# Osgoode Elder Law Certificate Program

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# Parent/Adult Child and Sibling Struggles

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## INTRODUCTION

Older adults have varied life experiences. Some have experienced full lives, have worked, raised families or travelled the world, experienced joys and sorrow, and many have settled down to spend their final years in peace. No older adult expects or plans for their final years to be filled with family fights, anger, and emotional turmoil. Unfortunately, many older adults however do find that their last years are far from peaceful. All families have some dysfunction and sometimes this dysfunction erupts into conflict between older parents and adult children, between sisters and brothers, and even between grandparents and grandchildren.

To illustrate the sorts of later life disputes that we are seeing in practice and before the courts and tribunals, I have set out a few scenarios for consideration, some based on real cases, all of which deal with actual situations that arise in "*Parent/Adult Child and Sibling Struggles*".

Following each case scenario is a brief (non-exhaustive) overview highlighting some of the legal issues to consider, including issues related to: an older adult's vulnerability, dependency and capacity; susceptibility to undue influence; the presence of suspicious circumstances in testamentary and end-of-life planning; an array of power of attorney disputes, risks and remedies; elder abuse (whatever the nature or forum for remedy); and other prevalent issues concerning gifting, transfers of title to real property and jointly held assets as between parents and adult children, including adopted children/step-children. Some useful tools, resources, and checklists are referenced at the end of this paper, which may prove to be of assistance.

Demographics and changing social circumstances, including changing family dynamics and family composition, the rise in complex family structures, developments in technologies and communications, travel and international trade and economy, all make our families and communities much different than in the past. Our older adult communities are not necessarily geographically near any of their family. Older adults today, enjoy

greater longevity and as such, are sometimes vulnerable and susceptible to falling victim to predators, intent on financial exploitation given all of the changes in our social structure. These predators are often, but not always, family members. They are children, neighbours, scammers, opportunists, service providers, career or serial criminals and others.

**CASE SCENARIO #1 – Mother in the Middle**

- Yasmin is an older adult who is a widow and mother of three adult children. Yasmin does not speak English well. She relied on her husband, when he was alive, to handle the finances and run the house.
- After her husband died, Yasmin's oldest son Rajesh and his wife moved in with her to her house. They lived together for four years. During that time, Yasmin transferred her home into the names of Rajesh and his wife. Rajesh called a lawyer to handle the transaction for Yasmin. Rajesh and his wife brought Yasmin in to the lawyer's office sign the paperwork.
- Yasmin's daughter, Reena, showed up one day and removed Yasmin from the house and moved Yasmin into her own house. Reena then called the police alleging that Rajesh had been abusing their mother. She alleged that he was not feeding their mother and had kept her from her friends and social activities. The police arrested the son, but no charges were laid.
- The mother then commenced a civil claim against Rajesh and his wife to have the title of her house returned to her name. Reena is adamant that Rajesh somehow convinced the mother to transfer the house to him even though she didn't want to. The house was supposed to be left to all three children under her Will.
- Yasmin continues to reside at her daughter's house. The daughter and oldest son are not on speaking terms and there is great animosity between them.
- Yasmin's youngest son (who is trying to remain neutral in this dispute) has observed that Yasmin "is very loving and trusting of her caregivers…and will go to extreme lengths to avoid upsetting …her caregiver." The youngest son also noted

that Yasmin "doesn't like to upset anybody that is taking care of her, because she is very needy and doesn't want to offend anyone." [1]

- Rajesh asserts that Yasmin is just doing what Reena told her to do and that Yasmin did not want the police called or for a claim to be commenced. His response to the abuse allegations was that Yasmin asked to stay home because she no longer felt safe outside the house, that was why she didn't see her friends anymore, although her friends were more than welcome to visit her and Rajesh even extended the invitations. And Yasmin always said she wasn't hungry, but Rajesh and his wife fed her and cared for her the best that they could.
- Reena is now keeping Yasmin from Rajesh, he has no access to his mother. Reena has also taken Yasmin's credit cards and bank cards and is in total control of her mother's money, because, according to Reena, Yasmin "doesn't have a clue" when it comes to finances.

## LEGAL ISSUES – CASE SCENARIO #1

### Elder Abuse

Did Rajesh abuse his mother? Or is Reena now abusing their mother? Elder abuse can involve abuse of a sexual, emotional or financial nature, or outright willful neglect. Abuse can be perpetrated by a trusted family member, a spouse, daughter, son, caregiver, service provider, or other person in a position of power or trust (even if only as a result of an inequality in bargaining power due to compromised capacity, dependency or vulnerability).

Elder financial abuse can include: fraudulent procurement, misuse of powers of attorney or joint accounts, forgery, sharing an older adult's home without payment of rent, gifts nearing the full value of assets held by the grantor/giftor, misusing, stealing, diverting, using, appropriating or depleting an older adult's assets, and can even include targeted financial scams.

[1] This scenario is loosely based on *Rikhye v. Rikhye* 2017 ONSC 4722.

The Toronto Declaration on the Global Prevention of Elder Abuse defines senior abuse as:

> " … a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."[2]

The National Initiative for the Care of the Elderly (NICE) provides a broad conceptual definition of mistreatment of older adults in Canada:

> "Mistreatment of older adults refers to actions/behaviors or lack of actions/behaviors that cause harm or risk of harm within a trust relationship."[3]

Financial abuse has also been defined by NICE as:

> "An action or lack of action with respect to material possessions, funds, assets, property, or legal documents, that is unauthorized, or coerced, or a misuse of legal authority."

The critical concepts that emerge are imbalance of power, control, restrictions on rights and freedoms, and abuse of trust.

The most common civil proceedings to remedy elder abuse concern powers of attorney proceedings before the Ontario Superior Court of Justice under the *SDA,* or before the Consent and Capacity Board Tribunal (the "CCB") (including removal of attorneys for misuse or abuse), guardianship, and breach of fiduciary. These proceedings often involve disputes amongst siblings, families, friends, strangers and predators. Such proceedings can also involve disputes over the personal care of the older adult and end-of-life decision making. Disputes over the person can include disputes over the nature and extent of care

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[2] Background Paper: Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts, Canadian Center for Elder Law (March 2013): The Toronto Declaration is an international call to action jointly authored by the World Health Organization, the University of Toronto, and the International Network for the Prevention of Elder Abuse. Toronto Declaration on the Global Prevention of Elder Abuse (2002) online: http://www.who.int/ageing/projects/elder_abuse/en/ [Toronto Declaration].

[3] National Initiative for the Care of the Elderly, Defining and Measuring Elder Abuse, online: http://www.nicenet.ca/tools-dmea-defining-and-measuring-elder-abuse [Defining and Measuring Elder Abuse].

and related costs, the nature and extent or type of care required, and end-of-life and treatment decisions.

The Canadian Criminal Code plays a role, directly and indirectly, in protecting older adults from financial abuse and exploitation. Select criminal offences can be, if used, helpful in deterring and penalizing perpetrators of abuse. Moreover, section 718.2(a)(i) of the Criminal Code indicates that if there is evidence that a person who committed a criminal offence was motivated by bias, prejudice or hate based on age, a court imposing a sentence can consider increasing the length of that sentence.[4]

The *Criminal Code* does not itself provide for the specific offence of "elder abuse" or "financial abuse." Instead, the *Criminal Code* provides for several separate offences under which such a perpetrator could be charged, including the regular theft[5] and assault provisions,[6] fraud,[7] criminal breach of trust,[8] extortion and forgery,[9] as well as theft by a power of attorney.[10]

There is also section 215, “Failing to Provide the Necessaries of Life”, which reads:

> 215. (1) Everyone is under a legal duty:
>
> . . .
>
> (c) to provide necessaries of life to a person under his charge if that person
>
> (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
>
> ii) is unable to provide himself with necessaries of life.

[4] *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 718.2(a)(i).
[5] Section 322 (theft) and section 342 (theft or forgery of a credit card).
[6] Section 265 (physical assault) and section 271 (sexual assault). See *R v Fernandez* 2018 ONCJ 272.
[7] Sections 386-388 (fraud). See *R v Bernard* 2015 BCPC 107, *R v Taylor* 2012 ONCA 809
[8] Section 336 (criminal breach of trust).
[9] Section 346 (extortion) and section 366 (forgery).
[10] Section 331 (theft by a power of attorney). See *R v Kaziuk* 2011 ONCJ 851, sentencing reduced 2013 ONCA 217 and *R v Hooyer* 2016 ONCA 44.

> (2) Everyone commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if:
>
> . . .
>
> b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

This is a hybrid offence punishable by a maximum penalty of imprisonment for a term not exceeding two years where the Crown elects to proceed by indictment. While many of the cases where abusers have been charged under section 215 focus on the physical and mental abuse of the victims, most of these cases also involve an element of financial abuse as well.[11]

In Yasmin's scenario, if Rajesh isolated Yasmin from her friends and family, he is stopping her from participating in her hobbies and interests and from leaving the house. If she was not eating nourishing meals and/or not able to care for herself, Rajesh may not have been providing Yasmin with the necessaries of life including proper food and social well-being. Yasmin's health could have been permanently injured.

## Undue Influence

Is Reena unduly influencing the mother to sue her son? Or did Rajesh unduly influence the mother to transfer the house into his name? The youngest son clearly believes his mother is vulnerable and susceptible to influence by her caregivers.

The doctrine of undue influence is an equitable principle, employed by the courts to set aside transactions that have been procured by undue influence, or in other words, influence tantamount to coercion, or in a relationship of un-equals. Where one person has

[11] See for example: *R v Siwicki* 2018 MBQB 115 and *R v Davy* 2015 CanLII 10885 (ON SC).

the ability to dominate the will of another, whether through manipulation, coercion, or the outright, but subtle abuse of power, undue influence may be found.

In the context of gifts, even where there is no evidence of actual and/or specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence. In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[12]

In cases where planning instruments have been drafted and executed, such as power of attorney documents, courts will look at the timing and circumstances of the planning documents and for a pattern of change involving a particular individual as a potential indicator that undue influence is at play.

*Seguin v Pearson*, 2018 ONCA 355 is a very recent appeal case where children from a first marriage commenced litigation against a subsequent spouse of the deceased alleging undue influence. This case confirms the distinction between the analysis for testamentary undue influence and undue influence in the context of an *inter vivos* transaction.

The deceased had made his new spouse the principal beneficiary under his Will and had made an *inter vivos* transfer of his house into joint tenancy with his new spouse. His daughter brought an application seeking to invalidate the Will and *inter vivos* transfer alleging undue influence by the spouse. The trial judge rejected the daughter's argument and found on the basis of "all of the evidence" that the daughter had failed to prove the spouse exerted dominance over the deceased.[13]

On appeal the daughter argued that the relationship between her father and his spouse (who also acted as his caregiver near the end of his life) gave rise to a presumption of undue influence which the spouse failed to rebut. In response the Court of Appeal clarified that the rebuttable presumption of undue influence arises only in the context of *inter vivos*

[12] *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).
[13] *Seguin v Pearson*, 2016 CarswellOnt 17438 (SCJ) at para 456.

transactions that take place during the grantor's lifetime. For Wills, it is testamentary undue influence that amounts to "outright and overpowering coercion of the testator, which must be considered".

The Court of Appeal went on to find that the trial judge erred in the articulation of the test for testamentary undue influence. The trial judge erroneously conflated the test for undue influence that applies to *inter vivos* transfers with the relevant test in relation to testamentary gifts. However, the Court went on to find that this error "did not affect the reasonableness of his conclusions" and that the "trial judge's finding that there was no undue influence using the *inter vivos* standard would necessarily be the same had the trial judge applied the correct standard applicable to testamentary dispositions."[14]

The Appeals Court observed that under either test, the trial judge was required to examine all of the relevant surrounding circumstances, including: medical and lay evidence of the deceased's state of mind and overall health; the nature and length of his relationships with his spouse and his children; and his instructions to his solicitors, which indicated that he had thought deeply and thoroughly about the disposition of his property. The Wills and *inter vivos* transfer were "not the result of rash or emotional action but followed several months of [the deceased's] deliberate reflection, coupled with the meticulous and comprehensive legal advice that he received from two experienced practitioners." The daughter's appeal was dismissed.

