DECISIONAL CAPACITY:
A Wills & Estates Context

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1. INTRODUCTION

Lawyers require an understanding of decisional capacities when servicing clients in an aging demographic. Capacity considerations are complex, and the prevalence of capacity concerns will only increase as Canada's population continues to age rapidly. Longer life expectancy accounts, in part, for an increase in the occurrence of medical issues affecting mental capacity. There are a wide variety of disorders that affect one's decisional capacity and increase an individual's susceptibility to being vulnerable and dependent.

Acting for clients who appear to suffer from diminished mental capacity can raise complex ethical issues for lawyers. Importantly, detection is not simple. A heightened degree of care, diligence, and professionalism is required. Important too, are developing measures such as probative questioning, fact checking strategies, and consideration of medical assessment.

This paper will provide an overview of decisional capacity, with a focus on decisional capacity issues arising in the wills, estates, and the elder law context. This paper pulls from cases across Canada, and in particular, case law and legislation in Alberta, referencing the different criteria or factors to be applied for determining legal decisional capacity.

Demographics: Current Trends

To understand the importance of capacity issues in 2022, we must examine current trends in our demographics. Our populations worldwide are aging rapidly. Globally, we are facing the largest demographic shift in the history of humankind. According to data from the *United Nations, "World Population Prospects: the "2019 Revision by 2050,"* one in six people in the world will be over 65, up from 1 in 11 in 2019. By 2050, one in four persons living in Europe and North America could be aged 65 or over. Persons aged 65 or above have outnumbered children under five years of age globally for the past few years. The

number of persons aged 80 years or over is projected to triple, from 143 million in 2019, to 426 million in 2050.[1]

Closer to home, in 2019 there were more than 6.5 million Canadians over the age of 65 years, and, over 10,000 centenarians.[2] According to various projection scenarios, the proportion of seniors (aged 65 and older) will increase to between 21.4% and 29.5% in 2068. The increase in this group is expected to be the most pronounced between now and 2030, a period during which all members of the Baby Boomer cohort will reach 65 and over. The number of older seniors (aged 80 and over) will continue to increase rapidly in the coming years, particularly between 2026 and 2045 as the Baby Boom cohort enters this age group. According to projection scenarios, the population aged 80 and over, will increase from 1.6 million in 2018 to between 4.7 million and 6.3 million by 2068.[3] In Canada, a man's life expectancy is now 86, while a woman's life expectancy is now 89.[4]

According to the most recent statistics from the Alzheimer Society (Canada), there are over half a million Canadians living with dementia, plus about 25,000 new cases diagnosed every year. By 2031 that number is expected to rise to 937,000, an increase of 66 per cent.[5] Dementia refers to a set of symptoms and signs associated with a progressive deterioration of cognitive functions that affect daily activities. It is caused by various brain diseases and injuries. Alzheimer's disease is the most common cause of dementia.

According to the United States' Alzheimer's Society, Alzheimer's is the 6th leading cause of death with no cure in that country. 5.8 million Americans are living with the disease. By

[1] United Nations, *2019 Revision of World Population Prospects*, online: https://population.un.org/wpp/ [accessed on 02/10/20]
[2] Statistics Canada, *Table 17-10-0005-01 Population Estimates on July 1st by age and sex*, online: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000501 [accessed on 02/10/20]
[3] Statistics Canada, *Population Projections for Canada (2018-2068)*, online: https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/hi-fs-eng.htm [accessed on 02/10/20]
[4] Statistics Canada, *Summary of Long-Term Projection Scenario Assumptions, Canada*, online: https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/sect01-eng.htm [accessed on 02/10/20]
[5] Alzheimer Society, Canada, *Latest Information and Statistics*, online: https://alzheimer.ca/en/Home/Get-involved/Advocacy/Latest-info-stats [accessed on 02/10/20]

2050, it is projected that this number will rise to 14 million. Every 65 seconds someone in the United States develops the disease.[6]

Keeping in mind these statistics and Canada's aging demographic, this next section will look at legal capacity.

2. CAPACITY IN GENERAL

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."[7] 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."[8]

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.[9] This presumption is found in both legislation across Canada and in case law. Alberta's *Adult Guardianship and Trusteeship Act*,[10] states: "an adult is presumed to have the capacity to make decisions until the contrary is determined."[11] Ontario's *Substitute Decisions Act, 1992*[12] 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 years of age or

[6] The Alzheimer's Society (United States), *2019 Alzheimer's Disease Facts and Figures*, online: https://www.alz.org/media/Documents/alzheimers-facts-and-figures-infographic-2019.pdf [accessed on 02/10/20]
[7] See chart, "Cross-Provincial Capacity Legislation"
[8] Gerald B Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Carswell 1994), at 179.
[9] *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)
[10] SA 2008 c A-4.2
[11] *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.
[12] SO 1992 C 30.

more is presumed to be capable of giving or refusing consent in connection with his or her own personal care."[13]

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.[14] 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.[15] 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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[13] *Substitute Decisions Act, 1992*, SO 1992 c 30, s 2(1) & (2).
[14] 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.
[15] 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.

3. CAPACITY TO MAKE A WILL

The leading case on testamentary capacity, *Banks v Goodfellow*,[16] is now 150 years old and remains the authority in England, Canada and the rest of the common law world. There are several recent testamentary capacity cases across Canada that have cited and applied *Banks v Goodfellow*.[17]

The key passage from *Banks v Goodfellow* is as follows:

[16] (1870), [1861-1873] All ER Rep 47, 39 LJQB 237, [1871] LR 11 Eq 472, LR 5 QB 549, 22 LT 813 (Eng QB)

[17] **Alberta**: *Christensen v Bootsman*, 2014 ABQB 94; *Mah v Zukas Estate*, 2016 ABQB 587; *Wasylynuk v Bouma*, 2018 ABQB 159; *Mawhinney v Scobie*, 2019 ABCA 76, reversing 2017 ABQB 422, leave to appeal refused, 2019 CarswellAlta 1654 (SCC), *Re From Estate*, 2019 ABQB 988. **British Columbia**: *Laszlo v Lawton*, 2013 BCSC 305; *Devore-Thompson v Poulain*, 2017 BCSC 1289; *Re Singh Estate*, 2019 BCSC 272; *Halliday v Halliday Estate*, 2019 BCSC 554. **Manitoba**: *Schrof v Schrof*, 2017 MBQB 51. **New Brunswick**: *Marsden v Talbot*, 2018 NBCA 82, affirming *Re Estate of Jean Agnes Marsden*, 2017 NBQB 199. **Nova Scotia**: *Wittenberg v Wittenberg Estate*, 2015 NSCA 79, affirming 2014 NSSC 301; *Whitford v Baird*, 2015 NSCA 98, affiriming *Re Baird Estate*, 2014 NSSC 266. **Ontario**: *Orfus Estate v Samuel & Bessie Orfus Family Foundation*, 2013 ONCA 225, affirming 2011 ONSC 3043; *Walman v Walman Estate*, 2015 ONSC 185; *Yeas v Yeas*, 2017 ONSC 7402; *Birtzu v McCron*, 2017 ONSC 1420; *Stekar v Wilcox*, 2017 ONCA 1010, affirming 2016 ONSC 5835; *Shannon v Hrabovsky*, 2018 ONSC 6593*; Dujardin v Dujardin,* 2018 ONCA 597, affirming 2016 ONSC 6980; *Slover v Rellinger*, 2019 ONSC 6497 & unreported *voir dire* Court File No CV-16-005069-00ES, 21 February 2019 (Ont SCJ); *Graham v Graham*, 2019 ONSC 3632; *Kay v Kay Sr*, 2019 ONSC 3166; *Quaggiotto v Quaggiotto*, 2019 ONCA 107, affirming 2018 ONSC 345; **Quebec**: *Gidney v Lemieux*, 2016 QCCA 1381; **Saskatchewan**: *Cutts v Phillips*, 2016 SKQB 126, *Bachman v Scheidt*, 2016 SKCA 150, affirming 2016 SKQB 102; *Karpinksi v Zookewich Estate*, 2018 SKCA 56, affirming 2017 SKQB 278; *Olson v Skarsgard Estate* 2018 SKCA 64, *Carlson v Carlson (Estate),* 2018 SKQB 196.

> It is essential to the exercise of [the testamentary power] that the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[18]

Courts will often break this paragraph down into separate step-by-step considerations. An example is set out in John Poyser's text, *Capacity and Undue Influence*:

> It is essential to the exercise of [the testamentary power] that a testator:
>
> 1) Shall understand the nature of the act and its effects;
>
> 2) Shall understand the extent of the property of which he is disposing;
>
> 3) Shall be able to comprehend and appreciate the claims to which he has to give effect; and,
>
> 4) With a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, of the mind had been sound, would not have been made.[19]

In order for the testator to understand ***the "nature of the act and its effects,"*** the first essential element of *Banks v Goodfellow,* the testator must actually understand the making of *this particular* will, not will-making in general.[20]

In determining whether the testator understood the ***"extent of the property,"*** the testator was giving away, courts have been clear that the testator does not need to have

[18] *Banks v Goodfellow*, (1870), [1861-1873] All ER Rep 47, 39 LJQB 237, [1871] LR 11 Eq 472, LR 5 QB 549, 22 LT 813 (Eng QB) at 565.
[19] John E S Poyser, *Capacity and Undue Influence*, 2nd ed (Toronto: Thomson Reuters, 2019) at 42.
[20] See *Hoff v Atherton*, [2004] EWCA Civ 1554 at para 35, and Albert H Oosterhoff, "A Review of Testamentary Capacity in Canada with Reference to Recent Cases", Isaac Pitblado Lectures, November 8, 2019 at 5.

"encyclopedic knowledge,"[21] or the "precise makeup" of her estate as long as she has a general idea, or "general structure" of the types of property she owns.[22]

The third element, ***"claims to which the testator ought to give effect"*** is often raised by disappointed heirs and others who had expected to inherit. This criterion requires the testator to appreciate who would have a natural claim to the testator's accumulated assets. Then the testator must use a rational mind to decide to include or exclude members of that group from her will.[23] The testator has testamentary freedom to exclude whomever she chooses, however, if she suffers from a mental disorder that causes her to disinherit close relatives, the court will not let the will stand.[24]

The fourth element from *Banks v Goodfellow* ensures ***that "no disorder of the mind shall poison,"*** and ***"no insane delusions shall influence"*** the testator's will. *Banks'* defines an insane delusion as one that causes the testator to dispose of his property in a way that would not have been made if the mind had been sound. In several cases a will has been struck down for delusions that resulted in a partial or total disinheritance of the testator's family. In *Smee v Smee*,[25] the testator believed that he was the illegitimate son of King George IV. In *Corbett v Wall,*[26] the testator believed that his daughter had wired his chair and given him an electric shock. Other delusions that have invalidated wills included the testator believing that two of her brothers alienated her from her mother in *Re Fawson Estate,*[27] and delusions that children opposed their father's connection to a church in *Fuller Estate v Fuller*.[28]

The Court of Queen's Bench of Alberta in 2019 addressed the aspect of memory and presence of delusions when assessing testamentary capacity. The case, *Re From*

[21] *Quaggiotto v Quaggiotto*, 2019 ONCA 107 at para 7, affirming 2018 ONSC 345.
[22] See *Orfus Estate v Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043 at para 106, affirmed 2013 ONCA 225 at para 60.
[23] Albert H Oosterhoff, "A Review of Testamentary Capacity in Canada with Reference to Recent Cases". Isaac Pitblado Lectures, November 8, 2019 at 6.
[24] See *Sharp v Adam*, [2006] EWCA Civ 449.
[25] (1879), 5 PD 84 (CA).
[26] [1939] 2 DLR 201 (NBCA).
[27] 2012 NSSC 55.
[28] 2004 BCCA 218.

Estate,[29] is of note for two reasons. First, it traces and endorses a line of cases[30] that stand for the proposition that a delusion as to character, or motive, can invalidate a will, with or without a concurrent delusion as to fact. An example of the former is "my son is dishonest." An example of the later is "my son stole my car." The two statements are different, but there is authority, now buttressed in some measure by *Re From Estate*, suggesting that a delusion of either category is sufficient to overturn a will. Second, the decision cites earlier authority and joins a line of cases[31] citing power of memory as the "grand criterion" for testamentary capacity. Without memory, there can be no valid will, since the criteria from *Banks v Goodfellow* draws heavily on the will-maker's ability to recall and recount assets and objects of bounty.

In a will challenge case, the standard of proof is the normal civil standard, requiring proof on the balance of probabilities.

