



WHALEY ESTATE LITIGATION PARTNERS

# **WHALEY ESTATE LITIGATION PARTNERS ON ELDER LAW**

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# FOREWORD

**By: Albert H. Oosterhoff**

Over the last several years Whaley Estate Litigation has published a number of books on important topics in Estate Litigation. They include Whaley Estate Litigation Partners on Dependents' Support and WEL on Powers of Attorney, as well as books on Guardianship and Fiduciary Accounting. The books are written by members of the firm. They have become an important resource for lawyers practicing in the area and also provide useful information to the interested lay person and clients.

I am therefore delighted to introduce the latest in the series, Elder Law. Elder law did not form a distinct part of a lawyer's practice until relatively recently. Of course, lawyers have always addressed the particular issues faced by the elderly, but issues affecting older persons were usually only a small part of one's practice. However, with changes in demographics, the proportion of older people in the population has increased greatly in recent years. In consequence, issues affecting the elderly have become much more prominent and society, including lawyers, has taken steps to address them.

This publication is therefore very timely and much needed. It is also comprehensive. Not only does it address the well-known topics of capacity, undue influence, powers of attorney, and guardianship, the book also addresses discrimination against older persons, predatory marriages, and other topics. Prominent among the topics discussed is elder abuse in its various forms, including financial and physical abuse, civil and criminal law remedies to counter abuse, and protection of the elderly. These are matters that need to be addressed, especially in light of horrendous breaches of care and abuse that have been reported in the press in recent years. As well, case law in areas such as predatory marriages, another form of elder abuse, have made it important to describe the vulnerability of the elders in such cases and others and to give guidance on how to prevent such abuses and predations. The book also covers end of life decisions and professionalism and ethics in dealing with vulnerable clients.

The book concludes with a number of appendices that contain helpful checklists on elder abuse, undue influence, and capacity, as well as a summary of capacity criteria.

I am confident that the reader will find the book to be a helpful guide in finding his or her way in this developing area of the law. Heartily recommended.

Albert H. Oosterhoff

Professor Emeritus, Western University  
Counsel, WEL Partners

## **ACKNOWLEDGEMENTS**

The members of Whaley Estate Litigation Partners have contributed to the materials compiled herein on Elder Law to provide a resource to clients and professionals alike.

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

Enjoy.

Kimberly A. Whaley

Whaley Estate Litigation Partners

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# CHAPTER 1: INTRODUCTION TO ELDER ABUSE

## INTRODUCTION

Elder abuse is a serious problem in our society, one that is likely to increase as our population ages and Canada faces a large demographic shift.

From 2011 to 2016 (the last reported census) Canada registered the largest increase in the proportion of seniors since Confederation.<sup>1</sup> 2016 marked the first time that the census enumerated more seniors (5.9 million, 16.9% of the population) than children 14 years of age and younger (5.8 million, or 16.6 of the population). The increase in the number of seniors from 2011 to 2016 was the largest observed since 1871. This is a clear sign that seniors make up a higher percentage of the population than ever previously recorded.<sup>2</sup>

Many aspects of Canadian society are being shaped by the fact that the first baby boomers turned 65 in 2011 and many of them have now left the labour market. More Canadians are seeking more geriatric health care and related services.

Centenarians were the fastest-growing population from 2011 to 2016 (+41.3%). This population has been growing rapidly for many years, mainly due to the gradual increase in life expectancy.<sup>3</sup> Given that women have a longer life expectancy than men, the aging of the Canadian population is also changing the distribution by sex. In 2016 women accounted for 50.9% of the total population. Among people 65 years of age and older, the number of women exceeded the number of men by more than 20% and there were two women for every man in the 85 and older population.

By 2031, close to one in four Canadians (23%) could be 65 years of age or older. By 2061 there could be 12 million seniors.<sup>4</sup> Globally, we are facing the largest demographic shift in the history of humankind; the statistics on aging are staggering.

As the older adult lives longer, there is an increased propensity to develop physical and cognitive impairments that make older adults more vulnerable and susceptible to abuse, including financial

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1 Statistics Canada, Census 2016 Results on Age and Gender, released 2017, online: <http://www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.htm> [accessed 30.07.19].

