



**CAPACITY AND THE ELDER REAL ESTATE CLIENT: A
MEDICO-LEGAL PERSPECTIVE**

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CAPACITY AND THE ELDER REAL ESTATE CLIENT: A MEDICO-LEGAL PERSPECTIVE

I. INTRODUCTION

The presumptions and considerations concerning mental and requisite decisional capacity need to be known by all lawyers to ensure awareness no matter the age or health of the client. With an increasingly older client base, however, these emerging issues are now somewhat more pressing.

It is certainly not the case that all older adults have mental capacity challenges, indeed there are many older adults who are able to consistently function at a high level and possess requisite decisional capacity. This may be so, even where challenges such as dementia or Alzheimer's disease exist which do not necessarily render an individual incapable of making certain decisions on his/her behalf.

However, a wise lawyer turns one's mind to issues of capacity, all the while being alive to potential red flags and taking steps to ensure that one is satisfied that there are no tasks that the client is incapable of undertaking relating to the transaction in question. It is also well-advised for lawyers to clearly document all steps taken to address capacity concerns and issues with the client. Documented notes may be required at some point in the future as evidence of capacity if there is a challenge at some point after the retainer has ended.

Mental capacity is a complex area with many factors including medical and legal to consider.. Our legal system leans heavily in favour of autonomy and the freedom of individuals to make choices on their own behalf. All individuals at law are presumed capable of making all decisions. That presumption of legal capacity is only rebutted with evidence of incapacity that would justify interference with an individual's independence.

The definitions of capacity and incapacity can be somewhat elusive. Capacity can fluctuate over time, and with respect to different tasks, and in different situations. An individual may be capable with respect to some tasks, and incapable with respect to

other tasks, or capable with respect to some tasks at certain times, and incapable of the same tasks at other times.

There is no concrete measurement of capacity as it is determined by a combination of medical, legal and evidentiary factors.

This paper sets out some of the principles underpinning concepts of capacity, and its application to real estate transactions.

II. CAPACITY AS A CONCEPT

There is no single legal definition of the term “capacity.” In Ontario, the *Substitute Decisions Act, 1992*¹ (the “SDA”) which addresses various types of capacity, simply defines “capable” as “mentally capable”, and provides that “capacity” has a corresponding meaning. This is unhelpful for the most part.

There is no general test so to speak, criteria to apply or factors to consider for establishing “capacity”, “mental capacity” or “competency”. Each particular decision or task or decision undertaken has its own corresponding criteria considerations for establishing capacity.²

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.³

A person is not wholly “incapable.” A person may be incapable of particular decisions, but each decision entails its own specific capacity determination or corresponding assessment.

¹ S.O. 1992, c. 30 as amended [hereinafter *SDA*]

² Attached at the back of this paper is an Appendix setting out a summary of capacity standards for a range of tasks

³ *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 (QL), 154 A.C.W.S. (3d) 996 (S.C.J.) [hereinafter *Palahnuk Estate*]; *Brillinger v. Brillinger-Cain*, [2007] O.J. No. 2451 (QL), 158 A.C.W.S. (3d) 482 (S.C.J.) [hereinafter *Brillinger v. Brillinger-Cain*]; *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (ed) 216 (Ont. S.C.J.) [hereinafter *Knox v. Burton*]

Capacity is determined upon factors of mixed law, medicine and fact and by applying the evidence available to the applicable test (note there is no ‘test’ per se, the term test is oft used for convenience only as a colloquial reference to the criteria to be applied for establishing decisional capacity) or standard for decisional capacity.⁴

Capacity is an area of enquiry where medicine and law collide, in that legal practitioners are often dealing with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal criteria in their clinical practices to determine capacity, or are asked to review evidence retrospectively to determine whether at a particular time an individual had the requisite capacity to complete a particular task, or to make a specific decision.

The assessment of capacity is a less-than-perfect science, both from legal and medical perspectives. Capacity determinations are often very complicated. In addition to professional and expert evidence, lay evidence can be relevant and even paramount to determining capacity in some situations. The standard of assessment varies between assessors and the unique qualifications and experience of the particular assessor and this too, can become an obstacle that is difficult to overcome and reconcile in determining capacity. To add further to the complexity, in contentious settings, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long-past decision of an individual, alive or since deceased.

Capacity is *decision, time and situation*-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. A person is not globally “incapable” and there is no test to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task or decision and at a particular moment in time.

⁴ *Starson v. Swayze*, [2003] 1 S.C.R. 722 [hereinafter *Starson v. Swayze*]

(i) Capacity is Decision-Specific

Capacity is *decision*-specific in that, for example, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one's property or personal care. Capacity to contract, testamentary capacity, or capacity to give a gift, all involve different considerations as determined at common law. As a result, an individual may be capable of making some decisions, but not others.

(ii) Capacity is Time-Specific

Capacity is *time*-specific in that it can vary over time. Individuals can have good days and bad days where capacity fluctuates. This can be due to the nature of an illness, addiction, medication levels, tiredness, or other factors. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a will can vary over time.⁵

The issue of time-specificity and capacity means that any expert assessment or examination is necessarily specific to that time. This can mean that a lawyer's assessment of a client's capacity at the time that instructions are given may have more probative value than an assessor's report, as the assessment is most often not contemporaneous with the giving of the relevant instructions.⁶

(iii) Capacity is Situation-Specific

Capacity also can fluctuate with a person's situation or circumstances. A situation of stress or unfamiliar or intimidating circumstances may impact a person's capacity. As an example, a person may be capable of making certain decisions if at home, but have difficulty with those same decisions in a lawyer's office or a doctor's office. Also, the presence or absence of certain individuals may also impact a person's capacity.