In cases where a client has limited mastery of the language used by the lawyer in the taking of instructions, and drafting and execution of legal documents, courts have sometimes considered such limitation to be an indicator of undue influence. For instance, where the only translation of the planning document was provided to the grantor by the grantee, not the lawyer, and a relationship of dependence exists in that relationship, undue influence may be found.[15] As another example, after a woman with limited English language skills and no access to independent legal advice signed a document transferring

[14] *Seguin v Pearson* 2018 ONCA 355 at para 14.
[15] *Nguyen Crawford v Nguyen*, 2010 CarswellOnt 9492; *Grewal v Brar*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

title in her property to her adult son, believing that she was signing a document that would allow her son to care for her as she got older, undue influence was found.[16]

In a Divisional Court case,[17] the Court highlighted some indicators or red flags for undue influence in the context of executing testamentary or planning documents:

- Whether there is any increasing isolation, alienation, sequestering of the testator;
- Is the testator dependent upon anyone?
- Any substantial *inter vivos* transfers of wealth by the testator;
- Any failure to provide a reason or explanation for excluding someone who would have an expectation to inherit under the Will;
- Any material changes in circumstances between the time of the first Will from the time of the final Will that would undermine the testator's earlier reasons for favouring his son in his Will;
- Has the testator been moved from his home?
- Is the lawyer unknown to the testator? Was the lawyer chosen by someone other than the testator?
- Who provided the instructions to the lawyer? The testator or someone else?
- Did someone else receive a draft of the Will before it was executed?
- Did the lawyer meet with the testator alone?
- Any evidence of the testator's documented statements that he was afraid of the respondent.[18]

[16] *Servello v. Servello*, 2014 ONSC 5035, 2014 CarswellOnt 12095, aff'd in *Servello v. Servello*, 2015 ONCA 434, 2015 CarswellOnt 8911.
[17] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct).
[18] See *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para. 9. For recent cases dealing with undue influence and the execution of a testamentary document see *Re Kozak Estate*, 2018 ABQB 185, *Birtzu v. McCron* 2017 ONSC

In this case scenario, there are a few indicators or red flags that Yasmin may have been unduly influenced and these should have been explored or probed by the lawyer involved in the house transfer. Yasmin did not know the lawyer. Yasmin's son contacted the lawyer and provided the instructions for the transfer. The lawyer did not meet with Yasmin alone and it was Rajesh and his wife brought Yasmin to the lawyer's office.

Often, the undue influencer will bring the vulnerable person to a lawyer and may wish to be present throughout the interview. This is one of the reasons why it is important for a lawyer to meet with his or her client alone in order to investigate the potential for undue influence, keeping in mind, however, that as per W.N. Renke J., in *Re Kozak Estate*: "The most effective control works regardless of presence".[19]

Also, there is evidence that Yasmin may have only signed the transfer document so her son would not be mad at her. If the lawyer had explored the potential for undue influence, he may have been able to discover this. Furthermore, it is unclear in this scenario whether the lawyer was also the son's lawyer. If so, independent legal advice (ILA) for the mother would have likely been warranted. ILA is usually the best evidence to prove free will. Indeed, in the case of *Csada*,[20] the court determined that ILA was the "best way" to rebut the presumption of undue influence and as such appears to be well established in the prevailing jurisprudence.

Even more recently, in the Saskatchewan Court of Appeal decision of *Thorsteinson Estate v. Olson,*[21] the court summarized the purpose of independent advice and stated that: "*whether it emanates from an accountant, lawyer, financial advisor, a trusted and knowledgeable friend, or someone else, it is to provide evidence that the donor knew what he or she was doing, was informed, and was entering into the transaction of their own free will."*

1420 and *Sweetnam v. Lesage*, 2016 ONSC 4058, appeal dismissed *Sweetnam v. Williamson Estate*, 2017 ONCA 991.

[19] *Re Kozak Estate*, 2018 ABQB 185 at 76.

[20] *Csada v. Csada*, 1984 CanLII 2403 (SK CA) at para 29.

[21] *Thorsteinson Estate v. Olson*, 2016 SKCA 134 (CanLII), para 51.

Lawyer's providing ILA should be cautious where the client does not speak the same language as the lawyer. Instructively, the Law Society of British Columbia has helpfully stated:

> 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.[emphasis added][22]

Checklist: Appendix "A" - Undue Influence. Weblink:

http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf

**CASE SCENARIO #2 – To Gift or Not to Gift? Joint Asset Issues**

- Anatoly, a widower, and his 18 year old son immigrated to Canada. The son quickly adapted to Canadian life, but Anatoly struggled. Because of this, Anatoly opened a joint bank account with his son and applied for a Visa in their joint names. It was just easier to have his son help navigate the bank and his finances. He meant to remove his son once he got more comfortable, but he never did.
- Eventually, the son met and married a young woman. Anatoly had accumulated substantial savings both before and after coming to Canada and now he wanted to invest in real estate in Toronto. He purchased a large house for the son and his new wife to live in. Instead of putting the house in his name though, he put it in the name of his son and daughter-in-law jointly.
- Unfortunately, there was a breakdown in the relationship between the son and his father. Anatoly went to the bank one day and found that all of the money in the joint bank account was gone and the Visa had been maxed out.
- Anatoly asked his son and daughter-in-law to leave his house. They refused, arguing the house belonged to them. They asserted the father always wanted to

[22] Law Society of British Columbia, Practice Resources, Independent Legal Advice Checklist, https://www.lawsociety.bc.ca/docs/practice/resources/checklist-ila.pdf

gift the house to them. They said that Anatoly was an experienced, generous and successful business person who always did things deliberately and with thought, so he must have purposefully put the property in their names as it was a gift. He always told them it was their house and they could do as they pleased with it. He was always buying them large extravagant gifts: vacations, tvs, furniture for the house. Of course, the house was a gift too, they told him. He could not now say it wasn't a gift. That wasn't fair to them.

- Anatoly did not deny that he gave them lots of gifts, but he denied that the house was a gift. He put title in their names as he just wanted to help and avoid probate fees – while he was alive, it was his property, but when he was dead "it didn't matter what happened". He told them when he bought the property that "when there is a right moment, I will sell this property", but that in the meantime he "trusted them". The son and his wife never financially contributed to the house (renovations, upkeep, taxes, etc.) Everything was paid for by the father, "but for maybe a light bulb".[23]

## LEGAL ISSUES – CASE SCENARIO #2

### Disputes over Joint Assets

Many older adults will add their children to their bank accounts, investment accounts and even houses, both as a planning tool and also as a way for the adult children to easily look after finances for the older adults. We often hear that there has been some advice given to plan in this way so as to avoid probate. However, these initiatives may not be as safe as they appear. Often older adults have no understanding of the legal implications of taking such steps and have not contemplated the legal consequences to themselves or indeed their chosen heirs.

*Joint Bank Accounts*

[23] This scenario is loosely based on *Malkov v. Stovichek-Malkov,* 2017 ONSC 6822.

Joint bank accounts are often used by older adults to permit their adult child or children to assist them with bill payments and other financial matters. Joint accounts with rights of survivorship are also used (rightly or wrongly) as estate planning tools by individuals who wish to avoid paying probate taxes and/or the fees of professionals who draft Wills and other testamentary planning documents. In our practice, however, we often find that where there is estate litigation, there is a joint bank account.

At common law, there is a presumption of advancement that applies to gratuitous *inter vivos* transfers from parents to their minor children (children under 18 years of age); these transfers, in other words, are assumed to be gifts. This presumption does not apply to gratuitous transfers by a parent to an adult child. Rather, the law presumes that the adult child is holding the property in trust for the parent (a "resulting trust"). This presumption can be rebutted with evidence that speaks to the grantor's intentions when he/she granted status of joint bank account holder to his/her adult child. See the case of *Pecore v. Pecore*.[24]

It is relatively easy to attach "rights of survivorship" to a joint account; often it is only a matter of checking the appropriate box on a banking agreement. Checking that box does not necessarily rebut the presumption of resulting trust, but it can be used as evidence that the deceased parent had intended the funds in that account to pass to the adult child/joint account holder outside of the estate. Regardless, section 72 of the *Succession Law Reform Act*[25] provides that funds held jointly by the deceased and another can be clawed-back into the estate for the purpose of satisfying claims for dependant's support against the estate.

In a recent case, *Elines et al v. Ollikainen and Elines*,[26] an issue arose regarding a joint account the deceased had with her niece. The beneficiaries of the estate argued it formed part of the estate. The deceased had opened the joint account without the niece being present, with a co-applicant form with a clause "your account will be joint with right of

[24] [2007] 1 S.C.R. 795. Also, for a recent case on the presumption of resulting trusts and *inter vivos* gifts see *Grosseth Estate v. Grosseth* 2017 BCSC 2055.
[25] R.S.O. 1990, Chapter S.26.
[26] 2017 ONSC 1576.

survivorship unless the following is ticked: no right of survivorship". That box was *not* ticked off. The niece gave evidence that she had access to the account to pay the deceased's expenses. The account received deposits by way of CPP, OAS, and other pension income. She testified that the deceased had said to her: "There isn't that much in the account, you have it".

However, the balance in the account at the time of death was close to $25,000.00, and a deposit of $8,000 was made into it a few days after her death. While the niece testified that she too made deposits into the account, no banking statements were filed with respect to the activity in the account to show how the sum of $25,000 was arrived at or if any withdrawals were made to pay the deceased's bills. The Court concluded that based on *Pecore* a presumption of resulting trust was created. The Court went on to conclude, on the following facts, that the niece could not rebut the presumption and show that the deceased had intended to gift the funds to her:

- No evidence that there was any money in the account when it was opened or that payments of the deceased's bills were ever made from the account.
- The deceased likely anticipated only a small amount would be left in the account after deposits and disbursements; however, there was no evidence that any disbursements ever took place.
- The niece was also the power of attorney for property and therefore was in a position to pay the bills from other accounts leaving this account to accumulate the deposits.

The joint account formed part of the residue of the estate and was to be divided in accordance with the Will.

A joint bank account may seem like a benign financial planning tool. However, many older adults sell their homes to provide for their health care, and many never owned property in the first place. An individual who has only one or two accounts takes an enormous risk if he/she gives an adult child – or anyone else – immediate access to all of their property.

In our case scenario above the Court would have to look at evidence regarding the use of the joint bank account between Anatoly and his son to determine if the son could rebut the presumption of a resulting trust, including, the documents to open the account, the bank statements, etc. Was the son using it solely for his own banking? Or, was it only the father who was depositing and withdrawing the money? Or, was it both?

*Joint Tenancies*

Like joint bank accounts, payments or transfers of title from a parent to an adult child are generally not presumed to be gifts; they are presumed to form a resulting trust in which the parent keeps an interest in the property. However, it is open to a party claiming the transfer is a gift to rebut the presumption of a resulting trust by providing evidence to that effect. Once again, see *Pecore v. Pecore*.

The above case scenario is loosely based on the cases of *Malkov v. Stovichek-Malkov*[27]*.* In *Malkov* the son and daughter-in-law separated and during the divorce proceedings, the daughter-in-law argued that their house was a gift from her father-in-law. However, the Court found that the daughter-in-law's evidence fell short of rebutting the presumption of resulting trust. The father paid for all of the carrying costs of the house and paid for the house in cash up-front.

The Court found that the house was "not a gift that [the son and daughter-in-law] could have accepted". The family did not need a bigger house and could not afford to carry the costs of the house and could not have been able to afford the $300,000 renovation which was necessary to restructure it into a family home. Also, the daughter-in-law could not explain why the father would purchase a home that was beyond their means, selected solely for its potential as an investment or why she and the son didn't pay at least some of the carrying costs if the home was intended to be theirs. The Court also noted that the father testified he put the title of the house in their names to "prevent any probate issues upon his death." The father had gifted a conditional right of survivorship, only. While he "intended his son and daughter-in-law to be title holders, it was conditional on the

[27] 2017 ONSC 6822, see also the case of *Jones v. Jones*, 2014 ONSC 787.

investment increasing in value, (if it did not, he would sell it) not finding a superior investment, and the house being in good hands".

The Court will look at evidence of intention when determining whether the presumption of resulting trust has been rebutted. A valid gift requires intention to gift, acceptance of the gift and sufficient delivery. Absence of intention means no valid gift could have been made. Often, when the giftor has died, evidence of intention will be found in the banking documents, through deeds of gift, or through evidence of third parties such as drafting lawyers, paralegals, notary publics, financial or investment advisors or bank tellers. See our Chart on Survey of Appellate Cases – *Pecore* in the Last 10 Years.

Checklist: Appendix "B" - Grounds to Attack an *Inter Vivos* Gift. Weblink:

http://www.welpartners.com/resources/WEL_Chart_of_relevent_grounds_to_attack_intra_vivos_gift.pdf

Checklist: Appendix "C" – Presumption of Resulting Trust. Weblink:
http://www.welpartners.com/resources/WEL-Checklist-Resulting-Trust-2017.pdf

Chart : Appendix "D": Pecore Last 10 Years – Survey of Appellate Cases

**CASE SCENARIO #3 – Predatory Marriage**

- Henry is 85 years old and father of three adult children. After he divorced his first wife 20 years ago, he was in a bad car accident and suffered from serious cognitive defects.
- Henry has now fallen in love with his neighbour Marsha, who is 30 years younger than him and they married in a private ceremony in Henry's home. Henry's sons only found out about the wedding months later. Henry told them he didn't want to mention it to them because they would be upset and he didn't want them meddling with his affairs.
- Marsha and Henry met when Marsha offered to look after Henry so he wouldn't have to be put into a nursing home. Previously, Henry's children had paid for private nursing help or cared for him themselves. After they married, Marsha

cancelled the nursing support and changed the locks on Henry's house, telling Henry it was to stop his "sons from barging into their marital home". Marsha does not like Henry to speak with his sons. She tells Henry that they just want to make her look bad and that they are jealous of their love.

