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Elder Financial Abuse: Predators, Attorneys, Guardians And Court Proceedings

Presentations On Elder Law Litigation And Older Adults In The Courtroom: Lessons Learned

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A. INTRODUCTION*

The statistics confirm that our population is aging rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, 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 capability.[1] There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. Other factors affecting capacity include, 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.[2] These sorts of issues unfortunately invite opportunity for abuse, elder abuse, and exploitation. Predatory marriages and abuse through powers of attorney and guardianships are just some examples of financial exploitation and abuse of older adults.

Power of Attorney Abuse:

The Power of Attorney document (the "**POA**") has long been viewed as one way in which a person can legally protect their health and their financial interests by planning in advance for when they become ill, infirm or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. In certain circumstances, however, POA documents may cause rather than prevent conflict.

In our practice, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. We have also seen it used as a means of protection against predators, of which there is a very real risk. Unfortunately, we have also seen these documents used abusively, causing the grantor harm through fraud, neglect, and depletion of wealth. This is necessarily accompanies with negligence in the provision of necessary care requirements.

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* Paper by Kimberly A. Whaley, Principal of Whaley Estate Litigation, updated with the assistance of Jaël Marques de Souza.

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

[2] *Ibid.* at 1.

While a POA document can be used for the good of a vulnerable adult or an 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 extent of the powers being bestowed, 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. Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our 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.

Predatory Marriages:

Another form of elder financial abuse can be found in predatory marriages, where unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit.[3] 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—perhaps because they are afflicted with one of the ailments described above.[4] "Predatory marriage" 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.[5]

The problem with such marriages is that they are not easily challenged. The current test for “capacity to marry” as developed in the case law is anything but a rigorous one. This means that capacity is likely found, even in the most obvious cases of exploitation, and, consequently, that predatory and exploitative marriages are more likely to withstand challenge.

While litigation arising from marriages involving older adults is still relatively uncommon, we are seeing an increase in such cases as the number of older adults reaches record highs. As this paper is but a snapshot of the many critical issues arising from predatory relationships, those

[3] *Supra* Note 1 at 1.
[4] *Ibid*.
[5] *Ibid*. at 70.

interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*, a Canada Law Book, A Division of the Cartwright Group Ltd**. publication, co-authored by Kimberly Whaley, Dr. Michel Silberfeld, Heather McGee and Helena Likwornik. http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html [6]

This paper will first examine financial abuse of older adults through the misuse of POAs and secondly through predatory marriages.

B. FINANCIAL ABUSE THROUGH MISUSE AND EXPLOITATION OF POWER OF ATTORNEY DOCUMENTS

1. What is a Power of Attorney?

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 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 *Substitute Decisions Act* (the ***"SDA"***)[7]; 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.

This paper will focus on Power of Attorneys for Property and how the abuse and misuse of these documents can lead to elder financial abuse.

[6] *Ibid.*
[7] *Substitute Decisions Act*, 1992, SO 1992, c 30

The Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property is commonly used to ensure that the financial affairs of a person are looked after in circumstances where that person is unable to look after them on their own, temporarily, as agent, and permanently when incapable.

Pursuant to the *SDA*, a POA for Property is a CPOAP if:

(a) the document states that it is a continuing power for attorney; or
(b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

A person is considered incapable of managing their property if they are unable to understand information that is relevant to making a decision in the management of their own property or unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. A CPOAP document can be limited to specific dates or contingencies and/or it can continue during the incapacity of the grantor, hence the name "*Continuing* Power of Attorney for Property."

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal test of capacity to give or revoke a CPOAP is different from that of capacity to manage property to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property.

Much to the surprise of many older adults, the CPOAP is effective immediately upon signing *unless* there is a provision or "triggering" mechanism in the document which directs that it will come into effect in accordance with a specified date or event, such as incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance.

The powers granted to an Attorney acting on behalf of an incapable person are extensive. An Attorney operating under a CPOAP has the power to do anything on behalf of the grantor that

the grantor could do if capable, except make a Will. These powers are subject to the *SDA* and any court-imposed conditions.

Guidelines for the execution, resignation, revocation, and termination of a CPOAP can be found in the *SDA*.

2. How to Choose the Right Attorney

Choosing the right attorney for property is perhaps the most important decision a person can make in order to protect his or her property or person in the event that he or 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.

The *SDA* requires that an attorney be over the age of 18 in order to exercise decisional authority.[8] Before naming an attorney in a POA document, it is important to consult the person in question and ensure that he or she is willing to act. Some individuals will choose to appoint a trust company as an attorney. Such companies perform the services of an attorney for a fee. They are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

It is important to note that granting a new POA cancels any previous power of attorney document and as such, before granting a new POA, a grantor should ensure that there is no pre-existing POA document they wish to keep in existence.

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 on their behalf. Unless it is specified in the POA document that attorneys are allowed to act separately, statutory law assumes that jointly appointed attorneys must make decisions together.[9]

[8] *Substitute Decisions Act, 1992*, SO 1992, c-30 [*SDA*], s. 5.
[9] *Ibid.*, s. 7(4), 46(4).

It is also possible to assign different responsibilities to separate attorneys.[10] 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.[11] 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.

A person who is a grantor's health care provider may not be appointed to be his or her attorney for personal care unless the person is the grantor's spouse, partner or relative. Similarly, a person who provides residential, social, training or support services for compensation may not be appointed his or her attorney for personal care unless that person is the grantor's spouse, partner or relative.[12]

Although the Public Guardian and Trustee ("PGT") may act as an attorney of last result in certain cases, it is important to note that the PGT cannot be named in a POA document unless her approval is obtained beforehand.[13]

3. The Specific Duties of an Attorney for Property

All of the duties of the CPOAP are set out in the *SDA*. In the case of *Banton v. Banton*, 1998 CanLII 14926 (ONSC), Justice Cullity discussed many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. According to the Court, some of the specific duties and obligations of an Attorney for Property include the following:

(1) Manage a person's property in a manner consistent with decisions for the person's personal care;

(2) Explain to the incapable person the Attorney's powers and duties;

(3) Encourage the incapable person's participation in decisions;

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[10] See e.g. *ibid.* at s. 7(6), 46(7).
[11] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>; see *SDA, supra* note 2 at s. 7(2) and 46(2).
[12] *SDA, supra* note 8, s 46(3).
[13] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>.

(4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;

(5) 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

(6) 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.

The Attorney for Property must consider whether a given transaction is in the 'best interests' of the individual for whom he is acting, and also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA.* The Attorney must keep detailed records of all transactions as well as ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. An Attorney for Property must be prepared to keep accounts for the passing of such accounts, in the event it is required by the grantor, or with leave of the Court requested by an interested person, or indeed after the death of the grantor if required by the Estate Trustee.

While an attorney is required to keep accounts, an attorney is not required to pass the accounts. The court may, however, order that all or a specified part of the accounts of an attorney be passed.[14] The accounts are filed in the court office and follow the same procedure as the passing of estate accounts.[15] Although the passing of accounts may not be required, it may still be advisable to do so because once the accounts have been passed, they have received court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in certain circumstances, but accounts or records must be produced to

[14] *SDA, supra* note 8, s. 42(1): The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. Note: This would be done by way of Notice of Application

[15] *Ibid.,* s. 42(6): The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators' accounts and *Rules of Civil Procedure*, RRO 1990, Reg 194, R. 74.16-74.18.

the incapable person, the incapable person's other attorneys, and the Public Guardian and Trustee if required.[16]

4. Situations of Abuse

As mentioned, a POA is an extremely powerful document which enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will. Consequently, there are a number of ways in which a POA document can be used to the detriment of a grantor. Some common scenarios in which the procurement or use of a POA go awry, and to the detriment of an older adult who is vulnerable or dependent are:

a) The grantor grants a POA while incapable of doing so;

b) The POA is fraudulently-procured from a vulnerable or physically dependent grantor by an individual with improper motives, as a result of exerting of undue influence, or in a situation of suspicious circumstances, for the sole purpose of abuse, exploitation, and personal gain;

c) Disputes and accounting discrepancies arise concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;

d) The POA is fraudulently or imprudently used, for the sole purpose of self-interest of the Attorney and/or used in a way that constitutes a breach of fiduciary duty;

e) the Attorney makes unauthorized, questionable or even speculative investment decisions, or decisions lacking in diversity;

f) the Attorney fails to take into consideration the tax effects of the Attorney's actions or inactions;

g) the Attorney fails to seek professional advice where necessary or appropriate;

[16] *Ibid.,* s. 42(3): A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.

h) the Attorney inappropriately deals with jointly held assets or accounts;

i) The Attorney misappropriates the grantor's assets.

j) If more than one, one attorney acts without the knowledge, approval, or acquiescence of the other(s) either under a Joint or Joint and Several POA.

5. A Review of Case Law

Bishop v. Bishop[17]

In ***Bishop v. Bishop***, Justice O'Neill of the Superior Court found a POA granted to an elderly woman's son *void ab initio* based on medical evidence that she did not have capacity to grant a CPOAP to her son at the time that she did. Alma Bishop gave her son a CPOAP in 2005. The medical evidence included a score of 22/30 on the mini-mental health status test administered by her family physician and a diagnosis of mild Alzheimer disease. Allegations of fraud and abuse however were held to be unfounded.

Covello v. Sturino[18]

In *Covello v. Sturino*, the widow owned 50% ownership in her house; her son owned the remaining half. She also owned property in Italy. In 2001, the widow made a will which would divide her assets equally among her five children. Her doctor's notes indicate that she began experiencing memory loss in 2004, and began treatment for Alzheimer's in January of 2005. In the summer of 2005, her son took his mother to his own lawyer, and, on that same day, his mother executed a Continuing Power of Attorney appointing him as her attorney, which took effect on the date of execution, and transferred her ownership property in her home and in certain property in Italy to the attorney/son, for nominal consideration/as a gift. Almost a year later, and pursuant to a court order, the mother underwent a capacity assessment that found her incapable of managing her own affairs.

The Court applied *Bishop v. Bishop*, to state that, as a result of the grantor's diminished mental capacity, both the lawyer who drafted the new power of attorney document and the attorney appointed "*should have insisted that [the grantor] undergo a medical assessment prior to*

[17] 2006 CarswellOnt 5377.
[18] 2007 CarswellOnt 3726.

executing her Power of Attorney."[19] The Court held that, where no such contemporaneous formal assessment exists, the court must rely on the evidence surrounding the execution of the power of attorney, such as doctors' consultation letters and a subsequent capacity assessment, and the facts and circumstances existing in the grantor's life as at the date of execution of the POA, such as evidence of financial mismanagement, lack of independent legal advice and the presence of undue influence from her the attorney appointed.