⁵ *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton*, all *supra* note 4

⁶ *Palahnuk Estate*, *supra* note 3 at para. 71

III. CAPACITY ASSESSMENTS

As noted above, capacity is assessed based on legal and medical factors. In the context of a lawyer's dealings, however, a lawyer is best to keep in mind the relevant capacity standards/criteria/factors applicable to the task and think about applying those standards to the situation. A lawyer who has concerns about a client's ability to understand the relevant information and appreciate the foreseeable consequences of a decision would do well to put those questions to the client directly and make detailed notes of such an enquiry. Those notes if sufficiently detailed may go a long way in addressing capacity concerns should they arise in the future.

In cases where the lawyer is not satisfied of the client's capacity or has significant concerns, it may be worthwhile to recommend sending the client for a formal assessment by a statutorily qualified capacity assessor. A capacity assessor may be a physician, social worker, nurse⁷ or other health care professional.⁷ In complicated cases where there may be dementia or other complex disorders, a geriatric psychiatrist well-versed in such diseases may be best-placed to conduct the assessment. Moreover, when dealing with complicated legal issues as may arise in a real estate practice, an experienced assessor who has dealt with such matters previously may also be a good choice to consider.

The lawyer should provide clear directions in writing to the assessor outlining the transaction in question that the client wishes to undertake, seeking an assessment of that client's capacity in that regard and setting out the appropriate legal standard and considerations elicited from statute and common law. This is especially important as the assessor is not usually a legally qualified, and as such requires the guidance of the lawyer on the particular issues that the assessor is being asked to address and weigh.

⁷ The term "capacity assessor" is defined in the *Substitute Decisions Act*, Regulation 460/05 and comprises members of the following colleges: College of Physicians and Surgeons of Ontario; College of Psychologist of Ontario; Ontario College of Social Workers and Social Service Workers (while holding a certificate of registration for social work); College of Occupational Therapists of Ontario; and College of Nurses of Ontario (while holding a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse).

Rights advice will be provided at the outset of the assessment to confirm that the client understands that the assessment could impact his/ her rights, such that there is a right to refuse to undergo the assessment.

If the capacity assessment is negative, then the lawyer should not act in respect of the decision in question. Similarly, if a lawyer reaches that conclusion, the lawyer should not act for the client in respect of that decision. If there is another task that the client seeks to undertake, the lawyer may undertake another capacity assessment to determine whether the client has the requisite capacity. As a result, in a single retainer there may well be more than one capacity assessment.

If the assessor concludes that the client possesses capacity to undertake the task in question, then that report will assist the lawyer in dealing with that client and in taking instructions in respect of that task. Any capacity assessment obtained should be placed in the client's file in the event it is required in the future.

IV. CAPACITY DEFINED

Although each task has its own specific capacity standard, it is fair to say that in very broad terms, capacity to make a decision is demonstrated by (a) a person's ability to understand all the information that is relevant to the decision to be made; as well as (b) that person's ability to process the information and appreciate the potential implications of the decision in question.

To be found capable, a person must possess both the ability to understand the relevant information and the ability to appreciate the consequences of the decision in question.

If an individual is able to understand the relevant information but not process the effects of the information, then he /she lacks the requisite capacity to make the decision in question.

The 2003 Supreme Court decision in *Starson v. Swayze*⁸ provides guidance on certain issues involving decisional capacity. Although this decision dealt solely with the question of capacity to consent to treatment under the *Health Care Consent Act, 1996*⁹ (an issue and statute which are not addressed in this paper) it provides analysis by virtue of similar themes applied in the context of all capacity determinations.

Writing for the majority, Major J., pointed out that the presence of a mental disorder does not equal incapacity, and that the presumption of legal capacity can only be rebutted by clear evidence.¹⁰

Major J. emphasized the ability to understand and process information is key to ascertaining capacity. The ability to comprehend the relevant information requires the “cognitive ability to process, retain and understand the relevant information.”¹¹ Then, a person must “be able to apply the relevant information to one’s own circumstances, and be able to weigh the foreseeable risks and benefits of a decision or lack thereof.”¹²

A capable person requires the “ability to appreciate the consequences of a decision”, and not necessarily “actual appreciation of those consequences.”¹³ By this reasoning, a person who possesses the ability to understand the relevant information and appreciate the consequences of a decision has the requisite mental capacity, even if he/she fails to exercise those abilities.

Major J. also importantly noted, the person subjected to the capacity assessment, need not agree with the assessor on all points, and that mental capacity is not to be equated with a standard of correctness or reasonableness.¹⁴ A capable person is entitled to be unwise in his or her decision-making.

⁸ *Supra* note 5

⁹ S.O. 1996, c. 2, Sched. A as amended

¹⁰ *Starson v. Swayze*, *supra* note 5 at para. 77

¹¹ *Ibid.* at para. 78

¹² *Ibid.* at para. 78

¹³ *Ibid.* at paras. 80-81

¹⁴ *Ibid.* at para. 79

In *Re. Koch*,¹⁵ Justice Quinn also emphasized this same point, that folly is not to be equated with incapacity. A person is entitled to make a less-than-wise decision so long as that person has the requisite capacity to make that particular decision. Justice Quinn wrote emphatically as follows:

....

It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...¹⁶

Therefore, it is not the decision itself which determines a person's capacity, but whether the person at the time of making the decision had the requisite capacity to do so. The folly or wisdom of the decision is not determinative of capacity.

V. CAPACITY IN REAL ESTATE TRANSACTIONS

What is the Relevant Capacity Standard in Real Estate Transactions?