- One day Henry appeared on one of his son's doorsteps saying he wanted to live with him and he wasn't sure who the woman was in his house. Marsha came an hour later and tried to convince Henry to come back home. The son refused to allow Henry to leave. The police were called and they left Henry in the care of his son.
- Henry's children are quite concerned for Henry and do not want him to go back to living with Marsha. They want him to seek a divorce. Henry's health has also taken a turn for the worse. Henry had a Will executed when he divorced from his first wife but had not made a new one. He also has not executed any power of attorney documents.

## LEGAL ISSUES – CASE SCENARIO #3

### Predatory Marriages

Civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry.[28] Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the 'predatory marriage'.[29] This is not a term that is in common use. However, given that marriage brings with it a wide range of property and financial entitlements, it does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.[30]

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

To truly appreciate why predatory marriages can be so problematic, it is necessary to understand what entitlements are gained through marriage. For example, it is important to note that in many Canadian provinces, marriage automatically revokes a Will or testamentary document. An exception applies where there is a declaration in the Will that it is made in contemplation of marriage. This revocation of a Will upon marriage can raise serious consequential issues where a vulnerable adult marries but lacks the capacity to make a Will thereafter or dies before a new Will can be executed. In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily-mandated property rights as between spouses.

In our case scenario above, if Henry is located in Ontario, his Will was revoked when he married Marsha. This means that should he die, he will die intestate and Marsha will inherit under the intestacy provisions of the *Succession Law Reform Act* RSO 1990, c. S. 26 (*SLRA*), or she can pursue her property rights through a family law election under the *Family Law Act,* or seek dependent support claims under the *SLRA*, etc. Based on the facts that we know, Henry may not have the requisite testamentary capacity to execute a new will.

Furthermore, the overriding problem with these types of marriages today, is that they are not easily challenged. The current standard or factors to be applied for ascertaining the requisite “capacity to marry” as developed at common law are anything but rigorous. This means that capacity is likely found by a court, even in the most obvious cases of exploitation. Consequently, predatory and exploitative marriages are more likely than not, to withstand challenge.

Issues of capacity arise frequently in matters concerning the older adult. With longevity often comes an increase in the occurrence of medical issues affecting the executive functioning part of the brain, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, alzheimer’s, cognitive disorders and other conditions involving reduced functioning and decisional capability. There are a wide variety of disorders that affect capacity and increase an individual’s susceptibility to being vulnerable and dependent. Amongst the many potential factors affecting capacity, included are normal aging, disorders such as depression which are

often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.

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. As an example, a person may have the requisite capacity to decide to enter into a contract of marriage, but may not have the requisite decisional capacity to execute a Will or other testamentary document.

A person is not globally "capable" or "incapable" and there is no test to administer that determines general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision and at a moment in time. There is no 'test', *per se*, though this term is often colloquially used. Rather, there are determining factors or criteria applied in ascertaining requisite decisional capacity.

Currently, in Canada, to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.[31] 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, such as *Durham v. Durham*,[32] which collectively espouse the following principle: "the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend."[33]

In *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.), expert witness Dr. Malloy significantly opined that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected. Also, some cases have expanded the factors to possibly require capacity to manage property and the person.

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[31] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. http://www.canadalawbook.ca at 50.
[32] *Durham v. Durham* (1885), 10 P.D. 80 [*Durham*].
[33] *Durham* at 82.

See *Devore-Thompson v. Poulain (BC)*.[34] In this decision, the British Columbia Supreme Court set aside a marriage based on lack of requisite capacity to marry and declared the marriage void *ab initio*. This claim was brought by a family member after the death of the incapacitated party. The Court also set aside two Wills based on the testator's lack of testamentary capacity. This lengthy decision (74 pages) is the first case since the 2014 case of *Ross-Scott v. Potvin*[35] to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry.

Ms. Walker was an older adult, who had been previously married and divorced, and had no children. She thought of her sister's children as her own. She was a strong independent woman until she was diagnosed as having Alzheimer's disease in 2005. According to those close to her, Ms. Walker's condition progressively deteriorated in the years following her diagnosis, to the point where she forgot how to use utensils and a phone, could no longer cook, forgot who people were, and could not clean or care for herself. Ms. Walker, however, refused to acknowledge her declining health and insisted on remaining independent. Her niece, the Plaintiff in this case, loved her aunt dearly and increasingly assisted her aunt to live independently as long as possible.

In early 2007 Ms. Walker saw Dr. Maria Chung who prepared a consultation report. The report recommended that Ms. Walker's driver's license be revoked before she injured herself or others. Dr. Chung continued to care for Ms. Walker after the initial consultation and provided evidence at the trial.

Following Dr. Chung's advice, Ms. Walker made a new Will as of February 16, 2007 and appointed her niece as her attorney under a power of attorney for property. As of May 17, 2007, Ms. Walker also signed a representation agreement appointing her sister and her niece as her representatives under the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, giving them each independent authority to make health and personal care decisions on her behalf.

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[34] *Devore-Thompson v. Poulain*, 2017 BCSC 1289 [*Devore*].
[35] 2014 BCSC 435.

Her affairs were in order and everything was settled. Or so the niece thought. It was discovered later (discussed below) that Ms. Walker had executed a new Will in 2009 and granted new powers of attorney.

On September 14, 2010, A Certificate of Incapability was issued pursuant to s. 1(a) of the *Patients Property Act,* R.S.B.C. 1996 c. 349, declaring Ms. Walker incapable of managing her legal and financial affairs. The Public Guardian and Trustee (PGT) was appointed committee of the estate. Ms. Walker died on December 26, 2013.

*The "Predatory" Relationship*

Unknown to Ms. Walker's caring niece, while Ms. Walker's health was deteriorating significantly, she was being "preyed on"[36] by a younger man for financial gain.

Ms. Walker met this man, Mr. Floyd Poulain in 2006 at the local mall when he asked her for five dollars and her address and phone number. Ms. Walker and Mr. Poulain went on to have dinner together and this began Mr. Poulain's "campaign".[37]

Unbeknownst to her family and friends, Mr. Poulain took Ms. Walker to a lawyer in 2009 for Ms. Walker to execute a new Will. The lawyer testified at the trial but had to rely on his "sparse notes" as he could not recall the meeting. His notes indicated that Mr. Poulain remained with Ms. Walker while she was meeting with the lawyer. The evidence demonstrated that the 2009 Will was prepared from handwritten notations to the 2007 Will. The notations were in Mr. Poulain's handwriting. The notes struck out the appointment of Ms. Walker's friend as executor, and inserted "Floyd S. Poulain". Mr. Poulain also struck out the gift of Ms. Walker's car to her nephew with the instruction "omit" (as Mr. Poulain had already taken over Ms. Walker's car). There was also a note "to make power of attorney Floyd S. Poulain."

Madame Justice Griffin, in her decision, noted "*I find there to be a high probability that Ms. Walker sat in front of [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and Ms.*

[36] *Devore* at para.4.
[37] *Devore* at paras. 255 & 329.

*Walker was quite determined not to let on that she was having cognitive difficulties*."[38] Justice Griffin found difficulty placing any weight on the evidence provided by the lawyer; noting that nothing in his evidence suggested that based on his standard practices he was able to detect Ms. Walker's testamentary capacity.

Shortly thereafter, the niece became aware that Ms. Walker had placed her condominium up for sale, in contradiction to her earlier assertions that she enjoyed living in her condo. The family intervened, and the listing was cancelled. Ms. Walker's actions were likely prompted by Mr. Poulain. Around this time Ms. Walker also became highly suspicious of family members, including her niece who had been assisting her the most. Mr. Poulain was reportedly fueling her suspicions.

Ms. Walker and Mr. Poulain were married in June of 2010. Ms. Walker did not inform any of her family members that she intended to marry Mr. Poulain. In fact, she had expressed that she did not intend to remarry. The marriage caught her close family members and her treating physician completely off guard. Mr. Poulain testified that it was her idea.

Mr. Poulain was unable to recall any material details of the wedding under cross-examination; including who the witnesses were (they were supplied by the marriage commissioner). There was one photograph produced at trial where Ms. Walker and Mr. Poulain were together and her facial expression was vacant. The marriage commissioner's evidence was unhelpful on the issue of whether Ms. Walker had capacity to marry as he could not remember the marriage ceremony and does hundreds of ceremonies. He had "no practice of testing for capacity" (the Court noted that "it is not suggested he should have") and simply asks the parties to say "I do not" and "I do" to the standard questions.[39]

Justice Griffin noted it was likely that Ms. Walker was prompted on what to say at the ceremony and went along with it and the fact that the marriage ceremony took place is of little help in determining capacity.

[38] *Devore* at para. 294.
[39] *Devore* at para. 303.

When Dr. Chung learned about the marriage from the niece, she made an urgent referral to the PGT stating her opinion that Ms. Walker was incapable of entering into a marriage relationship. Dr. Chung continued to be of the opinion, at the trial of this matter, that Ms. Walker was not capable of consenting to marriage and not capable to sign the 2009 Will.

After the marriage, Mr. Poulain and Ms. Walker consulted with another lawyer at the same office where her 2009 Will was executed. This second lawyer's file was produced at trial but the lawyer was not called as a witness. The file suggests that the lawyer was told Ms. Walker had had a stroke but was not advised of her Alzheimer's diagnosis. The file also indicated that the consultation was about obtaining greater access to Ms. Walker's bank account. The lawyer wrote a letter to her bank seeking information about Ms. Walker's account balance and why she was not permitted to access her account. Ms. Walker's niece (her attorney under the power of attorney for property) had put a $500 withdrawal limit on her account as all of Ms. Walker's bills were automatically deducted from her bank account. There was no need for Ms. Walker to obtain large sums of cash. Justice Griffin observed that this evidence pointed to "concerted efforts by Mr. Poulain to try to get access to Ms. Walker's funds at Scotiabank post-Marriage: repeated contact with [the lawyer]; approaching the Scotiabank; and approaching another bank".[40]

When the niece learned of the involvement of the second lawyer, she informed the lawyer of her power of attorney and her suspicions of Mr. Poulain. Nevertheless, the lawyer "pressed on for a while" including preparing a new power of attorney appointing Mr. Poulain as Ms. Walker's attorney. The authenticity of this document was at issue since the niece claimed that she was with Ms. Walker until 4:00 p.m. on the date it was purportedly signed and she never mentioned an appointment with a lawyer. It wasn't until the PGT office communicated with the lawyer that he wrote a letter to Mr. Poulain concluding that he ought not to represent Mr. Poulain.

The day after the new power of attorney was purportedly signed Ms. Walker had a fall in her condominium and was taken to the hospital. A note was found after Ms. Walker was

[40] *Devore* at para. 252.

in hospital in which Mr. Poulain had written "will you please go over to the bank and withdraw $40,000. . . it is really really important".[41]

Mr. Poulain claimed that he had no knowledge of Ms. Walker's health condition and that he never observed anything out of the ordinary in her behaviour. He testified that even in September of 2010 when Ms. Walker was admitted to the hospital, she was fine, there was no change in her memory or other cognitive function from the time that he knew her.

The Court nevertheless found that the evidence showed a consistent campaign by Mr. Poulain to try to get access to Ms. Walker's funds post-marriage:

> I find it likely on the evidence that Mr. Poulain had long been fanning the fire of Ms. Walker's anxiety and paranoia by suggesting that the plaintiff was unfairly restricting her access to her own money, and that the intensity of these efforts increased after the Marriage.[42]

Justice Griffin provided a thorough review of the evidence before her and ultimately concluded that Ms. Walker did not have the requisite decisional capacity to marry and as such the marriage to Mr. Poulain was *void ab initio*. Her Honour also found that, based on the evidence, Ms. Walker did not have capacity to execute a Will in 2009 or even in 2007, leaving the question of Ms. Walker's estate open for further inquiry.

Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."[43] Referring to *Hart v. Cooper*, [1994] B.C.J. No. 159 (B.C.S.C.) at paragraph 30, Justice Griffin confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates."

Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont.

[41] *Devore* at para. 253.
[42] *Devore* at para. 262.
[43] *Devore* at para. 43.

C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 161 (S.C.C.), Justice Griffin observed that:

> the common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the 'lowest level of understanding' in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce.[44]

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

> [343] As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level.
>
> [344] The fact that Ms. Walker told some people that she had married Floyd Poulain does not overcome all of the evidence as to her disordered thinking. This does not mean she had any understanding of what it means to be married.
>
> [345] It is also clear that Ms. Walker's mental capacity had diminished to such an extent that by 2010 she could not have formed an intention to live with Mr. Poulain, or to form a lifetime bond. She did not understand, at that stage, what it meant to live together with another person, nor could she understand the concept of a lifetime bond.
>
> [346] Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage.
>
> [347] 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

[44] *Devore* at para. 46-48.