Although the Court found that the medical evidence strongly suggested that the grantor did not have sufficient legal capacity to execute the Continuing Power of Attorney at the time it was granted and it should, therefore, be declared invalid, it noted that, even if one were to find that the grantor did have sufficient legal capacity, the lack of independent legal advice and the presence of undue influence from her son Giovanni, still worked together to invalidate the document. In fact, it did more. The Court's finding that the son exercised undue influence and always acted in his own best interests, rather than the interests of his mother, sufficiently disentitled him to be appointed as guardian of her property.

Importantly, although there was no evidence in this case that the drafting solicitor was aware of the grantor's cognition issues, the case appears to place an onus on drafting solicitors to insist on capacity assessments in situations where it is known that the would-be grantor has diminished mental capacity, before taking instructions to draft a power of attorney. As stated by the Court, "[h]ad [the drafting solicitor] made sufficient inquiries into the state of [the grantor's] health and cognitive abilities, as reported by her physicians, he would have been alerted to the fact that her ability to understand, think, remember and communicate had been affected."[20]

***Dhillon v. Dhillon*[21]**

The case of *Dhillon v. Dhillon* involved a wife and son who, while the husband/father was living in India, used a forged POA to sell residential property that the husband owned, and used another forged POA to withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded

[19] *Ibid.* at 23.
[20] 2007 CarswellOnt 3726 at 33.
[21] 2006 CarswellBC 3200 (C.A.).

a considerable amount in damages, including $5,000 in punitive damages and special costs at 80 percent of solicitor-client costs. The British Columbia Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son and substantially upheld the decision of the trial judge with respect to damages.

Nguyen-Crawford v. Nguyen[22]

In *Nguyen-Crawford v. Nguyen*, a daughter accompanied her mother to her mother's lawyer's office where her mother executed powers of attorney appointing her daughter as her attorney. Before executing the documents, the daughter translated them to her mother, whose primary language was Vietnamese. The siblings later sought a declaration that the powers of attorney were invalid on the basis that the daughter, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her and was the only person who translated both the documents and the lawyer's advice concerning them.

The Court found that the daughter did not meet the "high evidentiary burden" necessary to uphold the documents and demonstrate that her mother knew what she was signing or that the powers of attorney were clear expression of her wishes at the time the mother signed the documents, and, consequently, the powers of attorney were of no force and effect. In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that the attorney daughter exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was that (a) the mother was dependent upon her daughter, b) the daughter provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves (which, in turn, conferred on the daughter extensive powers to act on her mother's behalf), and, somewhat perplexingly, c) the daughter and her husband used the mother's funds as if they were their own. This latter point is somewhat peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents, but took place two years later.

Importantly, in *obiter*, there was some discussion of the fact that since the drafting solicitor failed to obtain an independent translator for the grantor/mother before the documents were executed,

[22] 2010 CarswellOnt 9492 (S.C.J.).

the solicitor may have failed to discharge her duty of care, and could have been found negligent. The attorney daughter had attempted to argue that such a finding was a condition precedent, so to speak, to finding the powers of attorney documents invalid. The Court did not agree with the daughter's submission, but did suggest that the drafting solicitor's notes, records and testimony would have been useful had it provided positive evidence that the documents and advice were independently translated.

On the issue of solicitor negligence, the Court did refer to the similar case of *Barbulov v. Cirone*[23] and noted that "[t]here was no comment as to whether the solicitor had breached his duty to the donor/father by failing to have the power of attorney translated to him by an independent translator." Unfortunately, the Court did not delve further into the issue on the basis that there was no evidence to support any finding on that issue, since it lacked the drafting solicitor's notes, records and testimony.

The case of *Nguyen-Crawford v. Nguyen* sends a clear message to drafting solicitors who attempt to draft documents for grantors with little command of the languages spoken by the drafting solicitor. Care should be taken to ensure that proper independent translators are obtained—not those who do not stand to benefit from the document itself. Would-be attorneys ought to be equally vigilant, if they do not wish to have the document they later act pursuant to, to be challenged at a later date on the basis of grantor's lack of capacity to grant the power.

***Johnson v. Huchkewich*[24]**

The case of *Johnson v. Huchkewich* involved a similar set of facts as that of *Nguyen-Crawford v. Nguyen*, thus underscoring the point that many individuals view power of attorney documents as a way in which to gain access to the assets of a vulnerable individual.

In this *Johnson v. Huchkewich*, one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as a "a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets. During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour.

[23] 2009 CarswellOnt 1877 (S.C.J.)
[24] 2010 CarswellOnt 8157 (S.C.J.).

Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother, in Polish; and no one else in the room understood Polish. Shortly after that and as stated by the Court "'before the ink had dried'", the daughter used the power of attorney to transfer $200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant cost associated therewith, and a number of orders were made against the attorney/daughter, including:

- An order that she return of the $200,000 to the joint bank account;
- An order that the other sister/daughter be appointed as guardian of the widow's property and personal care and that the widow would reside with that daughter and her family; and, among other things,
- an order restraining the attorney/daughter from harassing and annoying her sister/the appointed guardian.

Interestingly, and somewhat disappointingly, these facts and orders were brought to light in the context of a will challenge by the same sister who had misappropriated her mother's funds. This application, however, was dismissed as not even being a "close call" and costs submissions were requested.

While the Courts were able to remedy the attorney injustices in *Johnson v. Huchkewich* and *Nguyen-Crawford v. Nguyen*, these cases raise the important question of how many power of attorney abuse cases exist, but go unreported or unnoticed by our judicial system, thus leaving vulnerable adults at risk of being preyed upon by individuals seeking financial gain, to the vulnerable and/or incapable person's detriment.

***Grewal v. Bral*[25]**

The Manitoba case of ***Grewal v. Bral*** involved a widow and her daughter, the plaintiffs, who had lived most of their lives in India and had moved to Canada around 2006. The plaintiffs had resided with the defendant and his family when they first arrived to Canada. The defendant claimed that he had provided for them financially while they lived with his family, while the plaintiffs denied this fact and claimed that the mother had provided the defendant with financial

[25] 2012 MBQB 214.

remuneration and had cared for his children during the work week without being financially compensated.

At issue in this case was the validity of two POA documents, one signed by each plaintiff, which had been used to sell two properties in India. The defendant had ultimately benefitted from the proceeds of the sale. The defendant asserted that the plaintiffs had agreed to the sale of the properties and that he be given their proceeds as compensation for the expenditures he had incurred when they lived with him upon moving to Canada. The plaintiffs denied having been aware of the sale of the properties and claimed damages for the value of the properties sold as well as punitive damages from the defendant.

Both the plaintiffs and the defendant agreed that the plaintiffs had each been given a document to sign while they were living with the defendant and that they had signed it. However, the opposing parties disagreed as to the circumstances under which the documents had been signed—for instance, whether the document had been signed at the lawyer's office and whether the nature and effect of the document they were signing had been explained. The plaintiffs claimed that they had been given the document by the defendant without the lawyer's presence or advice and that the defendant had said to them that the document pertained to a matter being litigated in India.

Justice Perlmutter stated that his analysis turned on credibility. He found that the plaintiffs' story was corroborated by third party evidence, while the defendant as well as the lawyer he had retained in respect of the POAs presented evidence which conflicted with the evidence presented at trial.[26] Consequently, Justice Perlmutter accepted the plaintiffs' evidence as to the circumstances under which they had signed the 2009 POAs.

In his opinion, Justice Perlmutter applied *Nguyen-Crawford v. Nguyen*, above, in considering the mother's limited understanding of the English language and the fact that the POA had not been translated into her native tongue of Punjabi. This increased their reliance on the defendant's representation regarding the POAs. The judge found that the defendant had falsely induced the plaintiffs to sign the POA document and used it to benefit himself to their detriment. As such, the POAs were declared void ab initio.

[26] 2012 MBQB 214 at para. 81.

In addition, Justice Perlmutter found that the defendant's conduct had given rise to "the independent actionable wrong of fraud and misrepresentation" [27] and, consequently, awarded punitive damages against the defendant in the amount of $30,000.

This case is useful not only as an example of courts following the precedent of *Nguyen-Crawford v. Nguyen*,[28] but also in showing that in circumstances where a defendant's behavior constitutes a certain level of fraud and misrepresentation, punitive damages may be used to punish this behavior.

***Elford v. Elford*[29]**

In *Elford v. Elford*, the husband put certain property into his wife's name, with her knowledge and for the purpose of defeating his creditors. He had a general POA over his wife's property. A disagreement developed between them and the husband, using the POA, transferred the property into his own name. The wife sued to have the property re-transferred to her. The trial judge dismissed the action; the Court of Appeal reversed it and maintained the wife's action. The Supreme Court of Canada affirmed, finding that the transfer by the husband to himself "transgresses one of the most elementary principles of the law of agency."[30] It was *ex facie* void and should not have been registered.

***Burke Estate v. Burke Estate*[31]**

In *Burke Estate v. Burke Estate*, the husband used the POA granted to him by his wife to transfer Canadian savings bonds registered in the wife's name to their joint names. The Court held that the husband had acted in breach of the fiduciary duty owed to the wife. The bonds were deemed to be held on constructive trust and formed part of the deceased wife's estate.

[27] *Ibid.* at para 88.
[28] *Nguyen-Crawford v. Nguyen*, *supra* note 22.
[29] 1922 CarswellSask 162 (S.C.C.).
[30] *Ibid.* at para. 22.
[31] 1994 CarswellOnt 442.

***Westfall v. Kovacec*[32]**

In the case of *Westfall v. Kovacec*, an attorney or guardian of property sought authorization to use certain monies of the incapable person for himself. He argued that it was a relatively small amount, that he really needed the money, that the incapable person didn't need it and that he was likely to eventually inherit it anyway. The Court refused to allow it. The only gifts or loans which are allowed are those to friends or relatives where there is reason to believe, based on intentions the incapable person expressed before becoming incapable, that he or she would make if capable.

***Chu v. Chang*[33]**

The case of *Chu v. Chang* involved an interesting and somewhat unusual set of facts. The case revolved around Mrs. Chang, a then 98 year old woman, and the way in which her children and one of her grandchildren were involved in her care. The matter first came before the Court in December 2008 when her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang's sons) and Lily's son, Dr. Stephen Chu.

Any family peace dissipated shortly thereafter and the parties went back and forth before the Court on countless occasions and in one endorsement the Court voiced concerns about Mr. Chang and Dr. Chu getting along and executing their duties appropriately. The Court warned all of Mrs. Chang's children that they should be guided by Mrs. Chang's wishes (found, in this case, in her affidavit) which were that she was happy when her children spent time with her and got along. The Court told the parties to "act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life."[34]

Unfortunately, further proceedings ensued and Dr. Chu requested an urgent motion on the ground that he had been compelled to remove Mrs. Chang from her home on the basis of information he had received from Mrs. Chang's caregiver that she had been told "not to feed"

[32] [2001] O.J. No. 3942 (S.C.J.).
[33] *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010), 2010 CarswellOnt 4507 (Ont. S.C.J.), 2011 CarswellOnt 1840 (Ont. C.A.).
[34] *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.) at para. 35.