Capacity is decision-specific. In the context of real estate transactions, however, there is no particular set standard to determine requisite capacity to enter into a real estate transaction. There is no statutory test or determining factors.

To determine which standard is applicable it is important to consider the nature of the real estate transaction.

When determining capacity in the context of real estate transactions, courts generally consider whether the individual in question has/had capacity to enter into a contract. However other factors will apply in certain circumstances.

In cases where the person in question is undertaking a real estate transaction as a gift, then the applicable determining factors for assessing capacity to make a gift are relevant. Where a gift is substantial by comparison to the value of the person's assets,

¹⁵ 1997 CarswellOnt 824, 33 O.R. (3d) 485, 27 O.T.C. 161 (Gen. Div.)

¹⁶ *Ibid.* at para. 69

such that the person is gifting virtually all of their assets/estate during life, or otherwise where the gift affects the individual's testamentary dispositions, then the requisite testamentary capacity determinations apply as defined at common law.

The question of which standard is applicable is relevant as the determining factors or criteria for each task vary.

Capacity to Contract

As stated, court decisions addressing the issue of real estate and capacity usually focus on an individual's capacity to contract.¹⁷

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("SDA").¹⁸ Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.¹⁹ Subsection 2(3) also provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the person is incapable of entering into the contract."²⁰

From the lawyer's perspective, the statutory presumptions of capacity provide that in most cases, one can rely on such, unless there are "reasonable grounds" to think that the client lacks the capacity to contract

When the issue of potential incapacity arises, one must consider what the standard for capacity to enter into a contract is. That standard is not found in a statute, rather at common law.

¹⁷ See for example: *Park v. Park*, 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)

¹⁸ *SDA*, *supra* note 2

¹⁹ *SDA*, subsection 2(1)

²⁰ *SDA*, subsection 2(3)

The criteria for ascertaining capacity to contract was set out succinctly in the 1973 Prince Edward Island, Supreme Court decision of *Bank of Nova Scotia v. Kelly*.²¹ In that case, the court defined capacity to enter into a contract as requiring the following:

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

Therefore, in order to be capable of entering into a contract, a person must understand the nature and consequences of the contract contemplated. He/she requires the ability not only to understand the nature of the contract, but also the impact on his/her interests.

In *Bank of Nova Scotia v. Kelly*, the Court established that a person entering into a contract must exhibit an ability to understand all possible ramifications of the contract. In the decision, Nicholson J. concluded that the person in question was able to understand the basic facts, but was unable to process how those facts would affect him:

..It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests*.²²

The requisite standard of capacity to contract stems from the requirement that all contracting parties have full and informed consent when entering into a contract. In the 1953 decision of *Royal Trust Co. v. Diamant*,²³ the British Columbia Supreme Court noted that in order to be capable of entering into a contract, the person must be able to

²¹ (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) [hereinafter *Bank of Nova Scotia v. Kelly*]

²² *Ibid.* at 284 [emphasis in original]

understand the “nature and effect of the transaction.” This decision establishes the requirements to set aside a contract wherein it must be demonstrated that the party in question was not able to understand the relevant information and/or how the contract would affect his/her interests.

Specifically, the Court wrote as follows:

The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.

The degree of mental incapacity which must be established in order to render a transaction inter vivos invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches v. Trimborn* (1946), 115 L.J.K.B. 305.²⁴

Generally speaking therefore, in order for an individual to be capable of entering into a real estate transaction, that person requires the requisite capacity to enter into a contract, which means that he/she requires the ability to understand the nature of the real estate transaction, and the ability to appreciate the impact of that transaction on his/her interests.

Capacity to Make A Gift

In some instances, a real estate transaction is not purely contractual but rather for the purposes of effecting a gift. This may be in cases where an individual transfers a property for nominal consideration, or places someone on title on their property. In such instances, the transaction is a gift, rather than a contract. Depending on the size of the gift, vis-à-vis the size of the person’s asset base, it may venture into the territory of a

²³ [1953] 3 D.L.R. 102 (B.C.S.C.) [hereinafter *Royal Trust Co. v. Diamant*]

testamentary transaction. That is to say, if the size of the gift is significant, and would substantially affect the size of the client's estate, then arguably it is a testamentary disposition.

It is worth noting that since many real estate transactions are of significant value as compared to an individual's estate, then many gratuitous transfers of real property would require requisite testamentary capacity, which is detailed below.

Starting with the premise that some real estate transactions are gifts short of a testamentary disposition, then the requisite determining criteria for establishing capacity to gift is similar to that as capacity to contract. As with capacity to contract, there is no statutory test for determining the requisite capacity to make a gift. The factors to consider are indeed the same as for those in ascertaining capacity to enter into a contract. Capacity to make a gift requires the following:

- (a) The ability to understand the nature of the gift; and
- (b) The ability to understand the specific effect of the gift in each set of circumstances.

The common law criteria on capacity to make a gift have been summarized in a number of decisions including the 1953 decision of *Royal Trust Co. v. Diamant*²⁵. In that case, the Court held that an *inter vivos* transfer is not valid if the donor had "such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."²⁶

This criterion was further established in the case of *Re Bunio (Estate of)*:²⁷

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

²⁴ *Ibid.* at 6 [emphasis added]

²⁵ *Royal Trust Co. v. Diamant*, *supra* note 24

²⁶ *Royal Trust Co. v. Diamant*, *supra* note 24 at page 6

²⁷ 2005 ABQB 137 at para. 4

Citing earlier case law on the capacity to gift, the British Columbia Supreme Court in *Dahlem (Guardian ad litem of) v. Thore*,²⁸ stated:

The transaction whereby Mr. Dahlem transferred \$100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore. **On the authority of *Kooner v. Kooner (1979)*, 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.**²⁹

In his book, *Gifts: a Study in Comparative Law*,³⁰ Professor Richard Hyland of Rutgers University examines the law of gifts in the United States, England, India, Belgium, France, Germany, Italy, and Spain and addresses the factors for determining capacity in various jurisdictions.