> 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.
>
> [348] I conclude that Ms. Walker did not have the capacity to enter the Marriage.
>
> [349] Since I have concluded that Ms. Walker did not have the capacity to enter the Marriage, the Marriage is void *ab initio*. Because the Marriage is void *ab initio*, s. 15 of the *Wills Act* does not apply and, therefore, the Marriage does not revoke the prior wills.

With respect to the 2009 Will, the Court concluded that the circumstances surrounding the document were suspicious and concluded based on the evidence presented that Ms. Walker did not have testamentary capacity at the time that the 2009 Will was purportedly signed.

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

The question of capacity with respect to marriage, will, no doubt, often be more complicated than it was in this case as the niece's evidence was strong, with several credible witnesses. Nevertheless, this is a strong precedent for future claims to set aside predatory marriages for lack of capacity.

This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, and in this instance, the evidence indicated the lawyers failed to follow best practices. The testimony regarding preparation of the 2009 Will and 2010 power of attorney suggested that no inquiries were made of the deceased's capacity. Instead, notations made by a party, with a vested interest in the changes to the Will, were accepted as instructions.

Two further recent cases also dealt with capacity issues in the context of marriage and have provided some helpful commentary: *Hunt v. Worrod*, 2017 ONSC 7397, and *Chuvalo v. Chuvalo* 2018 ONSC 311. Our case scenario above is based loosely on both of these cases.

*Hunt v Worrod* examines the requisite decisional capacity to enter into a marriage contract. In this case 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 on the road outside his home. He did not have his medications. 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 the wedding had already taken place. Police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues that the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, was the marriage *void ab initio*?

Justice Koke started the analysis by citing *Ross-Scott v. Potvin* 2014 BCSC 435:

> A person is capable off entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.[45]

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. 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

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

marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original][46].

After reviewing extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be *void ab initio*.

The case of *Chuvalo v. Chuvalo* involves the 80-year-old boxer George Chuvalo who is now suffering from significant cognitive decline. George's adult children commenced a divorce proceeding on behalf of their father (under a power of attorney) against their stepmother, Joanne. Joanne wishes to remain married. In their application the adult children raised allegations of kidnapping, brainwashing, extortion, and reckless spending. They also alleged that Joanne preyed on George's vulnerable mental state to "extort cash money". The main issue, however, at the three-day trial was whether George had the requisite decisional capacity to decide whether to divorce or reconcile with Joanne.

In her decision, Justice Kitely determined that George "does not have capacity to decide whether to reconcile" with Joanne and further noted that she need not decide whether he has the capacity to divorce.[47]

Justice Kitely made this determination after reviewing expert evidence and case law, noting that while there were several cases on the subject of capacity to marry, none of them addressed capacity to decide to reconcile. Justice Kitely preferred the expert evidence of Dr. Shulman who opined that George did not have the capacity to seek marital reconciliation. Joanne argued that Dr. Shulman had introduced a "higher and impossible test" to decide whether a person had capacity to reconcile or divorce. Justice Kitely disagreed. Dr. Shulman noted in his report that "two equally essential cognitive tasks apply to capacity evaluation in respect to the decision-making process for the required legal test: 1. The ability to understand information relevant to making the decision. 2. The ability to appreciate the consequences of making the decision or not".[48] Justice Kitely

[46] *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.
[47] *Chuvalo v. Chuvalo* 2018 ONSC 311 at paras. 16-17
[48] *Chuvalo v. Chuvalo* 2018 ONSC 311 at para. 33.

found that there was no evidence that George understood whether there would be consequences to a decision to "live with" his wife.

Notably, the fact that Joanne had spent several months arguing that under s.10(2) of the *Divorce Act*, the Court was compelled to stay or suspend the proceedings to afford the parties an opportunity to attempt reconciliation. Justice Kitely concluded that "Mr. Chuvalo does not have legal capacity to do so and therefore s.10(2) has no application. While I need not make a decision on the point, I do not agree with [counsel's] submission that s.10(2) is so rigid and inflexible that the court has no alternative."[49] Joanne has appealed the decision.

In the scenario set out above, it appears that Marsha has taken advantage of Henry's cognitive issues and may reap the benefits of being Henry's spouse. The sons may want to bring an application for divorce on behalf of their father like in the *Chuvalo* case or an application to have the marriage declared void *ab initio* like the *Hunt* case. However, the facts as we know them reveal that there are no power of attorney documents, Henry may not have capacity to instruct counsel, he likely needs a litigation guardian, etc. It would also have to be determined if Henry had the requisite decisional capacity to marry Marsha at the time of the marriage, or if he has the requisite capacity to divorce or even reconcile with Marsha. These types of files and the issues involved are never straightforward and there are always serious consequences.

Predatory marriages appear to be on the rise, and I would suggest, world-wide, irrespective of country or culture. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, such unions are usually characterized by one spouse who is significantly advanced in age and, because a number of factors which range from the loneliness consequent upon losing a long-term spouse, illness or incapacity, or dependency, they are vulnerable, and as such they are more susceptible to exploitation. These unions are frequently clandestine – alienation and sequestering from friends, family and loved ones being a tell-tale red flag that the relationship is not above board. For further reading, the following cases involve such fact scenarios:

[49] *Chuvalo v. Chuvalo* 2018 ONSC 311 at para.68.

*Cadieux v. Collin-Evanoff*,[50] *Hart v. Cooper*,[51] *Banton v. Banton*,[52] *Barrett Estate v. Dexter*,[53] *Feng v. Sung Estate*,[54] *Hamilton Estate v Jacinto,*[55] *A.B. v. C.D.,*[56] *Petch v. Kuivila,*[57] *Ross-Scott v. Potvin,*[58] *Juzumas v. Baron*,[59] *Elder Estate v. Bradshaw*,[60] ad *Asad v. Canada (Citizenship and Immigration*).[61]

Also for those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*, Canada Law Book,** co-authored by Kimberly Whaley et al.,http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html, "**Predatory Marriages**" (2013) by Albert H. Oosterhoff and "**Predatory Marriages - Equitable Remedies**" (2015) by Kimberly Whaley and Albert H. Oosterhoff.[62]

Checklist: Appendix "E" Summary of Capacity Criteria
http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf

**CASE SCENARIO #4 – Estranged Brother Skeptical of "Over-Involved" Brother**

- Joseph and Robert are brothers. Joseph has been estranged from his mother, Stella, since her husband, his father, died three years ago. Stella is a resident of a nursing home and has suffers from dementia, as well as several physical ailments after suffering a stroke over a year ago, including difficulty with speech. Joseph does not call Stella and has only visited her once since his father's death.
- Nevertheless, Joseph was surprised to find out that six months ago, Stella appointed Robert as her attorney under a power of attorney for property and for personal care. At Stella's request a lawyer attended her nursing home, met with Stella alone, spent about 10 mins with her, had her sign the documents, and left.

[50] *Cadieux v Collin-Evanoff*, 1988 CanLII 524 (QCCA)
[51] *Hart v. Cooper,* 1994 CanLII 262 (BCSC).
[52] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244.
[53] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).
[54] *Feng v Sung Estate,* 2003 CanLII 2420 (ONSC)
[55] *Hamilton v. Jacinto*, 2011 BCSC 52 (CanLII).
[56] *A.B.v. C.D.* 2009 BCCA 200.
[57] *Petch v. Kuivila* 2012 ONSC 6131.
[58] *Ross-Scott v. Potvin* 2014 BCSC 435.
[59] *Juzumas v. Baron* 2012 ONSC 7220.
[60] *Elder Estate v. Bradshaw* 2015 BCSC 1266.
[61] *Asad v Canada (Citizenship and Immigration)* 2017 CanLII 37077 (CA IRB).
[62] Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 ETPJ 24, Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

He asked her no questions, other than whether she understood the document. Stella nodded yes.

- Joseph is very suspicious of Robert's over involvement with his mother's affairs and knows Robert is spending their mother's money on his own rent and his lease for his BMW and a fancy vacation to the Turks & Caicos. Joseph wants Robert to be removed as their mother's attorney for property and for Joseph to be appointed as her guardian.
- Robert knows that Joseph is doing this only because Joseph's business just went bankrupt, he is broke, and he wants their mother's money for himself. Robert knows he spent some of his mother's money on his own personal bills, but his mother was fine with it when he told her afterwards, and besides she would have given him the money if he had asked first. He also admits he is a lousy bookkeeper and maybe hasn't kept track of every single receipt or recorded every withdrawal of cash, but he wrote down all the large important ones. Robert doesn't understand what the big deal is, Stella has lots of money. He loves his mother very much and of course her best interests are top of mind for him. He visits her almost daily, ensures all of her medical bills are paid, he takes her out to her favourite restaurant when he can, he makes sure she is cared for and well looked after. Unlike Joseph who never visits and is just waiting for her to die.[63]

## LEGAL ISSUES – CASE SCENARIO #4

### Power of Attorney Disputes / Breach of Duties

The Power of Attorney document (the "POA") has long been viewed as one way in which a person can legally plan to protect their health and their finances and property by planning in advance for when they become ill, infirm or incapable of making certain decisions. The POA is also seen as a potential means of minimizing family conflict during one's lifetime and preventing unnecessary, expensive, destructive and avoidable

[63] This case scenario was loosely based on *Abel v. Abel et al*, 2017 ONSC 7637.

litigation. In certain circumstances, like this case scenario, however, POA documents may cause, rather than prevent, conflict.

In my practice, I have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care and management that their vulnerable loved one needs. I have also seen a POA used effectively as a means of protection against predators, of which there is a very real risk. Unfortunately, I have also seen POAs used abusively and procured fraudulently while a person is compromised cognitively and susceptible to influence, causing the grantor harm through fraud, neglect, and depletion of wealth. This is often accompanied by negligence in the provision of necessary care requirements.

That POA documents are generally a good planning vehicle is a widely shared view. This is evident from the fact that, since 1994 and to this day, the Ontario Ministry of the Attorney General has distributed free POA kits and online forms to the public and solicitors have routinely recommended them as part of an estate plan. It is, however, not always clear to attorneys just what legislative principles they are to follow in carrying out their duties and obligations (for example, such as the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "*SDA*") or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "*HCCA*") or, even if they are indeed aware of such principles, whether they adhere to them as they are obligated to or not.

While a POA document can be used for the good of a vulnerable adult, or a decisionally incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document. More often than not, it becomes apparent that the grantor never fully understood and/or put much thought into the nature and extent of the powers being granted, whether the chosen attorney truly had the ability to do the job and fulfill his/her duties, or whether the attorney chosen could truly be trusted to act in an honest and trustworthy manner. (This is what appears to be happening in the case scenario above.) It looks like Robert possibly lacks the financial skills required to be an attorney under a POA for property and is unaware of his fiduciary duties.) Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result

of a POA which has not been carefully contemplated or that has been procured through false or misleading pretenses. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our office, in my estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

One of the primary ways of reducing or eliminating the outcome of abuse under a POA document is to choose the right attorney, ensuring the qualities of honesty and integrity. Secondly, understanding the different types and uses of POA documents as well as their provisions can go a long way to ensuring that all parties understand the legal relationship they are entering into. Thirdly, a review of the duties and obligations expected of an attorney for property will facilitate legal practitioners properly advising those acting as fiduciaries.

In summary, a POA is an instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even unremitting incapacity. Proper, thoughtful preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

(1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;

(2) the Continuing POA for Property (or "**CPOAP**"), pursuant to the provisions of the *SDA*; and

(3) the POA for Personal Care (or "**POAPC**") pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;

- a general authority granting the power to do all that is permissible under the governing principles and legislation; and

- a continuing authority which survives subsequent incapacity.

A POA for Personal Care can be used to grant powers exercised during incapacity only.

A CPOAP is effective upon execution unless there is a triggering provision to the contrary. It can be used in an agency type relationship and during subsequent incapacity.

Choosing the right attorney is perhaps the most critical decision a person can make in order to protect his/her property or person in the event that he/she becomes unable to do so. In choosing an attorney, a grantor should consider whether a potential attorney has the values of honesty, integrity and accountability.

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together or enable each attorney to act separately/alone. Unless it is specified in the POA document that attorneys are permitted to act separately, statutory law assumes that jointly appointed attorneys must make decisions together. Regardless of whether acting permissibly severally where two or more attorneys are appointed, the attorneys are accountable to each other and similarly liable for the actions of the other.

It is also possible to assign different responsibilities to separate attorneys. You can also assign one attorney to act on your behalf and a substitute attorney to act for you should death or another event prevent the attorney first named to act. It is important, when deciding whether to appoint more than one attorney, to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to a grantor's personal and financial well-being.