Mrs. Chang. Notwithstanding the concerns about feeding (of which there was considerable debate), Justice Brown ordered Dr. Chu to return Mrs. Chang to her home the following day.[35]

Two competing motions were then heard within which each guardian sought to have the other removed. In light of all the evidence, Justice Brown terminated *both* guardianships on the basis that the two sides could not work together. As for Dr. Chu, Justice Brown wrote: "It is difficult to find words to describe adequately his misconduct. Suffice it to say, by, in effect, kidnapping his grandmother Dr. Chu demonstrated that he was not prepared to work within the legal framework of a guardianship."[36] Although Mr. Chang's misconduct was not found to be as serious as Dr. Chu's, he too had showed he was obstructive in the process and not a suitable candidate to act as a guardian of property (he had refused to sign a court-imposed management plan). The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company.

Mrs. Chang's youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang's personal care. However, Peggy was reminded of her duty to consult family members regarding her personal care decision-making, pursuant to the *SDA*, as well as her statutory obligation to foster contact between Mrs. Chang and those family members considered "supportive family members"—of which Lily was not considered one.[37] The court held that given the history of high conflict in the family, restrictions on access by Lily and her son would be in Mrs. Chang's best interests, and stipulated both by the times and the conditions under which visits would occur. Peggy was, however, required to provide fresh information about Mrs. Chang's medical condition in the event of significant developments.

On January 6, 2010, Mr. Justice D. Brown ordered, among other things, that the Bank of Nova Scotia Trust Company be appointed guardian of the property of How Seem Chang; and, that Lily Man-Lee Chu, Dr. Stephen Chu, Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang prepare accounts, in the form prescribed by Rule 74.17 of the *Rules of Civil Procedure*, for their terms as attorneys or guardians of the property of How Seem Chang.

[35] 2010 CarswellOnt 246.
[36] 2010 CarswellOnt 246 at para. 5.
[37] *Ibid.* at para. 29.

On the matter of costs of bringing their respective motions, on March 26, 2010, Justice D. Brown released his costs endorsement.[38] In their submissions, the respondents had sought full indemnity costs in the amount of $82,591.25 payable by Dr. Chu. It was their position that Dr. Chu's reprehensible conduct, including misleading the Public Guardian and Trustee, removing his grandmother from her home, surreptitiously filming his uncle in the courthouse, and filing affidavits that raised irrelevant attacks on the respondents warranted an award of full indemnity costs. The PGT also sought costs against Dr. Chu in the amount of $8,347.50 on the basis that it was required to file affidavits with the court in order to correct misleading information provided to the court by Dr. Chu. Dr. Chu took the position that as there was mixed success on the motion—the court removed both co-guardians, appointed an institutional guardian suggested by Dr. Chu and appointed another relative as Mrs. Chang's guardian of the person—this signaled that each party should bear its own costs or, alternatively, Dr. Chu should pay the respondents costs of $4,266.96. In reaching his decision on costs, Justice D. M. Brown gave little weight to the offers to settle that were made by both parties primarily on the basis that both guardians had requested that the other resign and both ended up being removed and replaced by his Honour.

The Court did not accept Dr. Chu's submission that the success on the motions was mixed. Instead, his Honour focused his attention on the fiduciary duty owed by guardians of the property as set out in the *SDA*—that being to exercise their powers and duties diligently, with honesty and integrity and in good faith **for the incapable person's benefit**—and the consequences of a guardian of the property and/or person breaching his/her fiduciary duties [emphasis by his Honour].[39] His Honour opined that substantial indemnity costs may be awarded where a party has made serious allegations of misconduct against another which were unfounded and misused the court's process. And, according to Justice D. M. Brown, "that is what happened here." His Honour stated:

> Dr. Chu breached his fiduciary duties by misleading the court, making baseless allegations against his co-guardian and other relatives and then, incredibly, resorting to self-help by kidnapping his grandmother. At the same time as he was instructing his counsel to seek an urgent hearing from the court, Dr. Chu removed his grandmother from her home, took her to an undisclosed location, kept her sequestered from her children who

[38] *Chu v. Chang*, 2010 ONSC 1816.
[39] 2010 CarswellOnt 1765 at para. 10.

> had seen her virtually daily up until that point, and did not return his grandmother until ordered to do so by the court.[40]

In light of the forgoing, the Court concluded that at paragraph 15 that Dr. Chu was not motivated by an objectively-based concern for the welfare of his grandmother, but by a desire to improve the position within the family of the interests of his mother, the applicant, and himself, and, in the Court's view, to use SDA proceedings for such a purpose amounted to an attempt to subvert the whole purpose of the SDA. As, in the Court's view, Dr. Chu's misconduct stood at the extreme end of the scale, the Court concluded that it was appropriate in this case to award costs against him on a substantial indemnity scale. The Court fixed the PGT's substantial indemnity costs to $8,000.00, inclusive of disbursements and GST and fixed the respondents' costs at $35,000.00, inclusive of GST and ordered Dr. Chu to pay those costs personally. At paragraph 24, the Court noted that "while some might raise an eye-brow when they see an award of close to $45,000.00 in costs for a one-day motion," the following was worth repeating:

> Dr. Chu's initiation of the post-November 20, 2009, litigation was baseless, a breach of his fiduciary duties as a guardian, motivated by self-interest, and a misuse of the scheme of the SDA. When viewed in that light, I regard the resulting costs award as temperate in the circumstances.[41]

On June 7, 2010, the parties attended before Justice Lederer.[42] Among the motions heard was that successfully brought by Dr. Stephen Chu who, although not a named party, stated that Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang were in contempt of the order of Mr. Justice Brown, in that did not prepare the requisite accounts for their terms as attorneys or guardians of the property of How Seem Chang.

This decision was then appealed to the Court of Appeal,[43] which found no error on the part of the motion judge, and fixed costs to the respondents fixed at $5,000 inclusive of disbursements and applicable taxes.

[40] *Ibid.* at para. 14.
[41] *Supra* note 38 at para. 24.
[42] 2010 CarswellOnt 4507 (Ont. S.C.J.).
[43] 2011 CarswellOnt 1840 (Ont. C.A.).

Teffer v. Schaefers[44]

The case of *Teffer v. Schaefers* is one that concerned the use of an invalid power of attorney. The victim in that case was Mrs. Schaefers, who was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24 hour nursing care in her home. She had also been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed. Despite the fact that there was considerable evidence which supported the view that Mrs. Schaefers did not have capacity to assign a POA, Mr. Verbeek, a lawyer, had Mrs. Schaefers execute a POA on April 27, 2006 naming him as her attorney.

While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on April 27, 2006 and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for Property should be terminated. The Court found that Mrs. Schaefers' best interests were not being met and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as complying with disclosure requests or proceeding with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary and the duties and responsibilities of an attorney are significant. Thus, if Mr. Verbeek was too busy as a sole practitioner to discharge his duties as an attorney for the property of Mrs. Schaefers then he should be relieved of those responsibilities.

[44] *Teffer v. Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).

***Woolner v. D'Abreau*[45]**

In *Woolner v. D'Abreau*, Norah D'Abreau executed a Continuing Power of Attorney for Property in favour of the applicant, Robert Woolner, a lawyer, as well as another person, under which Mr. Woolner began to manage Ms. D'Abreau's property and financial affairs. Ms. D'Abreau subsequently retained another lawyer, Mr. Marcovitch, who began to ask Mr. Woolner questions about how he was handling Ms. D'Abreau's financial affairs.

Mr. Woolner suggested that Ms. D'Abreau undergo a capacity assessment; Mr. Marcovitch communicated that Ms. D'Abreau saw no need to do so. Ms. D'Abreau then appointed Mr. Marcovitch as her attorney, whereupon Mr. Woolner brought this application to compel Ms. D'Abreau to submit to a capacity assessment. Mr. Marcovitch then retained Mr. Koven as litigation counsel for Ms. D'Abreau. Mr. Koven recommended that she undergo an assessment. Ms. D'Abreau did so, and the assessment found her to be capable of managing her own affairs. According to the Court, counsel then debated the issue of costs of the application for the better part of half a year, which led to no costs being ordered due to collective loss of proportionality.

A hearing under Rule 57.07(2) of *Rules of Civil Procedure* was held with respect to the possibility of disallowing any costs as between client and her counsel and costs were disallowed beyond what had already been paid for in the earlier portion of litigation. According to the Court, as the legal services provided up to the costs dispute had contained value for their clients, counsel were entitled to compensation for them. However, the Court found that the parties could have settled costs simply by re-attending court with little expense and that the evidence adduced had not established, on balance of probabilities, that Mr. Marcovitch clearly informed his client as to the risks and potential costs of the litigation strategy employed or that he received informed instructions to proceed with that strategy. The Court found that the strategy was unreasonable, disproportionate to what was at stake, and provided no value to the client.

As such, Mr. Marcovitch was not entitled to compensation beyond the $6,250, already paid. Mr. Koven's fiduciary obligation required that he ensure the client understood the nature and risk of litigation, and no documentation indicated that he had done so. Similarly, the Court found that the legal work provided by Mr. Koven referable to the costs dispute provided no value to the

[45] *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).

client and resulted in costs being incurred without reasonable cause. As such, Mr. Koven was not entitled to recover any costs incurred for the costs dispute stage of the litigation.

Re Koch[46]

Although not a POA case *per se*, the case of *Re Koch* provides an example of a situation where one person may have an ulterior motive when seeking an assessment of a vulnerable person, particularly an assessment which results in a determination of incapacity. In this case, Ms. Koch had suffered from multiple sclerosis for fifteen years. She was confined to a wheelchair, although able to walk short distances with a walker. Ms. Koch and her husband separated in January 1996. Each retained lawyers and negotiations commenced with a view to resolving the usual property and support issues. On April 23rd, 1996, her lawyer forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In or about May 1996, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the formidable mechanisms of both the *SDA* and the *Health Care Consent Act*, 1996, S.O. 1996, c.2 sched.A ("HCCA"). A hearing was held before the Consent and Capacity Board (the "CCB") and Ms. Koch was adjudged by the CCB to be:

1. incapable of managing her financial affairs and property; and
2. incapable of consenting to placement in a care facility.

Ms. Koch sought a reversal of the CCB's decision. And, as stated by the Court, her cry was essentially thus: "My husband had me committed." The Court agreed with Ms. Koch and found the CCB to have erred in law. Justice Quinn stated:

> *The assessor/evaluator must be alive **to an informant harbouring improper motives**. [The Assessor] should have done more than merely accept the complaint of the husband, coupled with the medical reports [...], before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More*

[46] *Koch, Re*, 1997 CarswellOnt 824, (Ont. Gen. Div.); Additional reasons in: *Koch, Re*, 1997 CarswellOnt 2230 (Ont. Gen. Div.).