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

exploitation. According to a study commissioned by the Alzheimer's Society of Canada, 747,000 Canadians are living with cognitive impairment, which included but is not limited to dementia.<sup>5</sup> Further, 1 in 11 Canadians over the age of 65 currently has Alzheimer's or a related dementia. Dementia affects 20 % of seniors by the age of 80, and well over 40% by age 90.

Also, in the coming years, there will be a significant transfer of wealth between the 'saving generation' and the baby boomers. Some may choose to transfer that wealth while they are still alive and have a right to do so. However, some may not have the requisite decisional capacity to gift their savings away or may be unduly influenced into doing so.

With these statistics in mind, and as a background, a general overview of elder abuse, including defining the various types of abuse, recognizing the problems of under-reporting, as well as examples of red flags and indicators of abuse will be provided.

## **DEFINITION**

There is not a single comprehensive definition for "elder abuse." In many Canadian jurisdictions, at least one key organization/agency has developed or otherwise has adopted a definition for elder abuse and neglect. For the most part, the definitions contain two components: a general definition of elder abuse followed by an enumeration of the types of abuse and neglect (for example psychological and physical).<sup>6</sup>

The Advocacy Centre for the Elderly ("**ACE**") in Toronto, defines elder abuse as "*Harm done to an older person by someone in a special relationship to the older person.*"<sup>7</sup>

Seniors First BC defines elder abuse as "an action, or deliberate behaviour, by a person(s) in a position of trust, such as an adult child, family member, friend or caregiver, that causes an adult: physical, emotional or mental harm; and/or damage to, or loss of, assets or property."<sup>8</sup>

The World Health Organization defines "elder abuse" as:

A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.<sup>9</sup>

5 Statistics Canada, Health Reports: Alzheimer's Disease and Other Dementias in Canada, May 2016, online: <http://www.statcan.gc.ca/pub/82-003-x/2016005/article/14613-eng.htm> [accessed 30.07.19].

6 Department of Justice, Legal Definitions of Elder Abuse and Neglect, online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p23.html> [accessed on 30.07.19].

7 Advocacy Centre for the Elderly, Elder Abuse, online: [http://www.advocacycentreelderly.org/elder\\_abuse\\_-\\_introduction.php](http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php) [accessed on 30.07.19].

8 Seniors First BC, "What is Elder Abuse?", online: <http://seniorsfirstbc.ca/getting-help/elder-abuse-and-neglect/what-is-elder-abuse/> [accessed on 30.07.19].

9 World Health Organization, Elder Abuse, online: [http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/) [accessed on 30.07.19].

The United States' Centers for Disease Control and Prevention ("**CDC**") defines elder abuse as "*An intentional act, or failure to act, by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to an older adult.*"<sup>10</sup>

The CDC defines an "older adult" as "someone age 60 or older." The CDC also advocates for a "consistent definition for elder abuse" in order to:

Monitor the incidence of elder abuse and examine trends over time. Consistency helps to determine the magnitude of elder abuse and enables comparisons of the problem across locations. This ultimately informs prevention and intervention efforts.

Unfortunately, elder abuse has been:

- 1) poorly or imprecisely defined;
- 1) defined specifically to reflect the unique statutes, or conditions present in specific locations (e.g. states, counties or cities); or
- 1) defined specifically for research purposes. As a result, a set of universally accepted definitions does not exist.<sup>11</sup>

### **TYPES OF ELDER ABUSE AND NEGLECT**

Elder abuse can take many forms, including financial, physical, psychological (mental or emotional) and sexual abuse. Neglect can also be a form of abuse:

- **Physical abuse:** Actions or behaviours that result in bodily injury, pain, impairment or psychological distress. Examples: slapping, pushing, beating or forced confinement.
- **Financial abuse:** An action or lack of action with respect to material possessions, funds, assets, property, or legal documents that is unauthorized, or coerced, or a misuse of legal authority. Examples: stealing, fraud, extortion or misusing a power of attorney; improper use of joint bank accounts, forgery or abuse involving a Power of Attorney document, sharing an older adult's home without payment or sharing in expenses, misuse, appropriation, or theft of an older adult's assets, transfer of real property, ATM fraud and other.<sup>12</sup>

10 Centers for Disease Control and Prevention, Definitions, online: <https://www.cdc.gov/violenceprevention/elderabuse/definitions.html> [accessed on 30.07.19]. ("CDC")

11 CDC Definitions, online: <https://www.cdc.gov/violenceprevention/elderabuse/definitions.html> [accessed on 30.07.19].

12 Government of Canada, "What every older Canadian should know about: Financial Abuse", online: <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/financial-abuse.html> [accessed on 30.07.19].



