

PMAC Lawyers Network

Fiduciary Challenges and Ethical Obligations When Dealing with Older Adult Clients

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INTRODUCTION

- Overview of our aging population
- Statistics:
 - 2015 – Seniors will exceed number of children
 - 2013 – 6,900 centenarians; 2063 – approx. 62,200
 - Dementia affects 20% of seniors by age of 80 and over 40% by 90
 - 1 in 11 Canadians over age of 65 currently has Alzheimer's or related dementia

Identifying and Managing clients with Diminished Capacity



CAPACITY

- **Presumption that a person is capable** of making decisions until presumption rebutted
- Reminder of importance of older adult's **autonomy** and decision making ability
- Competent individual's decisions must be **respected even when they conflict** with what others believe to be reasonable

CAPACITY

- **Decision – Specific**
 - Capacity to marry different from capacity to grant POA etc.

- **Time – Specific**
 - Capacity can fluctuate – “Good” days and “Bad” days

- **Situation – Specific**
 - In home may differ from in lawyer’s office etc.

CAPACITY

- **Capacity to Manage Property**
 - Ability to understand the information that is relevant in making a decision in the management of one's property; and
 - Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision

CAPACITY

- Capacity assessments are not conducted informally
- No POA or person willing to act as guardian?
- Request assessment: Whether PGT should become statutory guardian of property under s. 16 of *SDA*
- Other options?
- Appoint attorney under CPOAP if individual has capacity to do so

CAPACITY

- **Capacity to Grant and Revoke POA for Property**
 - a) Knowledge of property and approx. value
 - b) Awareness of obligations owed
 - c) Knowledge of what attorney can do
 - d) Knowledge that attorney must account
 - e) Knowledge that if capable may revoke
 - f) Appreciate that unless managed prudently property value may decline
 - g) Appreciate possibility attorney may misuse

CAPACITY

- **Capacity to Contract**
 - Ability to understand nature of contract;
and
 - Ability to understand contracts specific
effect in the specific circumstances

CAPACITY

- **Capacity to Make a Gift (Wealth Transfer)**
 - Depends on size and nature of gift
 - Generally, same as capacity to contract
 - However, if significant in value in relation to donor's estate: likely, factors for determining testamentary capacity

CAPACITY

- **Testamentary Capacity**
- Must have ability to understand:
 - Nature and effect of making a will;
 - Extent of the property in question; and
 - The claims of persons who would normally expect to benefit under a will of the testator

CAPACITY

- ***Laszlo v. Lawton* 2013 BCSC 305**
- Questions distinction between cognitive defects and delusions
- Suffered from “non-vitiating” delusions that were not obviously connected to decision to disinherit
- Deceased lacked testamentary capacity but not based on delusions – she did not understand the nature and quantum of her estate

CAPACITY

- **Capacity to Revoke a Will**
- Requires testamentary capacity
- Physical destruction: must understand nature and effect of destruction and revocation at time will is destroyed and testamentary capacity

CAPACITY

- **Some Indications of No or Diminished Capacity**
 - Age
 - Memory problems
 - On medication
 - Cannot readily identify assets/family members
 - Hearing/vision problems
 - Brings in written instructions but cannot articulate them independently
 - Defers to caregiver/partner/relative/friend
 - Recently suffered emotional/physical upheaval: loss of loved one; relocation; hospitalization; change in medical status
 - Lack of investment experience
 - Reliance on bank manager or investment advisor

CAPACITY

- **Client's capacity is in question: Do you get family members involved?**
- Remember presumption of capacity
- Confidentiality and older adults is challenging
- Should adhere to duties of confidentiality, except where permission to divulge information
- Is there an attorney under a POA?

CAPACITY

- Be proactive
- Before a client becomes incapable – have conversation
- If POA, make note of who the attorney is
- If no POA, recommend they execute one

CAPACITY

- **Undue Influence**
- Equitable principle to set aside certain transactions including gifts and wealth transfers
- Two classes:
 - 1) Direct or actual
 - 2) Presumed or by relationship

CAPACITY

- **Some Indicators of Undue Influence:**
 - Dependence on beneficiary for fulfilling emotional or physical needs
 - Socially isolated
 - Recent family conflict
 - Recent bereavement
 - Increasing isolation
 - Substantial pre-death transfers of wealth from testator to beneficiary

CAPACITY

- **Indicators of Undue Influence cont.**
 - Failure to provide reason or explanation for leaving entire estate to one and excluding others
 - Use of lawyer or financial advisor chosen by beneficiary unknown to older adult
 - Beneficiary conveys instructions
 - Older adult afraid of beneficiary

CAPACITY

- **Guidelines:**
 - Meet with client alone and take comprehensive notes
 - Determine relationships
 - Who supports client?
 - Be mindful of indicators of capacity issues
 - Ask probative, open-ended questions
 - One person overly involved?
 - **Follow your instincts!**

Power of Attorney Issues and Risks

POA ISSUES AND RISKS

- SDA for CPOAP validity requirements
- The document :
 - States that it is a continuing power of attorney; or
 - Expresses the intention that the authority given
 - Must have two witnesses
 - Not spouse of grantor or attorney
 - Not child
 - Not less than 18
 - Not someone under guardianship
- Effective immediately upon signing *unless* provision or triggering mechanism

POA ISSUES AND RISKS

- When presented with a POA:
 - Check if properly executed
 - Check for conditions/restrictions
 - Is it valid beyond capacity?
 - If more than one attorney – how do they exercise powers (jointly, severally or by majority)?