> *importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.*[47]

Down Estate v. Racz-Down[48]

This case is an example of a wife taking financial advantage of her incapacitated husband through joint accounts rather than a POA. In December of 2003 William and Marion, then in their late 70s, entered into a marriage contract that established a regime of separate property. The couple had cohabited for some time before they married. William executed a will under which he made Marion his executor, along with children from a previous marriage. Under the will, the revenue from William's estate was to be paid to Marion, while the children were beneficiaries of the estate on her death. In January of 2004, William began treatment for dementia. There was evidence to show that Marion was aware of this and that she had in fact attended with him at his various doctor appointments when the diagnosis was made. In July, William added Marion as a joint account holder on his primary bank account. The judge made a point of noting that Marion never reciprocated with any of her own bank accounts, by making them joint. The Court found that Marion made significant unexplained withdrawals on their shared account. It also noted that while in August and September of 2004, the account balance on the shared account was $739,224.36, on May 26, 2009 when William died, the account had dwindled away to $72,438.16. The Court found that most of the transactions could be traced to Marion's separate accounts. The plaintiffs in the action, William's children, brought an action against Marion for damages for conversion and breach of fiduciary duty, alleging misappropriation. Marion defended her actions on the basis of joint ownership of the account.

The issue before Justice Gordon was whether to maintain a previous order which granted a Mareva injunction which restrained Marion from disposing of certain real and personal property, including the funds in her account. Justice Gordon found that the plaintiff children had met the test for the injunction. In the Court's view, not only had the plaintiffs shown a strong prima facie case, but, in his view, "the case is overwhelming." As stated by the Court at paragraphs 88 to 93:

> 88 *The spousal relationship, William's vulnerable state and the circumstances pertaining to finances establish a fiduciary relationship. Marion owed William a duty of utmost good faith and*

[47] 1997 CarswellOnt 824, at par. 69.
[48] *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010).

trust. The power of attorney was required on the sale of the condominium. Marion had direct access to the joint bank account. Marion had a discretion, indeed a unilateral ability, in dealing with the funds.

89 In exercising her discretion, Marion was required to have regard for the provisions of the marriage contract and William's will.

90 The gratuitous transfers from the joint account to Marion's sole bank account are unexplained. There was no reason or purpose for the transfers that could be justified. A resulting trust results from the fiduciary relationship. No evidence was tendered in rebuttal.

91 The exclusion in Section 14, Family Law Act, at best, applies at the time of William's death. It does not justify gratuitous inter vivos transfers, nor does it negate the common law principles regarding fiduciaries and resulting trust in all circumstances involving spouses.

92 The marriage contract established a regime of separate property. The will granted Marion a life interest in William's estate. Marion's transfer of funds defeats the obvious intent of both documents.

93 The plaintiffs have established a prima facie case. Indeed, on the evidence presented, in my view, the case is overwhelming.[49]

The Court found that the remaining components of the test for Mareva injunction had been met: there would irreparable harm to the plaintiffs if the injunction was not granted, and damage award would not suffice; there was a risk that Marion would remove/dissipate what minimal assets remained in her possession; and the balance of convenience favoured the plaintiffs. Justice Gordon ordered that the order granting the injunction would continue until trial or further order.

Zimmerman v. McMichael Estate[50]

The deceased were husband and wife and founders of extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executors of their estates. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made. The husband died on November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health

[49] *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J.).
[50] *Zimmerman v. Fenwick*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).

deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her will. The trust deed contained terms that differed from will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were a granted certificate of appointment of estate trustee with will.

The niece and her husband successfully brought an application for a declaration that the power of attorney and the trust were void and an order that required Mr. Zimmerman to account for his dealings with the trust property. Mr. Zimmerman was ordered to his pass accounts, but failed to do so and was removed as trustee on March 9, 2009. The niece and her husband made many objections to his accounts and Mr. Zimmerman failed to respond and made an application to pass his accounts for the property and the trust. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit verifying the accounts were inadequate, incomplete and in many respects false. The accounts contained no statement of the compensation claimed by Mr. Zimmerman in connection with the discharge of his responsibilities under the Trusts. In fact, it was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners not while, but after visiting Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home. There was a dearth of evidence and/or explanation as to how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the SDA. Although the trust deed impliedly permitted pre-taking, the court found that the authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: he

failed to properly account; he made improper and unauthorized payments and loans to himself, or for his benefit out of the Trusts; he mingled Trust property with his own property and he used the two interchangeably for his own purposes; he paid himself compensation of almost $450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And, there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs. Mr. Zimmerman has since died.

Jurgen Fritz Zimmerman (Criminal Proceedings)

This case came through to our offices from an article in the Hamilton Spectator. The case involved a man named Jurgen Fritz Zimmerman, who was 64 years old, who had been appointed his father's attorney pursuant to a power of attorney for property in 2007 after both his father and stepmother were hospitalized. The couple was later placed in a long-term care facility. Using the power of attorney, Jurgen Zimmerman withdrew almost all of the couples' life savings from their various bank accounts, which savings amounted to over $394,000 Canadian dollars as well as $12,000 US dollars, and sold the couples' home to his own son. It was the couples' grandchildren that eventually reported the matter to the police.

Jurgen Zimmerman who was given a nine-month conditional sentence, including six months of house arrest and a three-month curfew (he is required to wear an electronic-monitoring bracelet), after pleading guilty to attempting to appropriate his parents' life savings pursuant to a power of attorney. Jurgen Zimmerman was also ordered to pay $51,805.00 within ten (10) days. Jurgen Zimmerman's lawyer was quoted as saying that Jurgen Zimmerman, a retired truck dispatcher, was not very knowledgeable about this role as an attorney acting pursuant power of attorney.

***Bosch v. Bosch*[51]**

Michael Bosch was married to Maria Bosch and they had two children, Alan and Charlotte. Michael, the father, had resided in a nursing home since 2005. Maria had acted as his guardian of property and his attorney for personal care. However, in 2009, Alan commenced two applications seeking orders declaring Maria incapable and appointing him as her guardian of property and personal care, and appointing him as father's guardian of property and personal care. At mediation, the parties entered into settlement agreement resolving litigation, subject to court approval. Pursuant to that agreement, the first application would be dismissed without costs and the second application would be settled by appointing mother and son as joint guardians of the father, and on other terms. As well, Maria would seek court approval of the settlement and her reasonable costs of the motion for approval would be paid by Michael's estate on a full indemnity basis.

Maria brought her motions for court approval of settlement. However, Justice D. M. Brown was not prepared to approve the settlement on the materials filed, due to several reasons, the first of which is important and is as follows (at paragraph 4):

> (i) I have significant reservations about appointing two competing litigants as joint guardians for Michael's personal care. How, might I ask, will Michael's best interests be served by appointing as his joint guardians two persons who have engaged in litigation against each other? If there is a history of lack of co-operation between son and mother, I do not see how appointing them as joint guardians will suddenly change their relationship into one of harmony and co-operation. Absent clear evidence of the unalterable willingness of two disputing persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person, joint guardianship can become a minefield, with the incapable person the

[51] 2010 ONSC 1352.

> loser: *Chu v. Chang* [2009 CarswellOnt 7246 (Ont. S.C.J.)], 2009 CanLII 64816 para. 30; and 2010 ONSC 294 (Ont. S.C.J.) (CanLII), para. 4;

As can be seen, his Honour cited *Chu v. Chang* as support for this position. The other reasons were as follows: (ii) Maria and Alan did not file a joint Guardianship Plan signed by each; (iii) evidence of Michael's incapacity with respect to personal care decisions was not included in the motion records seeking approval of the settlement; and, (iv) Maria did not file any evidence about the costs of the motion to approve for which she seeks payment from Michael's estate, and neither party advanced any reasons why Michael's estate should pay for the legal costs of their dispute.

His Honour required further evidence on all of the issues and, therefore, adjourned the motions *sine die*. Of note, His Honour concluded at paragraph 5 that, "If Alan and Maria wish a court to consider their request for a joint guardianship, they must each file affidavits which demonstrate that they will stop arguing, start co-operating, and focus their efforts solely on the best interests of Michael."[52]

Ziskos v. Miksche[53]

Johanna Miksche had no living relatives save an 87-year-old sister (Ursula Lill) and nephews who lived in Germany (Heinz, Johann, and Hannes). Until her death, she spent her later years living in a long term care centre. She appointed her friends Perry and Teresa as her attorneys for personal care and property and, when it became apparent to them that she was no longer capable of living independently, they sold her house. Shortly thereafter, her nephews visited her in the company of a lawyer of the law firm of Polten & Hodder, where Mrs. Miksche signed powers of attorney for property and personal care in favour of one nephew and her sister. The nephews also had her sign a retainer, retaining the law firm to act on her behalf, as well as theirs. Mrs. Mikshche later retained an alternate solicitor, Mr. Silverberg, who served a notice of change of solicitors in late November 2005.

Competing applications for guardianship of Mrs. Miksche's personal care and property ensued. The proceedings were case managed and the disputed matters were resolved on either consent or unopposed basis, save for the issue of costs. Applications for costs were brought by Mrs.

[52] *Supra* note 51 at para. 5.
[53] 2007 CarswellOnt 7162.

Miksche's nephews and sister, her legal counsel (Mr. Silverberg), and the public guardian and trustee. The June 29, 2007 decision of *Ziskos v. Miksche* disposed of the claims and cross claims for costs, which claim for costs together totaled almost $1.175 million and exceeded the total value of Mrs. Miksche's estate. The court found astonishing the fact that the claim for costs of one group of parties (the nephews) was for more than $1 million—an amount that was almost 90% of the total costs claimed by all four sets of counsel, notwithstanding the fact that the within applications were never argued on the merits and, in fact, not a single motion was argued on the merits saved for the motions on costs. The court characterized the amount claimed by the nephews as "scandalous," particularly given the circumstances known to the nephews and their counsel early on in the litigation.

In the result, the nephews and sister were awarded $35,500 to be paid by the estate, Perry and Teresa were awarded $54,480 to be paid by the estate, Mrs. Miksche's lawyer was awarded $30,173 in costs, and the public guardian and trustee was awarded $11,034. However, the nephews were ordered to personally pay costs in the amount of $28,000 to Perry and Teresa, $10,000 to the deceased's lawyer (Mr. Silverberg), and $3,100 to the public guardian. According to the Court, most of the work done by the nephews' counsel could not be justified. Moreover, as noted by the Court, "there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance."[54]

In support of its cost award, the Court noted that the nephews conducted the litigation in an oppressive manner by making unreasonable demands on the other parties and that both the nephews and the law firm ignored credible medical evidence that the deceased lacked capacity. As well, they maintained the unreasonable position that the deceased remained in the care facility against her will, and, consequently, incurred unnecessary costs. Resultantly, the Court found that the nephews were to be responsible for the unnecessary costs incurred by Perry and Teresa, which costs were the result of the nephews' conduct. In addition, the court found that there was no basis on which to challenge the retainer of the deceased's solicitor (Mr. Silverberg), and it was accepted that deceased's solicitor spent at least 50 per cent of his time dealing with unreasonable claims and positions taken by the nephews. It was also found that

[54] 2007 CarswellOnt 7162 at para 74.

the allegations made by the nephews against the public guardian and trustee were serious and required considerable response.