Referring to American law, Professor Hyland outlines the following proposition on capacity to gift:

...In American law, donors generally have the capacity to make a gift only if they understand the extent of their property, the natural object of their bounty, the nature of the disposition, and the effect the gift may have on their future financial security.³¹

While these considerations are similar to those outlined in the cases cited, they set out a somewhat more onerous obligation to meet, than just a simple test of understanding the nature of the gift and its effect, in that it requires donors to understand the “extent of their property.” Arguably, since most gifts of property are significant in value, the appropriate capacity standard is closer to that for capacity to make a will, per the common law determinations.

²⁸ [1994] B.C.J. No. 809 B.C.S.C.

²⁹ *Ibid.* at page 9 [emphasis added]

³⁰ Hyland, R., *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009)

³¹ *Ibid.* at page 222

Testamentary Capacity: Capacity to Make a Will

In the English case of *Re. Beaney*,³² the court explained the difference in the threshold of capacity to give gifts as opposed to making a will, as follows:

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

While the judge in *Re. Beaney*, imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. This proposition is not new. In an even earlier case, *Mathieu v. Saint-Michel*,³³ the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is significant, relative to the donor's estate, even if it be less than the entirety of the estate, then the standard for testamentary capacity applies in determining whether the gift is valid.

The requisite criteria for making a will is arguably more onerous than that for entering into a contract as the former requires the testator to have an understanding not only of his/her property, but also the fact that there could be parties who would have potential claims in respect of that property, and to understand the basis of those claims. The criteria are different.

³² [1978] 2 All E.R. 595 (Ch.D.) [hereinafter *Re. Beaney*]

³³ [1956] S.C.R. 477 at 487

The legal criterion to be applied in determining the requisite capacity to make a Will was established in the 1800's in the seminal English case of *Banks v. Goodfellow*.³⁴

Testamentary capacity in short is defined as:

- (a) The ability to understand the nature and effect of making a Will;
- (b) The ability to understand the extent of the property in question; and
- (c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Other cases have attempted to clarify the test per se, respecting testamentary capacity, and in particular that a testator need not have a detailed understanding of these three factors. In the 1944 decision of *Leger et al. v. Poirier*,³⁵ the Supreme Court set out that the testator requires a "disposing mind and memory" which is defined as a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like."

There is a view that testamentary capacity "focuses on the testator's ability to understand the nature and effect of the act of making a Will, rather than the particular provisions of the proposed Will."³⁶ From the real estate perspective, this suggests that a client is required as such, to understand the nature and effect of transferring a property, short of the actual transfer itself. This distinction may be less relevant in a real estate setting, however, as there is no real distinction between the "making of the transfer" and the transfer itself.

Analogizing in the context of a real estate transaction, however, would require the donor to have the ability to comprehend the nature and impact of making a gratuitous real estate transfer.

³⁴ (1870) L.R. 5 Q.B. 549.

³⁵ *Leger et al. v. Poirier*, [1944] S.C.R. 152 at page 153

³⁶ Robertson, G., *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at p. 214 [hereinafter *Mental Disability and the Law in Canada*]

In applying the *Banks v. Goodfellow* criteria to the context of a gratuitous real estate transfer, the relevant capacity standard would arguably require the following:

- (a) The ability to understand the nature and effect of making the transfer in question;
- (b) The ability to understand the extent of all of the donor's property; and
- (c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the donor.

A solicitor who drafts a Will is obliged to assess the client's testamentary capacity when instructed to prepare the Will where circumstances warrant it. The drafting lawyer must ask probing questions and be satisfied that the testator not only can communicate clearly, and answer questions in a rational manner, but that the testator has the ability to understand the nature and effect of the Will, the extent of his/her property, and all potential claims that could be expected with respect to the estate.³⁷ Thus similarly, a lawyer taking instructions respecting the gratuitous transfer of real property ought to take steps to ascertain the client's capacity to make such a transfer on the basis of the criteria for testamentary capacity. The real estate lawyer should ask clear questions respecting the subject property in question the donor's other property, and the potential beneficiaries and claimants in respect of the donor's potential estate.

Where the gift is significant in value, the onus is arguably higher, but in any case different as required by the real estate lawyer, and clear enquiry into and well-documented notes on the issue of capacity are warranted.

Capacity to Instruct Counsel

A related issue for all lawyers is the matter of capacity to instruct counsel. As with all other decisions, an adult is presumed capable of giving instructions to his/her lawyer.

³⁷ *Murphy v. Lamphier*, (1914) 31 O.L.R. 287, 6 O.W.N. 238 (Ont.H.C.) at 317, aff'd (1914), 32 O.L.R. 19, 20 D.L.R. 906 (Ont.C.A.); *Hall v. Bennett Estate*, 2003 CanLII 7157 (Ont.C.A.) at para. 58

In an article by Ed Montigny, staff lawyer at ARCH Disability Law Centre, “Notes on Capacity to Instruct Counsel,”³⁸ he contends generally, that to have capacity to instruct counsel, a client must:

- (a) Understand what they have asked the lawyer to do for them and why,
- (b) Be able to understand and process the information, advice and options the lawyer presents to them; and
- (c) Appreciate the advantages, disadvantages and potential consequences of the various options.³⁹

As with other capacity issues, lawyers must carefully ask probing questions and should properly document the answers, particularly when they suspect a client’s (or potential client’s) capacity may be compromised. As our legal system prioritizes autonomy and only provides for the curtailment of independence where there is evidence of incapacity, a lawyer must balance the priority of independence with the need to ensure that vulnerable individuals are protected.