POA ISSUES AND RISKS

- Very important to choose the right attorney
- Consult the person
- Competing POA documents – where two or more attorneys argue over validity
- These disputes lead to contentious court proceedings
- Jointly appointed attorneys must make decisions together

POA ISSUES AND RISKS

- ***McMaster v. McMaster***
- Mother was 80 years old and in good health
- Appointed two sons jointly as attorneys but failed to tell one of them
- The son who knew he was attorney started managing her affairs (she was diagnosed with Alzheimer's)
- Son lost over \$2 million of her money on bankrupt companies

POA ISSUES AND RISKS

- Attorney is a fiduciary with many common law duties, including:
 - Stay within scope of the authority delegated
 - Exercise reasonable care and skill
 - Must not make secret profits
 - Cease to exercise authority if POA revoked
 - Must not act contrary to the interests of the grantor or in conflict with those interests

POA ISSUES AND RISKS

- Duties cont.
 - Must not exercise the POA for personal benefit
 - Cannot make / change / revoke a Will on behalf of donor
 - Cannot assign or delegate his or her authority to another person

POA ISSUES AND RISKS

- **Specific Duties of Attorney for Property**
 - Manage property in a manner consistent with decisions for personal care
 - Explain to incapable person powers and duties
 - Encourage incapable person's participation in decisions
 - Consult
 - Preserve the property bequeathed in Will
 - Make expenditures reasonable required

POA ISSUES AND RISKS

- Must act in “best interests” of incapable person
- But, also has discretion
- Detailed records and keep accounts
- Although not required to pass accounts may be advisable to have accounts passed
- Compensation pursuant to *SDA*

POA ISSUES AND RISKS

- *R. v. Kaziuk*
- Only child of widow, appointed attorney for property
- Son mortgaged her various properties and defaulted on mortgages
- Mother went from having over \$1 million and properties to penniless in homeless shelter
- 10 year sentence reduced on appeal to 8 years

Ethical Dilemmas and Conflicts of Interest



ETHICAL DILEMMAS

- Lawyers have clear duties and obligations to their clients – *Rules of Professional Conduct*
- Financial advisors – possible common law fiduciary duty
- i.e. where elderly, unsophisticated client places his or her retirement savings in hands of investment advisor

ETHICAL DILEMMAS

- In conflicts of interest situations – remember your duty to your client
- Also presumption your client is capable
- If attorney or guardian breaches fiduciary duty and makes decisions not in best interests – steps might be taken to have them removed

Family Members and Beneficiaries: Potential for Financial Abuse

FINANCIAL ABUSE

- Family members often have good intentions when assisting older adults
- BUT must be aware of red flags for undue influence, incapacity issues and financial abuse
- Frequent perpetrators are family members

FINANCIAL ABUSE

- **Examples Elder Financial Abuse:**
 - Misusing a POA
 - Stealing pension cheques, money etc.
 - Committing fraud or forgery or extortion
 - Sharing an older adult's home without paying
 - Pressure them to sell property, invest money a certain way, give money to relatives etc.

FINANCIAL ABUSE

- **Red flags:**
 - Unexplained or sudden inability to pay bills;
 - Unexplained or sudden withdrawal of money
 - Poor living conditions compared to assets
 - Changes in banking patterns
 - Changes in appearance
 - Confusion or lack of knowledge about financial situation
 - etc.

FINANCIAL ABUSE

- **Managing the Risk**
 - Know your client
 - Take steps to ensure client understands and can give instructions
 - Set stage for meeting with client
 - Meet at times when client is alert
 - Avoid asking leading questions
 - Ensure client is aware of effects of a transaction and especially risk of loss and potential impact on portfolio as a whole
 - Keep detailed notes
 - Follow up with letter of confirmation
 - Update Know your Client form on regular basis as appropriate

FINANCIAL ABUSE

- Meet with client alone or even with a colleague as another witness
- If instruction of client is contrary to your advice, document your advice and the instruction and confirm by letter
- If advisable seek advice internally

FINANCIAL ABUSE

When presented with a power of attorney

- check if properly executed
- check for conditions/restrictions
- Check if power of attorney to be valid beyond incapacity
- Check if more than one attorney and manner of exercising power (joint, several, majority)

FINANCIAL ABUSE

- **Managing Assets of the Older Adult:
Questions for Discussion**
 1. What are best practices for handling requests to transfer assets to child (to cover expenses child is claiming is for elderly client) when there are multiple children?
 2. What are best practices for handling questions from interested beneficiaries about parent's portfolio?

FINANCIAL ABUSE

3. What are the best practices when client requests changes that you believe are not in their best interests?

4. What do you do if a client suddenly requests a change in beneficiaries?

5. What to do if income beneficiaries and residual beneficiaries do not get along and give conflicting directions?

FINANCIAL ABUSE

6. What are best practices when one spouse is more “involved” then becomes incapacitated or dies and remaining spouse does not understand decisions made?

7. What happens when acting in client’s best interests and resisting or questioning POA’s direction may result in assets being moved to another firm?

FINANCIAL ABUSE

8. After death and before probate obtained, how should portfolio managers proceed when custodian typically puts a freeze on the account?

THANK YOU and QUESTIONS?

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