The propounder of the will must prove due execution, knowledge and approval, and testamentary capacity. However, if a will has been executed in accordance with the prescribed formalities, after it was read over to the testator who appeared to understand it, the presumption that the testator had capacity and knew and approved the contents is raised.[32] Other cases suggest that the presumption is triggered simply if the will has been properly executed.[33] This presumption may be rebutted by evidence of what is referred to in many decisions as "suspicious circumstances," in which case the burden reverts to the propounder.[34] Suspicious circumstances typically refer to any circumstances surrounding the execution of a planning document and may involve circumstances

[29] 2019 ABQB 988.
[30] *Re From Estate*, 2019 ABQB 988 at paras 132-134, citing *Sweetnam v Lesage*, 2016 ONSC 4058, *Royal Trust Corp of Canada v Saunders*, 2006 CanLII 19424, [2006] OJ No 2291,at para 61, *Watts Estate (Re)*, 1933 CarswellNB 9 (NBSCAD) at para 8-9, *Re Weidenberger Estate* 2002 ABQB 861, *O'Neil v Royal Trust Co* [1946] SCR 622.
[31] *Re From Estate* 2019 ABQB 988 at para 123 citing *Simpson v Gardners Trustees*, (1833) 11 Ct of Sess Cas 1049 (Scottish Ct of Sess) at 1051-52; *Murphy v Lamphier*, 31 OLR 287 (HC), aff'd 20 DLR 906, 32 OLR 19 (CA); and *Re Fraser Estate* (1932), 26 Alta LR 551, [1932] 3 WWR 382 at para 19 (CA).
[32] *Vout v Hay*, [1995] 2 SCR 876 at para 27. See also the recent cases of *Mawhinney v Scobie*, 2019 ABCA 76 at para 9, application for leave to appeal dismissed, 2019 CanLII 73207 (SCC); *Wilton v Koestlmaier*, 2019 BCCA 262 at paras 24-25, and *Dujardin v Dujardin,* 2018 ONCA 597 at paras 44-45.
[33] Albert H Oosterhoff, "A Review of Testamentary Capacity in Canada with Reference to Recent Cases". Isaac Pitblado Lectures, November 8, 2019 at 14.
[34] *Vout v Hay,* 1995 CanLII 105 (SCC), [1995] 2 SCR 876.

tending to call into question the capacity of the testator, or grantor, and in circumstances that show that the free will of the testator, or grantor, was overborne by acts of coercion or fraud.[35] In the trial decision of *Orfus Estate v Samuel & Bessie Orfus Family Foundation*,[36] Justice Penny referred to the case of, *Royal Trust Corporation of Canada v Saunders*[37] in commenting whether there are suspicious circumstances the court may consider:

1) The extent of physical and mental impairment of the testator around the time the will is signed;
2) whether the will in question constitutes a significant change from the former will;
3) whether the will in question generally seems to make testamentary sense;
4) the factual circumstances surrounding the execution of the will; and,
5) whether a beneficiary was instrumental in the preparation of the will.[38]

Testamentary capacity is a legal construct, and while often presented, medical evidence is not required.[39] While expert medical evidence can be helpful in assisting a court to determine a person's capacity at a particular point in time, in itself it is not determinative.[40] Whether a testator has the requisite capacity to make a will is a question of fact to be determined in all of the circumstances. The assessment is highly individualized and a fact-specific inquiry.

The question of testamentary capacity focuses on the time at which instructions are given, not necessarily when the will is executed. Though, as our case law expands, we know

[35] *Vout v Hay*, 1995 CanLII 105 (SCC), [1995] 2 SCR 876.
[36] 2011 ONSC 3043, affirmed 2013 ONCA 225.
[37] 2006 CanLII 19424 (ON SC).
[38] *Orfus Estate v Samuel & Bessie Orfus Family Foundation et al*, 2011 ONSC 3043 at para 110, affirmed 2013 ONCA 225, citing *Royal Trust Corporation of Canada v Saunders*, 2006 CanLII 19424 (ON SC) at para 78.
[39] *Stevens v Morrisroe*, 2001 ABCA 195 at paras 19-20, leave to appeal denied, [2001] SCCA No 483, *Mah v Zukas Estate*, 2016 ABQB 487 at para 56.
[40] *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 95.

this to be a factor,[41] the rule in *Parker v Felgate* [42] however, provides that even if the testator lacked testamentary capacity at the time the will was executed, the will is still valid if:

(a) The testator had testamentary capacity at the time he or she gave the lawyer instructions for the will;

(b) The will was prepared in compliance with those instructions; and,

(c) When the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his or her own previous instructions.

Courts have cautioned that the rule in *Parker v Felgate* can only be applied where the instructions for the will were given to a lawyer. In other words, even if the testator provided instructions to a non-lawyer at a time when the testator had testamentary capacity, and that layperson then conveyed those instructions to a lawyer, the resulting will could not be valid if the testator lacked testamentary capacity on the date of its execution.

A solicitor drafting a will is obliged to assess the client's testamentary capacity prior to preparing the will. The drafting lawyer must ask probing questions and be satisfied that the testator not only can communicate clearly, and answer questions in a rational manner, but also that the testator has the ability to understand the nature and effect of the will, the extent of the testator's property and all potential claims that could be expected with respect to the estate.

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[41] *Banton v Banton*, 1998, 164 DLR (4th) 176; *Eady v Waring* (1974), 2 OR (2d) 627 (CA): "While the ultimate probative fact which a Probate Court is seeking is whether or not the testator has testamentary capacity at the time of the execution of his will, the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proven incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself." at p. 639 [emphasis added], para. 178.

[42] *Parker v. Felgate*, (1883), 8 PD 171, most recently cited in *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 102.

Capacity to Revoke a Will

A testator who seeks to revoke a will requires testamentary capacity.[43] This is especially clear in cases where a testator revokes a will by executing a later will or document.

As for revocation by physical destruction, however, for that decision to be a capable decision, the testator must be able to understand the nature and effect of the destruction and revocation at the time the will is destroyed and must have testamentary capacity at the time of the destruction. If the testator lacks that ability at the time of the destruction of the will, then the will is not deemed properly revoked.[44] It is extremely important as a result, to know when precisely a will was destroyed, and if at that time, the person was capable of revoking his will.

In the case of *Goold Estate (Re)*,[45] the Court of Queen's Bench of Alberta dealt with the issue of the long-standing presumption that if a will, last known to be in the custody of the testator, is not found at the testator's death, than, the testator destroyed it with the intention of revoking it, otherwise known as the "presumption of revocation." In this case, the executors named in a holograph will, the original of which had gone missing, argued that the presumption did not apply in this case as there was an issue as to whether the testator had capacity to revoke her will. Justice Yungwirth relied on the Ontario Court of Appeal decision of *Sorkos v Cowderoy,*[46] wherein it was stated as "doubtful" that the presumption of revocation applied where a testator had likely lost capacity to revoke a will by the date at which the impugned will went missing.[47] The facts involved consideration of several years having passed since the testator executed a holograph will, together with evidence of her subsequent diminishing capacity and incapacity during this period. Ultimately, Justice Yungwirth found that the applicants had the burden of establishing that

[43] *Polischuk Estate v Perry*, 2014 BCSC 1089 at para 64, confirming principles set out in *Re Broome*, 1961 CanLII 394 (MBCA), 29 DLR (2d) 631, and *Goold Estate (Re),* 2016 ABQB 303 at 57, aff'd *Goold Estate v Ashton*, 2017 ABCA 295.
[44] This principle is outlined in the English case of *Re. Sabatini* (1969), 114 Sol. J 35 (Prob. D.), as well as in Canadian case law: *Re. Beattie Estate,* [1944] 3 WWR 727 (Alta Dist Ct) at 729-730, *Re Drath* (1982), 38 AR 23 (QB) at 537. For more detailed discussion on revocation and destruction of wills, please see Gerald Robertson, *Mental Disability and the Law in Canada*, 2nd ed, (Toronto: Carswell, 1994) at 224 to 225. See also *Re Green (Estate)* 2001 ABQB 835 at para 34.
[45] 2016 ABQB 303, aff'd *Goold Estate v Ashton*, 2017 ABCA 295.
[46] 2006 CanLII 31722 (ONCA) at para 11.
[47] *Goold Estate (Re)*, 2016 ABQB 303 at para 60.

the will was destroyed while the testator was of sound mind, and, they did not discharge this burden. Justice Yungwirth also found sufficient evidence to rebut the presumption that the testator intended to revoke the holograph will.

As revocation requires testamentary capacity, in cases where a testator makes a will and then subsequently and permanently loses testamentary capacity, that testator cannot revoke that will. The only exception to this is, in most provinces, but not in Alberta, British Columbia, Quebec, and now Ontario, where a testator marries (and has capacity to marry) at which time the will is effectively revoked. [48]

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 even dies before a new Will can be executed.

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 now no longer revokes a Will.[49] British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("WESA") came into force.[50] Under WESA, marriage now no longer revokes a Will. 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 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 *Succession Law Reform Act* (the "*SLRA"*)[51] came into effect on January 1, 2022.

[48] *Re. Beattie Estate* [1944] 3 WWR 727 (Alta Dist Ct).
[49] *Wills and Succession Act,* SA 2010, c W-12.2.
[50] *Wills, Estates and Succession Act*, SBC 2009 c 13.
[51] Succession Law Reform Act, R.S.O. 1990, c. S.26

Capacity to Make a Codicil

Various provincial legislation defines a "will" as including a "codicil."[52] Therefore, capacity to make a codicil is determined on the criteria applied to determining testamentary capacity.

4. CAPACITY TO MAKE AN *INTER VIVOS* GIFT

Making a gift during one's lifetime is characteristically different than making a gift through a testamentary instrument. *Inter vivos* gifts come in all different shapes and sizes and can include a small cash gift, or the gift of a deed to a substantive real property. The gift could include a very small portion of the gift-maker's possessions or could amount to their entire life savings. Testamentary gifts, on the other hand, have the same characteristics, in that the will-maker is gifting away the entirety of their estate, all their assets, and the gift takes place upon death.

There are no statutory criteria to assist with determining the requisite capacity to make a gift. Common law factors are applicable, and these factors depend in part, on the size and nature of the gift.

In general, the criteria to be applied were set out in the 1829 case of *Ball v Mannin,*[53] which found that to have capacity, a gift-maker must be able to understand the "nature and effect" of the transaction, if the gift-maker were given a full explanation of its basic terms. This has been refined over the years through various cases and is easily divided into two requirements. In order to be capable of making a gift, a donor requires the following:

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

[52] See *Wills, Estates and Succession Act*, SBC 2009, c 13 section 1(1); *Wills and Succession Act*, SA 2010, c W-12.2, section 1(1); *The Wills Act*, 1996, SS 1996, c W-14.1, section 1(1); *The Wills Act*, CCSM c W150, section 1; *Succession Law Reform Act*, RSO 1990, c S 26, section 1(1); *Wills Act*, RSNB 973, c W-9, section 1; *Wills Act*, RSNS 1989, c 505, 2(f); Probate Act, RSPEI 1988, c P-21, section 1(t); *Wills Act*, RSNL 1990, c W-10, section 11 (and see *King Estate v. Hiscock*, 2015 CanLII 78084 (NLSC)); *Wills Act*, RSY 2002, c 230, section 1; *Wills Act*, RSNWT 1988, c W-5, section 1; *Wills Act*, RSNWT (Nu) 1988, c W-5, section 1.
[53] (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 ER 1241 HL (Irish Court of Exchequer).

b) The ability to understand the specific effect of the gift in the circumstances.[54]

The 1977 English decision of *Re Beaney,*[55] re-iterated the criteria set out in *Ball v Mannin. Re Beaney* was subsequently adopted and followed in Canadian case law. [56]

The law on capacity to make a gift was also discussed in the 1953 British Columbia decision of *Royal Trust Co v Diamant.*[57] In that case, Justice Whittaker determined that the "degree of mental incapacity which must be established in order to render a transaction *inter vivos,* invalid, is such a degree of incapacity as would interfere with the capacity to *understand substantially the nature and effect of the transaction*."[58] *Royal Trust Co v Diamant* has been cited favourably in a large number of subsequent cases on capacity to make a gift.[59]

This approach was further supported in the case of *Re Bunio (Estate of)*:

> A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it….[60]

Citing earlier case law on the capacity to gift, the court in *Dahlem (Guardian ad litem of) v Thore*[61] stated:

> The transaction whereby Mr. Dahlem transferred $100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore.