To that end, if a lawyer is satisfied that the client (or potential client) has capacity to give instructions, the lawyer may act for that client, keeping in mind that with each transaction, the lawyer ought to similarly be satisfied that the client possesses the requisite capacity.

If, however the lawyer is not satisfied that the client (or potential client) has the requisite capacity to give instructions on the task in question, the lawyer should not act in that transaction.

VI. THE RULES OF PROFESSIONAL CONDUCT

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

³⁸ www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0

³⁹ At page 3

Rule 3.2-9 provides that a lawyer in dealing with a client who may have compromised capacity, is required to maintain as much of a regular solicitor-client relationship as possible. This presumes that the client in question has the requisite capacity to retain and instruct counsel such that the lawyer may be retained and act on his/her behalf.

The Rules also contemplate a scenario where subsequent to the retainer, a client is no longer able to give capable instructions at which point, the lawyer ought to seek alternate representation for the incapable person by for example a litigation guardian or the Public Guardian and Trustee.

Rule 3.2-9 and the accompanying commentary provide as follows (with emphasis added):

3.2 QUALITY OF SERVICE

...

3.2-9 Client with Diminished Capacity

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

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC – not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take

steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.”⁴⁰

...

The Rule requiring maintaining a normal solicitor-client relationship with a client who may have some capacity challenges would also require that a lawyer be bound by the Rule respecting confidentiality. The Commentary in respect of Rule 3.3 (Confidentiality) provides that the duty of confidentiality is owed “to every client without exception.” Rule 3.3-1 provides as follows:

3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

- a) expressly or impliedly authorized by the client;
- b) required by law or by order of a tribunal of competent jurisdiction to do so;
- c) required to provide the information to the Law Society; or
- d) otherwise permitted by rules 3.3-2 to 3.3-6.

Commentary

[1] A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

⁴⁰ The LSUC Rules of Professional Conduct, Amendments current to October 2014, Rule 3.2-9 and Commentary [emphasis added]

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.⁴¹

...

The issue of confidentiality and older adults can be challenging. Often older adults have family members who are highly involved with and assist them. To the extent that a practitioner represents a client, whether an older adult or otherwise, he/she is required to adhere to the duty of confidentiality, except in cases where the client instructs the lawyer to divulge information to particular individuals. It is essential, when dealing with a client to ensure that their rights are not compromised because of their age, despite the otherwise possibly well-meaning intentions of family members or other individuals.

Rule 3.7 requires a lawyer to only withdraw from representing a client “for good cause.” If a lawyer has ascertained that his or her client is capable of instructing the lawyer, and undertaking the particular transactions, then he or she should continue to act. As for situations where capacity later becomes an issue, there are options short of withdrawal, including seeking a litigation guardian (as set out in Rule 2.02 (6)). Rule 3.7-1 provides as follows:

3.7 - WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

⁴¹ The LSUC Rules of Professional Conduct, Amendments current to October 2014, Rule 3.3-1 [emphasis added]

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

...

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

- (a) discharged by the client;
- (b) the client's instructions require the lawyer to act contrary to these rules or by-laws under the *Law Society Act*; or
- (c) the lawyer is not competent to continue to handle the matter.⁴²

⁴² The LSUC Rules of Professional Conduct, Amendments current to October 2014, Rules 3.7-1, 3.7-2, 3.7-7.

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

SECTION 5.1 – THE LAWYER AS ADVOCATE

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. **The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.**⁴³

...

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

VII. UNDUE INFLUENCE AND INCAPACITY

Another related issue that lawyers ought to be aware of is the potential for undue influence in real estate transactions.

Undue influence is said to occur where one person has the ability to dominate the will of another person, whether through manipulation, coercion, or the outright but subtle abuse of power.⁴⁴

⁴³ The LSUC Rules of Professional Conduct, Amendments current to October 2014, Rule 5.1.

⁴⁴ See *Dmyterko Estate v. Kulikovsky*, (1992) CarswellOnt 543 (S.C.)

There is significant interplay between undue influence and incapacity.

In situations of compromised capacity, the potential for undue influence is elevated. In the 2013 decision of *Gironda v. Gironda*,⁴⁵ Justice Penny noted that “[w]here an individual’s mental capacity is diminished, she will be more vulnerable to undue influence.”

Where capacity is at issue, “the legal threshold becomes higher and calls for more careful probing of the testator’s rationale at the time of the execution of a Will in particular, where circumstances are automatically more complex and there is the added suggestion of undue influence.”⁴⁶

In *Gironda*, Justice Penny set out a list of indicators of undue influence, which included the following: “..where the testator is dependent on the beneficiary for emotional and physical needs, where the testator is socially isolated, where the testator has experienced recent family conflict, where the testator has experienced recent bereavement, where the testator has made a new will not consistent with prior wills, and where the testator has made testamentary changes simultaneously with changes to other legal documents such as powers of attorney.”⁴⁷

While this list is non-exhaustive it sets out a fairly comprehensive set of criteria that lawyers can use as guidance. From a practical perspective, a lawyer alert to the issue of undue influence can probe the client regarding the purpose of the transaction, ensuring that he/she meets with the client alone, and obtain clear and independent instructions. If the lawyer is concerned about the client’s vulnerability and dependence on certain individuals, it may be wise to enquire into that person’s relationships with others, and potential reliance on them.