An additional hearing took place before Justice D. M. Brown on September 19, 2009.[55] The key issue to be determined on the application for directions brought by the Estate Trustee of the estate of the late Johanna Miksche was whether the law firm of Polten & Hodder could, under the guise of seeking to enforce a facially-accepted offer to settle, obtain, in effect, a charging order against the interests of one of the beneficiaries, Ursula Lill, the deceased's sister and formerly their client. In his judgment of November 4, 2009, Justice Brown admonished the conduct of the law firm, Polten & Hodder, stating: "The conduct of the law firm, and in particular of one of its principals, Eric Polten, has been scandalous and in breach of their duties as officers of this court."[56] Justice Brown described the costs of Polten & Hodder as "staggering" and made a costs order in the matter. However, since the costs were being sought pursuant to Rule 15.02 (4), as well as because of the conduct of the proceedings by Polten & Hodder for costs of the proceedings, including those before the Court of Appeal, Justice Brown adjourned the issue of costs to oral submissions and directed the law firm to engage independent counsel to represent them at the hearing.

***Fountain Estate v. Dorland*[57]**

This was a case respecting Eileen Fountain, a woman who had died at the age of 90 previous to the commencement of these proceedings. Mrs. Fountain had two daughters: Marilyn Dorland and Julie Sutherland. The latter was appointed her committee of the person and property prior to her death, and initiated this action in that capacity. Mrs. Sutherland initiated this action in order to recover just over $150,000 from Ms. Dorland and just under $30,000 from her nephew, Donald Rendall.[58]

Between 1999 and 2003, Mrs. Fountain wrote a number of cheques to help her daughter, Ms. Dorland and her grandson, Ms. Dorland's son, Mr. Rendall. Ms. Dorland and her common law spouse had supported themselves mainly by having recourse to social assistance for most of

[55] 2009 CarswellOnt 6770.
[56] 2009 CarswellOnt 6770, at par. 2.
[57] *Fountain Estate v. Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615, 214 ACWS (3d) 653.
[58] *Ibid.* at para 1.

their adult lives. Over the course of four and a half years, Mrs. Fountain wrote approximately 35 cheques ranging in amount from $500 to $25,000 for Ms. Dorland's benefit.[59]

At trial, Ms. Dorland was inconsistent in her description of why these cheques were given, but insisted that her mother had written them out of her own free will.[60] Mrs. Sutherland argued that the cheques had been written when her mother lacked capacity or that, failing that, they had not been written out of her own free will; that they had been made under circumstances of undue influence.[61]

It is worth noting that in this case, Mrs. Fountain was not under committeeship at the time the gifts were made. As is often the case with determinations of capacity, there can be a period of time during which capacity is decreasing but no formal determination of capacity is made until after suspicious transfers come to the fore.

In his analysis, Justice Barrow discusses the appropriate law that applies to gifts between family members:

> The first legal concept relevant to the analysis is that of the resulting trust. As explained by Rothstein J. in *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.) at paragraph 20:
>
> > A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner...
>
> The law presumes a resulting trust in certain situations. Again, as explained by Rothstein J. at paragraph 24 of *Pecore*: (…) where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended... To rebut the presumption, the transferee must show on a balance of probabilities that the transferor had an intention contrary to or inconsistent with the intention the law presumes in relation to gratuitous transfers (*Pecore* at paragraph 43).

To the extent that the cheques in question were given without consideration, the onus is on Ms. Dorland and Mr. Rendall to rebut the presumption of resulting trust. Ms. Dorland and Mr. Rendall argued that the cheques were gifts. In accordance with the law of resulting trusts, they must establish that Mrs. Fountain had the capacity to make a gift and that she exercised that capacity in writing the cheques currently in dispute.

Justice Barrow went on to state:

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[59] *Ibid.* at para 2.
[60] *Ibid.* at para 12.
[61] *Ibid.* at paras 2-3.

> *The court will set aside a gift if it is procured by undue influence (Goodman Estate v. Geffen, [1991] 2 S.C.R. 353 (S.C.C.) at paragraph 23). Undue influence may be established in one of two ways: it may be positively proven or it may be presumed.* ***Whether it will be presumed depends on whether "the potential for domination inheres in the nature "of the relationship between the parties to the transfer (Geffen at paragraph 42). Once the presumption arises, the onus shifts to the recipient or donee of the property to rebut it by showing that the transaction was the product of the donor's "full, free and informed thought"*** *(Geffen at paragraph 45). Discharging this burden "may entail a showing that no actual influence was deployed in the particular transaction" (Geffen at paragraph 45). Finally, the size of the impugned gift may be "cogent evidence going to the issue of whether influence was exercised" (Geffen at paragraph 45).*[62]

As such, the case law that applies throughout Canada on gratuitous transfers protects the interests of older adults who are susceptible to financial abuse. It is, however, often hard to reclaim financial assets that have been utilized by a transferee. Accordingly, it is important that relevant legislation state clearly the expectations that are placed on individuals acting on incapable persons' behalves with respect to their property.

Setting out expectations for gratuitous transfers of incapacitated adults would be especially useful for older adults, who may have children they wish to make transfers to. In the case at hand, as with other cases involving older adults whose capacity is at issue and their adult children, it is difficult to infer in retrospect whether the older adult in question would have wished to make a gift, and to what extent, to her family members, had she possessed the capacity to do so.

When considering the gifts made from Mrs. Fountain to Mr. Rendal, Justice Barlow appears to have considered her actions through the lenses of a reasonable person: Mrs. Fountain provided Mr. Rendal with a number of cheques after he had recently been laid off from his work due to the closure of the plant which was his place of employment. Mr. Rendal has three children for whom he needed to provide during this period. Mr. Rendal faced financial hardship both as a result of his unemployment, and because he had recently become separated, which meant he had to furnish his mobile home after his wife took most of the furniture when she left him. For a brief time after losing his job, Mr. Rendal had a gambling problem. Part of the money given to him by his grandmother was used to repay his gambling debts.[63]

Justice Barlow found that most of the money that had been given to Mr. Rendal was, in fact, used to buy furniture for his new home and to otherwise assist with living expenses for himself and his three children, who had returned to live with him after living with their mother for a short

[62] *Supra* note 57 at para 64 [emphasis added].
[63] *Supra* note 57 at para 80.

while. Although a portion of the gratuitous transfers that were given to him by his grandmother were used to assist with his gambling debt, Justice Barrow found that Mrs. Fountain had been aware of this fact and had nevertheless chosen to help her grandson. As a result, Justice Barrow chose not to interfere with these gratuitous transfers.[64]

As such, it seems courts will try to balance the need to protect older incapacitated adults' estates with a reasonable amount of deference to the older adults' wishes when these can be ascertained.

It is interesting to note the effect of credibility on Justice Barlow's findings. The Justice found that Mr. Rendal's testimony matched the information presented in his affidavits, and a result relied on the evidence he gave. Justice Barlow, however, did not feel he could rely on Ms. Dorland's testimony, as he found it to be inconsistent both internally and in comparison to her affidavit evidence.[65]

6. Conclusion on Elder abuse through Power of Attorneys

The application of the law as it pertains to the financial abuse of incapable older adults involves a heavy reliance on 'he said she said' evidence, as judges will sometimes have to infer from affidavit evidence and parties' testimonies what the adult, when capable, would have wished to have done with their property. Due to the courts' reliance on testamentary evidence, the importance of credibility and consistency is heightened.

The first lesson that can be extracted from these cases is that providing attorney, guardians, and other individuals with access and control over older adults' finances with clear guidelines as to the expectations that are placed on them in their dealings with the finances of incapacitated adults is crucial to avoid placing members of the judiciary in a position whereby they must infer the intentions of an older adult when capable via the testimony of their feuding children, often after an older adult's finances have already been depleted.

The second lesson in these cases is that the protection of older adults' assets, for their own benefit, should occur as soon as possible, and often prior to the time when a matter has reached the Court. Counsel advising family members of older adults should ensure that they are aware of both the statutory requirements, as well as common law principles of resulting trust

[64] *Ibid* at para 82.
[65] *Ibid.* at para 37.

and undue influence, and that their dealings with the older adult's property are conducted accordingly.

In *Re Baranek Estate*[66], a case that involved "intense litigation" that ensued between a prior and subsequent attorney for property, Justice D. Brown made the following remarks which, in our view, truly epitomize the problems associated with powers of attorney today and emphasize the need for legislative reform in this area:

> The so-called "battle of competing powers of attorney" is emerging as a growing area of litigation. This is a most unhealthy development. I suspect that when the Legislature passed the *Substitute Decisions Act* back in 1992 it intended to put in place a legal framework which would protect the affairs of the vulnerable elderly, not spawn a new breed of litigation which would see the hard-earned money of the vulnerable being exposed to claims for the payment of legal fees incurred by those whom they had appointed to protect their interests. In so commenting I am not passing judgment, one way or the other, on the conduct of Mr. Coon or Ms. Biegun. I am signaling that the inter-attorney litigation which erupted in this case is symptomatic of a much larger problem which, as Ontario's population ages, risks turning into a very serious social issue. Indeed, I think the time may have arrived for the Legislature of this province to look into this problem of litigation involving competing powers of attorney, especially involving subsequent powers of attorney made during the latter periods of a person's life when they are vulnerable to pressure, in order to see whether new protections are required to ensure that the assets of the vulnerable are used for one purpose only - the satisfaction of the needs of the vulnerable elderly while they are alive.[67]

C. PREDATORY MARRIAGES

7. Marriage and Property Law

To truly understand why predatory marriages can be so problematic, it is necessary to understand what entitlements are gained through marriage.

At the outset, it is important to note that in Ontario law and in many other provinces, marriage automatically revokes a will pursuant to section 15 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. (the "*SLRA*"), and the exceptions thereto as set out at section 16 of the *SLRA*. One of the exceptions that apply is where there is a declaration in the will that it is made in contemplation of marriage.

[66] 2007 CarswellOnt 7162.
[67] *Re Baranek Estate,* 2007 CarswellOnt 7162.

The 2010 Court of Appeal decision in British Columbia, *MacLean Estate v. Christiansen*[68] held that extrinsic evidence supported the term "spouse" as used in the will to mean the testator's legal spouse, with whom he was contemplating marriage. The legislation in Ontario likely would not provide for such a result, it requiring "a declaration in the Will" (Section 16(a)).[69]

In addition, in many Canadian provinces, with marriage come certain statutorily-mandated property rights. Using Ontario law as an example, section 5 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), provides that, on marriage breakdown or death, the spouse whose "net family property" is the lesser of the two net family properties is entitled to an equalization payment of one-half the difference between them.