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[54] See *Royal Trust Company v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; and *Bunio v Bunio Estate* 2005 ABQB 137 at paras 4 and 6.
[55] [1978] 1 WLR 770, [1978] 2 ALL ER 595 (Ch D).
[56] See for example, *Lynch Estate v Lynch Estate*, 1993 CanLII 7024 (ABQB) at para 96; *MacGrotty v Anderson*, 1995 CanLII 2952 (BCSC) at para 20(2); *Elsie Jones (Re)*, 2009 BCSC 1723 at para 100; *Estate of Emiel Cyrille Van de Keere*, 2012 MBQB 33 at para 27; *Gironda v Gironda*, 2013 ONSC 4133 at para 99; *Wasylynuk v Bouma*, 2018 ABQB 159 at para 123; *Gordon Estate (Re)*, 2018 BCSC 487 at para 44, *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11; *Slover v Rellinger*, 2019 ONSC 6497 at para 277; and *Bolster Estate(Re)*, 2020 ABQB 100 at para 21.
[57] [1953] (3d) DLR 102 (BCSC).
[58] *Royal Trust Co v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; most recently cited and applied in *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 103 and *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11.
[59] *Ewart v Abrahams* (1988), 22 BCLR (2d) 138 (CA) at 143; *Dahlem (Guardian ad litem of) v Thore* (1994) 2 ETR (2d) 300 at para 45, 47 ACWS (3d); *Booth Estate v McGowan* (1998), 72 OTC 115, [1998] OJ No 3464 (SCJ) at para 52; *Lodge (Attorney for) v Royal Trust Corp of Canada*, 2003 BCSC 1416 at para 51; *St.Onge Etsate v Breau*, 2009 NBCA 36 at para 29; *York v York*, 2011 BCCA 316 at para 38
[60] *Re Bunio (Estate of)*, 2005 ABQB 137 At para 4.
[61] [1994] BCJ No 809 (SC).

> On the authority of *Kooner v.Kooner* (1979), 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.[62]

While some case law suggests the onus is on the person attacking the gift to prove the incapacity of the maker, [63] the general consensus is that the onus is on the party alleging a valid gift to prove that the gift-maker had capacity.[64] The standard of proof is always the civil standard, requiring proof on a balance of probabilities. A gift or other *inter vivos* wealth transfer is void, not voidable, for want of capacity.[65]

Significant Gifts

The determination of the requisite capacity to gift changes if the gift is significant in value in relation to the donor's estate. In such cases, the applicable capacity criteria applied changes to that required for capacity to make a will, that is, testamentary capacity.

In *Re Beaney,* the court explained the difference in approach:

> At one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on an intestacy, then the degree of understanding required is as high as that required to make a will, and the donor must understand the claims of all potential donees' and the extent of the property to be disposed of.[66]

While the court in *Re Beaney* imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law has imposed the standard of testamentary capacity for gifts that comprise less than

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[62] [1994] BCJ No 809 (SC) at para 6.
[63] Poyser at 414, citing *Rogers (Re)* 1963 CarswellBC 51. See also *Archer v St John*, 2008 ABQB 9 at para 22.
[64] *Elsie Jones (Re),* 2009 BCSC 1723 at para 5; *Breau v The Estate of Ernest St. Onge et al*, 2009 NBCA 36 at paras 27; *Lodge v Royal Trust Corp*, 2003 BCSC 1416 at para 49; *Weisbrod v Weisbrod*, 2013 SKQB 282 at para 18; *Blake v Blake*, 2019 ONSC 1464 at paras 24-25; *Slover v Rellinger*, 2019 ONSC 6497 at para 41; *The Canada Trust Company v Umanoff et al; Re Estate of John Alan Kell*, 2019 MBQB 88 at para 6.
[65] Poyser at 401.
[66] *Re Beaney*, [1978] 2 All ER 595 (Ch Div) at 601.

the majority of an estate. In an even earlier case, *Mathieu v Saint-Michel,* [67] the Supreme Court of Canada ruled that the standard of testamentary capacity applied for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it is less than the entirety of the estate, then the standard for testamentary capacity applies for the gift to be valid.

Several Canadian cases[68] have used the testamentary capacity criteria to determine whether an individual had the requisite capacity to make a substantial *inter vivos* gift, most recently in *Geluch v Geluch,*[69] where an older adult's most significant asset, her home, was "gifted" away. Justice Francis noted that if the solicitor who drafted the deed (along with a will) "had asked [the older adult] the *Banks v Goodfellow* questions and recorded the answer in his file, it would no doubt assist this Court in determining the validity" of the transfer. Ultimately, Justice Francis concluded that while the older adult was capable of executing the property transfer, she was "not satisfied that [the older adult] *knew or approved of* the choices that she purportedly made."[70] The transfer was declared invalid.[71]

One Alberta case has gone even further and stated that testamentary capacity is required for all gifts, regardless of value. In *Petrowski v Petrowski Estate*,[72] Justice Moen concluded that:

> The mental capacity required to give effect to an *inter vivos* transfer is the same as that for the execution of a will. The standard for capacity applied to an *inter vivos* transfer is no less stringent than that for testamentary dispositions.[73]

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[67] [1956] S.C.R. 477 at 487
[68] *Re Rogers* (1963), 1963 CanLII 472 (BCCA0, 39 DLR (2d) 141 (CA) at 148; *Re Elsie Jones*, 2009 BCSC 1723 at paras 98-101; *Lynch Estate v Lynch Estate*, 1993 CanLII 7024 (ABQB) at para 92, *Brydon v Malamas*, 2008 BCSC 749 at para 230; *Miller v Turney*, 2010 BCSC 101 at paras 32-33, *Gironda v Gironda*, 2013 ONSC 4133 at para 99; Wasylynuk *v Bouma*, 2018 ABQB 159 at para 123; *Slover v Rellinger,* 2019 ONSC 6497 at para 277.
[69] 2019 BCSC 2203.
[70] *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 125 [emphasis added].
[71] *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 135.
[72] 2009 ABQB 196.
[73] *Petrowski v Petrwoski Estate*, 2009 ABQB 196 at para 392.

This view, that testamentary capacity is required for all *inter vivos* gifts, is not a common one, and most case authority supports the position that the requisite capacity relates to the significance of the gift.

5. CAPACITY TO GRANT POWER OF ATTORNEY / PERSONAL DIRECTIVE

The factors to determine the requisite capacity to grant or revoke a power of attorney for property or personal care or personal directive are found in provincial legislation[74] with guidance from case law.

Enduring Power of Attorney

In Alberta, the *Powers of Attorney Act*[75] governs enduring power of attorney documents which grant powers to an attorney to make financial decisions on behalf of the donor. Section 3 states:

> An enduring power of attorney is void if, at the date of its execution, the donor is *mentally incapable of understanding the nature and effect* of the enduring power of attorney. [emphasis added]

Case law has expanded upon this legislative provision. In *Re K,*[76] cited with approval in *Midtdal v Pohl*,[77] the court concluded that it "was not necessary for the donor to be capable of managing property and affairs on a regular basis" to meet these criteria.[78]

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[74] See chart:Cross-Provincial Capacity Legislation. **Ontario:** *Substitute Decisions Act, 1992*, SO 1992; **British Columbia**: *Power of Attorney Act*, RSBC 1996 c 370 at 12; *Patients Property Act*, RSBC 1996 c 349, s 9; *Adult Guardianship Act*, RSBC 1996 c 6, s 8(4); *Representation Agreement Act*, RSBC 1996, c 405 **Manitoba**: *The Powers of Attorney Act*, CCSM c P 97; *Health Care Directives Act*, CCSM c H 27; *Vulnerable Persons Living with a Mental Disabilty Act*, CCSM c V 90; **New Brunswick**: *Property Act*, RSNB 1973, c P-19; *Infirm Persons Act*, RSNB 1973, c I-8; **Newfoundland & Labrador**: *Advance Health Care Directives Act*, SNL 1995, c A-4.1; *Enduring Powers of Attorney Act*, RSNL 1990, c E-11; **Northwest Territories**: *Powers of Attorney Act*, SNWT 2001, c 15 s 7; *Personal Directives Act*, SNWT 2005, c 16; *Guardianship and Trusteeship Act*, SNWT1994 c 29; **Nova Scotia**: Adult Capacity and Decision-Making Act, SNS 2017 c 4; Powers of Attorney Act, RSNS 1989 c 352; Personal Directives Act, SNS 2008 c 8; Nunavut: Powers of Attorney Act, S Nu 2005 c 9, s 3(1); *Guardianship and Trusteeship Act*, SNWT (Nu) 1994, c 29; **PEI:** *Powers of Attorney Act*, RSPEI 1988, c P-16; *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2; **Quebec**: Civil Code of Quebec, CCQ-1991 art 2166-2174; **Saskatchewan**: *Powers of Attorney Act, 2002*, SS 2002 c P-20.3; *Adult Guardianship and Co-Decision-Making Act*, SS 2000, c A-5.3; *The Health Care Directives and Substitute Health Care Decisions Makers Act*, SS 2015 c H.0.002

[75] RSA 2000, c P-20, s 3.

[76] *Re K, Re F*, [1988] 1 ALL ER 358.

[77] 2014 ABQB 646.

[78] *Re K, Re F*, [1988] 1 ALL ER 358 at 362(j)-363(a).

Justice Moreau in *Midtdal v Pohl,*[79] also made note of specific factors to determine whether a donor has capacity to execute an enduring power of attorney:

> Capacity to execute the power of attorney would be established if the donor understood that:
>
> a) The attorney would be able to assume complete authority over the donor's affairs;
>
> b) The attorney could do anything with the donor's property that the donor could have done;
>
> c) That the authority would continue if the donor became mentally incapable; and,
>
> d) Would in that event become irrevocable without confirmation by the court.[80]

In *Pirie v Pirie*,[81] Justice Hall confirmed that these factors are the same factors to determine whether a donor has capacity to *revoke* an enduring power of attorney[82] under section 13(1) (a) of Alberta's *Powers of Attorney Act* which states: "an enduring power of attorney terminates if it is revoked in writing by the donor at a time when the donor is mentally capable of understanding the nature and effect of the revocation."

Personal Directives

Alberta's *Personal Directives Act,*[83] enables an individual to appoint an agent (by means of a personal directive) who can consent to healthcare treatment and make personal care decisions on behalf of the individual. Personal matters may include decisions related to healthcare, accommodation, participation in social, educational and employment activities, and legal matters. In some provinces, including Ontario, this document is known as a power of attorney for personal care.

The *Personal Directives Act* provides that, "any person who is at least 18 years of age and *understands the nature and effect of a personal directive* may make a personal

[79] 2014 ABQB 646.
[80] *Midtdal v Pohl*, 2014 ABQB 646 at para 92.
[81] 2017 ABQB 104.
[82] *Pirie v Pirie*, 2017 ABQB 104 at para 35.
[83] RSA 2000 c P-6.

directive."[84] Also, this *Act* provides that any person who is at least 18 years of age is "*presumed to* understand the nature and effect of a personal directive."[85]

2018 - Melin v Melin (Alberta)

The recent Alberta case of *Melin v Melin,*[86] addresses the requisite capacity to make both an enduring power of attorney, and, a personal directive. A father had appointed his adult son and adult daughter as co-attorneys under an enduring power of attorney and co-agents under a personal directive. The power to make decisions on their father's behalf was triggered upon determination by two medical professionals that the father lacked capacity to make such decisions. A few months after executing the documents, the father saw a geriatrician and his family doctor who both assessed the father's capacity and concluded that he had "neither insight nor capacity to make informed decisions about his health or finances" and signed a *Declaration of Medical Doctor* certifying that he was mentally incapable with respect to personal and financial decisions.[87] A few weeks later, at a subsequent visit, the family physician and a psychologist concluded that he improved, and he had "the ability to understand the information required for sound decisions and does with some assistance appreciate the implication of these decisions."[88] The doctors also concluded that he had "the mental capacity" to execute a new enduring power of attorney and personal directive, but with a co-decision maker.[89]

With respect to whether the father had capacity to execute the power of attorney document, the Court referred to the *Powers of Attorney Act*, *Midtdal v Pohl*, *Perie v Perie* and *Re K,* and noted that the father "must be mentally capable of understanding the nature and effect of the document and it may only be revoked when the donor is mentally capable of understanding the nature and effect of the revocation."[90] Also, that it was not necessary for the father to be capable of managing his property and affairs on a regular

[84] *Personal Directives Act*, RSA 2000 c P-6, s 3(1).
[85] *Personal Directives Act*, RSA 2000 c P-6, s 3(2).
[86] 2018 ABQB 1056.
[87] 2018 ABQB 1056 at para 41.
[88] *Melin v Melin*, 2018 ABQB 1056 at para 41.
[89] *Melin v Melin*, 2018 ABQB 1056 at paras 48-49 & 54.
[90] *Melin v Melin*, 2018 ABQB 1056 at para 70.

basis to meet the criteria for capacity to grant or revoke a power of attorney or personal directive.[91] Justice Feehan went on to observe:

> An adult is presumed to have the capacity to make decisions until the contrary is determined. I accept that there are varying levels of capacity and that the ability to manage finances, consent to treatment, stand trial, manage personal care, and make personal care or health decisions all require separate decision-making capabilities and capacities. It is not necessary for the donor of a Power of Attorney to be capable of otherwise managing his or her property and affairs on a regular basis in order to have the capacity to make or revoke a Power of Attorney. What is required is that the donor understand the nature and effect of their action to effect or revoke that document.
>
> It is also clear to me that Dale Melin's capacity to understand the nature and effect of a Power of Attorney or the revocation of a Power of Attorney has not been static.[92]

After reviewing the medical evidence, Justice Feehan concluded that the father had capacity to execute the first power of attorney and personal directive, then he suffered a loss of capacity, but had regained it when he executed the second power of attorney and personal directive documents.