An attorney is a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law (and statute) imposes obligations on what an attorney

acting as a fiduciary may do. Thus, in addition to any specific duties that may have been set out by the grantor in the POA document, the common law has also imposed the following duties upon an attorney:

- The attorney must act within the scope of the authority delegated;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (If acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his/her own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);
- The attorney must not make secret profits;
- The attorney must cease to exercise authority if the POA is revoked;
- The attorney must not act contrary to the interests of the grantor or in a conflict with those interests;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

According to the court in *Banton v. Banton,*[64] some of the specific duties and obligations of an Attorney for Property include the following:

- Manage a person's property in a manner consistent with decisions for the person's personal care;
- Explain to the incapable person the Attorney's powers and duties;
- Encourage the incapable person's participation in decisions;
- Consult with the incapable person from time to time as well as family members, friends and other Attorneys;
- Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will; and
- Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into account the value of the property of the incapable person, including considerations as to the standard of living and other legal obligations.

In the recent case of *Tarantino v. Galvano* 2017 ONSC 3535, an attorney was found to have breached her duties as an attorney for property in transferring an interest in a house to herself. This case is an example where, despite providing loving and devoted care to her incapable mother and having sought legal advice, the attorney still acted inappropriately by entering into a transaction that benefitted her personally and breached her statutory and common law duties. The Court found that under the *Substitute Decisions Act*, the attorney could only enter into the agreement to transfer the house if it was "reasonably necessary" to provide for the grantor's care, which the Court found it was not. The transfer was set aside, but the Court also noted, "if required, I would find under s.33(2) of the *Substitute Decisions Act* that [the attorney] should be relieved of

[64] 1998 CanLII 14926 (ONSC).

liability for committing a breach of duty, as she acted honestly, reasonably and diligently".[65]

In the case scenario, Robert admitted to taking his mother's money and using it for his own personal use, thereby breaching a fiduciary duty. It does not sound like Robert is aware of his duties as an attorney under a power of attorney for property nor that he has the financial skills necessary to fulfil his role. Joseph may be successful in bringing an application to have his brother removed as an attorney.

Justice Fragomeni, in *Teffer v. Schaefers*[66], set out the test for removal of a power of attorney as follows:

1) There must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor; and

2) The court must be of the opinion that the best interests of an incapable person are not being served by the attorney.

Examples of attorney misconduct under the first step of the test include failure to provide a monthly accounting; failure to voluntarily pass accounts; failure to provide missing information or documentation with respect to missing funds; and an inability to follow court orders. In this case scenario the first part of the test would likely be met.

The second part of the test, applied to our fact scenario, requires the Court to determine whether Robert was serving his mother's best interests. While he may be caring for her by visiting her every day and looking after her medical bills, helping himself to her money to lease a BMW and go on vacations is likely not in his mother's best interests.

The even more recent case of ***Crane v Metzger*** 2018 ONSC 5382, involved a POA dispute between the incapable person's daughter and brother. The daughter sought to have her uncle removed as her mother's attorney under a POA for property and to be appointed as her mother's sole permanent guardian of property and of the person. The

[65] *Tarantino v. Galvano,* 2017 ONSC 3535 at para.48
[66] *Teffer v. Schaefers* (2008), 93 OR (3d) 447, see also *Berkelhammer v. Berkelhammer Estate*, 2012 ONSC 6242.

mother was 84 years old with vascular dementia. Both parties agreed, after capacity assessments were conducted, that the mother was incapable to make decisions with respect to both her property and her personal care. Her assets were valued at $700,000.00 and she was living in a long-term care home.

The daughter advanced a lengthy list of grievances against her uncle, including that the uncle was mishandling her mother's finances, care, and was not acting in her mother's best interests. The daughter also asserted that the mother's current long-term care home was "substandard" and did not suit her advanced needs.

The uncle alleged that the daughter had behaved recklessly with regard to her mother's care, viewed her mother's assets as her own, and that he was a prudent manager of his sister's property and personal care. Further, the uncle advised the Court of one particular incident when the daughter lied to him and took her mother to Seattle when the daughter told him she was taking her to Wasaga Beach. The mother did not have proper travel medical insurance at the time. The daughter had also secured a passport for her mother under false pretenses.

The Court also found that, based on the evidentiary record, the daughter had taken her mother to the bank to withdraw funds from her account while knowing that she was incapable of doing so. When the withdrawals were brought to the attention of the bank, "the bank agreed that they were at fault for allowing the withdrawal by [the daughter] and [the mother]".[67] More than $10,000.00 was returned to the account by the bank. The Court concluded that the daughter "cannot be trusted to deal with the financial welfare of [her mother]".[68]

With respect to the uncle's actions, the Court found that "the record discloses that [the uncle] is doing the best he can in the circumstances" and that the daughter "failed to provide strong and compelling evidence of misconduct or neglect on the part of the

[67] *Crane v Metzger* 2018 ONSC 5382 at para 36.
[68] *Crane v Metzger* 2018 ONSC 5382 at para 37.

attorney or that the best interests of [her mother] required the removal of [the uncle] as her attorney."[69] The motion was dismissed.

Checklists: Appendices "F" and "G" - Duties of Attorneys for Property Checklist; and Duties of Attorneys for Personal Care Checklist. Weblinks:

http://www.welpartners.com/resources/WEL_CapacityChecklist_POA_Property.pdf

http://www.welpartners.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf

### Capacity (Grant/Revoke Power of Attorney)

Another issue that is raised in this case scenario is the question of whether Stella was capable of granting the Power of Attorney at the time she granted it to Robert? This question deals with the rather complicated issue of decisional capacity and the older adult, which we have touched on above.

In this scenario, Stella may not have been capable of granting POAs. The factors to be applied in assessing capacity to grant/revoke a continuing power of attorney for property ("CPOAP") are found at section 8 of the *SDA*. A person is capable of giving/revoking a CPOAP if he/she possesses the following:

> (a) Knowledge of what kind of property he/she has and its approximate value;
>
> (b) Awareness of obligations owed to his or her dependants;
>
> (c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a Will, subject to the conditions and restrictions set out in the power of attorney;
>
> (d) Knowledge that the attorney must account for his/her dealings with the person's property;

[69] *Crane v Metzger* 2018 ONSC 5382 at para 44.

(e) Knowledge that he/she may, if capable, may revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him/her.

The factors to be applied in ascertaining capacity for revoking a CPOAP are the same as that for granting a CPOAP. A person is capable of revoking a CPOAP if he/she is capable of granting one.

Assessments of capacity to grant/revoke CPOAP documents need not be conducted only by certified capacity assessors, although they certainly can be completed by assessors. Indeed, it is the responsibility of the drafting solicitor, if there is one, to assess the client's capacity to grant/revoke a power of attorney, either for property or for personal care, when asked to prepare such documentation. A lawyer is obligated to ensure that a person taking such steps possesses the requisite decisional capacity to do so. Solicitors should take careful notes of their assessments of their client's capacity and should keep those notes with the file and the executed powers of attorney.

The factors to be applied in granting/revoking a POA for personal care ("POAPC") are found at section 47 of the *SDA*. A person is capable of giving a POAPC if the person has:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.

***Analysis of Case Scenario***

It is the responsibility in this scenario, of the drafting lawyer to determine whether or not Stella had the capacity to grant the POAS. The lawyer, however, on the facts as we know them, arguably failed to ask Stella any questions or take any steps to determine whether or not she had capacity to execute these documents. Simply asking a person if they understand the documents is not conclusive in determining decisional capacity.

Checklists: Appendices “H” and “I” Capacity in the Estate Planning Context and “Red Flags” for Decisional Incapacity of a Legal Retainer. Weblinks:

http://www.welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

http://www.welpartners.com/resources/WEL_ILA%20checklist.pdf

## CONCLUDING COMMENTS:

While not all family disputes can be avoided, having proper planning in place may reduce the nature and extent of those disputes involving older adults and/or reduce or avoid the costs of litigation. Perhaps some of these disputes in our case scenarios could have been avoided if the families knew in advance of the wishes and plans of the older adult. Communication is critical in planning for older adults. Determining the best people to act as substitute decision makers is also important. How will one daughter react when the brother is appointed? Can all three children work together? Before putting that daughter on your joint bank account, is there another way? Perhaps children are not the best choice; there could be a family friend or neighbour. Sibling rivalry can be costly, and evinces bad behaviour amongst siblings including alienation, kidnapping, and other forms of abuse. Once these disputes arise, the cost is large, both emotionally and financially and often it is the older adult’s assets that are depleted in litigating these disputes.

**TOOLS AND RESOURCES: APPENDICES "A" TO "H"**

Checklists which can also be found online at:

http://welpartners.com/resources/practicechecklists

**Checklists**

Appendix "A": Undue Influence Checklist

Appendix "B": Grounds to Attack an *Inter Vivos* Gift or Wealth Transfer

Appendix "C": Presumption of Resulting Trust Checklist

Appendix "D": Chart: Pecore Last 10 Years, Appellate Decisions

Appendix "E": Summary of Capacity Criteria

Appendix "F": Duties of an Attorney Under Power of Attorney for Property

Appendix "G": Duties of an Attorney Under Power of Attorney for Personal Care

Appendix "H": Capacity – Estate Planning Context

Appendix "I": ILA Red Flags for Decisional Incapacity in Legal Retainer

WEL publications, papers, articles, case reviews, newsletters, reported decisions and publications will offer further materials for consideration:

http://welpartners.com/resources/

## APPENDIX "A"

## UNDUE INFLUENCE CHECKLIST

### UNDUE INFLUENCE: SUMMARY

- The doctrine of undue influence is used by courts to set aside certain *inter vivos* gifts/wealth transfers, transactions, and planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent. Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[1]

### TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires **coercion**. It is only where the will of the person who becomes coerced into doing that which he or she does not desire to do, that it is undue influence.[2] Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". Persuasion is allowed, but where one person has the ability to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power, undue influence will be found.[3]

- ***Burden of Proof****:* While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence.[4]

- ***Standard of Proof****: C(R) v McDougall*[5] held that there is a single standard of proof in civil cases— **the balance of probabilities**—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.[6]

- ***Indirect Evidence***: In the U.K. case of *Schrader v Schrader*[7], the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is

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[1] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[2] *Wingrove v Wingrove* (1885) 11 PD 81 at 82
[3] *Dmyterko Estate v. Kulikovsky* (1992) CarswellOnt 543
[4] Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.
[5] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[6] *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38
[7] *Shrader v Shrader, [2013] EWHC 466 (ch)*

arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

- ***Relationship***: Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develops health issues it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[8]

- ***Multiple Planning Documents***: In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[9]

- ***Language***: In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[10] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[11]

- ***Indicators of Testamentary Undue Influence***: The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*[12] provided a (non-exhaustive) list of indicators of undue influence:
    - The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
    - The testator is socially isolated;
    - The testator has experienced recent family conflict;
    - The testator has experienced recent bereavement;
    - The testator has made a new Will that is inconsistent with his or her prior Wills; and
    - The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[13]

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

[9] See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

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

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

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

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

In *Tate v. Gueguegirre*[14] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.[15]

## INTERPLAY WITH CAPACITY AND SUSPICIOUS CIRCUMSTANCES

- Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[16] Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[17]

- *Suspicious Circumstances*: Typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:
    - Circumstances surrounding the preparation of the Will or other planning instrument;
    - Circumstances tending to call into question the capacity of the testator/grantor, and;
    - Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[18]

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[14] 2015 ONSC 844 (Div. Ct.)
[15] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[16] See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence. In *Leger v. Poirier*, [1944] SCR 152 the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "disposing mind and memory" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.
[17] *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[18] *Vout v Hay,* [1995] 2 SCR 876 (SCC).

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly "unnatural" dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.[19]

## *INTER VIVOS* GIFTS: UNDUE INFLUENCE

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

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

- ***Actual Undue Influence***: Has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[20] Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.

- ***Presumed Undue Influence*:** This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being abused.[21] These relationships are determined by a "smell test": does the potential for domination inhere in the relationship itself?

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

[19] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.
[20] *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181
[21] *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

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

The presumption of undue influence can be rebutted by:

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

## LAWYERS' CHECKLIST

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present. In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present. In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

### *Checklist*

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?

- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?

- ❑ Is there conflict within your client's family?

- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

- ❑ If the client is isolated, does he/she live with one particular individual?

- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

- ❑ Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?

- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?

- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

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

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

- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?

- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

- ❑ Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

***Involvement of Professionals***

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

- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?

- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

***Substantive Inquiries***

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?

- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?

- ❑ Is the client making a marked change in the planning documents as compared to prior documents?

- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

**Guidelines for Lawyers to Avoid and Detect Undue Influence**

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- ❑ Interview the client alone;

- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

- ❑ Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability. Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;

- ❑ Address recent health changes and determine whether the client have any physical impairment (hearing, sight, mobility, limitations)?

