective October 1, 2021, Manitoba enacted regulations which make changes to the remote witnessing of wills, power of attorney, and other documents permanent. The Law Society of Manitoba announced that, "Both witnesses to a will executed by the testator by video conference must be together when they watch the testator sign the will and again when they affix their signatures as witnesses. Multi-party video conference execution of wills is no longer acceptable." New regulations to: *Powers of Attorney Act,*[304] *Wills Act*,[305] *Manitoba Evidence Act*,[306] *Homesteads Act*,[307] *Real Property Act*,[308] *Health Care Directives Act*.[309]

New Brunswick

On December 18, 2020, *An Act Respecting the Enduring Powers of Attorney Act and the Wills Act,*[310] received Royal Assent. This Act amended the *Enduring Powers of Attorney Act*[311] and the *Wills Act*,[312] "by allowing remote witnessing and signature of wills and enduring powers of attorney using an electronic means of communication. These amendments are to be in effect until December 31, 2022. The Law Society of New Brunswick confirms that from December 18, 2020 to December 31, 2022, they are "able

[304] C.C.S.M. c. P97.
[305] C.C.S.M. c. W150.
[306] C.C.S.M. c. E150.
[307] C.C.S.M. c. H80.
[308] C.C.S.M. c. R30.
[309] C.C.S.M. c. H27.
[310] SNB 2020, c 31.
[311] SNB 2019, c 30.
[312] RSNB 1973, c W-9.

to support clients with the execution of wills or powers of attorney remotely with the assistance of electronic means of communication in which all persons are able to see, hear and communicate with one another in real time, to the same extent as if the persons were communicating in person in the same location."[313]

Newfoundland and Labrador

Pursuant to the *Temporary Alternate Witnessing of Documents Act,*[314] Newfoundland now permits the witnessing of Wills where the witness is a lawyer by audio-visual technology. This, however, must be done in conjunction with the Law Society's Rule 18, which requires practitioners to identify and verify the client's identity and mitigate risks commonly associated with fraud, identity theft, undue influence, duress, and potential lack of capacity.

Nova Scotia and Prince Edward Island

Nova Scotia and Prince Edward Island have no legislation or regulations which deal with remote signing or witnessing.

Ontario

Effective August 1, 2020, Ontario legislation O. Reg 431/20, Administering Oath or Declaration Remotely, remote commissioning of documents is permitted on certain conditions that lawyers and paralegals must follow: the commissioning takes place by an

[313] Law Society of New Brunswick, "Law Society of New Brunswick Directives for Remote Execution and Witnessing of Wills and Powers of Attorney in the Context of the COVID-19 Pandemic." 2020, online: https://lawsociety-barreau.nb.ca/en/for-lawyers/covid-19.

[314] SNL 2020, c T-4.001.

electronic method of communication in which the commissioner and the deponent can see, hear, and communicate with each other in real time throughout the entire transaction and the commissioner confirms the identity of the deponent (for example by examining a copy of the deponent's driver's license).

On April 7, 2020, Lieutenant Governor in Council made an Order under s. 7.0.2(4) the *Emergency Management and Civil Protection Act,*[315] temporarily permitting the virtual execution of wills and powers of attorney through audio-visual communication technology during COVID-19. In taking steps to make some of these changes permanent, Ontario's Bill 245, *Accelerating Access to Justice Act, 2021*,[316] received Royal Assent on April 19, 2021, making significant reforms to Ontario's estate law. Bill 245 amended the *Succession Law Reform Act* and the *Substitute Decisions Act* retroactively to April 7, 2020 in line with the provisions of the previous emergency order. While remote witnessing of wills through audio-visual means is now permanent in Ontario, at least one of the persons acting as a witness must be a licensee within the meaning of the *Law Society Act* at the time (a lawyer or a paralegal), and the making or acknowledgment of the signature and subscribing of the will are contemporaneous.

Quebec

The Quebec Bar has issued guidelines about the execution of wills by lawyers, roughly translated it provides that:

[315] R.S.O. 1990, c. E.9.

[316] S.O. 2021, c. 4.

1. Electronic signatures of the testator and witnesses are permissible as long as the technology used permits identification of the testator and witnesses and confirmation of the testator's consent;
2. The testator and witnesses must be able to see and hear each other simultaneously so that the witnesses can hear the testator's declaration that the document is her/his will and everyone sees each other signing the document;
3. The testator and witnesses must be able to see the will; and
4. The integrity and confidentiality of the will and the signing process must be maintained.

Saskatchewan

Saskatchewan has enacted a series of regulations related to electronic or remote witnessing. In 2020, the Law Society of Saskatchewan shared that:

> we are happy to announce that today, the Government of Saskatchewan repealed the temporary emergency regulations related to remote execution of certain documents and wills and replaced those regulations with permanent regulations allowing for remote execution of documents via electronic means (i.e. video calls) to continue long-term beyond the end of the public emergency period.[317]

With OC 388/2020 – The Wills Regulations (Minister of Justice and Attorney General), Regulations (RRS L-10.2 Reg 2) permits the remote witnessing of wills using electronic means where one of the two required witnesses is a lawyer. This regulation amends *The Wills Act*.[318] With the enactment of OC 389/2020 – The Powers of Attorney (Remote Witnessing) Amendment Regulations, 2020 (Minister of Justice and Attorney General), Regulations (RRS P-20.3 Reg 1) permit lawyers to witness powers of attorney executions remotely using electronic means. This regulation amends the *Powers of Attorney Act*.[319]

[317] Law Society of Saskatchewan, "Remote Executing Of Certain Documents And Remote Witnessing Of Wills By Electronic Means Legislation Now Permanent" August 7, 2020, online: https://www.lawsociety.sk.ca/uncategorized/remote-executing-of-certain-documents-and-remote-witnessing-of-wills-by-electronic-means-legislation-now-permanent/.

[318] 1996, W-14.1.

[319] 2002, P-20.3.

The Law Society of Saskatchewan has also published Practice Directive 3 and Form PD3 – Declaration of Lawyer Who Has Witnessed a Will via Electronic Means, which enables lawyers to act as one of two witnesses. Lawyers are required to complete Form PD3 every time they witness a will via electronic means.

CONCLUDING COMMENTS

For various reasons, estate claims leading to litigation are on the rise. Some of the factors identified include the rising housing market, the historical anticipated transfer of wealth, and complications due to the increased lifespan and longevity of older adults. As litigation thrives, so too, do emotions and unfortunately, the conduct of the parties to litigation. As this paper has demonstrated, courts are more than even willing to advance costs for substantial and full indemnity where a parties' conduct is so reprehensible that it negatively impacts the litigation. Some of these contentious matters also involve complex allegations of elder abuse, and as discussed, the most obvious cases are being dealt with by involving law enforcement and charging the offending parties under the *Criminal Code of Canada*. However, as also demonstrated, sometimes the abuse is not so obvious; in cases of predatory marriages, a vulnerable older adult is often the victim of psychological and financial abuse. Legislative amendments which seek to remove the revocation of a previous Will by a subsequent marriage offer some relief in plugging a legislative gap which allows unscrupulous individuals to prey on vulnerable older adults.

Since the nature of an estates and trusts practice evolves, practitioners must be mindful of remote changes that are here to stay; in British Columbia, for the first time in Canadian history, remote wills are permitted in that province. It is only a matter of time before the rest of the country follows suit since most of these provinces have already created their

own regulations and provisions during the pandemic to allow for remote witnessing of wills and powers of attorneys.

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

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