- **Sexual abuse:** Direct or indirect involvement in sexual activity without consent.
- **Emotional/Psychological Abuse:** Severe or persistent verbal or non-verbal behaviour that results in emotional or psychological harm. Examples: treating an older person like a child or humiliating, insulting, frightening, threatening or ignoring an older person.
- **Neglect:** Repeated deprivation of assistance needed by the older person for activities of daily living. Examples: failing to give an older person food, medical attention, or other necessary care or abandoning an older person in their care.<sup>13</sup>

According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults,<sup>14</sup> and this type will be discussed in more detail in Chapter 10 of this book. The Department of Justice also commented on the difficulty in estimating the prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.<sup>15</sup> Often, financial abuse is conducted by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized. Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).<sup>16</sup> Financial abuse often occurs in connection with other types of abuse. For example, an attorney under a power of attorney document may refuse to provide an older adult with funds to pay for groceries or other necessities of life.

Many of the types of elder abuse listed are criminal offences under the *Criminal Code of Canada*<sup>17</sup> (the “**Criminal Code**”). While the *Criminal Code* does not provide for the specific offence of “elder abuse,” or of “financial abuse” there are, however, certain offences under which such a perpetrator could be charged, including under:

- Section 215: Failing to provide the necessities of life (criminal neglect);
- Section 264.1: Uttering threats;
- Section 265: Physical assault;

13 See NICE Study “Into the Light: National Survey on the Mistreatment of Older Canadians 2015” at p 6 online: <https://cnpea.ca/images/canada-report-june-7-2016-pre-study-lynnmcdonald.pdf> [accessed on 16.08.19] and Advocacy Centre for the Elderly, Elder Abuse, online: [http://www.advocacycentreelderly.org/elder\\_abuse\\_-\\_introduction.php](http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php) [accessed on 30.07.19].

14 Lisa Ha and Ruth Code, Department of Justice, An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Section of the Ottawa Police Service, 2013, online: [http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13\\_1/p1.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13_1/p1.html) [accessed on 30.07.19] and *Backgrounder Elder Abuse Legislation*, 2012, online: <https://www.canada.ca/en/news/archive/2012/03/elder-abuse-legislation.html> [accessed on 30.07.19].

15 *Ibid.*

16 *Ibid.*

17 *Criminal Code*, R.S.C., 1985, c. C-46 (“*Criminal Code*”).

- Section 271: Sexual assault;
- Section 279: Unlawful confinement;
- Section 322: Theft;
- Section 331: Theft by a person holding a power of attorney;
- Section 336: Criminal breach of trust (Conversion by Trustee);
- Section 342: Theft or forgery of a credit card;
- Section 346: Extortion;
- Section 366: Forgery;
- Section 386-388: Fraud; and
- Section 423: Intimidation.

For several reasons, financial abuse of older adults does not always attract criminal charges. For reasons discussed in more detail, a victim may be unable or unwilling to extricate him/herself from the presence of undue influence and may refuse ultimately to report a loved one, or care provider to the police. This is especially true in circumstances where the older adult relies on the perpetrator for care and needed assistance.

In some cases, the police may even decline to investigate at all for several reasons and even on the basis that such issues may be perceived or appear not to be criminal in nature, but rather civil. However, there are several sections of the *Criminal Code* that are under-utilized due to this misperception that such matters are best suited to civil recourse rather than criminal remedy. More on this topic and possible criminal remedies can be found in Chapter 12 of this book.