A spouse's "net family property" or NFP is the value of all of their property (except for certain excluded properties set out in subsection 4(2) of the *FLA*) that a spouse owns on the valuation date (which could be the date of divorce, or date of death of a spouse), after certain deductions are made, such as the spouse's debts and other liabilities and the value of property that the spouse already owned on the date of marriage after deducting the debts and other liabilities related to that property. Importantly, even if the matrimonial home was owned before/as at the date of marriage, its value is not deducted from a spouse's NFP, nor are any debts or liabilities related directly to the acquisition or significant improvement of the matrimonial home (calculated as of the date of the marriage). The definition of property in the *FLA* is fairly vast: "any interest, present or future, vested or contingent, in real or personal property."

Such entitlements do not terminate on death. Rather, where one spouse dies leaving a will, marital status bestows upon the surviving spouse the right to 'elect' to either take under the will, or to receive an equalization payment, if applicable. Even if a spouse dies intestate, the surviving married spouse is entitled to elect to either take pursuant to the intestacy laws set out in the *SLRA*, or chose to elect to receive an equalization payment pursuant to the *FLA*. While a claim for variation of one-half of the difference can be made, it is rarely achieved in the absence of fraud or other unconscionable circumstances.[70]

[68] *MacLean Estate v. Christiansen*, 2010 BCCA 374.
[69] Section 16(a) of the *SLRA.*
[70] *Supra* note 84.

Section 44 of Part II of the *SLRA* provides that where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.[71] Where a spouse dies intestate in respect of property having a net value of more than the "preferential share" and is survived by a spouse and issue, the spouse is entitled to the preferential share, absolutely. The preferential share is currently prescribed by regulation as $200,000.00.[72]

There are legitimate policy reasons underlying this statutorily-imposed wealth-sharing regime which have developed over time. Using the marital property provisions of the *FLA* as an example, section 5(7) of that Act sets out its underlying policy rationale as follows:

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

Arguably, this policy rationale does not apply to the predatory marriage scenario, where one party is significantly older, holds the bulk if not all of the property and finances in the relationship, there are no children, and the other party offers little in the way of contribution. Such a relationship is not, as the legislation presumes, founded on an equal contribution, whether financial or otherwise.

As is apparent, in some provinces, like Ontario, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate or intestate succession, to such an extent that spouses are given primacy over the heirs of a deceased person's estate. Ontario's SLRA also permits under Section 58, a spouse to claim proper and adequate support as a dependant of a deceased, whether married, or living common law. Interestingly, the recent decision of Belleghem J., in *Blair v. Cooke* (Allair Estate)[73] the Court determined that two different women simultaneously spouses of the deceased were not precluded from both obtaining a support award from the Estate.

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[71] *Ibid*.
[72] *SLRA*, O. Reg. 54/95, s. 1.
[73] *Blair v. Cooke* (Allair Estate) 2011 ONSC 498 (Can LII).

The difficulty with predatory marriages is that despite the injustice they cause to the incapable spouse (and his legitimate heirs, if any), such unions are not easily challenged. The reason for this is that the test for capacity to marry has, historically, been a fairly low threshold to cross and continues to be so and, unfortunately, the case law arguably has not kept pace with the development of legislation that has been designed to promote and protect property rights.

8. Review of Some of the More Recent Case Law on Elder Financial Abuse Through Predatory Marriages

Predatory marriages are on the rise. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, they are usually characterized by one spouse who is significantly advanced in age and, because a number of factors which range from the loneliness consequent to losing a long-term spouse, or illness or incapacity, they are in a vulnerable position, thus making them more susceptible to exploitation by another. These unions are frequently clandestine – alienation from friends and loved ones being a tell-tale sign that the relationship is not above board.

Hart v. Cooper[74]

The case of *Hart v. Cooper* involved a 76 year old man, Mr. Smiglicki, who married a woman 18 years his junior: Ms. Hart. The couple married by way of a civil marriage ceremony. As is generally the case, Mr. Smiglicki's marriage to Ms. Hart automatically revoked a will he had made six years prior, which named his three children as the beneficiaries of his Estate. Mr. Smiglicki had made this will after learning that he had a terminal illness and little more than a month to live. Mr. Smiglicki's children challenged the validity of his marriage to Ms. Hart on the ground that Mr. Smiglicki lacked the mental incapacity to contract a marriage. Allegations were also made of alienation by Ms. Hart of Mr. Smiglicki.

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney* and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic test for capacity to marry, a test which relies on the concept of marriage as a 'simple contract':

> 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. The recognition that a ceremony of

[74] 1994 CanLII 262 (B.C.S.C.)

> marriage is being performed or the mere comprehension of the words employed and the promises exchanged is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into; *Durham v. Durham; Hunter v. Edney* (otherwise *Hunter*); *Cannon v. Smalley* (otherwise *Cannon*) (1885), L.R. 10 P.D. 80 at 82 and 95. But the contract is a very simple one - - not at all difficult to understand.[75]

The court then proceeded to describe the appropriate burden of proof as follows:

> Where, as here, a marriage has, in form, been properly celebrated, the burden of proving a lack of mental capacity is bore by the party who challenges the validity. What is required is proof of a preponderance of evidence. The evidence must be of a sufficiently clear and definite character as to constitute more than a "mere" preponderance as is required in ordinary civil cases: *Reynolds v. Reynolds* (1966), 58 W.W.R. 87 at 90-91 (B.C.S.C.) quoting from *Kerr v. Kerr* (1952), 5 W.W.R. (N.S.) 385 (Man. C.A.).[76]

The court in this case did not accept the medical evidence of Mr. Smiglicki's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The court added that there was no evidence given to suggest that Ms. Hart ever profited financially from either her marriage to Mr. Smiglicki or to her previous husbands. Additionally, the court found that Ms. Hart's motivation in marrying Mr. Smiglicki was not otherwise relevant to the determination of his mental state at the time of the marriage ceremony. Accordingly, the marriage was upheld as valid, and the will previously executed remained revoked.

It is difficult to determine from the reasons in this case whether and to what extent the court considered the allegations of alienation and potentially predatory circumstances that the family asserted preceded the marriage.

Although the Court found that the burden of proof had not been satisfied, no significant analysis was made by the Court of the allegations of alienation by Ms. Hart and its impact on Mr. Smiglicki's decision to marry. Moreover, whether Mr. Smiglicki fully understood the financial consequences of marriage or the impact of marriage on his property rights were not matters considered by the court in reaching its conclusion. Consequently, the case makes no advancements in defining the '*duties and responsibilities'* that attach to the marriage contract or what must be understood by those entering into the contract of marriage.

[75] *Supra* note 103 at 9.
[76] *Ibid.* at 9.

Thus, in a consistent application of the historical case law, *Hart v. Cooper* confirms the age-old principle that the contract of marriage is a simple one.

***Banton v. Banton*[77]**

The facts of *Banton v. Banton* are as follows. When Mr. Banton was 84 years old, he made a will leaving his property equally amongst his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent.

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Muna Yassin, and a will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, and shortly after the new identical documents were prepared, a further capacity assessment was preformed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Banton's children raised a number of issues before the Court, including the following: whether Mr. Banton had capacity to make wills in 1994, and 1995; whether the wills were procured by undue influence; and, whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton lacked testamentary capacity to make the Wills in 1994 and 1995, and that the Wills were obtained through the exertion of undue influence. In spite of these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the tests for testamentary capacity, capacity to manage property, capacity to give a power of

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

attorney for property, capacity to give a power of attorney for personal care and capacity to marry according to the provisions of the *Substitute Decisions Act*.[78]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[79] Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions of whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[80] In reaching this conclusion, Cullity J. drew a significant distinction between the concepts of 'consent' and of 'capacity,' finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[81]

Having clarified the distinction between 'consent' and 'capacity', Justice Cullity then embarked upon an analysis of the test for capacity to marry and whether Mr. Banton passed this test. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[82] In the Court's view, however, the test is not one which is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Justice Cullity then turned his attention to whether or not, in Ontario law, there was an "additional requirement" for requisite mental capacity to marry:

> An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in *Browning v. Reane* (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:

[78] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at para.33.
[79] *Ibid.* at para.136.
[80] *Ibid.*
[81] *Ibid.* at paras. 140-41.
[82] *Ibid.* at para.142.

> If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. at pp. 70-1

The principle that a lack of ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in *Spier v. Bengen*, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:

> *There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property*. at p. 46

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "the test for capacity to marry at common law":

> *Whether a person of unsound mind was capable of contracting a valid marriage depended, according to eccle-siastical law to which the court had to have regard, upon his capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities created, his freedom or otherwise from the influence of insane delusions on the subject, and his ability to take care of his own person and property.*

After review of these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in Browning v. Reane appeared to require both incapacity to manage oneself as well as one's property, whereas Willmer J.'s statement in Re Spier could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to incapacity to marry. Notably, Halsbury's statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to manage oneself and one's affairs, including one's property. It is only with the enactment of the Substitute Decisions Act that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in Browning v. Reane. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property

as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."

Despite articulating what would, at the very least, be a dual test for capacity to marry (one which requires a capacity to manage one's self and one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, somewhat surprisingly, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid. Even more, Justice Cullity made this determination in spite of the fact that he found that, at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "judgment was severely impaired and his contact with reality tenuous." Moreover, Justice Cullity made his decision expressly "on the basis of Browning v. Reane." However, you will note that, earlier in his reasons, he stated that the case of Browning v. Reane is the source to which the "additional requirement" is attributed, which requirement goes beyond a capacity to understand "the nature of the relationship and the obligations and responsibilities it involves" and, as in both Browning v. Reane and Re Spier, extends to capacity to take care of one's own person and property.

Barrett Estate v. Dexter[83]

In sharp contrast to the holding in Banton, in Barrett v. Dexter ("Barrett") the Alberta Court of Queen's Bench declared the marriage performed between Arlene Dexter-Barrett and Dwight Wesley Barrett to be a nullity based upon a finding that Mr. Barrett lacked the legal capacity to enter into any form of marriage contract.

The case of Barrett v. Dexter involved a 93 year old widower, Mr. Dwight Barrett, who made the acquaintance of a woman almost 40 years his junior, Arlene Dexter Barrett. They met in a seniors club where Mr. Barrett was a regular attendee. In less than a year or so, Ms. Barrett began renting a room in Mr. Barrett's house. As part of the rental agreement entered into, Ms. Dexter was to pay $100.00/month and do some cooking and cleaning of the common areas of the home.

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

Not long after she moved in, however, Mr. Barett's three sons became suspicious of the increasing influence that Ms. Dexter was [exerting] over their father and, in September of that year, only months after she had moved in, Mr. Barrett apparently signed a hand written memorandum which gave Ms. Dexter a privilege of living in his home while he lived until one year after his death. The one year term was later crossed out and initialed thus giving Ms. Dexter a privilege of living in the home for the duration of her lifetime and at the expense of the Estate.