2021 - Hunter v Martin (Alberta)

The case of *Hunter v Martin*[93] involves older adult, Marion Hunter, and a dispute "driven chiefly by personal animus between Marion's two former daughters-in-law and concerns over the preservation and distribution of Marion's estate."[94]

Marion Hunter, 99 years old, executed a new Immediate Enduring power of attorney, Personal Directive, and Will on March 22, 2019. She did so in her room on a locked memory-care ward of the AgeCare Midnapore facility. Marion suffered from dementia and

[91] *Melin v Melin*, 2018 ABQB 1056 at para 70.
[92] *Melin v Melin*, 2018 ABQB 1056 at paras 92-93.
[93] *Hunter v Martin*, 2021 ABQB 153 [*Martin*].

[94] *Martin*, *supra*, at para. 2.

a history of severe delirium, documented as early as 2016.[95] There is detailed evidence all the way up to February 2019 of her severe delirium.

Marion was born in New Brunswick in 1921 and lived there most of her life with her husband, Walter. Together, they had one son, Ron. Ron's first wife is the Applicant, Sheila Christine Martin ("Chris"). Ron and Chris separated in 1992 and divorced in 1997. They had two children together: Matthew and Geoffrey. In 1997, Walter died, and Marion moved to Calgary.[96] Shortly thereafter, Ron commenced a long-term relationship with the respondent, Karla Mae Hunter ("Karla"); the couple assisted Marion with some of her activities. Ron and Karla were married in 2014. In 2015, Marion sold her condo and moved into a seniors' residence.

In 2017, Ron died of cancer. Two days before his death, Marion updated her Will, personal directive and enduring power of attorney. The power of attorney documents still had Ron listed as Attorney, with Karla as an alternate. After Ron's death, Karla continued to help Marion; Marion made joint bank accounts to facilitate this. Marion suffered a continual progressive decline in her mental health. Her primary care physician, Dr. Andrea Cullingham, provided evidence that this decline correlated with Ron's death.[97] On October 31, 2018, at an annual patient care conference, with Karla and Matthew present, it was concluded that Marion's 2017 personal directive should be activated.

In late 2018, Marion began expressing financial concerns to her grandson Matthew, who relayed this to his mother Chris.[98] Chris took Marion to her bank and claimed that Marion was shocked to learn Karla was making transactions. Chris then arranged for a lawyer to see Marion, describing her as a competent adult who "knows what's what."[99] The Lawyer's notes detailed that Chris framed the situation as financial elder abuse. Chris made no mention that Marion lived on a secure memory-care floor. The lawyer spent two and a half hours with Marion, taking detailed notes. The Lawyer's firm arranged for Marion

[95] *Martin,* at para 9.
[96] *Ibid*. at paras. 4-5.
[97] *Ibid*. at para. 25.
[98] *Ibid*. at para. 26.
[99] *Ibid*. at para. 30.

to be assessed by Dr. Arlin Pachet, who testified as their expert. The firm ceased to act when the matter became litigious and the Lawyer's role as a witness became evident.[100]

The decision in *Martin* offers some cautionary advice for lawyers. The Honourable Mr. Justice N.E. Devlin held that, "In most cases, the evidence of the independent legal professional who acted for the donor or testator when estate planning documents are created will provide the best evidence of capacity. In many ways that is also true in this case, though that evidence leads to the conclusion opposite to that reached by the Lawyer himself."[101]

While Devlin J. held that the Lawyer impressed the Court, he ultimately concluded that "his perspective on the matter was excessively influenced by what he was told by Chris, who hired him and paid the bills." Most importantly, Devlin J. held that "this case provides a cautionary tale for lawyers who are drawn into complex and often highly conflictual family dramas surrounding older people's money."[102] Where it concerned the actions of the Lawyer, Devlin J. concluded that:

> I do not wish to be unduly critical of the Lawyer. His experience with this case, however, highlights the invidious trap awaiting legal professionals recruited by a third party to act on behalf of elderly individuals in the disposition/control of their assets. It is critical that lawyers in this position keep a keen eye of who their client truly is. In this instance, Chris retained and instructed the lawyer, but the real client was Marion. It is important that lawyers maintain scepticism and objectivity when drawn into these situations, obtain as much information from as many objective sources as possible and be wary of haste.[103]

The decision placed less weight on Dr. Patchet's opinion about Marion's capacity at the time of the execution of the documents in question. To Devlin J., "it was clear Dr. Patchet attempted to apply a standard of capacity lower than that with which he felt comfortable

[100] *Ibid.* at para. 70.
[101] *Ibid*. at para. 138.
[102] *Ibid*. at para. 139.
[103] *Ibid*. at para. 154.

as a health practitioner."[104] Devlin J. reiterated that in *Pirie v Pirie,*[105] Dr. Patchet opined that "the test [for capacity to execute a power of attorney] should include an analysis as to the capacity for the Revocation and new *appointment*." Yet, in the case at bar, Devlin J. held that he "learned of Marion's low MoCa test score and Dr. Patchet's assessment of her capacity at 3/10 overall only through my own questions."[106]

The decision in *Martin* looked at the capacity to grant a power of attorney, holding that in Alberta, the capacity is not defined by statute. However, s. 3 of the *Powers of Attorney Act*, RSA 2000, c P-20 outlines the degree of capacity *without* which one cannot create a plan:[107]

> **Incapacity of execution**
>
> 3. An enduring power of attorney is void, if at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.

The "nature and effect" test is derived from this provision. The leading Alberta case interpreting this standard is *Midtdal v Pohl*[108], where Moreau J. (as she then was) adopted the approach formulated by Lord Hoffman in the English decision of *Re K; Re F*[109] where it is held that the donor must possess four key facets of knowledge and awareness. The capacity to execute a power of attorney would be established if the donor understands that:

> a) the attorney would be able to assume complete authority over the donor's affairs;
>
> b) the attorney could do anything with the donor's property that the donor could have done;
>
> c) that the authority would continue if the donor became mentally incapable; and
>
> d) would in that event become irrevocable without confirmation by the court.

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[104] *Ibid*. at para. 162.
[105] 2017 ABQB 104 at para. 32.
[106] *Martin, supra*, at para. 165.
[107] *Ibid.* at para 171.
[108] 2014 ABQB 646 [*Midtdal*].
[109] [1988] 1 All ER 358 (ChD) at para. 92.

Devlin J. held that, "the requirement that a donor understands the 'nature and effect' of a power of attorney is not satisfied by the bare, abstract incantation of specified words. Rather, the donor must understand the effect of a power of attorney *on them*. In my view, this requires their conception of that effect to be tested against their circumstantial awareness."[110] Devlin J. also held that, "in assessing capacity to execute a power of attorney, it is both reasonable and desirable for the Court to inquire into the donor's relationship with reality, understanding of their own circumstances, and ability to express genuine, durable will."[111]

The Court was unable to find on a balance of probabilities that Marion understood the "nature and effect" of the 2019 POA. The 2019 POA was therefore declared invalid.

6. CAPACITY TO MARRY/SEPARATE/DIVORCE/RECONCILE

An individual must have the requisite decisional capacity to enter into a marriage; separate from one's spouse; commence divorce proceedings; and, to reconcile. The capacity criteria for each of these decisions is governed by common law.

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.

Some, but not all, provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity in order to marry yet none set out the criteria to determine that capacity. For example, certain statutes prevent a marriage commissioner from issuing a license to, or solemnizing the marriage of, someone known or with

[110] *Martin*, *supra*, at para. 180.
[111] *Ibid*. at para. 185.

reasonable grounds believe, lacks mental capacity to marry,[112] is incapable of giving a valid consent,[113] or has been certified as mentally disordered.[114]

Alberta's *Marriage Act,*[115] prohibits a person from issuing a marriage license when the person knows or has reason to believe that a certificate of incapacity under the *Adult Guardianship and Trusteeship Act*, or equivalent legislation of another jurisdiction in effect with respect to a party to the intended marriage.[116] Further, no person shall issue a marriage license or solemnize a marriage if the person knows or has reason to believe that the person is "under the influence of alcohol, or a drug."[117]

In Manitoba, 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.[118] In fact, a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered, will be guilty of an offence and liable on summary conviction to a fine.[119]

Professor Oosterhoff's blog from 2020, Modernizing the Law of Wills in Manitoba[120] addresses some of the Proposed Reform of their Wills Act and includes a summary of some of the Manitoba recommendations relevant to the within discussion on predatory marriage, divorce and undue influence. Excerpted below are the salient comments extracted from Professor Oosterhoff's blog:

"*The Manitoba Law Reform Commission published its Final Report #139, Reform of The Wills Act, The Law of Property Act, and The Beneficiary Designation Act, Revisited in*

[112] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "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."
[113] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).
[114] *The Marriage Act*, CCSM c. M50 (Manitoba).
[115] *Marriage Act*, RSA 2000, c M-5.
[116] *Marriage Act*, RSA 2000, c M-5, s 27(1)(b).
[117] *Marriage Act*, RSA 2000, c M-5, s 27(3).
[118] *The Marriage Act*, CCSM c M50, section 20.
[119] *The Marriage Act*, CCSM c M50, sub-section 20(3).
[120] Professor Oosterhoff's blog: http://welpartners.com/blog/2020/03/modernizing-the-law-of-wills-in-manitoba/

March 2020.[121] The rather cumbersome title reflects the fact that the Commission first considered reform of The Wills Act[122] in its 2003 Report 108, Wills and Succession Legislation.[123] Its recommendations were not enacted, which is why the Commission revisited the matter in its latest Report. However, the Commission did not retract the 2003 Report and it remains in force, save, as changed by the new Report.

1. *Revocation by Marriage and Common-law Relationship. Most wills statutes in Canadian provinces[124] contain a provision that a will is revoked by the marriage of the testator, unless the will contains a declaration that it is made in contemplation of the marriage. The feedback received by the Commission recommends the repeal of this provision because people are unaware of it. Further, predators take advantage of the provision by marrying older, vulnerable persons so that they can take the victims' property on their intestacy. The Commission was persuaded that Manitoba should follow the example of Alberta and British Columbia, which abolished this provision. This is a very important first step for legislators to take to frustrate the plans of predators! Is anybody in authority in Ontario listening? The Commission makes a further recommendation to include a reference to the commencement of a common law marriage if the provision is retained.*

2. *Revocation by Divorce. Most modern wills statutes contain a provision to the effect that a gift to a spouse is revoked if the parties divorce (or their common law relationship ends) unless the will provides otherwise. The Commission recommends that the Wills Act should require the registrar of the Court of Queen's Bench to accompany a decree absolute of divorce with a notice of that provision, and for the Director of Vital Statistics upon the registration of the termination of a common law relationship to do the same. In a companion recommendation, the Commission recommends that the Wills Act should state expressly that the provision does not prevent a former spouse or common law partner from relying on any agreement to which the testator is a party.*

3. *Undue Influence. The Commission sought input on the question whether the Wills Act should contain a statutory doctrine of undue influence, like that adopted by British Columbia. The British Columbia legislation[125] introduces the equitable presumption of undue influence, which applies to inter vivos gifts, into the realm of probate. That presumption is raised when the donee of an inter vivos gift stands in a confidential or fiduciary relationship to the donor and imposes a burden on the donee to rebut the presumption. There is no such presumption in the law of*

[121] http://www.manitobalawreform.ca/pubs/pdf/additional/the_wills_act_revisited_final_report.pdf (the "Report").
[122] CCSM c. W150
[123] *Wills and Succession Legislation*, Report 108, 2003. This Report is available on the Commission's website. It's list of recommendations is contained in Appendix A of the 2020 Report
[124] Except in Alberta, British Columbia, and Quebec