⁴⁵ 2013 ONSC 4133 (CanLII) at para. 56 [hereinafter *Gironda*]

⁴⁶ Kenneth I. Shulman *et al.*, “Treatment in Psychiatry, Assessment of Testamentary Capacity and Vulnerability to Undue Influence,” May 2007, 164:5, *Am. J. Psychiatry*, p. 723

⁴⁷ *Ibid.* at para. 77

Case law suggests that lawyers have a “heightened” or elevated duty to the client or even disappointed beneficiaries in circumstances where there are potential indicia of undue influence.

In the 1997 decision of *Hussey v. Parsons*,⁴⁸ Justice Puddester of the Newfoundland Supreme Court (Trial Division) was asked to determine whether the lawyer who assisted the plaintiff’s husband with transferring the sale proceeds of her house to her nephew had been negligent. Although Justice Puddester did not find the transfer agreement to be unconscionable, nor that there was actual undue influence, he did find that there was solicitor negligence in the actual execution of the agreement.⁴⁹ Justice Puddester noted that there were indicators of potential undue influence that “called for an extra degree of care and inquiry by the defendant [solicitor] in terms of exactly what were the interests, intentions and understandings of the plaintiff [client].”⁵⁰

As such lawyers when keeping in mind considerations of potential incapacity ought to also be aware of the potential for undue influence. In cases of older adults who are brought in by other family members or friends or caregivers, or who seek to undertake transactions that unilaterally benefit those individuals, the onus is even higher on the solicitor to ensure that the transaction is not procured through undue influence.

VIII. RED FLAGS AND PRACTICE TIPS

While the vast majority of retainers with older adults will proceed without concern, it is incumbent as a practitioner to be aware of issues of capacity, and in a similar vein, undue influence. To protect oneself as a solicitor one should spend enough time with each client to ensure that he/she is receiving capable instructions.

If there is any reason for concern then a lawyer would be well-advised to take the time and initiate the steps required to ensure that the client has the requisite capacity. These indicators can be hesitation or confusion on the part of the client, difficulty remembering

⁴⁸ 1997 CarswellNfld 349 (SCTD) [hereinafter *Hussey v. Parsons*]

⁴⁹ *Ibid.*, para. 685

⁵⁰ *Ibid.*

details, cognitive difficulties, or any other difficulties that demonstrate the client may not comprehend the transaction. Other indicators may be the transaction itself, or the presence or involvement of a third party who benefits from the proposed transaction. If, for instance, again, an older adult seeks to transfer the main asset he/she owns to a third party (whether family or otherwise), the lawyer is well-advised to ensure that the client is doing so on his/her own volition, that he/she is capable, and that he/she is even if capable, free of undue influence. This will require meeting with the client alone, without the third party, and in circumstances that make the client comfortable. This can be in the client's home and at times of the day when the client is most alert. The lawyer may have to make enquiries with the client as to the circumstances that he/she would prefer and should ask about when the client is most at ease and alert, i.e. at what time they take medications and eat meals, so that the client is best-positioned to properly instruct the lawyer. As capacity can fluctuate with the time and situation a person is in, it is good practice for a lawyer to attempt as much as possible to facilitate the person's comfort.

A lawyer can also provide a role in assisting a client to understand the relevant information and appreciate the consequences of a decision. A lawyer has in his/her possession, information and expertise to assist a client in making decisions that affect their legal entitlements. That is to say that as part of the process of ensuring capable instructions, a lawyer ought to ensure that the client has all the information available so that to the extent he or she is able to, he/she can make a capable decision.

From a practical perspective, where a client attends at a lawyer's office, and wishes, for instance to place a real property in joint tenancy with another individual, it is incumbent on that lawyer to explain the ramifications of such a decision, that is, that the property may pass to the receiving party by right of survivorship;⁵¹ that if the receiving party has liabilities or legal disputes that such could affect the property; and that the older adult may be limited from accessing the entire equity in the property in the future. This is

⁵¹ Subject to any presumption of resulting trust as per the Supreme Court decisions in *Pecore v. Pecore* (2007) SCC 17, *Madsen Estate v. Saylor* (2007) SCC 18

apart from the implications that such a transaction could have on one's estate which ought to be probed in full.

The lawyer should be satisfied that the client has the ability to appreciate those ramifications and assist the client by explaining same. It is those consequences that the client must have the ability to appreciate in order to possess requisite decisional capacity.

Undue influence is referenced above (see also Checklist), and the lawyer should also be satisfied that the transaction is not being undertaken as a result of undue influence.

As capacity is task-specific, a lawyer must ensure capable instructions.

If a client lacks the requisite capacity to undertake a task, a lawyer must not act on the client's instructions in respect of that task.

With all such files, it is incumbent on a lawyer to ask thorough questions of the client and to record and keep careful notes. While in many situations, retrospective capacity assessments are often conducted, the most valuable assessment is the contemporaneous notes and interview conducted by the attending lawyer. Carefully documented files with evidence that the lawyer probed sufficiently into the client's capacity and the possibility of undue influence can assist a lawyer many years down the road.

Of course the requisite *Rules of Professional Conduct* pertaining specifically to real estate lawyers conducting real estate transactions are particularly relevant.⁵² An individual lawyer cannot act for, or otherwise represent both the transferor and the transferee with respect to a transfer of title to real property except in certain limited, defined circumstances and only if the lawyer is able to comply with the Rules and Section 3.4 of the *Rules* regarding conflicts of interest.⁵³ These limited circumstances

⁵² See LSUC, *The Two Lawyer Rule in Real Estate Transactions*, online: <http://www.lsuc.on.ca/TheTwoLawyerRuleInRealEstateTransactions/> [accessed on March 31, 2015].