## **STATISTICS ON ELDER ABUSE**

According to a 2015 study completed by the National Initiative for the Care of the Elderly (“**NICE**”), and its report “Into the Light: National Survey on the Mistreatment of Older Canadians” the aggregate prevalence for elder abuse in Canada was 7.5% (physical, sexual, psychological and financial abuse) representing 695,248 older Canadians.<sup>18</sup>

The prevalence of psychological abuse was 2.7% representing 251,157 Canadians. Physical abuse

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<sup>18</sup> NICE Study, *supra* note 13, at p ii.

represented 2.2% or 207,889 Canadians, sexual abuse was 2.6% or 244,176 Canadians and financial abuse was 2.6% representing 244,176 older adults living in Canada.

According to a 2016 Statistics Canada report, nearly 4% of victims of family violence were 65 years or older. Nearly 61% of incidents of elder abuse were physical assaults against older adults and 21% involved threats. 31% of older adults were victimized by a family member. Among women victims, 33% were victimized by their spouse and 31% by their grown children. In comparison, among men, the victim's grown child was the most common perpetrator.<sup>19</sup>

Another Statistics Canada report provided that the rate of violent victimization among women and men with a cognitive disability, or a mental health-related disability was approximately four times higher than among those who did not have a disability. Among women and men with a sensory or physical disability, the rate of violent victimization was roughly twice as high as among those who did not have a disability.<sup>20</sup>

The National Council on Aging (the “**NCOA**”) reports that approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as 5 million older adults who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities.<sup>21</sup> The NCOA also reports that the perpetrator in 60% of elder abuse and neglect incidents is a family member with 2/3 of the perpetrators being adult children or spouses.<sup>22</sup>

Older adults who have been abused have a 300% higher risk of death when compared with those who have not been mistreated.<sup>23</sup> While this number is likely low due to under-reporting, estimates of older adult financial abuse and fraud cost to older Americans range from \$2.9 billion to \$36.5 billion annually.<sup>24</sup>

## **UNDER-REPORTING OF ELDER ABUSE**

Older adult abuse is under-reported for several reasons, often because the older adult:

- feels shame or embarrassment having been victimized;

19 M. Burczycka & S. Conroy, (2018). “Family violence in Canada: A statistical profile, 2016.” Juristat, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/problem-canada.html#fn1-0-rf> [accessed on: 03.07.18].

20 Adam Cotter, Statistics Canada, Violent Victimization of Women With Disabilities, 2014, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54910-eng.htm> [accessed on: 03.07.18].

21 National Council on Aging, *Elder Abuse Facts*, online <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> [accessed on 21.08.19]. [“NCOA Elder Abuse Facts”]

22 NCOA Elder Abuse Facts.

23 NCOA Elder Abuse Facts.

24 NCOA Elder Abuse Facts.

- is fearful of the perpetrator, or has a fear of the police or other authorities;
- is dependent upon the perpetrator for physical well-being;
- wants to protect the abuser, especially if a family member;
- feels that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is family or is a friend;
- feels guilty for becoming a victim, or feels blameworthy;
- can minimize, rationalize or deny the abuse altogether;
- may not even recognize the abuse;
- may not be able to report even if a desire to do so exists;
- may not have the physical ability to report;
- may be suffering from dementia or lack of requisite mental capacity;
- worried about stigma on the family or harm to the family's reputation or honour; or,
- resistant to having strangers in the home to provide services that the abuser does.

The most frequent perpetrators of abuse on older adults are adult children, service providers, strangers, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain). Often adult children who cause harm to their parents may themselves suffer from any number of health issues including those related to mental health, substance abuse, social isolation, and employment issues of their own and are financially dependent on the older person. The abuser may rationalize the abuse thinking that they deserve the money as they are the older adult's child.

### **MANDATORY REPORTING**

Despite the prevalent under-reporting of elder abuse, there are certain situations that require mandatory reporting. Reporting elder abuse is mandatory when an older adult resides in a Long-Term Care Home, or a Retirement Home and elder abuse is suspected or has occurred. The law requires reporting by anyone who knows or has reasonable grounds to suspect that a resident has been or might be, harmed by any of the following:

- improper or incompetent treatment or care;

- abuse of a resident by anyone;
- neglect of a resident by a staff member or the owner of the home;
- illegal conduct;
- misuse or fraud involving a resident's money; or
- misuse or fraud involving public funding provided to the home (long-term care homes only).<sup>25</sup>

This obligation to report applies to everyone except residents of the home. Members of regulated health care professions, social workers, and naturopaths must report even if the information is otherwise confidential.