[125] *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 52

> *probate, where someone who attacks the will for undue influence always has the onus to prove it. Thus the British Columbia legislation imposes the onus to prove that undue influence did not exist on the propounder of will in situations of potential dependence or domination of the testator The majority of the responses received recommended that this area should be left uncodified and the Commission agreed. I believe that the British Columbia provision was misguided, because it blurs the distinction between the jurisdiction of the court exercising its probate jurisdiction and its interpretive jurisdiction. That distinction is centuries old and is well-worth preserving."*[126]

In Ontario, Section 7 of the *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what he/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*.[127]

In British Columbia, the *Marriage Act,*[128] makes it a criminal offence to issue a license for a marriage, or to solemnize a marriage, when the authority in question knows, or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.[129] The British Columbia legislation further provides that a caveat can be lodged with an issuer of marriage licenses against the issuing of a license to persons named in the caveat.[130] 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.[131] However, there are no reported cases citing section 35 of the British Columbia legislation, which suggests that offences under this legislation, if they occur, are not prosecuted. The writer had been told, however, by British Columbia counsel that this provision is successfully used for protective purposes where predatory marriages are suspected. Discussion with lawyers in British Columbia suggests further, however, that

[126] See Albert H. Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017), 46 Adv. Q. 316. And see *Oosterhoff on Wills*, 8th ed. by Albert H. Oosterhoff, C. David Freedman, Mitchell McInnes, and Adam Parachin (Toronto: Thomson Reuters/Carswell, 2016), §6.5, 9th ed. forthcoming 2021
[127] *Marriage Act*, RSO 1990, c M 3, section 7
[128] RSBC 1996, chapter 282.
[129] *Marriage Act*, RSBC 1996 chapter 282, section 35.
[130] *Marriage Act,* RSBC 1996, chapter 282, section 23.
[131] *Marriage Act,* RSBC 1996, chapter 28, subsection 23(2).

the caveat system, although useful in theory, is not fully implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

New Brunswick's *Marriage Act* also features a similarly worded *caveat* provision. In Quebec, the Civil Code also allows interested parties to oppose the solemnization or issuing of a marriage to individuals that may lack the mental capacity to do so. Quebec's Civil Code holds that a marriage may be declared null upon the application of an interested person who applies within three years of the solemnization, except where public order is concerned, in particular if the consent of one of the spouses was not "free or enlightened".

Where provincial or territorial legislation is silent on this issue of capacity and marriage, common law dictates that a marriage may be found to be void *ab initio* if one or both spouses did not have the requisite mental capacity to marry.

As such, whether by statute or at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid marriage. A lack of capacity will render a marriage void *ab initio,* meaning it is as if it never happened. The marriage is null and void from the start.[132]

Despite 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.

With the less-than-ideal legislation currently in place, we must turn to the common law to determine the criteria for the capacity to marry. There is still no single or complete definition of the requisite decisional capacity to marry, or even of what the concept of consent to marry truly involves.

[132] *Feng v Sung Estate*, (2003) 1 ETR (3d) 296, affd 11 ETR (3d) 169 (ONCA) at para 66 and *Hunt v Worrod*, 2017 ONSC 7397 at para 12.

There have been historical, and more modern, cases that take the view that marriage is but a mere contract, and a simple one at that, "not at all difficult to understand,"[133] and which "does not require a high intelligence to comprehend."[134] The 2011 British Columbia Court of Appeal case of *Wolfman-Stotland v Stotland,*[135] cited with approval the trial decision of *Calvert v (Litigation Guardian of) Calvert*[136] that described the contract of marriage as "the essence of simplicity."

Currently, in Canada, to enter a valid marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.[137] No party is required to understand all of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite long-standing classic English cases,[138] which collectively adopt the principle that "the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend."[139]

However, other courts have espoused the view, that the requirement to marry is not so simple. In the 1945 British Columbia Court of Appeal case of *Shaw v Shaw,*[140] Sidney Smith JA., commented: "it should be remembered that marriage is more than a simple contract. It is a status involving other interests."[141] Other cases have the view that one must be capable of managing one's person or one's property, or both,[142] in order to enter into valid marriage.

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[133] See *Hart v Cooper*, [1994] BCJ No 159 (SC) at para 30. See also, *In the Estate of Park, Park v Park*, [1954] CA; *Hunter v Edney*, (1881) 10 PD 93 at 95-96; *Durham v Durham* (1885) 10 PD 80; *Cannon v. Smalley (otherwise Cannon)* (1885), LR 10 PD 80.
[134] *Lacey v Lacey (Pubic Trustee of)* [1983] BCJ No 1016 (SC)
[135] 2011 BCCA 175.
[136] (1997) 32 OR (3d) 281 (GD) at para 55.
[137] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 50.
[138] *Durham v Durham* (1885), 10 PD 80.
[139] *Durham v Durham* (1885), 10 PD 80 at 82.
[140] [1946] 1 DLR 174.
[141] *Shaw v Shaw*, [1946] 1 DLR 174 at 177. See also Rutherford v Richardson, [1923] AC 1.
[142] See *Spier v Benyen (sub nom Spier Estate, Re),* [1947] WN 46 (Eng PDA); *Spier v Spier*, [1947] The Weekly Notes at para 46 per Willmer J; *Browning v Reane*, (1812), 161 ER 1080, [1803-13] All ER Rep 265

In the Alberta case of *Barrett Estate v Dexter*,[143] Justice Wilkins cited the Court of Appeal for Alberta in *Chertkow v Feinstein,*[144] and noted:

> What must be established is set out in *Durham v Durham* (1885) 10 PD 80) at p 82 where it is stated that the capacity to enter into a valid contract of marriage is, "A capacity to understand the nature of the contract, **and the duties and responsibility which it creates**."[emphasis added][145]

Also, in *Barrett Estate v Dexter*, an expert witness, Dr. Malloy opined that:

> A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected.[146]

In the 2014 British Columbia case of *Ross-Scott v Potvin*,[147] Justice Armstrong concluded that:

> A person is 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. 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.[emphasis added][148]

This paragraph was cited with approval in the 2017 Ontario case of *Hunt v Worrod*,[149] and Justice Koke importantly noted that:

> In determining whether a person had the capacity to enter into a marriage contract, the tension in the analysis is between preserving Mr. Hunt's personal autonomy and the right to choose how to spend the balance of his life against the possibility that *he did not fully appreciate how marriage affected his legal status or contractual obligations*.[emphasis added][150]

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[143] 2000 ABQB 530.
[144] 1929 CanLII 513 (AB CA), [1929] 3 DLR 339.
[145] *Barrett Estate v Dexter*, 2000 ABQB 530 at para 51.
[146] *Barrett Estate v Dexter*, 2000 ABQB 530 at para 72.
[147] 2014 BCSC 435.
[148] *Ross-Scott v Potvin*, 2014 BCSC 435 at para 177, citing *AB v CD*, 2009 BCCA 200 at para 21 and 22.
[149] *Hunt v Worrod*, 2017 ONSC 7397, additional reasons on costs, 2018 ONSC 2133, costs decision rev'd 2019 ONCA 540, leave to appeal dismissed 2020 CanLII 3696 (SCC). See comments further below-this case was argued by WEL PARTNERS
[150] *Hunt v Worrod*, 2017 ONSC 7397 at para 10.

Also in 2017, Justice Griffin observed in the case of *Devore-Thompson v Poulain,*[151] that:

> 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 future in that it will be an exclusively mutually supportive relationship until death or divorce.[152]

Justice Griffin went on to assess several factors in determining that the individual in this case, Ms. Walker, lacked the capacity to marry:

> I find on the whole of the evidence, 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.[153]
>
> She did not understand…what it meant to live together with another person, nor could she understand the concept of a lifetime bond.[154]

2017 - Hunt v. Worrod (Ontario)[155]

Hunt v Worrod, examines the requisite decisional capacity to enter into a marriage contract.

In this decision, Kevin Hunt, father of two adult sons, was severely injured in an ATV accident and sustained a catastrophic brain injury. Before his accident, Mr. Hunt was involved with Ms. Worrod in an on-again and off-again relationship. Three days after Mr. Hunt returned home from the hospital he disappeared. He did not have his medications with him. When his sons tracked him down at a hotel (by obtaining particulars from his credit card) they learned that Ms. Worrod had made arrangements to marry Mr. Hunt and that the wedding had already taken place. The police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues

[151] 2017 BCSC 1289.
[152] *Devore-Thompson v Poulain,* 2017 BCSC 1289 at para 48.
[153] *Devore-Thompson v Poulain*, 2017 BCSC 1289 at para 347.
[154] *Devore-Thompson v Poulain*, 2017 BCSC 1289 at para 345.
[155] *Hunt v. Worrod* 2017 ONSC 7397, WEL PARTNERS counsel

that 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 of 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.[156]

Justice Koke recognized the need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how marriage affected his legal status or contractual obligations.[157] Justice Koke went on to conclude that a finding by a Court that an individual has capacity to marry, as set out in *Ross-Scott v. Potvin*, requires that that person "entering into a marriage contract understand the duties and responsibilities which a marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original].[158]

Justice Koke thoroughly examined the significant amount of evidence dealing with the issue of capacity 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. A number of medical professionals had found that prior to the marriage and shortly after, Mr. Hunt demonstrated the following severe cognitive and physical impairments, among others:

- 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;

[156] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para.177.
[157] *Hunt v. Worrod* 2017 ONSC 7397 at paras. 10-11.
[158] *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.

- 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.

Justice Koke found that the evidence of the lay witnesses called by the sons supported the opinion of the medical experts as to Mr. Hunt's cognitive and physical impairments.

Before his release from the hospital, Mr. Hunt was assessed by Bill Sanowar, a capacity assessor on two separate occasions. On August 5 2011, Mr. Sanowar found Mr. Hunt to be incapable of managing his property. On October 19, 2011, five days before the marriage, Mr. Sanowar found Mr. Hunt to be incapable of making personal care decisions with respect to the areas of health care, nutrition, shelter, and safety.

After reviewing this 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 capacity to marry and declared the marriage to be *void ab initio*.

Unlike most predatory marriage cases which make it to trial, this case is markedly different since Mr. Hunt is not an older adult, 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.

Due to the nature and extent of Mr. Hunt's injuries from his accident, extensive medical evidence for the period surrounding the marriage was available to the Court. Of particular

importance were the contemporaneous capacity assessments with respect to property and personal care that had been conducted and were available to the Court. This in itself is unusual since predatory marriage cases often involve an older adult who may not require regular medical attention. As a result, there is often limited medical evidence from the period surrounding the marriage available.

Alienation, isolation and sequestering is another common element of predatory marriages, where the unscrupulous opportunist chooses to wedge him or herself in between the older adult and their friends and family. While Ms. Worrod did attempt to alienate Mr. Hunt from his sons and influence his actions, since the sons are his guardians, they were able to do what they could to protect him and continue to make decisions in his best interest.

In its cost's decision,[159] the Court made a bold move, invoked its inherent jurisdiction and awarded costs against both Ms. Worrod and Legal Aid Ontario ("LAO"), who was funding Ms. Worrod's litigation. The application judge concluded that by failing to adequately monitor and assess the merits of the defence it was funding, LAO engaged in an abuse of process.

However, on appeal, the Court of Appeal for Ontario set aside the award of costs against Legal Aid. Family law associations intervened in the appeal, telling the panel of appeal judges that "this precedent will cause a chill in the availability of legal aid funding" and "a reduction in the number of lawyers willing to accept legal aid certificates."[160] The Court of Appeal concluded that the lower court had "misconstrued the role of LAO." As "a non-party, LAO's conduct must be viewed in the context of its statutory mandate .... the decision to fund a litigant is driven by LAO's statutory mandate and associated funding criteria, not by the prospect of economic return to LAO."[161]

Leave to the Supreme Court of Canada was denied with costs awarded to LAO.[162]

[159] *Hunt v Worrod*, 2018 ONSC 2133.
[160] *Hunt v Worrod*, 2019 ONCA 540 at para 28.
[161] *Hunt v Worrod*, 2019 ONCA 540 at para 38.
[162] https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18121/index.do

Mr. Hunt, an extremely vulnerable person, was the victim of a predatory marriage orchestrated by Ms. Worrod. Despite the overwhelming evidence in support of this finding, and notwithstanding that Mr. Hunt was wholly successful at trial, he has been denied justice in favor of Legal Aid Ontario, the organization that funded Ms. Worrod, the predator in the litigation. We can only hope that this case, at the very least, demonstrates that we as a society need to do better when it comes to protecting the vulnerable and incapable members of our society.

2020 – Tanti v. Tanti (Ontario)[163]

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."[164]

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

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

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.[165]

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."[166] 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."[167]

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,
- Guardianship of Paul's property and personal care,
- Custody of Paul,

[165] *Tanti* 2020, *supra*, at paras. 25-26.
[166] *Ibid*, at paras. 29
[167] *Ibid.*

- 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."[168]

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.[169]

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 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 <u>contemporaneous</u> to the marriage.[170]

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

[169] *Ibid*. at para. 38.
[170] *Ibid*. at para. 58.