⁵³ Rules 3.4-16.7 and 3.4-16.9

where a lawyer can act for both sides include a transfer where the transferor and the transferee are “related persons” as defined in section 251 of the *Income Tax Act* (Canada).⁵⁴ When registering the transfer, the lawyer must make a “compliance with law statement” indicating that the transfer is being completed in accordance with the solicitor’s professional standards.⁵⁵ “Related persons” include individuals connected by blood relationship, marriage or common-law partnership or adoption.⁵⁶

However, even if the lawyer can act for both sides, in some cases, the lawyer should not and would be better to recommend that the client obtain independent legal advice before accepting a joint retainer. An example of such situation would include where one of the parties is less sophisticated or more vulnerable than the other.⁵⁷

Also, if the lawyer knows one of the parties and is engaged in a continuing solicitor-client relationship, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer, before accepting the joint retainer.⁵⁸ Lawyers should also consider not acting for both sides to a transaction, and at the very least take steps to have the more vulnerable party obtain ILA, especially where one of the parties is receiving a greater benefit than the other, or where the parties are related and one of the parties is more vulnerable than the other party.⁵⁹

In *Juzumas v. Baron*⁶⁰ had the solicitor not agreed to act for both parties and suggested instead that the vulnerable older adult obtain ILA, much hardship, and the loss of the older adult’s house, may have been avoided. Fortunately, this story has a positive outcome as the court eventually invalidated the transfer of a property by the older adult due to undue influence. In this case a “caretaker” befriended a vulnerable older adult

⁵⁴ Rule 3.4-16.9(b).

⁵⁵ See LSUC, *The Two Lawyer Rule in Real Estate Transactions*, online: <http://www.lsuc.on.ca/TheTwoLawyerRuleInRealEstateTransactions/> [accessed on March 31, 2015].

⁵⁶ *Income Tax Act*, RSC 1985, c-1 (5th Supp), s. 251.

⁵⁷ See Commentary to Rule 3.4-5[1].

⁵⁸ Rule 3.4-6.

⁵⁹ See LSUC, *The Two Lawyer Rule in Real Estate Transactions*, online: <http://www.lsuc.on.ca/TheTwoLawyerRuleInRealEstateTransactions/> [accessed on March 31, 2015].

with limited English and convinced him to marry her. The day before the wedding she took him to a lawyer he had not met previously to have a will drafted. After their wedding, she returned with him to the same lawyer to execute a transfer of his house to her son. While the Court did not directly comment on whether the solicitor's actions were negligent, Justice Lang relied partially on his actions (or non-actions) in finding that undue influence existed including that the solicitor:

- Did not meet with the older adult alone, but also in the presence of the caretaker;
- Met with the parties only briefly;
- Was aware of the older adult's limited English;
- Provided no advice directly to the older adult about the transfer and its consequences;
- Did not show or explain the agreement to him: it was the lawyer's custom to give clients a "reader's digest" version; and
- Spoke significantly in Polish, which the older adult did not understand but the caregiver did.⁶¹

The Court remarked that the solicitor did not "appreciate the power imbalance" that existed.⁶²

IX. CONCLUSION

Our legal system prioritizes the autonomy of individuals to make decisions on their own behalf. That autonomy has very limited checks, yet can and do provide some protection to those who are vulnerable. While our laws whether statutory or at common law, presume the capacity of individuals to make their own decisions, that presumption is set aside where there is evidence that a person does not have the requisite capacity to make a particular decision.

⁶⁰ 2012 ONSC 7220.

⁶¹ 2012 ONSC 7220 at paras. 79-93.

⁶² *Ibid.* at para. 88.

While the issue of capacity is complex, it is one that all lawyers must be aware of. A lawyer can only act on the capable instructions of a client.

Elder abuse frequently involves the transfer or encumbrance of real property. A real estate lawyer who is well-versed in issues of capacity and undue influence is well-positioned to prevent financial abuse of older and other vulnerable adults.

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

*Kimberly
April, 2015*

Whaley,

Whaley

Estate

Litigation,

APPENDIX “A”: SUMMARY OF CAPACITY STANDARDS

The following is a synopsis which attempts to summarize the various standards, factors, or tests relevant for capacity evaluation:

TASK	SOURCE	DEFINITION OF CAPACITY
Manage property	<i>SDA, s. 6</i>	(a) Ability to understand the information that is relevant in making a decision in the management of one’s property; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	<i>SDA, s. 45</i>	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	<i>SDA, s. 8</i>	(a) Knowledge of what kind of property he or she has and its approximate value; (b) Awareness of obligations owed to his or her dependants; (c) Knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney; (d) Knowledge that the attorney must account for his or her dealings with the person’s property; (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney; (f) Appreciation that unless the attorney manages the property prudently its value may decline; <u>and</u> (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.
Grant and revoke a POA for Personal Care	<i>SDA, s. 47</i>	(a) Ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; <u>and</u> (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; <u>and</u>

TASK	SOURCE	DEFINITION OF CAPACITY
		(b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; <u>and</u> (b) Ability to understand the specific effect of the gift in the circumstances. <i>In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.</i>
Make a will	Common law	(a) Ability to understand the nature and effect of making a will; (b) Ability to understand the extent of the property in question; <u>and</u> (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a will	Common law	(Same as above – to Make a will)
Make a codicil	Common law	(Same as above – to Make a will)
Make a testamentary designation	Common law	(Same as above – to Make a will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; <u>and</u> (b) Ability to understand the trust's specific effect in the specific circumstances. <i>In cases of a testamentary trust, the test for testamentary capacity applies.</i>
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children. Also possibly required: capacity to manage property and the person Dr. Malloy stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.
Capacity to separate	Common law	Ability to appreciate the nature and consequences of

TASK	SOURCE	DEFINITION OF CAPACITY
		abandoning the marital relationship.
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce.