If the victim lives in their own home, the law does not require anyone to report the abuse.

## **INDICATORS OF ABUSE**

Indicators of abuse on an older adult include:

- changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without permission or consent;
- unexplained or sudden inability to pay bills;
- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison to the value of the assets;
- changes in banking patterns;
- changes in appearance;
- controlling spending;
- confusion or lack of knowledge about a financial situation and execution of legal documents;
- being forced to sign multiple documents at once, or successively;
- being coerced into a situation of overwork and underpay;

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<sup>25</sup> Long-Term Care Homes Act, 2007, SO 2007, c 8, s.24(1).

- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in Power of Attorney documents;
- being overcharged for services or products by providers; or,
- being denied the right to make independent financial decisions.<sup>26</sup>

## **CONCLUSION**

This is but a brief overview and introduction to elder abuse, one aspect of the area of elder law. All individuals and professionals who have interactions with older adults (lawyers, financial advisors, caregivers, service providers, etc.) should keep an eye out for any red flags as indicated above and do their part to prevent or limit the harm done by potential perpetrators of elder abuse.

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26 See National Initiative for the Care of the Elderly (“NICE”), Tools for Preventing and Intervening in Situations of Financial Abuse, online: <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>

## CHAPTER 2: AGEISM AND THE NEED FOR PROTECTION AGAINST ELDER ABUSE

### **INTRODUCTION**

Both ageism and age discrimination are harmful to older adults. Not all older adults fit the detrimental and often negative stereotypes of the frail and vulnerable older person. However, it is also true that not all older adults are physically or mentally capable, independent, and autonomous. While ageism and age discrimination must be discouraged, there remains an important balance to be struck which strives to discourage ageism while protecting older and vulnerable adults.

Vulnerability should not be automatically associated with an individual based on their age. Ageism seeks to make older people broadly vulnerable as a class, even while individual older adults may not be, or identify as, particularly vulnerable themselves.<sup>1</sup> However, statistics show that many older adults face abuse and violence in their own homes and institutional and long-term care facilities. This has become more prevalent in the media in the recent past with several high profile elder abuse claims involving celebrities such as Stan Lee, Mickey Rooney and Harper Lee.<sup>2</sup>

Older adults are also sometimes denied the right to make decisions about their finances, property and health care. Therefore, protection is required to prevent financial, sexual and physical abuse of older adults.

From a Canadian legal perspective, our legislation and court processes are not particularly well equipped to easily and cost-effectively remedy these very complicated issues and related disputes for either the abused or the persons trying to help.

From a public policy perspective, the maintenance of an individual's fundamental rights and freedoms, autonomy and the presumption of capacity must be delicately balanced with the need to protect the vulnerable, meaning: those with diminished capacity; those who are under disability;

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1 Vulnerable Adults and Mental Capacity in BC: Provincial Strategy Document, January 2009, BC Adult Abuse and Neglect Preventions Collaborative, online: [http://www.bcli.org/sites/default/files/Vanguard\\_\(16May09\).pdf](http://www.bcli.org/sites/default/files/Vanguard_(16May09).pdf). [accessed on 09.07.19].

2 Elder Abuse Allegations Involving Harper Lee, Mickey Rooney, And Other Well-Known People Shed Light On a Dark Problem, Kristen Hunt, online: <https://www.everplans.com/articles/elder-abuse-allegations-involving-harper-lee-mickey-rooney-and-other-well-know-people-shed-light-on-a-dark-problem>. [accessed on 09.08.19].

those who are frail, whether through sheer aging and/or illness; those who are dependant; and those who require some degree of protection from predators. Striking this balance is no easy feat. Accordingly, this Chapter will focus on what ageism means, its prevalence in society and the arguments in favour of the need for protection for older vulnerable adults.