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).[171]

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.[172] 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.

[171] 2021 ONCA 717 [*Tanti* 2021].
[172] *Ibid*. at paras. 3-6.

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.[173]

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."[174] 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

[173] *Ibid*. at paras. 11-12.
[174] *Ibid*. at para. 13.

is situation specific."[175] 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 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.[176] 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. Arguably, the capacity to marry should not be viewed as falling below other types of decisional capacity at law on a hierarchy. More is discussed on this issue under "Hierarchy Myth" below.

Capacity to Separate

The question of the requisite decisional capacity to separate was addressed in the British Columbia Court of Appeal case of *AB v CD*.[177] In that decision, the Court of Appeal agreed

[175] *Ibid.* at para. 21.
[176] 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.
[177] 2009 BCCA 200.

with the characterization of the different standards of capacity, including the standard of capacity to form the intention to leave a marriage, as set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*.[178] Professor Robertson focuses on the spouse's overall capacity to manage his or her own affairs. This standard, which the lower court relied on as well, was described in the decision:

> Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry and involves an ability to appreciate the nature and consequences of abandoning the marital relationship. [179]

The Court noted that this differs from that adopted in the English decisions of *Perry v Perry,*[180] and *Brannan v Brannan,*[181] both of which conclude that when a spouse suffers from delusions that lead to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notes that it prefers Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her life.[182]

The Saskatchewan Court of Queen's Bench also reviewed the capacity to separate, among other issues, in the case of *Babiuk v Babiuk*.[183] Justice Brown concluded that:

> In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life…There is evidence that [the wife] wants to live in the care home and not with [her husband] and that she wants her half of the family property.

Justice Brown in *Babiuk* relied on the findings in *Calvert (Litigation Guardian of) v Calvert* stating that:

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[178] Gerald Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994).
[179] *AB v CD*, 2009 BCCA 200, leave to appeal denied, 2009 9 WWR 82 (SCC) at para 21.
[180] [1963] 3 All ER 766 (Eng PDA)
[181](1972), [1973] 1 All ER 38 (Eng Fam Div)
[182]*AB v CD,* 2009 BCCA 200 at para 30.
[183] 2014 SKQB 320.

> Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live.[184]

This statement was more recently accepted by the British Columbia Court of Appeal in *Wolfman-Stotland v Stotland.*[185]

However, finding that separation only requires the decisional capacity to decide with whom one wants to live is not in keeping with the Supreme Court of Canada case of *M v H*[186] which confirmed the non-exhaustive list of several factors set out in *Molodowich v Penttinen,*[187] in determining whether a conjugal relationship exists. This list includes several factors dealing with shelter, sexual and personal behavior, services, social factors, societal factors, economic support and children.[188] Living with someone is only one factor in a sea of other factors in a relationship, all of which have far reaching consequences. Separation, specifically determining the date of separation, has legal and financial consequences in the family law and statutory context, since it is used to determine the equalization of property, separation agreements that might be entered into and other domestic contractual arrangements or divorce decrees.

Capacity to Divorce

In *Calvert (Litigation Guardian of) v Calvert*,[189] Justice Benotto compared the different standards of capacity with respect to the capacity to divorce:

> Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. *Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one's spouse.* It is the undoing of the contract of marriage. [emphasis added][190]

Justice Benotto proceeded to equate the threshold for capacity to divorce with the threshold for the capacity to marry, citing the "simple" factors or criteria for the capacity

[184] *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (ONSC), 32 OR 3d 281.
[185] 2011 BCCA 175 at para 27.
[186] 1999 CanLII 686 (SCC).
[187] 1980 CanLII 1537 (ONSC).
[188] Recently applied in *Wright v Lemoine*, 2017 ABQB 395 at para 44; Doege v Doege, 2015 ABQB 802 at para 94; *Riley Estate (Re),* 2014 ABQB 725 at paras 24-25; and
[189] 1997 CanLII 12096 (ONSC), 32 OR 3d 281, 1997 CarswellOnt 581.
[190] 1997 CanLII 12096 (ONSC), 32 OR 3d 281, 1997 CarswellOnt 581 at para 54.

to marry. However, Justice Benotto also relied on the evidence of an expert physician to explain the requisite factors for determining capacity. For a person to be competent to make a decision, a person must: understand the context of the decision; know his or her specific choices; and, appreciate the consequences of these choices.[191]

Capacity to Reconcile

In the 2018 decision of *Chuvalo v Chuvalo*,[192] Justice Kiteley examined the issue of whether an individual had the requisite decisional capacity to reconcile with his wife. The case involved retired legendary boxer George Chuvalo. In his eighties, Chuvalo suffered from significant cognitive decline. Chuvalo's children, in their capacity as his attorneys under powers of attorney brought divorce proceedings against Chuvalo's wife Joanne, on behalf of Chuvalo. Joanne sought to reconcile and not divorce, despite the fact that the parties were separated. Justice Kiteley reviewed several capacity cases including *Calvert v Calvert*,[193] *Banton v Banton*,[194] *Feng v Sung Estate*,[195] and ultimately concluded that Chuvalo did not have the requisite decisional capacity to reconcile. While Chuvalo expressed a wish to live with his wife there was no evidence that he understood whether there would be consequences that followed from that decision:

> Expressing a desire to live with his wife is just that. There is no evidence that he understood whether there would be consequences to a decision to "live with" his wife. Indeed, there are consequences such as changing the financial status quo between them; such as changing the date of separation for purposes of s. 8(2) of the *Divorce Act*. There are other consequences such as the emotional impact if the attempted reconciliation fails.
>
> This court cannot rely on Mr. Chuvalo's assertions that he wants to live with his wife as a basis on which to find that he is capable of making the decision to reconcile.[196]

[191] *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (ONSC), 32 OR 3d 28, 1997 Carswell Ont 581at para 73.
[192] 2018 ONSC 311.
[193] 1997 CanLII 12096 (ONSC), 32 OR 3d 281
[194] 1998 CarswellOnt 3423, 164 DLR (4th) 176 (Gen Div).
[195] 2003 CarswellOnt 1461, [2003] OTC 355, 122 ACWS (3d) 508.
[196] *Chuvalo v Chuvalo*, 2018 ONSC 311 at paras 61-62

Drawing on this case and the authorities discussed within, moving forward when assessing requisite decisional capacity to reconcile, the individual would be required to be able to foresee and understand the consequences of a reconciliation which necessarily would involve not only emotional, but, also financial consequences.

Concluding Summary

Put simply, the factors for establishing the requisite decisional capacity to divorce, to marry, to separate or reconcile, at common law appears to be based on the consideration of whether the person in question has an ability to appreciate the nature and consequences of the decision in question, and in particular, the fact that the decision taken is legally binding. As the law on capacity to marry is evolving, so must the law on the capacity to divorce, separate and reconcile. This is an area warranted of tracking since the law continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights, and attendant legislative changes.

7. CAPACITY TO ENTER A LEGAL RETAINER/CONTRACT

2021 - Guardian Law Group v. LS (Alberta)

In the case of *Guardian Law Group v. LS*,[197] 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.

[197] 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.[198]

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.[199]

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.[200]

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.[201] 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*").[202] On June 28, 2019, Guardian Law filed a "Brief of 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.

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[198] *Guardian* at para. 1.
[199] *Ibid.* at paras. 6-7.
[200] *Guardian, supra* note 1 at paras. 8-9.
[201] *Ibid.* at paras. 10-11.
[202] *Ibid.* at para. 12.

In *Bank of Nova Scotia v Kelly*[203], 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.[204]

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,*[205] *"*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"[206]

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,[207] 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?

[203] *Bank of Nova Scotia v. Kelly*, 1973 CanLII 1289 (PE SCTD), [1973] 41 DLR (3d) 273 (PE SCTD) at para. 10 [*Kelly*].
[204] *Guardian, supra* note 1 at para. 43.
[205] 2020 ABQB 328 [*RMK*].
[206] *Guardian, supra* note 1 at para. 44.
[207] *Ibid.* at para. 58.

b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?[208]

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.[209] 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.[210]

Analysis of the Criteria / Test

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

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

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."[211] 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?

[208] *Ibid.* at para. 57.
[209] *Ibid.* at para. 59.
[210] *Ibid.* at para. 63.
[211] *Ibid.* at para. 69.

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[212] - "absent information that alerts them to incapacity, they are entitled to rely on the presumption of capacity."[213]

In *Guardian*, Jones J. endorsed a non-mandatory, non-exhaustive list mostly captured from *RMK* and *Kozak Estate (Re)*[214] which may be helpful to the analysis:

1) The retainer pertains to proceedings which concern the client's capacity;
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."[215]

[212] *Chitty on Contracts*, (32nd ed, 2015), vol. 1, at p. 837 [Chitty].
[213] *Guardian, supra* note 1 at para. 70.
[214] *Kozak Estate (Re)*, 2018 ABQB 185 [*Kozak*]
[215] *Guardian, supra* note 1 at para. 76.

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 or constructive knowledge: mitigate the client's potential incapacity or make reasonable inquiries to confirm the client's capacity.[216]

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.[217]

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."[218] 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

[216] *Ibid.* at para. 77.
[217] *Ibid.* at para. 82.
[218] *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*,[219] 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.

8. 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.

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,

3) An appreciation of the advantages, disadvantages and potential consequences of the various options.[220]

[219] 1992 CanLII 1002 (BC CA), [1992] 67 BCLR (2d) 389 (CA).
[220] 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

Justice Price cited and applied these criteria in the case of *Costantino v Costantino,*[221] 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.[222]

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.[223]

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.[224] Master Graham noted in *Torok v Toronto Transit Commission,*[225] 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 risk of alternatives, and a reasonable range of possible outcomes, both positive and negative.[226]

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

February 10, 2020]. See also, Clare Burns & Anastasja Sumakova, LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at 40.

[221] 2016 ONSC 7279.

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

[223] 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]

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

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

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

> 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.[227]

Alberta's *Code of Conduct* for lawyers also provides some assistance to lawyers questioning their client's decisional capacity to instruct. The commentary found in Rule 3.2-15, *"Clients with Diminished Capacity"* provides that there is a presumption that the client has the requisite mental capacity to make decisions about his or her legal affairs and to "give the lawyers instructions." The commentary also notes that the client may have capacity to make some decisions but not others, and, that:

> the key is whether the client has the ability understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyers will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.[228]

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."[229]

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

[227] *Costantino v Costantino*, 2016 ONSC 7279 at para 56(d).
[228] Law Society of Alberta, *Code of Conduct*, Version #2020-V1, February 20, 2020, Rule 3.2-15 and Commentary.
[229] Law Society of Alberta, *Code of Conduct*, Rule 3.2-15, Commentary [2]

Kirby v Leather,[230] provides an oft-cited definition of "a person under disability" with respect to ability to instruct counsel in litigation proceedings:

> 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.[231]

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*,[232] 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."[233] 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.[234]

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.[235] These litigation representatives may

[230] [1965] 2 ALL ER 441 (CA).
[231] 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)..
[232] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11.
[233] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11 (c).
[234] *Adult Guardianship and Trusteeship Act*, SA 2008, c A 4.2, s 1 (d).
[235] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.11 (d).

be automatic,[236] self-appointed,[237] or court appointed.[238] The litigation representative does not become the party to the litigation, but are "more of a vehicle than a driver."[239]

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.[240]

Further, Alberta's *Limitations Act,*[241] 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),*[242] Justice Rooke cited *Wirtanen v British Columbia,*[243] 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?

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,

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[236] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(a) and 2.13.
[237] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(b) and 2.14.
[238] *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.12(1)(c) and 2.15
[239] *Innes v Ferguson*, 2018 ABQB 959 at para 6.
[240] *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).
[241] RSA 2000, c L-12, section 5.
[242] *WP v Alberta (No1),* 2013 ABQB 295, upheld, 2014 ABCA 404, leave to appeal to SCC dismissed 2015 CanLII 23005 (SCC).
[243] 1994 CanLII 888 (BCSC), [1995] 2 WWR 723 (BCSC).

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?[244]

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][245]

Justice Schlosser in the Alberta case of *Innes v Ferguson*,[246] 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.[247]

9. OVERARCHING CAPACITY PRINCIPLES

[244] *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.
[245] 2014 ABCA 404 at para 38.
[246] 2018 ABQB 959.
[247] 2018 ABQB 959 at para 7.