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

*Kimberly Whaley, Whaley Estate Litigation
2014*

May,

APPENDIX “B”: UNDUE INFLUENCE CHECKLIST

Undue Influence: Summary

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney.

The Courts’ Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968):⁶³

“To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,— these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made.”

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,⁶⁴ stated:

*“Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator’s mind, but which really does not express his mind, but something else which he did not mean.”*⁶⁵

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”. We see in *Hall v Hall*, influence of a more subtle characterization which when read together

⁶³ (1968) LR 1 P&D.

⁶⁴ *Craig v Lamoureux*, [1919] 3 WWR 1101.

⁶⁵ *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

with more recent cases, arguably the application and scope of the doctrine is broadened.

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.⁶⁶

In making such determinations, courts will look at whether “the potential for domination inheres in the nature of the relationship between the parties to the transfer.”⁶⁷

Relationships Where There is an Imbalance of Power

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid.⁶⁸

Multiple Documents

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.⁶⁹

Language

⁶⁶ *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

⁶⁷ *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).

⁶⁸ *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.

⁶⁹ See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer’s office.

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.⁷⁰ For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.⁷¹

Other factors indicative of undue influence

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.⁷²

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property.⁷³

Not All Relationships of Dependency Lead to Findings of Undue Influence

As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the genuine willingness of the grantor to effectuate an otherwise questionable transaction in favourable manner.⁷⁴

⁷⁰ See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁷¹ *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁷² *Juzumas v Baron*, 2012 ONSC 7220.

⁷³ *Covello v Sturino*, 2007 CarswellOnt 3726.

⁷⁴ See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.⁷⁵

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*⁷⁶ provided a (non-exhaustive) list of indicators of undue influence:

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.⁷⁷

In *Tate v. Gueguegirre*⁷⁸ the Divisional Court noted that the following constituted “significant evidence suggesting that [a] Will was a product of undue influence”:

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator’s dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator’s failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;

⁷⁵ *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

⁷⁶ *Gironda v Gironda*, 2013 CarswellOnt 8612.

⁷⁷ *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

⁷⁸ 2015 ONSC 844 (Div. Ct.)

- ❑ The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- ❑ There were documented statements that the testator was afraid of the respondent.⁷⁹

Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.⁸⁰

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.⁸¹

Although the leading Supreme Court of Canada (“SCC”) case of *Vout v Hay* held that “*the extent of proof required is proportionate to the gravity of the suspicion,*”⁸² the more recent SCC case of *C(R) v McDougal*⁸³ held that there is a single standard of proof in civil cases—the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*⁸⁴ elicited the principles that apply to the standard of proof relating to undue influence:

*“The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be “the offspring of his own volition and not the record of someone else’s.”*⁸⁵

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with

⁷⁹ *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

⁸⁰ *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.

⁸¹ *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁸² *Vout v Hay* at para 24.

⁸³ 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

⁸⁴ (1993), 90 Man R (2d) 245 (Man QB) at para 38.

⁸⁵ (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall*, *supra*.

evidence of intention, that the transaction was made as a result of the donor's "full, free and informed thought."⁸⁶

See also *Buccilli et al v. Pillitteri et al*,⁸⁷ where the Court stated that:

*"The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely."*⁸⁸

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*⁸⁹ recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.⁹⁰

In *Leger v Poirier*,⁹¹ the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "disposing mind and memory" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental

⁸⁶ *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.

⁸⁷ 2012 ONSC 6624, upheld 2014 ONCA 337.

⁸⁸ *Buccilli*, *supra* note 248 at para. 139.

⁸⁹ *Shrader v Shrader*, [2013] EWHC 466 (ch)

⁹⁰ See for example the case of *Gironde v Gironde*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.

⁹¹ *Leger v Poirier*, [1944] SCR 152.

capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.⁹²

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly “unnatural” dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.⁹³

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer

⁹² *Vout v Hay*, [1995] 2 SCR 876 (SCC).

⁹³ Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.

to respond to inquiries in order to demonstrate that the mind of the grantor was truly “free and unfettered.”⁹⁴

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence demonstrating that the requisite formalities have been complied with and that the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.⁹⁵

Lawyer’s Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client’s family?
- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

⁹⁴ Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

⁹⁵ Kimberly Whaley, “Estate Litigation and Related Issues”, October 18, 2007, Thunder Bay CLE Conference at 33, <http://whaleystatelitigation.com/blog/published-papers-and-books/>

- If the client is isolated, does he/she live with one particular individual?
- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.
- Have numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and

his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?
- Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- Is the client making a marked change in the planning documents as compared to prior documents?
- Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- Does the client have a physical impairment of sight, hearing, mobility or other?

- Is the client physically dependant on another?

- Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

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

- Interview the client alone;

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

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

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

- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;

- Address recent health changes;

- Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

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

- Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations ...?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers

Checklist

- Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;
- Determine Intentions;
- Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);
- Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;
- Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator’s rapport with the law office, it may be worth asking a few questions and making inquiries as to that person’s relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;⁹⁶ and
- ❑ Be mindful of the *Rules of Professional Conduct*⁹⁷ which are applicable in the lawyer’s jurisdiction.

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

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⁹⁶ For a helpful review of tips for solicitors to prevent undue influence, see “Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide”, BCLI Report no. 61, Appendix, in particular “Checklist” and “Red Flags”, <http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf>

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

⁹⁷ *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>