- ❑ Consider evidence of intention and indirect evidence of intention; and

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

**Practical Tips for Drafting Lawyers - Checklist**

- ❑ Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;

- ❑ Determine Intentions;

- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a

client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[22] and

- ❑ Be mindful of the *Rules of Professional Conduct*[23] which are applicable in the lawyer's jurisdiction.

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

Kimberly A. Whaley, WEL PARTNERS 2019

[22] For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf

* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

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

## APPENDIX "B"

## CHECKLIST: GROUNDS TO ATTACK AN *INTER VIVOS* GIFT

| GROUND | CRITERIA |
|---|---|
| Decisional Capacity | In order to be found to have the requisite decisional capacity to make a gift, a donor requires the following:<br>(a) The ability to understand the nature of the gift; and<br>(b) The ability to understand the specific effect of the gift in the circumstances.<br><br>The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the factors for determining requisite testamentary capacity arguably apply. |
| Undue Influence | 1) **Direct or Actual undue influence**:<br>• Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[1]<br>• Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[2]<br>2) **Presumed undue influence** or undue influence by relationship:<br>• Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.[3]<br>• Does the "potential for domination inhere in the relationship itself"?[4]<br>• Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, "as well as other relationships of dependency which defy easy categorization."[5]<br>• A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[6] |

[1] *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.
[2] *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.
[3] *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.
[4] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.
[5] *Geffen v. Goodman Estate*,[1991] 2 S.C.R. 353 at para. 42.
[6] *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

| GROUND | CRITERIA |
|---|---|
| Resulting Trust | • Where there is a gratuitous transfer between a parent and an independent adult child there is a presumption of resulting trust.[7]<br>• The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient.<br>• The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.[8] |
| *Non Est Factum* | • *Non est factum* is the plea that a deed or other formal document is declared void for want of intention:<br>"[W]here a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of *non est factum* on the basis that his mind at the time of the execution of the document did not follow his hand."[9]<br>• *Non est factum* places the legal onus on the person attacking the transfer or gift to prove "no intention". |
| Unconscionable Bargain | A gift or other voluntary wealth transfer is prima facie unconscionable where:<br>1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests; and<br>2) The transaction affects a substantial unfairness or disadvantage on the maker.[10] |
| Unconscionable Procurement | 1) A significant benefit obtained by one person from another;<br>2) An active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.[11] |

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

Kimberly A. Whaley, WEL PARTNERS 2019

[7] *Pecore v. Pecore* 2007 SCC 17.
[8] *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 63.
[9] *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.
[10] *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).
[11] John Poyser, *Capacity and Undue Influence*, (Toronto: Carswell, 2014) at p.580.

## APPENDIX "C"

## PRESUMPTION OF RESULTING TRUST CHECKLIST

- A **resulting trust** arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he/she can establish it was given as a gift.

- In the case of a gratuitous transfer, **a rebuttable presumption of resulting trust** applies when the transfer is challenged. A Court must commence the inquiry with the presumption, weigh all of the evidence and attempt to ascertain the actual intention of the transferor. The presumption of resulting trust determines the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities.[1]

- The presumption of resulting trust applies to gratuitous transfers between parents and adult children. The **presumption of advancement** is still applicable between parents and minor children.

- A gift is a gratuitous transfer made without consideration. The donor must have *intended* to make a gift, the subject matter of the gift must be delivered to the donee, and the donee must accept the gift.[2] Once a gift is given it cannot be retracted. The standard for proving a gift is the usual civil standard of a balance of probabilities. The **intention of the donor** at the time of the transfer is the governing consideration.

## JOINT TENANCY/JOINT ACCOUNTS & RIGHT OF SURVIVORSHIP

- **Joint Tenancy**: Is a form of concurrent property ownership. However, parties may hold legal title to property as joint tenants while beneficial ownership is held differently. For example, a mother and adult son may own real property as joint tenants in law while the mother alone owns the beneficial interest. In such circumstances the beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'.[3]

- **Right of Survivorship**: When a joint tenant dies, his/her interest in property is extinguished. The last surviving joint tenant takes full ownership of the property.

- **Gift of the Right of Survivorship**: So long as the requirements of a binding gift are met, the owner of property may, during his/her lifetime, make an immediate gift of a joint tenancy including the right of survivorship. The donee of the gift may be

[1] *Pecore v. Pecore* 2007 SCC 17 at paras. 20, 22-25, 44; *Kerr v. Baranow*, 2011 SCC 10 at para.18

[2] *McNamee v. McNamee* 2011 ONCA 533 at para. 24

[3] Pecore v. Pecore 2007 SCC 17 at para. 4

holding it for the benefit of the donor while he/she is alive. When gifted *inter vivos*, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies. Donor may gift the right of survivorship but continue to deal freely with property throughout his/her lifetime. When legal title to property is transferred gratuitously and a resulting trust arises, the right of survivorship is held on trust by the transferee unless otherwise established.

## EVIDENCE OF INTENTION

- The intention of a person who transfers property gratuitously to another is sometimes difficult to determine, particularly when the transferor is deceased. In *Pecore,* Justice Rothstein set out a non-exhaustive list of factors for a Court to examine:

    - **Evidence of the deceased's intention at the time of the transfer**: including, where admissible, evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);

    - **Bank documents**: The clearer the wording in the bank documents as to the deceased's intention, the more weight that evidence might attract;

    - **Control and use of the funds in the account**: The circumstances must be carefully reviewed and considered to determine the weight to be given to this factor since control can be consistent with an intention to retain ownership, yet it is also not inconsistent with an intention to gift the assets in certain circumstances;

    - **Granting a Power of Attorney**: The court should consider whether a power of attorney is evidence, one way or another, of the deceased's intention;

    - **Tax treatment of joint accounts**: This is another circumstance which might shed light on the deceased's intention as, for example, a transferor may have continued to pay taxes on the income earned in the joint account since they intended the assets to form part of their estate. However, once again the weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge.[4]

- Several cases have also turned on the **testimony of drafting lawyers,[5] notary public,[6] financial and investment advisors[7] and bank tellers**[8] with respect to

[4] *Pecore* at paras. 55-70
[5] *Laski v. Laski* 2016 ONCA 337; *Van De Keere Estate Re* 2012 MBCA 109; *Lorintt v Boda* 2014 BCCA 354; *McKendry v. McKendry* 2017 BCCA 48
[6] *Fuller v. Harper* 2010 BCCA 421
[7] *Foley (Re*) 2015 ONCA 382; *Laski v. Laski* 2016 ONCA 337
[8] *Comeau v. Gregoire*, 2007 NSCA 73; *Doucette v. McInnes* 2009 BCCA 393

the deceased's intention at the time a transfer is made or the joint bank account is opened.

## APPLICABILITY

- **Gratuitous Transfer of Assets or Title into Joint Property**: In *Pecore*, the Supreme Court of Canada confirmed that the presumption of resulting trust applies to gratuitous transfers of assets or joint property between parents and adult children. The presumption of advancement still exists, but *Pecore* eliminated it as between parents and adult children.

- **Testamentary Dispositions**: The presumption of resulting trust does not arise with respect to testamentary dispositions since there is clear evidence of intention in the Will or other testamentary document.

- **Beneficiary Designations**: There is conflicting law on whether the presumption of resulting trust applies to beneficiary designations under RRSPs, RRIF or insurance policies for example. Courts in England,[9] Manitoba,[10] British Columbia,[11] Ontario,[12] and Alberta[13] apply the presumption of resulting trust to beneficiary designations. Only one province, Saskatchewan takes the position that the presumption of resulting trust does not apply to beneficiary designations.[14]

- **Transfers of Land**: Some cases have questioned whether the presumption of resulting trust applies to gratuitous transfers of land,[15] although there are several cases and authority that support the view that it does.[16]



[9] *In Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, (1901), [1902] 1 Ch 282
[10] *Dreger (Litigation Guardian of) v. Dreger* [1994] 10 WWR 293
[11] *Neufeld v. Neufeld Estate*, 2004 BCSC 25
[12] *McConomy-Wood v. McConomy* (2009), 46 ETR (3d) 259
[13] *Morrison Re.* 2015 ABQB 769
[14] *Nelson et al. v. Little Estate* 2005 SKCA 120
[15] *Thorsteinson Estate v. Olson* 2016 SKCA 134 at para. 17, citing *Thorsteinson Estate v. Olson* 2014 SKQB 237 at para. 103
[16] *Fuller v. Harper* 2010 BCCA 421

**APPENDIX "D"**

**CHART ON *PECORE* APPELLATE CASES**

**Pecore Last 10 Years – Review of Appellate Decisions Citing *Pecore* – Parent /Adult Child Gratuitous Transfers – Estate Context**