Reviewing the various criteria or factors to apply when assessing decisional capacity to make different legal decisions and undertake tasks as described within, one might observe certain high-level criteria or descriptive words that are often repeated: "understand" and "nature and effect." Some have suggested that there is one simple overarching "test" for capacity that applies to *all* decisional capacity tasks. The origin of the overarching principles arise out of the 1829 Irish case of *Ball v Mannin,*[248] and directs that one ask or assess whether the person making the decision (in this case a wealth transfer) would have been "capable of understanding what he did by executing the deed in question when its general purport was fully explained to him."[249] Based on this case, John Poyser describes the overarching principle of capacity as:

> A person has the mental capacity to validly perform a juridical act if that person enjoys the powers of mind necessary to **understand the nature and effect** of the juridical act **if given a proper explanation of its basic terms**. Some expressions of the test substitute the word 'quality' for the word 'effect' but without any apparent shift in nuance.[250]

The British Columbia Law Institute (BCLI) also noted in its publication, "Report on Common-Law Tests of Capacity," that there is a "baseline common law test of capacity" which holds that, "the person concerned must at the relevant time understand in broad terms what he is doing and the likely effects of his actions."[251]

Arguably, at a high-level, these are "general" criteria that can be used to assess capacity for various decisions, including entering into a contract, making an *inter vivos* gift, executing a power of attorney document, and so on-asking: Does the individual understand the *nature and effect* of the decision being made, provided the individual has been given a proper explanation of that decision? Nevertheless, one would also argue that this overarching principle, or question is only one part of the puzzle, since depending

[248] (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 ER 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).
[249] *Ball v Mannin* (1829), 3 Bli NS1, 1 Dow & CL 380, 4 ER 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer) at 21.
[250] John E S Poyser, *Capacity and Undue Influence*, 2nd Ed (Toronto: Thomson Reuters Canada Limited, 2019) at 675.
[251] British Columbia Law Institute, Report on Common-Law Tests of Capacity, BCLI Report No 73, 2013 at p 19, citing Law Commission for England and Wales, *Consultation Paper on Mentally Incapacitated Adults and Decision-Making: An Overview,* CP119 (London: HMSO, 1991) at 19-20

on the decision undertaken, other elements or criteria must be incorporated into these overarching capacity principles.

John Poyser notes that while this overarching "test," as he describes it, has been expressed in historical and modern case law,[252] it has been largely ignored when it comes to wills. The reason being, that the vast majority of wills amount to exactly the same act for the maker: giving away everything owned upon death. The homogeneity of the situation permits the development and application of a set "test" on the terms formulated in *Banks v Goodfellow*.[253]

Gifts or other *inter vivos* wealth transfers do not have the same homogeneity. Gifts arise in different situations and take different shapes. No single specific "test" can be formulated to fit these different scenarios:

> The generality of the test from *Ball v Mannin*, standing beside the specific test from *Banks v Goodfellow* for wills, might tempt the conclusion that two different tests are in play. That is not the modern view. The various passages [from case law] purport to express a unitary and overarching test applicable to all. That test involves a single principle to be applied in determining capacity, whether it be testamentary, *inter vivos*, or a compound transaction combining both. No case of any authority appears to have expressed or defended the existence of two separate tests as a competing view.[254]

10. HIERARCHY MYTH

Often courts in their determination and assessment of decisional capacity will compare the various factors or standards for the different decisions being made. When comparing, it is common for the courts to organize the different criteria or factors to be applied in a type of "hierarchy," with the idea being that certain decisions require a "higher" level of mental capacity than others. This is linked to the idea of the overarching principles

[252] See *R v MacNaughten* (1843), 8 ER 718, 10 Cl & F 200, 1843 WL 5869 (UKHL) at 723; *Boughten v Marston v Knight* (1872-75), LR 3 P & D 64 (Eng QB) at 71-72; *K (Enduring Powers of Attorney) Re*, [1988] Ch 310 at 313; *W (Enduring Power of Attorney), Re* (2000), [2001] Ch 609 at 613; *Gibbons v Wright* (1954), 91 CLR 423, [1954] ALR 383 (Australia HC) at 437; *Masterman-Lister v Brutton & Co* (No 1), [2003] 1 WLR 1511 (Eng CA) at paras 57 & 58; *Sheffield City Council v E* (2004), [2004] EWHC 2808 (Fam), [2005] 2 WLR 953 at para 19; and *York v York*, 2011 BCCA 316 at para 39, additional reasons 2012 BCCA 347.
[253] Poyser at 678.
[254] Poyser at 679.

discussed above, since the criteria or standards to be applied build on those basic elements. Those closest to the basic overarching principles would be considered at the "low level" and those with more criteria built upon the basic principles would be considered at the "high level." While this may appear to be a helpful tool for legal analysis, it is also at odds with the functional approach to mental capacity that the common law favors.[255] The idea of a capacity hierarchy is misleading, and it is largely, not supported by authoritative case law. There is no hierarchy *per se*. While it may be easier or instinctive to apply hierarchies to such analysis, a hierarchy delineating differing levels of decisional capacity does not actually exist. Rather different decisions or tasks and applicable determinative factors for establishing requisite decisional capacity simply calls for different standards to be applied.[256]

One authority for the capacity hierarchy argument is the oft-cited quote of Justice Benotto in the 1997 Ontario Superior Court of Justice decision of C*alvert (Litigation Guardian of) v Calvert* (discussed above). Justice Benotto compared the factors or criteria for determining testamentary capacity with the criteria for determining capacity to instruct counsel, noting:

> There is a distinction between the decisions a person makes regarding personal matters, such as where or with whom to live, and decisions regarding financial matters. Financial matters require a *higher level of understanding*. The capacity to instruct counsel involves the ability to understand financial and legal issues. *This puts it significantly higher on the competency hierarchy.* [emphasis added][257]

Justice Benotto also referenced the various "levels" for the capacity to separate, divorce, and marry within a hierarchical analysis (discussed above).

In error, several cases have adopted or referred to this "hierarchy of levels of capacity" and adopt the statement from *Calvert,* most recently in the 2019 Saskatchewan Court of Appeal case of *Hess v Thomas Estate*:

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[255] BCLI, "Report on Common-Law Test of Capacity", at 19
[256] See Kimberly A. Whaley, Kenneth I Shulman, and Kerri L Crawfod, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective", Adv Q, Volume 45, No 4, July 2016.
[257] *Calvert (Litigation Guardian of) v Calvert*, (1997) 1997 CanlII 12096 (ON SC), 32 OR (3d) 281 (Gen Dlv) at para 54, aff'd 1998 CanLII 3001 (ONCA), 37 OR (3d) 221, 106 OAC 299 (Ont C A).

> There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. *This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will: Park*, *supra*, at 1426. [emphasis added][258]

Other cases, correctly, find that the "hierarchy" approach fundamentally misunderstands the nature of decisional capacity. Historical cases of *Boughten and Marston v Knight*,[259] *Burdett v Thompson,*[260] and *Re Park Estate*,[261] dispel the notion of a capacity hierarchy. Justice Hannen, clarified in *Burdett v Thompson*:

> It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and never meant to say so. . .From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts…[262]

Hodson L.J. in *Re Park Estate* opined:

> In my opinion, there is no sliding scale of soundness of mind by reference to which different matters on which the law is required to take cognizance may be measure.[263]

A line of jurisprudence in Ontario,[264] observes that no hierarchy exists at all, rather, each of the various types of decisional capacity simply call for different criteria to be applied. One case being the Superior Court of Justice case of *Johnson v Huchkewich*,[265] where Justice Corbett concluded:

> The applicant notes that testamentary capacity is not the same thing as the capacity to manage one's property or the capacity to confer a power of attorney. I

[258] 2019 SKCA 26 at para
[259] (1872-75), LR 3 P &D 64 (Eng QB).
[260] Poyser at 688, noting: *Burdett v Thompson*, appears to be unreported, but referred to in a footnote in *Boughton and Marston v Knight* (1872-75), LR 3 P &D 64 (Eng QB) appearing at 72.
[261] *Park Estate (Re)* (1953), [1954] P 112 (Eng CA).
[262] Poyser at 688 noting: *Burdett v Thompson*, appears to be unreported, the passage survives in a footnote in *Boughton and Marston v Knight* (1872-75), LR 3 P &D 64 (Eng QB appearing at p 72
[263] Park Estate (Re) (1953), [1954] P 112 (Eng CA) at 135-136.
[264] See *Godelie v Pauli (Committee of),* [1990] OJ No 1207 (Dist Ct), 39 ETR 40 (Ont Dt Ct), *Covello v Sturino*, 2007 CanLII 21848, 2007 CarswellOnt 3726 (SCJ) at paras 20-21.
[265] 2010 ONSC 6002.

> agree. *This does not mean the test is "higher" for testamentary capacity; rather, it is different*. [emphasis added][266]

Recently, the Court of Appeal for Ontario observed:

> The law has long recognized that a person's capacity to make important life decisions is not an all-or-nothing proposition; rather, there are varying degrees of capacity required that derive from the nature of the decision being made.
>
> . . .Simpler acts require lower levels of understanding, while more complicated ones require greater understanding. This is true both across and within categories of decision making. For example, a person may be capable of managing personal care, but not his or her finances. Or, a person may have the capacity to make a will for a simple estate but not for a more complicated one.[267]

The assessment of decisional capacity is an inexact science, both legally and medically speaking. Regardless of what decision is being made, the level of conflict and complexity in the context of a decision emphasizes the importance of situation-specific factors. The greater the conflict and complexity in the life circumstances of a decision maker, the more onerous the threshold to reach capacity for a specific decision. The more impaired or emotionally vulnerable a decision maker, the less conflict or complexity will be necessary to reach a level of incapacity. In simpler life circumstances, even an impaired individual may retain decisional capacity.

Despite what some cases suggest, it does not necessarily follow that simply because one may have capacity with respect to certain decisions, and not others, that those decisions must fall along a linear hierarchy. A hierarchy of decisional capacity is not necessary where each decision is analyzed as it should be – with reference to the particular time and situation in which it is contemplated.

11. LAWYERS DUTIES & OBLIGATIONS

[266] *Johnson v Huchkewich*, 2010 ONSC 6002 at para 34.
[267] *Ohenhen (Re),* 2018 ONCA 65 at paras 79-80.

The lawyer's role when dealing with capacity issues is significant. In fact, it's the obligation of the lawyer to interview the client for the purpose of determining if they possess the requisite capacity for the decision undertaken.

The message from our common law precedent suggests that the lawyer, and in the wills and estates context, the drafting lawyer, should be satisfied that the client has capacity to give instructions for and execute the document in question, notwithstanding the presumption of capacity. This duty is particularly significant if the client is elderly, infirm, dependent, vulnerable, under disability, or if the instructions vary substantially from previous documents (wills, trusts, power of attorney documents), or where the instructions are not received from the client directly.

Re Kozak Estate,[268] is a recent Alberta decision that deals with the role of a lawyer when dealing with a vulnerable older adult client. The court found that the older adult's last will was invalid as a result of undue influence. The court commented on the difficulties facing lawyers where there may be a hidden narrative:

> …[U]nless there were obvious signs that something was amiss, as there was not in this case, the lawyer is not in a position to go beyond his or her capacity examination to test the information the client brings. The lawyer doesn't know how it is or why it is that the client has adopted the understanding that produces the instructions. The lawyer doesn't know and can't know what influences have been working on the client. Those influences may be operative, hard at work, while the meeting progresses. A third party who has controlled and manipulated a client can continue to control and manipulate that client while not being physically present.

Ultimately, lawyers must satisfy themselves that their client is capable of giving instructions and executing whatever documents a retainer requires and be prepared to defend the position taken.

Recently, in *Law Society of Alberta v Wilkinson*,[269] a lawyer was sanctioned for failing to provide competent, conscientious and diligent service to his client by failing to take

[268] 2018 ABQB 185.
[269] 2019 ABLS 24.

reasonable steps to assess his client's capacity prior to executing an enduring power of attorney and a personal directive, among other things.

The lawyer had been contacted by a son who urgently wanted a new power of attorney and personal directive drafted for his mother, who lived in a care home, appointing himself and another brother as attorney and agent. Allegedly, her bank had called to say there were "suspicious transactions" on her account. Two other siblings were her current attorneys and agents. The lawyer did not contact the mother, did not ask for any details about why the mother was in a care facility or how long she had lived there, he did not contact the bank to verify the information, and did not provide copies of the enduring power of attorney or personal directive to the mother before their meeting. The lawyer met with the mother at her care home but did not ask for identification. The director of the care home expressed concern about the mother's capacity to the lawyer. The lawyer asked about the names of her children and why she wanted the new documents executed; but, he did not ask why she wasn't using the lawyer who drafted the previous documents. The lawyer confirmed that the documents would revoke the previous appointments; but, failed to explain that the mother would also continue to have power over her finances herself until such time as she lost capacity. He did not go through the documents paragraph by paragraph; nor, did he ask the mother to explain in her own words "the nature and effect" of the documents.[270]

Within two weeks of executing the new enduring power of attorney and personal directive, the new attorneys withdrew approximately $156,000 from the mother's bank account leaving very little money left. An emergency application was brought, and the court concluded that the mother lacked capacity to sign the documents. The lawyer was reprimanded and fined $5,000.00 and ordered to pay costs.