Mr. Barrett's withdrawals from the bank began to increase in both frequency and amount. Ms. Dexter then made an appointment with the marriage commissioner, and her daughter and son-in-law were to attend as witnesses. The marriage was not performed as apparently the son-in-law had a change of heart about acting as a witness. Ms. Dexter then made another appointment with a different marriage commissioner. On this occasion, the limousine driver and additional taxi cab driver acted as witnesses. Mr. Barrett advised his grand-daughter of the marriage when she came to visit him on the day after the wedding. Mr. Barrett proceeded to draft a new Will, appointing his new wife as executor, and gifting to her the house and furniture as well as the residue of his estate. A capacity assessment was conducted shortly thereafter and Mr. Barrett's son brought an application to declare the marriage a nullity on the basis of lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own will and accord.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed that the marriage was necessary in order for him to avoid placement in a nursing home. There was evidence of alienation by Ms. Dexter, including removal by her of family pictures from Mr. Barrett's home and interference by her with planned family gatherings. Ms. Dexter was also accused of speaking for Mr. Barrett and advising him against answering his son's questions and that she had written documents on Mr. Barrett's behalf.

Not only were all of the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on his family and estate. On the issue of capacity to marry, one of the doctors, Dr. Malloy, significantly opined that a person must understand the nature of the marriage contract, the state of previous marriages, one's children, and how they may be affected. Dr. Malloy testified that it is possible for an assessor or

the court to set a high or low threshold for this measurement, but that in his opinion, “no matter where you set the threshold, Dwight [Mr. Barrett] failed.”[84]

In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of Chertkow v. Feinstein (Chertkow)85 which employed the test set out in Durham v. Durham:
What must be established is set out in Durham v. Durham (1885 10 P.D. 80) at p. 82 where it is stated that the capacity to enter into a valid contract of marriage is "A capacity to understand the nature of the contract, and the duties and responsibilities which it creates".[86]

According to the Court, the onus rests with the Plaintiff who attacks the marriage to prove on a preponderance of evidence that a spouse lacked the capacity to enter into the marriage contract. Applying the law to the facts, the Court noted that while the opinions of medical experts were not determinative in and of themselves, and had to be weighed in light of all of the evidence, in this case the medical evidence adduced by the Plaintiff established on an overwhelming preponderance of probability that Mr. Barrett lacked the mental capacity to enter into a marriage contract or any form of marriage on the date he married Ms. Dexter.

Although the Court did consider the evidence of the lay witnesses, relative to the medical evidence, the evidence given by the lay witnesses was weak. In fact, Ms. Dexter was the best lay witness. However, because she had a personal interest in the outcome of the case her evidence could not be accepted.

In conclusion, the Court held that the plaintiff had proven, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null and void and the court found it unnecessary to decide the issue of undue influence. As the Plaintiff son had been entirely successful in the action, he was entitled to costs.

***Feng v. Sung Estate*[87]**

In another predatory marriage case in 2003, Justice Greer refined the test and application of the capacity to marry in *Re Sung Estate*. The facts in *Re Sung* are as follows. Mr. Sung, recently

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[84] *Supra* note 112 at pp.71-2.
[85] *Chertkow v. Feinstein (Chertkow)*, [1929] 2 W.W.R. 257, 24 Alta. L.R. 188, [1929] 3 D.L.R. 339 (Alta. C.A.).
[86] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82.
[87] 2003 CanLII 2420 (ON S.C.).

widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were quickly married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share. Mr. Sung's children sought a declaration that the marriage was void *ab initio,* on the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, on the basis of duress, coercion and undue influence of a degree sufficient to negative any consent that there may have been.

In making her determination, Justice Greer found that there was no question that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party prior to Mr. Sung's death took steps to have it declared such.[88] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

In the Court's view, the evidence showed that Ms. Feng used both duress and undue influence to force Mr. Sung, who was in a vulnerable position, to marry her. Although Mr. Sung was only 70 years of age, he was both infirm and vulnerable and, the Court noted, Ms. Feng would have been very aware of his frail mental and physical health as a result of her nursing background. The Court also found that Ms. Feng was aware of Mr. Sung's vulnerability on the basis that Mr. Sung had agreed to help financially support Ms. Feng's son. It was suspicious that Mr. Sung, who had always been very close to his family, never told his children and his family about his marriage to Ms. Feng. Moreover, that Mr. Sung was under duress was evident from the fact that his health was frail and he feared that Ms. Feng would leave him if he did not marry her.

Justice Greer also states that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the mental capacity to enter into the marriage. In reaching this conclusion, Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen* where "the court noted that the person must also have the capacity to take care of his or her own person and property." Applying those principles, Greer J. found that the evidence is

[88] *Ibid.* at para. 51.

clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was capable of writing cheques, he was forced to rely on a respirator and Ms. Feng's operation of it. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the test for capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate*: "…a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[89] On the basis that Mr. Sung married Ms. Feng because he had erroneously believed that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.

Accordingly, the marriage certificate was ordered set aside and a declaration was to issue that the marriage was not valid and that Ms. Feng was not Mr. Sung's legal wife on the date of his death. In the result, the Will that Mr. Sung made in 1999 remained valid and was ordered probated.

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the capacity to enter into the marriage with Ms. Feng.90 The Court of Appeal endorsed Justice Greer's decision, although it remarked that the case was a close one.

***Hamilton Estate v. Jacinto*[91]**

This British Columbia Supreme Court decision bears some of the hallmarks of these predatory relationship situations; however, in this case, there was no marriage. The Court's analysis of the facts and issues is interesting from the perspective of these predatory situations.
In this case, Mr. Hamilton was married for 59 years before his wife died in March 2001, at which time he was 81 years old. Within a few months of losing his wife, Mr. Hamilton embarked on a relationship with Ms. Jacinto. The evidence before the Court was, that at some point Ms. Jacinto and Mr. Hamilton contemplated marriage, though the marriage never took place.

[89] S*upra* note 116 at para. 62.
[90] *Feng v. Sung Estate* [2004] O.J. No. 4496 (Ont. C.A.).
[91] *Hamilton Estate v. Jacinto*, 2011 BCSC 52 (CanLII).

In 2003, transactions took place that formed the subject matter of the action. Namely, Mr. Hamilton was the sole trustee and primary beneficiary of a trust that he set up. In that capacity, he arranged a line of credit, secured by property titled in the name of the trust and paid into the trust's bank account, money to fund the purchase of a house, the title to which was registered in Mr. Hamilton and Ms. Jacinto's names as joint tenants with rights of survivorship. Moreover, to facilitate the purchase, Mr. Hamilton opened two bank accounts with Ms. Jacinto, which were held jointly. At Mr. Hamilton's death in 2004, legal ownership of the monies in the joint account entitled to the property vested in Ms. Jacinto by survivorship, and not his estate.

Not surprisingly, Mr. Hamilton's children brought an action alleging inter alia that as the trustee of the trust, he was without authority to purchase the property using trust assets, undue influence was alleged against Ms. Jacinto, a claim of resulting trust alleged over the joint assets, as well as allegations of incapacity.

The Court engaged in considerable analysis as to whether or not Mr. Hamilton had authority to convert trust assets into non-trust assets. The Court, in this regard, had to determine Washington State law with respect to authority of the trustee in Mr. Hamilton under the trust; the position of Ms. Jacinto; and the interpretation of the trust powers itself. The Court analyzed the position of the children that Mr. Hamilton was a man in rapid physical and mental decline and their allegations that he was increasingly confused and forgetful in the last years of his life. There was a great deal of evidence of intent. The Court provided an in-depth analysis of the gratuitous transfer of property including the application of the doctrine of resulting trust to gratuitous transfers in Pecore v. Pecore[92].

Mr. Hamilton's children alleged that he was confused about his business affairs and had increasing difficulty in understanding them.

There was, however, a great deal of other evidence of independent witnesses. The evidence spoke to defeating the allegations that Ms. Jacinto was a "gold digger". Mr. Hamilton's solicitor was a witness. A number of independent witnesses testified that Mr. Hamilton had shared love and affection for Ms. Jacinto and spoke of their loving and intimate relationship. Relatives of Ms. Jacinto gave evidence. The Deceased's solicitor prepared a form of pre-nuptial agreement

[92] *Pecore v. Pecore,* 2007 SCC 17 (CanLII), 2007 SCC 17.

which had never been entered into but spoke to defeat the allegations of the children that they had not contemplated marriage. The Court looked at the conjugal nature of the relationship.
On undue influence, the Court found that Ms. Jacinto was not exploiting Mr. Hamilton or taking advantage of him in any way. Moreover, there was no evidence to draw an inference from the nature of their relationship that Ms. Jacinto exercised undue influence over Mr. Hamilton with respect to the property transactions conducted.

The Court was satisfied that the intent of the gift to Ms. Jacinto had been proven and accepted her evidence with respect to the jointly held property. Although the Court noted there were issues of credibility, that they had been considered and had no bearing on the evidence given by Ms. Jacinto about the decision that the property be held in joint tenancy, nor as to the nature of their relationship. The Court also took into consideration the fact that the children knew about the real property that had been bought during the Deceased's lifetime and the possibility of the marriage. In its thorough analysis, the Court concluded that Mr. Hamilton intended to give a gift to Ms. Jacinto of an interest in joint tenancy in the real property and the joint accounts. The Court determined that the Deceased had given the gift freely; that it was an independent act, and one which he fully understood. Moreover, the Court determined that the presumption of resulting trust had been successfully rebutted. The Court also found that Ms. Jacinto did not exercise undue influence over Mr. Hamilton when he decided to make the gift. The Court was satisfied that the gift was an act of love and an expression of affection and the action was dismissed and Ms. Jacinto entitled to her costs. It should be noted that Ms. Jacinto was in or about 30 years younger than Mr. Hamilton.

The judgment does not speak to issues of alienation from family. Too, there is no mention as to the value of the Deceased's estate in relation to the value of the joint property that passed by rights of survivorship. In conclusion, there were some of the usual hallmarks, but in this case there appear to be a rather thorough analysis of evidence in respect of the allegations which did not prove the plaintiffs case on a balance of probabilities. The law with respect to capacity was not analyzed, rather, decisions respecting resulting trust and legislation concerning the Trustee Act were analyzed.

***Juzumas v. Baron*[93]**

This case is not a case on the capacity to marry but seemingly nevertheless involved a predatory marriage situation.

The decision of *Juzumas v. Baron* provides a tool kit for practitioners seeking to remedy a wrong created by a perpetrator of elder financial abuse. The case involves a scenario not unlike the stories many of us have come across involving an older adult who comes into contact with an individual who, under the guise of "caretaking", moves to fulfill more of the latter part of that verb. The result: an older person is left in a more vulnerable position than that in which they were found.