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| 2007 | *Comeau v. Gregoire* 2007 NSCA 73 | **Joint Bank Account** Mother held account jointly with one of her children | • Testimony from various witnesses – mother and daughter were "very close"<br>• If bank account was meant for convenience of helping with banking it would have made more sense to set one up with one of her other children who lived closer to her<br>• Daughter testified that bank employee explained right of survivorship to them<br>• All deposits and all withdrawals were made by the deceased<br>• Annual statement sent to mother, mother paid tax on income<br>• Bank employee testified that she was "100 percent sure" the account was joint<br>• At one point mother withdrew $80,000 from account and put it in an investment solely in the name of daughter (post transfer conduct) | Gift |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| 2009 | *Simcoff v. Simcoff* 2009 MBCA 80 | **Real Property** Mother transferred title into name of herself and son as joint tenants | • Mother told son that she wanted property to go to him on her death<br>• When she moved out of property, son received all rents and was responsible for maintenance and upkeep<br>• Post-transfer conduct supported conclusion that mother used transfer as way for property to devolve to son on death | Gift |
| 2009 | *Doucette v. McInnes* 2009 BCCA 393 | **Joint Bank Account** Five investment accounts – term deposits - in joint names with children except one son. Children not aware of accounts | • "spotty" but uncontested evidence – trial judge failed to properly incorporate uncontested facts<br>• Children had no idea they were joint owners – Appeal Court noted this was important factor<br>• Bank teller testified that although in joint names, only mother's address on account – only she received statements - Mother insisted on complete control<br>• Mother surreptitiously obtained the signatures of her children on the banking documents<br>• Shortly before death mother wanted to transfer GIC from one child to another but non-redeemable – Teller advised mother to see lawyer – perhaps make the gift by Will<br>• Bank documents specified rights of survivorship | Gift |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | | • Mother received income from investments and paid taxes owing<br>• Although – no evidence mother ever made any statements about her intention with respect to accounts and mother did not tell lawyer that the joint accounts would *not* form part of estate | |
| 2009 | *Breau v. The Estate of Ernest St.Onge et al* 2009 NBCA 36 | **Joint Bank Account**<br>Deceased added friend (who was 32 years his junior) as joint holder on bank account (also 'gifted' personal items and tools) | • Deceased lacked mental capacity to gift personal items & tools (notes from lawyer at the time assessing him for testamentary capacity- disoriented, memory loss, deteriorating cognitive capacity etc.)<br>• Deceased required help with his finances – reviewing bills and writing cheques<br>• Had daughter previously on bank account to assist with paying bills etc. supported conclusion that friend was added to account for convenience<br>• Friend was also attorney under POA however trial judge did not take this into account – Appeal Court found this was not a determinative factor | Resulting Trust |
| 2010 | *Fuller v. Harper* 2010 BCCA 421 | **Real Property**<br>5 months before death, father tsf one-half joint interest in vacant lot to long-time friend | • Notary public testified that deceased "clearly intended" to register property in joint tenancy | Gift |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | Estranged son argued friend held lot in resulting trust for estate | • Deceased advised friend that he was adamant he did not want son to receive any share of the estate<br>• Clause in his Will disinheriting son<br>• Deceased wanted to gift land outright but Notary Public persuaded him to put in joint tenancy | |
| 2011 | *Beaverstock v. Beaverstock* 2011 BCCA 413 | **Money Transfers**<br>Mother gave money to son. Son died. Mother says money was a loan and sued son's wife (and executor) for return of the money. Wife says it was a gift. | • Trial judge "failed to begin his analysis with presumption of resulting trust" and made no finding of fact with respect to actual intention (did not even consider the question)<br>• Appeal Court: Wife provided no evidence to rebut presumption of resulting trust<br>• Mother's evidence was it was her intention to lend the money | Loan |
| 2012 | *Van De Keere Estate, Re,* 2012 MBCA 109 | **Money Transfers**<br>Father transferred various sums of money (totalling $408,000 ) to one daughter over 4 years before his death (unknown to his other children) | • Gifting daughter over 90% of his estate was inconsistent with behaviour by the deceased that showed an intention to treat his children equally, by his earlier gifts and by his Will.<br>• Lawyer testified that deceased made it clear that it was his intention to benefit his children equally<br>• Deceased was a "careful man when it came to his money" | Resulting Trust |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | | • No explanation was provided as to why deceased would "strip himself of almost all of his assets"<br>• Evidence from daughter was insufficient to establish a gift was intended | |
| 2013 | *Bergen v. Bergen* 2013 BCCA 492 | **Real Property**<br>Parents transferred one-third interest in property to son. They fought and parents severed joint tenancy. Parents sued for order to sell property and that son held property on a resulting trust. Son said parents were holding title on resulting trust for HIM. | • Parents paid for the property and improvements<br>• Hired a lawyer to tsf 1/3 interest<br>• Parents wanted to keep "control" and wanted to avoid probate fees – thought they could do both<br>• Found parents more credible – parents did not intend to make immediate gift of beneficial interest in land | Resulting Trust |
| 2014 | *Sawdon Estate v. Sawdon* 2014 ONCA 101 | **Joint Bank Accounts**<br>Between deceased father and adult sons | • Direct evidence at the time the bank accounts were opened<br>• Wording of the bank documents<br>• Control and use of the funds<br>• The terms of the POA that the father gave to one son<br>• Tax treatment of the bank accounts | Gift (the sons who held the legal title in the bank accounts held the beneficial right of survivorship for the |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | | | other children equally) |
| 2014 | *Lorintt v. Boda,* 2014 BCCA 354, leave to appeal dismissed 2015 CanLII 10577 (SCC) | **Real Property**<br>Requested lawyer to transfer his house to son. After discussion agreed to transfer to father and son as joint tenants. Father died. Executor claims son held title in resulting trust. | • Key evidence was lawyer's testimony which was supported by affidavits from the son<br>• Lawyer explained options to father, the concept of joint tenancy, spoke and understood English (although Father's first language was Hungarian)<br>• Executor tried to put evidence of father's intent forward in affidavits – both trial and appellate courts found it not useful – as dealt with father's later inconsistent comments on his intention (not his intention at time of transfer) and medical diagnoses at a later date (not at the time of transfer) | Gift |
| 2015 | *Mroz v. Mroz* 2015 ONCA 171 | **Real Property**<br>Mother transferred title of her house (only significant asset) into name of herself and daughter as joint tenants | • Mother wanted daughter to have title to the Property after her death BUT mother also wanted her other children to receive bequests under the Will from the sale of the Property<br>• *All witnesses* testified this was mother's intention | Trust |
| 2015 | *Foley (Re),* 2015 ONCA 382 | **Joint Bank Account & Savings Bonds** | • Testimony from financial advisor: Father looking for a way to avoid probate costs and he assured her that | Gift & Savings bonds were |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | Monetary transfers to daughter & savings bonds bequeathed under Will to daughter but deposited into joint account in names of both children & father shortly before death | his children would know how to divide the assets<br>• Deceased was only person to deposit/withdraw from joint account<br>• Corroboration of the gifts in written instructions provided to the financial advisor<br>• Deceased would keep track & record of any loans – he did not record the transfer of the savings bonds into the account as a loan<br>• Financial advisor testified father wanted daughter to receive bonds as son received farm – met with deceased alone<br>• Daughter was father's attorney under POA<br>• Expert evidence from geriatric psychiatrist re Father's capacity | bequeathed to daughter |
| 2016 | *Cowper-Smith v. Morgan* 2016 BCCA 200 | **Real Property**<br>Mother transferred residence into joint names with daughter<br>Both the Property and Mother's investments were held in trust through document called 'Declaration of Trust'- Mother was beneficiary and daughter was bare | • Brothers knew of the transfer into joint names with sister but was told it was just for easier management of mother's affairs<br>• Found that as the presumption of undue influence was not rebutted, it follows that the presumption of resulting trust was also not rebutted as Mother was unduly influenced by daughter when she made the | Trust |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | trustee – upon death daughter entitled to both assets "absolutely"<br>This rendered mother's estate devoid of assets | gratuitous transfer and executed declaration of trust | |
| 2016 | *Andrade v. Andrade* 2016 ONCA 368 | **Real Property**<br>Mother purchased home with a loan and mortgage, but put name of house and mortgages into children's names<br>One child died – wife of child sought to recover his half-interest in house<br>Mother said house belonged to her as beneficial owner | • Trial judge found deceased son was legal & beneficial owner – Overturned by Court of Appeal: son held house in trust for mother<br>• Mother rented out house and collected rent<br>• Children gave their money from jobs to mother while they lived in the house<br>• Mother used money to pay mortgage<br>• Evidence of intention was not lacking - trial judge failed to direct himself to question of mother's intention – instead looked at intention of children<br>• Mother "borrowed" their names for title and mortgage because she could not qualify and they could<br>• Mother died before trial but was able to give evidence as to her intention in affidavit and cross-examination before her death | Trust |
| 2016 | *Zeligs v. Janes* 2016 BCCA 280 | **Real Property & Joint Account**<br>Elderly mother held joint title in real property with | • Handwritten note by mother saying she wanted her daughter to be full owner when she died | Gift (but JT severed and ½ interest |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | one of her two adult children.<br>Mother also made daughter joint-holder of bank account and attorney under a POA.<br>Daughter mortgaged the property and used money for her and her husband's benefit.<br>Sold house and used funds for own benefit etc. | • Daughter saw mother put a copy of the note in an envelope to mail to other sister so she would know what was "going on"<br>• Daughter also told sister about transfer<br>• Trial judge found presumptions of undue influence and resulting trust were both rebutted BUT also found daughter severed the joint tenancy and extinguished the right of survivorship when she transferred the sale proceeds to herself and her husband<br>• Mother's estate was entitled to one-half of the sale proceeds – which daughter held in trust for estate | held in trust for Estate) |
| 2016 | *Laski v. Laski* 2016 ONCA 337 | **Joint Bank Account**<br>Father held certain bank accounts jointly with one of his three children (his daughter). Brother claimed she held funds on resulting trust. | • Clause in Will specified any assets held jointly with daughter were hers alone on his death – residue of estate split between other children<br>• Vast bulk of evidence was produced by daughter<br>• Lawyer's testimony was supported by her contemporaneous notes – she suggested clause in Will as Father had told her he suspected son would challenge entitlement to joint accounts – Lawyer wanted testator's intention to be clear<br>• Testator told lawyer he did not want to identify the exact joint assets in Will as | Gift |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | | that would make his life "a living hell" if son knew the extent of assets that would fall outside of estate<br>• Investment Advisor's evidence: joint accounts were opened on testator's instructions and had rights of survivorship<br>• Close to his death, testator signed direction prepared by the investment advisor transferring securities into joint account – Testator told investment advisor he felt he was dying and he wanted to make sure his daughter was taken care of<br>• Advisor understood that the assets were for daughter's benefit only, testator complained that his son was bullying him and asking for money that the testator did not want to give. He wanted to protect his daughter<br>• Son's evidence was "bald and self-serving"<br>• Evidence was "overwhelming" that the Testator intended gifts | |
| 2016 | *Franklin v. Cooper* 2016 BCCA 447 | **Real Property**<br>Deceased mother transferred title of her home to herself and daughter as joint tenants | • Daughter claimed the transfer was a result of an "agreement" and in consideration of expenses she had paid for in the past and she agreed to support her mother and not put her in a nursing home | Trust |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| | | | • Daughter claimed lawyer explained joint tenancy and right of survivorship to mother and she agreed that was what she wanted – but lawyer was not called as a witness, his file was destroyed<br>• No written evidence of an agreement<br>• Sister testified mother put title into joint tenancy to prevent mother from being defrauded into transferring her title away to a third party (she saw a tv show about this)– she claimed she had been<br>offered the joint title first<br>• Mother told all three children they would split the house<br>• No direct evidence to establish intention of a gift (court rejected evidence of daughter) | |
| 2016 | *Thorsteinson Estate v. Olson*<br>2016 SKCA 134 | **Real Property**<br>Deceased transferred land into the name of herself and a man she treated like a son (William). During her life she commenced action requesting tsf be set aside based on resulting trust (among others) Estate continued on the action. | • Deceased signed Deed of Gift and at the time of transfer expressed an intent to gift the land to William<br>• It was the deceased's idea to transfer land prompted by high probate fees incurred in William's father's estate<br>• The deceased on her own volition contacted and instructed the lawyer to prepare the Deed and transfers<br>• The transfer was consistent with her Will and the close "mother/child" relationship | Gift |

| Year | Case | Type of Property | Evidence of Intention | Outcome : Gift /Trust |
|---|---|---|---|---|
| 2017 | *McKendry v. McKendry* 2017 BCCA 48 | **Real Property**<br>Deceased mother transferred legal title to her home into joint tenancy with her son. | • At time of transfer it was clear son held property in trust for Mother. Later Mother decided to remove trust conditions so that son would receive property absolutely on death.<br>• Court of Appeal: Mother's intentions were "manifest and unambiguous"<br>• When she tsf property – she did so with intent that son held property in trust. She had a lawyer prepare a trust declaration reflecting that intention – although son did not sign it – it was clear evidence of her intention<br>• Later she consulted new lawyer – through lawyer's note and a two-page document prepared by lawyer – mother "unambiguously renounced" her beneficial interest in the right of survivorship<br>• Her Will also stated that the property was registered in JT with son and he would receive it subject to registered mortgages<br>• Nothing more would have been gained had the Mother executed a deed of gift under seal – no further act of delivery was required because of existing joint tenancy. | Gift |

## APPENDIX "E"

## SUMMARY OF CAPACITY CRITERIA

The following is a synopsis which attempts to summarize the various criteria or factors, and/or 'test' so to speak respecting certain decisional capacity evaluations:

| CAPACITY TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| **Manage property** | *Substitute Decisions Act, 1992*[1] *("SDA"),* s. 6 | (a) Ability to understand the information that is relevant in making a decision in the management of one's property; and<br><br>(b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. |
| **Make personal care decisions** | *SDA,* s. 45 | (a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and<br><br>(b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision. |
| **Grant and revoke a POA for Property** | *SDA,* s. 8 | (a) Knowledge of what kind of property he or she has and its approximate value;<br>(b) Awareness of obligations owed to his or her dependants;<br>(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;<br>(d) Knowledge that the attorney must account for his or her dealings with the person's property;<br>(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;<br>(f) Appreciation that unless the attorney manages the property prudently its value may decline; and<br>(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her. |

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

| CAPACITY<br>TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| **Grant and revoke a POA for Personal Care** | *SDA,* s. 47 | (a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and<br>(b) Appreciation that the person may need to have the proposed attorney make decisions for the person. |
| **Contract** | Common law | (a) Ability to understand the nature of the contract; and<br>(b) Ability to understand the contract's specific effect in the specific circumstances. |
| **Gift** | Common law | (a) Ability to understand the nature of the gift; and<br>(b) Ability to understand the specific effect of the gift in the circumstances.<br>*In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.* |
| **Make a Will**<br>***Testamentary Capacity*** | Common law | (a) Ability to understand the nature and effect of making a Will;<br>(b) Ability to understand the extent of the property in question; and<br>(c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator. |
| **Revoke a Will** | Common law | (Same as above – to Make a Will) |
| **Make a codicil** | Common law | (Same as above – to Make a Will) |
| **Make a testamentary designation** | Common law | (Same as above – to Make a Will) |
| **Create a trust** | Common law | (a) Ability to understand the nature of the trust; and<br>(b) Ability to understand the trust`s specific effect in the specific circumstances.<br>*In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)* |

| CAPACITY TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| **Capacity to Undertake Real Estate Transactions** | Common law | (a) Ability to understand the nature of the contract; and<br>(b) Ability to understand the contract's specific effect in the specific circumstances.<br><br>*In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)* |
| **Capacity to marry** | Common law | Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children.<br><br>Also possibly required: capacity to manage property and the person<br><br>Dr. Malloy[2] stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected. |
| **Capacity to separate** | Common law | Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry)[3]. |
| **Capacity to divorce** | Common law | Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[4]. |
| **Capacity to instruct counsel** | Common law | Understanding of what the lawyer has been asked to do and why;<br>Ability to understand and process the information, advice and options the lawyer presents to them; and<br>Appreciation of the advantages, disadvantages and potential consequences of the various options.[5] |

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

[3] *Calvert (Litigation Guardian of ) v. Calvert*, 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998 [hereinafter *Calvert*]

4 *Calvert*

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

| CAPACITY<br>TASK/DECISION | SOURCE | DEFINITION OF CAPACITY |
|---|---|---|
| **Capacity to give evidence** | *Evidence Act*, [6] ss. 18(1), 18(2), 18(3) | ***18.*** *(1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).*<br>***Challenge, examination***<br>*(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).*<br>***Exception***<br>*(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).* |
| | *Canada Evidence Act*,[7] s. 16(1) | ***Witness whose capacity is in question***<br>*16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine*<br>*(a) whether the person understands the nature of an oath or a solemn affirmation; and*<br>*(b) whether the person is able to communicate the evidence* |



[6] R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)

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

## APPENDIX "F"

## ATTORNEY CHECKLIST

## DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the "*SDA*")

**An Attorney MUST...**

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act*, 1992 (the "SDA") and the *Health Care Consent Act*, 1996 (the "HCCA")

- Be 18 years of age

- Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision

- Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
  - Is the power a "Continuing" Power of Attorney?
  - Is the power limited to a particular period of incapacity?
  - Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
  - Is the power to be exercised solely or jointly with another?

- Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will

- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:
  - Is the grantor aware of the scope of property possessed?
  - Is the grantor aware of the approximate value of property possessed?
  - Is the grantor aware of obligations owed to dependants?

- Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?

- Is the grantor aware that an attorney has a duty to account for all actions taken?

- Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?

- Is the grantor appreciative of the risks of entrusting property to the attorney?

❖ Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

❖ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

❖ Be aware of the statutory obligations of resignation
- Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable

- Notify persons previously being dealt with on the grantor's behalf

❖ Be aware that a Power of Attorney terminates upon the death of the grantor

❖ Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care

❖ Explain to the grantor its powers and duties and encourage the grantor's participation in decisions

❖ Facilitate contact between the grantor and relatives or friends

💰 Consult with relatives, friends and other attorneys on behalf of the grantor

❖ Keep accounts of all transactions

- ❖ Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs
    - Ordinary prudence v. Professional prudence
- ❖ Be aware of the legal liability assumed for a breach of an attorney's duties
- ❖ Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will
- ❖ Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care
- ❖ Be aware of the rights and duties to make application to the court for directions if deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- ❖ Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order
- ❖ Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney
- ❖ Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations
- ❖ Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority
- ❖ Do not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee
- ❖ Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts

**There are limits and restrictions for authority of Estate Planning, and gifting by the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:**

- **Duties**

32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit;

- **Personal comfort and well-being**

(1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit;

- **Personal care**

(1.2) A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions;

- **Exception**

(1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care;

- **Explanation**

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are;

- **Participation**

(3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property;

- **Family and friends**

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person;

- **Consultation**

(5) The guardian shall consult from time to time with,

(a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care.

- **Accounts**

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property;

- **Standard of care**

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs;

- **Same**

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise;

- **P.G.T.**

(9) Subsection (8) applies to the Public Guardian and Trustee;

- **Management plan, policies of P.G.T.**

(10) A guardian shall act in accordance with the management plan established for the property, if the guardian is not the Public Guardian and Trustee, or with the policies of the Public Guardian and Trustee, if he or she is the guardian;

- **Amendment of plan**

(11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval;

- **Application of Trustee Act**

(12) The Trustee Act does not apply to the exercise of a guardian's powers or the performance of a guardian's duties;

- **Liability of guardian**

33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty;

- **Same**

(2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability;

- **Exception, corporate directors**

(3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation;

- **Breach of duty**

(4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute.

**The following further restrictions and limitations should be considered in light of a decade of case law on the subject of Attorney duties, obligations and the authority of the Attorney to conduct Estate Planning on behalf of the Grantor of a Power of Attorney:**

- An Attorney may not change a beneficial designation of life insurance or a "Plan". Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person's death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario. R. S. O. 1990, C.I.8 as amended) and a "Plan" pursuant to the *Succession Law Reform Act, (*R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty *(Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII). [2001] B.C.J. [No. 2547]).*

- An Attorney may want to protect an incapable person's assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton* v. *Banton*, *1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.).*

- An Attorney may complete transactions already entered into by an incapable person.
- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher* v. *Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.).*

- An Attorney may make gifts that the Attorney has reason to believe the

Grantor, if capable, would make.

- ❑ An Attorney may settle an "*Alter Ego Trust"* or *inter vivos* trust. Similarly, certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor's Last Will and Testament, or otherwise if the ultimate beneficiary consents. The planning must be in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. Attorneys may settle *inter vivos* trusts as long as the trust does not contravene the intentions of the Grantor and is considered to be in the Grantor's best interests as defined by the SDA. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. A trust which is contrary to a Grantor's intentions (for example, where a trust has the effect of adding beneficiaries not named in a Will or avoids a gift established by a Will) then the trust may be successfully challenged. Tax considerations must also be factored into any planning (*Easingwood v. Cockcroft*, 2013 BCCA 182).

- ❑ Attorney's should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.

- ❑ An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.

- ❑ An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.

## APPENDIX "G"

## ATTORNEY CHECKLIST

## DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the "*SDA*")

**An Attorney MUST**...

- ☐ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the" SDA") and the *Health Care Consent Act*, *1996*

- ☐ Be aware that an individual of 16 years of age is capable of giving or refusing consent of one's own personal care

- ☐ Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor's behalf

- ☐ Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid

- ☐ Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor

- ☐ Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
    - Is the power to be exercised solely or jointly?
    - Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?

- ☐ Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power

    - Does the grantor have the ability to understand and appreciate the role of the attorney and in particular the risks associated with the appointment?
    - Does the grantor have capacity to give instructions for decisions to be made as to personal care?
    - Is the grantor aware of the Power to revoke the Power of Attorney if capable?
    - The grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care

- ☐ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

- ☐ Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

- ☐ Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions

- ☐ Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document

    - The HCCA applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
    - The HCCA prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
    - Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the SDA?
    - What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?

- ☐ Be aware that special provisions exist in the SDA and the HCCA addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment

- ☐ Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the SDA and the HCCA

- ☐ Arrange for a capacity assessment at the request of the grantor, except where there has been an assessment performed in the six months immediately previous

- ☐ Be aware the statutory requirements concerning resignation
    - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
    - Notify persons previously being dealt with on the grantor's behalf

- ☐ Be aware that a Power of Attorney for personal care terminates on the death of the grantor

- ☐ Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care

- ☐ Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions

- ☐ Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor

- ☐ Keep records of all decisions made on the grantor's behalf

- ☐ Facilitate contact between the grantor, relatives and friends

- ☐ Consult with relatives, friends and other attorneys on behalf of the grantor

- ☐ Facilitate the grantor' independence

- ☐ Make decisions which are the least restrictive and intrusive to the grantor

- ☐ Not use or permit the use of confinement, monitoring devices, physical restrain by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another

- ☐ Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the HCCA

- ☐ Maintain comprehensive records
    - A list of all decisions made regarding health care, safety and shelter
    - Keep all medical reports or documents
    - Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor

- ☐ Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required

- ☐ Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority

- ☐ Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records

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

Kimberly A. Whaley, WEL PARTNERS 2019

## APPENDIX "H"

## CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

### *Capacity Generally*

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[1]

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.[2]

In determining the ability to understand information relevant to making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

### *Testamentary Capacity*

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

(a) The nature of the act of making a Will (or testamentary document) and its effects;

(b) The extent of the property of which he or she is disposing of; and

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[3]

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[1] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 Wl 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calver*t [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161

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

[3] *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:

- A "*disposing mind and memory*" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. [4]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[5]:

> *"If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity*."

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.[6]

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

The *Succession Law Reform Act* [7] defines a "Will" to include the following:

> (a) a testament,
>
> (b) a codicil,

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[4] The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz,* 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne* Estate (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (BailII)

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

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

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

(c) an appointment by will or by writing in the nature of a will in exercise of a power, and

(d) any other testamentary disposition. ("testament")

- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.[8] Therefore, capacity is determined on the criteria applied to determining testamentary capacity
- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.**[9]** The criteria to be applied, is that of testamentary capacity.

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

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

Pursuant to section 8 of the *Substitute Decisions Act,* [10] to be capable of granting a Continuing Power of Attorney for Property ("CPOAP"), a grantor requires the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

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

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

[10] R. S.O. 1992, c 30, as am.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[11]

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[12]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.[13]

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

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

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

- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* [14]

***Capacity to Manage Property***

The criteria for assessing the capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

(a) The ability to understand the information that is relevant in making a decision in the management of one's property; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. **[15]**

*A person may be incapable of managing property, yet still be capable of making a Will.[16]*

[11] *SDA,* subsection 8(2)
[12] *SDA*, subsection 9(1)
[13] *SDA,* subsection 9(2)
[14] R.S.O. 1990, c. M.7
[15] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[16] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

### *Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")*

Pursuant to section 47 of the *Substitute Decisions Act*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.[17]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[18]

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[19]

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

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

### *Capacity to Make Personal Care Decisions*

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

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

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

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

[17] *SDA*, subsection 47(1)
[18] *SDA*, subsection 47(3)
[19] *SDA*, subsection 47(2)

### *Capacity under the Health Care Consent Act, 1996*[20]

Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

(a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

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

### *Capacity to Contract*

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[21]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[22]

Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and
(b) The ability to understand the contract's specific effect in the specific circumstances.[23]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[24] Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[25] Subsection 2(3) then provides that a person is entitled to rely on that presumption of

[20] S.O. 1996, C.2 Schedule A

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

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

[23] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

[24] *SDA, supra* note 2

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

capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[26]

### *Capacity to Gift*

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

(a) The ability to understand the nature of the gift; and
(b) The ability to understand the specific effect of the gift in the circumstances.[27]

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.[28]

### *Capacity to Undertake Real Estate Transactions*

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[29] which as set out above, requires the following:

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

(b) The ability to understand the contract's specific effect in the specific circumstances.[30]

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

(a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;

(b) The ability to understand the extent of the property in question; and

(c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

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[26] *SDA*, subsection 2(3)
[27] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[28] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487
[29] See for example: *Park v. Park,* 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)
[30] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

### *Capacity to Marry*

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.[31]

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.[32]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[33]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[34]

### *Capacity to Instruct Counsel*

Capacity to instruct counsel is derived from case law including the case of *Lengyel v TD Home and Auto Insurance*[35] where the Court's view towards evaluation of capacity to instruct counsel was stated as follows:

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

It should be noted that there exists a rebuttable presumption that an adult client is capable of instructing counsel.

As stated in *Torok v. Toronto Transit Commission*[36], at para. 40: The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision in the litigation includes the ability to consider a reasonable range of possible outcomes, including those

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[31] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[32] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[33] *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik
[34] *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494
[35] *Lengyel v TD Home and Auto Insurance* (2017) ONSC 2512, 278 ACWS (3d) 830
[36] T*orok v. Toronto Transit Commission* 2007 CarswellOnt 2834

that are unfavourable. This ability is essentially the capacity to assess risk, which requires consideration of a variety of results, both positive and negative."

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.[37] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

> (d) Understand what they have asked the lawyer to do for them and why,
>
> (e) Be able to understand and process the information, advice and options the lawyer presents to them; and
>
> (f) Appreciate the advantages, disadvantages and potential consequences of the various options.[38]

## Issues Related to Capacity

### *Undue Influence*

Undue influence is a legal concept where the onus of proof is on the person alleging it.[39]

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;[40]
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion [41]

[37] Staff lawyer at ARCH Disability Law Centre.

[38] At page 3

[39] *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. ( dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon,* 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.

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

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

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependancy.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[42]

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.[43]

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences. [44]

Psychological pressures creating fear may be tantamount to undue influence.[45]

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document … "cannot be said to be that of the deceased."[46]

Undue influence must be corroborated. [47]

Suspicious circumstances will not discharge the burden of proof required.[48]

* See Undue Influence Checklist

***Suspicious Circumstances***

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

(a) circumstances surrounding the preparation of the Will;

(b) circumstances tending to call into question the capacity of the testator; or

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

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

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

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

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

[47] S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; Orfus Estate v. Samuel & Bessie Orfus Family Foundation, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224

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

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[49]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[50]

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[49] *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin,* (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)*

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

## APPENDIX "I"

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

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

### RED FLAGS FOR INCAPACITY

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

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

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

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

- Comprehension problems: difficulty repeating simple concepts and repeated questions

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

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

- Intellectual impairment

- Cannot readily identify assets or family members

- Experienced recent family conflict

- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.
- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependant and vulnerable
- Poor living conditions in comparison with the client’s assets
- Changes in the client’s appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client’s instructions seem rational? For example, does the client’s choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation
- Keep in mind issues related to capacity including, **undue Influence**. See WEL’s Undue Influence Checklist
- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a

demographic perspective. However, this means that great age alone becomes a red flag[177]

- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives[178]

- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia[179]

- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia[180]

- A deathbed will where there is a strong likelihood that the testator may be delirious[181]

- Complexity or conflict in the milieu of a vulnerable individual[182]

**BEST PRACTICES:**

- Be alert to the signs of incapacity and always ask probing questions not leading questions

- Interview the client alone and take comprehensive, detailed notes

- Use open-ended questions to confirm or elicit understanding and appreciation

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

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

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

- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client

- Have clients re-state information in their own words and revert back to earlier discussions

- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken

- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege

- Be mindful of the Law Society of Upper Canada, *Rules of Professional Conduct*, http://www.lsuc.on.ca/lawyer-conduct-rules/, particularly the Rules related to capacity

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