In *Law Society of Ontario v Kyle*,[271] a lawyer admitted he failed to serve his client in a real estate transaction, and subsequent postponements of a vender take back mortgage and was in a conflict of interest by failing to adhere to the requirements for joint retainers when

[270] *LSA v Wilkinson*, 2019 ABLS 24 at Schedule 1, 5-6.
[271] 2019 ONLSTH 142.

representing two sellers who were both vulnerable individuals. The sellers were mother and son. The mother was elderly and diagnosed with vascular dementia. The son had obsessive compulsive disorder and received benefits from the Ontario Disability Support Program. Both admitted to being hoarders. Despite knowing this, the lawyer indicated at the time of the transaction that he had no concerns regarding capacity. The lawyer failed to ensure that both his clients fully understood and agreed to the transactions.

The parties presented joint submission for a penalty of a one-month suspension. The disciplinary panel was concerned that this "penalty was unduly light, given the multiple instances of serious misconduct, exacerbated by the vulnerability of the clients and the impact of the misconduct on them."[272] The panel noted that the lawyer's conduct in "failing to ascertain that his clients were fully informed, and consenting was neglectful and careless."[273] Ultimately, the panel concluded that while a one-month suspension was on the "very light side" considering the "vulnerability of the clients and the extent of their financial losses" the panel's role however, when presented with a joint submission was to determine if it was "unconscionable."[274] They did not believe the one-month suspension met the unconscionability test, so they adopted the joint penalty proposed, "with significant reservations."[275]

Rules of Professional Conduct / Codes of Conduct

It is important to consider the applicable *Rules of Professional Conduct or Codes of Conduct* when taking instructions from a client whose capacity may be at issue. Alberta's *Code of Conduct* Rule 3.2-15 deals with "Clients with Diminished Capacity." This Rule states:

> When a client's ability to make decisions is impaired because of minority or mental disability, or for some reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

[272] *Law Society of Ontario v Kyle*, 2019 ONLSTH 142 at para 51.
[273] *Law Society of Ontario v Kyle*, 2019 ONLSTH 142 at para 52.
[274] *Law Society of Ontario v Kyle*, 2019 ONLSTH 142 at para 62
[275] *Law Society of Ontario v Kyle*, 2019 ONLSTH 142 at para 62.

The commentary provides that a lawyer and client relationship "presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions."

Other rules to keep in mind, in particular: Rule 3.2-4 & 3.2-6, Client Instructions; Rule 3.3-1, Confidential Information; Rule 3.4-1(7)-(1), Conflicts, Consent and Disclosure; Rule 3.4-5(12), Joint Retainers, Informed Consent; Rule 3.4-13(16) Business with a Client, Gifts and Bequests; Rule 4.1-2, Restrictions, and Rule 4.2-1, Marketing of Professional Services.

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

Independent Legal Advice

A lawyer who agrees to provide independent legal advice (ILA) must not take on this role lightly. The duty of care, especially in certain demographics and circumstances, requires a high degree of integrity and professionalism.

Providing legal advice under a limited scope retainer with respect to only one particular transaction can have its challenges; this is especially true when the lawyer is meeting the client for the first time, knows little about the client had little background information and the client is older and possibly vulnerable, dependant, possessing physical and/or cognitive impairments.

The standard of care for providing proper ILA generally has been discussed in a number of decisions including *Goodman v. Geffen,*[276] *Inche Noriah v. Shaik Allie Bin Omar,*[277] and *Tulick v. Ostapoweich*.[278]

The case of *Inche* is authority for the proposition that in providing ILA, a lawyer must not only explain the nature and effect of the contract or guarantee or transaction to the client,

[276] 1991 CanLII 69 (SCC), [1991] 2 SCR 353.
[277] [1929] AC 127 (PC).
[278] (1988), 62 Alta LR (2d) 384 (Alta QB).

but must also have a broader understanding of the client's assets, the risk of the transaction and any alternatives for accomplishing the transaction without risk.

The Supreme Court of Canada observed that ILA addresses two primary concerns, namely, that a person *understands* a transaction, and, that a person enters into a transaction *freely and voluntarily*.[279] This raises the importance of the interplay of capacity and undue influence in providing ILA. ILA is usually the best evidence to prove free will and is the best way to rebut the presumption of undue influence.

It is not for the ILA lawyer to approve of the transaction if the ILA client understands the nature and effect of the transaction and has freely chosen to enter into the transaction.

The Law Society of British Columbia has provided the following guidelines to lawyers when giving ILA:

> When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences. **You must consider whether the client has capacity and whether the client may be subject to undue influence by a third party.** Further, if the client has communication issues (e.g. limited knowledge of the English language), you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter.

It is reasonable for ILA lawyers to proceed cautiously and protect themselves where there are capacity or undue influence concerns in an ILA retainer. To meet the standard of a reasonably competent lawyer, it is somewhat trite to say that an ILA lawyer must determine whether the ILA client has capacity to enter into the transaction for which the ILA is being provided.

12. CAPACITY ASSESSMENTS

Suggested best practices impress upon lawyers to first meet with clients and make their *own* determination of capacity of the client to instruct or execute certain documents *before* recommending consideration of a referral to obtain a capacity assessment. By seeking out a capacity assessment first, before making a determination of decisional capacity, the

[279] See *Gold v Rosenberg* [1997] 3 SCR 767.

lawyer assumes that a health professional or some other assessor has more knowledge about the legal standards or criteria for determining capacity to instruct on the particular matter on which the client wants advice. Health professionals will not know the specific legal criteria for determining the requisite legal capacity to undertake a particular purpose unless the lawyer details the criteria of the decisional capacity to be applied for seeking the assessment.[280]

If the lawyer wishes to have their client undergo a capacity assessment, each province trains and registers capacity assessors.

In Alberta, all physicians and psychologists can complete capacity assessments. Further, other healthcare professionals, if they are trained and meet certain requirements can register as capacity assessors, including nurses, psychiatric nurses, social workers, and occupational therapists.

There are different types of capacity assessments in Alberta, including co-decision-making capacity assessments,[281] adult guardianship, and trusteeship capacity assessments, and personal directive capacity assessments. The Government of Alberta keeps lists of capacity assessors.[282] If the assessor concludes that the person is incapable, the assessor must complete a *Declaration of Incapacity* and provide reasons why, in their opinion, the person lacks capacity. If the person's capacity improves and a significant change in the person's ability to make decisions has been observed, an assessment of regained capacity can be completed. In the case of a personal directive, the *Personal Directives Act* defines a "significant change" as being "an observable and sustained improvement that does not appear to be temporary."[283]

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[280] Judith Wahl, Capacity and Capacity Assessments in Ontario, PracticePro website at 5, online: https://www.practicepro.ca/wp-content/uploads/2017/06/2007-01-backup-capacity.pdf [accessed on February 11, 2020].

[281] Under the *Adult Guardianship and Trustee Act*, SA 2008, c A-4.2, Part 2, an adult on their own behalf or an interested person may apply to the court for an order appointing a co-decision-maker for the adult. The co-decision-maker and the adult work through the decisions together, but the adult has the final say. A capacity assessment must be filed in support of such an application.

[282] Government of Alberta, Capacity Assessments, online: https://www.alberta.ca/capacity-assessment.aspx [accessed on March 5, 2020]

[283] For more information see, Government of Alberta, "Capacity Assessment: Adult Guardianship and Trusteeship Act" online: https://open.alberta.ca/dataset/319287d7-01f6-4863-8d5a-

In *Melin v Melin*,[284] discussed above, the adult son had sought an order that his father undergo a capacity assessment. While Justice Feehan concluded that the court had jurisdiction and authority to order a capacity assessment of the father,[285] under the circumstances, he refused to do so, noting that a court should be reluctant to order a capacity assessment of an individual who has not put his capacity at issue in the litigation and where it appears that the request for such an assessment is a collateral attack on the matters raised by that person. Ordering a capacity assessment in such circumstances should only be a last resort in exceptional circumstances since it seriously impinges upon the individual's autonomy, and respect for the individual's decision-making in matters of fundamental personal importance and should only be used in the clearest of cases in the interests of and to protect the person subject to the order.[286]

The following case discussed below answers the question of whether an extensive capacity assessment is necessary.

Hambleton (Litigation guardian of) v. Hambleton[287]

In the case of *Hambleton*, the litigation guardian, Arleigh Hambleton ("Arleigh"), sought an order that her mother, Vale Hambleton ("Vale"), undergo an extensive capacity evaluation. Vale brought a motion on her on behalf, arguing that an assessment was already satisfied. At issue was whether the courts orders were satisfied. Relying on the assessment of Dr. Rogers, the Honorable Justice Mayer concluded they were.

In *Hambleton*, Arleigh first brought an application in her capacity as litigation guardian alleging that Vale was suffering from severe dementia and was the subject of undue

5b26f5734373/resource/9d1cb354-ce00-4082-a3fd-c5cbc589c7d3/download/opg-guardianship-brochure-opg5631.pdf and Government of Alberta, "Guide to Capacity Assessment Under the Personal Directives Act", online: https://open.alberta.ca/dataset/e9b8da0e-1292-481d-98be-75412b01876c/resource/717ce3b5-4735-45be-9a1b-b39760f1a2f2/download/opg-personal-directives-publication-opg1642.pdf

[284] 2018 ABQB 1056.

[285] Justice Feehan relied on section 9 of the *Powers of Attorney Act*, rule 5.41 of the *Alberta Rules of Court*, section 8 of the *Judicature Act,* and the court's *parens patriae* jurisdiction over vulnerable adults who lack capacity, noting though that "that jurisdiction should only be used in exceptional circumstances as an extraordinary step in the clearest of cases where an assessment is necessary" at para 111.

[286] *Melin v Melin*, 2018 ABQB 1056 at para 112.

[287] 2021 BCSC 1155 ["*Hambleton*"].

influence from her other daughter, Alice Hambleton ("Alice"). The central issue was and remains the validity of Vale's decision to transfer title to her North Vancouver home to herself and Alice to take a reverse mortgage. Arleigh argued that Vale lacks the mental capacity to make financial decisions.

In June 2017, Vale retained her own counsel and applied to strike action commenced in her name by Arleigh, including removing her as litigation guardian. In August 2017, despite concerns about overriding the presumption of capacity,[288] Mayer J. ordered Vale to undergo an assessment through the home she was living in. After refusing to allow the home to assess her, Vale participated in a mental capacity assessment in January 2019 with Dr. Rogers who found mild cognitive impairment but concluded that Vale was capable of personal financial decision-making and had the testamentary capacity to sign legal documents.[289] Vale and her husband Arthur were discharged unconditionally from Inglewood on March 25, 2020. Arthur died of COVID-19 in December 2020.

Arleigh argued that Dr. Rogers did not perform a 'medico-legal capacity assessment' and as such, the 2017/2018 orders were never satisfied. Mayer J. held that in granting those orders, the court was relying on its *parens patriae* power to override the presumption in the common law that Vale had the capacity to manage her own affairs.[290] Requiring Vale to undergo a further assessment would stretch the court's *parens* jurisdiction too far.[291] In a general assessment, Mayer J. also held that,

> It is an invasion of the rights of an individual to require them to attend at a mental capacity, an invasive process, and the court should not do so without a sufficient evidentiary basis for doing so. That said, where there is a reasonable possibility that an individual may, because of mental infirmity, be unable to make decisions on their own behalf and may be

[288] See *Hambleton*, *supra* at para. 7 where Mayer J. holds that, "despite my concerns about overriding the presumption that Vale was mentally competent, because at that time there was medical evidence from late 2015 and early 2016, indicating that Vale had suffered a mental health event leading to involuntary committal. I found the evidence submitted by the parties concerning the states of Vale's mental health to be insufficient."
[289] *Ibid.* at para 12.
[290] *Ibid.* at para 25
[291] *Ibid.* at para 32

subject to undue influence of others it may be in the best interests of justice to have an objective assessment of their mental capacity completed.

13. CONCLUSIONS

In every case, a lawyer has the overriding duty of ensuring that a client has the requisite decisional capacity to retain and instruct counsel and has capacity to undertake the task at hand. Any defense or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of incapacity, but a lawyer must always be satisfied of the ability to act for a given client and fulfill all of the duties and obligations owed to that client.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance 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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