This recent decision of the Ontario Superior Court of Justice involves a man, the plaintiff, who was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years.[94] Once a "lovely and cheerful" gentleman, the plaintiff was later described as being downcast and "downtrodden.[95] The defendant's infiltration in the plaintiff's life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator.

The defendant "befriended" the respondent in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance.[96] The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.[97]

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property.[98] She promised to live in the home after they were married and to take

[93] 2012 ONSC 7220.
[94] *Ibid.* at para 1.
[95] *Ibid.* at paras 39 and 56.
[96] *Ibid.* at para 25.
[97] *Ibid.* at para 28.
[98] *Ibid.* at paras 26-28.

better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared.[99] The plaintiff agreed.

The defendant however, testified that the plaintiff had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, Justice Lang found otherwise.[100] The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous "caretaking" experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable.[101]

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff's house ($600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet with the plaintiff without the defendant being present.[102]

After the wedding ceremony, which took place at the defendant's apartment, she dropped him off at a subway stop so that he would take public transit home alone.[103] The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant's promise that she would provide better care to the plaintiff if they married, testimonies from the plaintiff's tenant and neighbor, which were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "'abusive', 'controlling' and 'domineering'".[104]

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[99] *Ibid.* at para 28.
[100] *Supra* note 74 at para 27.
[101] *Ibid.* at para 24.
[102] *Ibid.* at para 30.
[103] *Ibid.* at para 31.
[104] *Ibid.* at para 54.

With the help of a plan devised over the course of the defendant's consultation with the lawyer who had drafted the plaintiff's Will made in contemplation of marriage, the defendant's son drafted an agreement which transferred the plaintiff's home to himself, no this mother to financially protect her. The "agreement" acknowledged that the plaintiff did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.[105]

The plaintiff, the defendant and her son attended the lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that overall his evidence indicated that it had not been explained to the client with sufficient discussion, or understanding the consequences of the transfer of property and moreover, that he was in the court's words "virtually eviscerating the Will he had executed only one month earlier…"; that he did not meet with the plaintiff alone; and only met with the parties for a brief time.[106] Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[107]

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. In fact, it seems the lawyer was under the impression that the defendant, and not the plaintiff, was the vulnerable party.[108]

The lawyer's notes likely read as a whole, but unknown on the reasons alone, indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.[109] In addition, Justice Lang found that the plaintiff had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on testimonial evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.[110]

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[105] *Supra* note 74 at paras 68-69.
[106] *Ibid.* at paras 79-84.
[107] *Ibid.* at para 84.
[108] *Ibid.* at para 88.
[109] *Ibid.* at para 91.
[110] *Ibid.* at paras 63 and 92.

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."[111]

When the plaintiff was injured with some severity, he was taken to the hospital. The hospital informed of the transfer of his house and release to a nursing home, instead, sent him home with two days a week of homecare.[112]

Notably, although the plaintiff initially sought a declaration that his marriage to the defendant was a nullity and void *ab initio*, he did not pursue this claim, instead seeking a divorce/dissolution of the marriage, which was granted in its place.

In considering the transfer of property, Justice Lang applied and cited McCamus' Law of Contracts, which outlines a "cluster of remedies" that may be used "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[113] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "if any of these doctrines applies, the weaker party has the option of rescinding the agreement."[114]

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which allows him or her to provide "a fully-informed and considered consent to the proposed transaction."[115]

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[111] *Supra* note 74 at para 97.
[112] *Ibid.* at para 104.
[113] *Ibid.* at para. 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[114] *Ibid.* at para 8.
[115] *Ibid.* at para 11.

As for the doctrine of unconscionability, Justice Lang stated that the doctrine "gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power."[116] The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

In addressing the defendant's claim of *quantum meruit* for services rendered, Justice Lang found that the period during which services were rendered could be distinguished as two categories: pre-marriage and post-marriage.

During the pre-marriage period, the defendant undertook to care for the plaintiff without an expectation or promise of remuneration, and persuaded the plaintiff to compensate her with a monthly income. Justice Lang found that no additional remuneration could be claimed for that period.

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had agreed to do so.[117] For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.[118] Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary, and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle that restitutionary relief allows a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."[119] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behaviour is such that it taints the entire relationship."[120] As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her *quantum meruit* claim.

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[116] *Ibid.* at para 13.
[117] *Supra* note 74 at para 129.
[118] *Ibid.* at para 128.
[119] *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 661.
[120] *Ibid.* at para 142.

Substantial costs were awarded in favour of the older adult plaintiff.[121]

This case provides helpful guidance in the area of elder abuse, as it demonstrates the tools of contract law and equity afforded to the court, in order to remedy a wrong incurred in the context of financial abuse. This case provides what is, in cases of financial abuse, a rarity: an uplifting ending. In this case, it is not a family member or acquaintance who brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult himself who, with the help of his neighbour, was able to seek justice and reverse some of the defendant's wrongdoing.

It is not every case of elder abuse that involves an older adult who is able to, or capable of being present during court proceedings to represent the facts as he or she recalls them. In addition to its review of the legal concepts that are available to counsel seeking to remedy the wrongs associated with predatory marriages, this case demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

A Notice of Appeal has been filed in this matter, the status of same currently unknown.

Some interesting on-line blog postings concerning the evidence of neighbours/tenants supporting Mr. Kazys Juzumas including affidavit evidence, can be accessed at: http://www.thethoughtvox.com/Court%20Files/

Petch v. Kuivila[122]

Petch v. Kuivila also highlights the effects of marriage on estate planning; specifically, the revocation of a will by marriage pursuant to s. 15 of the Succession Law Reform Act (SLRA). It also acts as a reminder of the correlation and consequences of predatory marriages and revocations of previous wills not made in contemplation of marriage.

In 2003, the Deceased designated the Applicant as the revocable sole beneficiary of his life insurance policy. In 2004, the Deceased made a will in which he named the Respondent and her brother as beneficiaries of that same insurance policy; that will was not made in contemplation of marriage. In 2008, the Deceased married the Respondent. After the date of

[121] 2012 ONSC 7332 (CanLII).
[122] 2012 ONSC 6131.

death, the Applicant sought the insurance proceeds on the grounds that his marriage to the respondent revoked the designation in his will.

Justice Macdonald made the following findings: the will revoked the 2003 designation pursuant to the Insurance Act, the 2008 marriage revoked the 2004 will pursuant to s. 15 of the SLRA, and the revocation by marriage did nothing to undo the previous revocation by will therefore the insurance proceeds were payable to the Deceased's estate.

D. BRIEF COMMENTARY ON COSTS

As is evident from the cases noted above, there is a strong cautionary message coming from our courts: Courts are not hesitant to award substantial indemnity costs against perpetrators of financial abuse against vulnerable older adults. In particular see, *Chu v. Chang* 2010 CarswellOnt 1765, *Dhillon v. Dhillon*, 2006 CarswellBC 3200 (C.A.); *Zimmerman v. Fenwick*, 2010 ONSC 3855 and *Juzumas v. Baron,* 2012 ONSC 7220 (discussed above). While this may be small comfort to those attempting to protect their loved ones from predators, it does underscore how problematic predatory marriages and abuse of powers of attorneys can be and further evinces a need for increased awareness of this systemic problem and thus increased vigilance by litigators, lawmakers and concerned citizens alike.

E. CONCLUSION: AWARENESS AND PREVENTION

Societal and demographic changes in the make-up of our population tells us that our family structure is very complex, with families fractured, not just as a result of a complicated family units and relationships, but also attributable to distance, in other words, family members do not necessarily reside in the same community, town, city, province, or even country.

As such, the older adult irrespective of age, cognitive impairment, vulnerability, dependency, may simply be lonely and ripe for the picking as a victim for abuse of this type.

The society as a whole has a duty to protect the vulnerable, knowledge and awareness is the first of many necessary steps.

Solicitors, planners, legislators, health care practitioners and the public at large, must be alert to the possibility of fraudulently obtained and fraudulently used POA documents and the risks to the older adult and to the cognitively impaired, the vulnerable, the dependant, and incapable.

Fraudulently obtained or fraudulently used documents can wreak havoc for grantors and third parties alike. To that end, we advise everyone when dealing with powers of attorney to be cautious and vigilant, to make enquiries and to be constantly aware of both the risks and benefits that attach the preparation and use of a power of attorney document. Solicitors must be attuned to this type of situation and be sure the retainer includes a review of principles associated with suspicious circumstances, undue influence, an investigation of age, illness, assets, family relationships and independent legal advice – especially where joint retainers – ensure there is no conflict of interest present.

Also, it is important to note that while older adults can be capable cognitively to marry, they may be influenced through improper motive facilitated by vulnerability, perhaps age related, although more importantly, on account of fear, associated with being able to stay living in their own home. This is a major fear of many older adults and a common cause of successful influence exercised to overbear and manipulate a vulnerable, often dependant older adult. Societal awareness of these predatory situations is crucial such that we are all live to such issues and can step in to help protect our largest population – that of the Older Adult.

F. CHECKLISTS AND RESOURCES

It is our view that checklists can be of assistance to grantors in considering the choice of attorney, and attorneys alike throughout the attorneyship appointment. For this reason, we have provided links to our website to access a checklist for legal duties and obligations associated with a Continuing Power of Attorney for Property; as well as, a checklist for the legal duties and obligations associated with a Power of Attorney for Personal Care. We have also provided you with a link to our checklist on Capacity in the Estate Planning context.

Whaley Estate Litigation Checklists: **http://whaleyestatelitigation.com/blog/checklists-for-attorneys-and-guardians/**

Below is a list of other resources and links to the checklists discussed above:

- The International Federation of Ageing - http://www.ifa-fiv.org
- The Advocacy Centre for the Elderly - http://www.advocacycentreelderly.org
- Whaley Estate Litigation (***see Elder Law and Elder Abuse Links***) - http://www.whaleyestatelitigation.com/practice/elderlaw.html
- The Toronto Police Community Mobilization Unit, Vulnerable Persons Issues - http://www.torontopolice.on.ca/communitymobilization/cmw.php
- The Public Guardian and Trustee http://www.attorneygeneral.jus.gov.on.ca

- The Ontario Network for the Prevention of Elder Abuse (Senior Safety Line) http://www.onpea.org
- National Initiative for the Care of the Elderly (NICE) http://www.nicenet.ca

G. CASES DISCUSSED

CASE
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Barrett Estate v. Dexter, 2000 ABQB 530 (CanLII)
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Bosch v. Bosch, 2010 ONSC 1352
Burke Estate v. Burke Estate, 1994 CarswellOnt 442
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Petch v. Kuivila, 2012 ONSC 6131
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Vecchiarelli (Re), 2010 CarswellOnt 8023
Westfall v. Kovacec, [2001] O.J. No. 3942 (Ont. S.C.J.).

Case
Woolner v. D'Abreau, *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v.*

D'Abreau, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).
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Ziskos v. Miksche, 2007 CarswellOnt 7162