### **WHAT IS AGEISM?**

The term “ageism” was coined in 1969 by Robert N. Butler who headed the District of Columbia Advisory Committee on Aging.<sup>3</sup> Butler stated that ageism is a combination of prejudicial attitudes towards older people, old age, and the aging process; discriminatory practices against older people; and institutional practice and policies that perpetuate stereotypes about older people.<sup>4</sup> A more recent definition of ageism has been used by gerontologist Erdman Palmore, who defines it as “any prejudice or discrimination against or in favour of an age group.”<sup>5</sup>

The Ontario Human Rights Commission’s definition of ageism refers to two concepts: a socially constructed way of thinking about older persons based on negative attitudes and stereotypes about aging *and* a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.<sup>6</sup>

Ageism is most commonly reflected in society through the use of ageist language which includes all stereotypes or beliefs about aging. This is prevalent in media, healthcare, education systems, the workplace, and filters into regular everyday conversation. Despite good intentions, ageism has permeated our justice system by the use of ageist language in written judgments such as the word “elderly”. Judgments that employ the term “elderly” in association with victimhood, vulnerability, and weakness arguably reinforce these negative social beliefs about older adults as a group.<sup>7</sup>

### **WHY IS AGEISM SO PREVALENT?**

The Honourable Justice L’Heureux-Dube observed in the case of *Dickason v. University of Alberta*:

Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we

3 Andrew Achenbaum, *The History of Ageism Since 1969*, Journal of American Society on Aging, October 19, 2015.

4 Robert N Butler, “Ageism: A Foreword” (1980) 36:2 Journal of Social Issues 8.

5 Erdman Palmore, *Ageism: Negative & Positive*, 2<sup>nd</sup> ed (New York: Springer 1999) at 89-90, as cited in Helene Love, “Ageism, Language and the Law” (2011) 31 Windsor Rev. Legal & Soc. Issues 133. [“Love”]

6 Ontario Human Rights Commission, *Ageism and age discrimination fact sheet*, online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet>, [accessed on 08.27.19].

7 Love, *supra* note 5, p.136.



fear it. We may be more likely to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us.<sup>8</sup>

## **HOW CANADA'S LAWS PROHIBIT AGEISM**

Generally speaking, all provinces and territories have legislation to ensure equality amongst their populations. Canada's provisions prohibiting age discrimination are grounded in the *Canadian Charter of Rights and Freedoms*<sup>9</sup> (the "**Charter**") which applies to all jurisdictions and governmental entities. Specifically, section 15(1) of the Charter contains an equality clause which provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Human rights are protected by federal, provincial and territorial laws depending on the jurisdiction. Each province and territory has a human rights statute that prohibits discrimination based on age. These laws stem from the *Universal Declaration of Human Rights*.<sup>10</sup>

Enforcement mechanisms against age discrimination differ depending on the jurisdiction in Canada. Some jurisdictions (for example, Alberta, Manitoba, and Nova Scotia) will investigate the alleged incident and then decide whether to refer the complaint to an adjudicative process. Others (for example, Ontario and British Columbia) permit an individual to apply directly to the administrative tribunal which will accept, screen, mediate and adjudicate the complaint.<sup>11</sup>

Age discrimination is often not taken as seriously as other forms of discrimination. To fight ageism, it is necessary to raise public awareness about its existence and to dispel common stereotypes and misperceptions about aging.<sup>12</sup> It is very prevalent in employment. Fewer training opportunities are afforded to older adults and many are coerced into early retirement.<sup>13</sup>

8 *Dickason v. University of Alberta*, [1992] 2 SCR 1103 at para 1173, 95 DLR (4th) 439.

9 *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

10 United Nations, *The Universal Declaration of Human Rights*, 1948, online: <http://www.un.org/en/universal-declaration-human-rights/> [accessed on 09.07.19].

11 Matthews Dinsdale LLP, "Canada Declaration on Human Rights", 1948, online: <http://www.agediscrimination.info/international-age-discrimination/canada> [accessed on 09.02.19].

12 Ageism and age discrimination (fact sheet)" Ontario Human Rights Commission, online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet> [accessed on 08.23.19].

13 Pnina Alon-Shenker, "Age is Different": Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" (2013) 17:1 *Canadian Labour & Employment Law Journal* 31. ["Alon-Shenker"]

Accordingly, much of the case law and legislation is grounded in the employment context. All jurisdictions in Canada permit an employer to terminate or refuse employment based on age if employers can show a limitation concerning age that is based on a “bona fide occupational requirement”.<sup>14</sup> For example, a skill or characteristic essential to a job, without which the job cannot be performed (e.g. pilots require exceptional eyesight).

The Supreme Court of Canada Decision *R v. Kapp* sets out the test for age discrimination in Canada and it requires that discrimination be motivated by, or perpetuate stereotyping or prejudice.<sup>15</sup> It has been argued, however, that this test has led adjudicators to fail to come to grips with wrongful ageism in the workplace.<sup>16</sup> [...]

### **STRIKING A BALANCE – PROTECTION OF OLDER ADULTS WITHOUT REINFORCING AGEIST BELIEFS**

One “common misconception about older adults is that aging invariably involves physical or mental decline.” In fact, “aging occurs at different rates for different adults, and assuming uniform characteristics, especially sickness or frailty, underestimates the vitality of many older adults.”<sup>17</sup>

An example of this is presented in the case of *Re Culbert Estate* where, despite finding that the 94-year-old testator had legal capacity to execute her will, Ball J., made the following statement about older adults in general, “[I]t is not uncommon for an elderly person to lose his or her mental faculties over a period of time, during which intervals of comprehension alternate with periods of confusion.”<sup>18</sup>

While this may be true, we simply cannot ignore that the statistics show that some older adults do have a decline in cognitive functions and mental acuity, which makes them vulnerable to potential abuse and undue influence. In her paper and her speech at the National Academy of Elder Law Attorneys Conference in 2012, entitled “Human Dignity at Any Age: The Law’s Response to an Aging Population”, former Chief Justice of the Supreme Court of Canada Beverly McLachlin observed:

[...] the Law Commission of Canada in 1999 worried that a separate area of the law and legal practice for the elderly may inadvertently reinforce the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independence

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14 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) (also known as “Meiorin”).

15 *R v. Kapp*, 2008 SCC 41.

16 Alon-Shenker, *supra* note 13, p. 44.

17 Love, *supra* note 5, p. 149-150.

18 *Re Culbert Estate*, 2006 SKQB 454, para 37.

and autonomy. It seems to me that if Elder Law is founded on the inclusionary value of respect for the full humanity of those with special needs, it can have the opposite effect. Elder Law specialization will no more spread the belief that elders are less capable than corporate law specialization has spread the belief that capitalists are less capable. It can help reverse ageist stereotypes rather than perpetuating them, while better meeting the special needs of the aging.<sup>19</sup>

By recognizing that not all older adults are the same and are not a homogenous group, we can hopefully protect the ones that need protection and stop ageist beliefs about those that do not.

The Honourable McLachlin also noted that seeking to protect older adults does not necessarily mean we are demeaning older adults or disrespecting their human rights:

[...] several jurisdictions in Canada have already enacted legislation to protect older adults who are victims of physical or sexual abuse, mental cruelty or inadequate care or attention, and to better coordinate legal, health, and social service interventions. Detractors call this a “child welfare model” and complain that it fails to respect the independence of older adults and will inevitably infantilize them. While this is a danger, again, I am not so pessimistic. We have a strong record of assisting people when they need special assistance while maintaining their independence and human dignity to the greatest extent possible.<sup>20</sup>

Ageism indeed plays a role in the lack of protection and perpetuation of elder abuse as well. Barbara Mikolajczyk in her paper, “International Law and Ageism”, writes that elder abuse is the “worst display of ageism and it manifests itself in (at least) 3 forms: 1) in neglect, meaning isolation, abandonment, and social exclusions; 2) in violation of human, legal and medical rights; and 3) in deprivation of choices, decisions, status, finances and respect.”<sup>21</sup>

## **A NEED FOR IMPROVEMENT**

Despite these ambiguities and the confusion surrounding the issue, there is a real need to confront the necessity for international protection for the elderly within the fight against ageism. All conversations, legislation, and initiatives combating ageism must include an element or discussion on the need for protection of older adults as well. As Mikolajczyk concludes:

19 Beverly McLachlin, *Human Dignity at Any Age: The Law’s Response to an Aging Population*, 6 *Journal of International Aging, Law & Policy* 111 (2013) at p. 126 & 127 [“McLachlin”].

20 McLachlin, *ibid*, p. 127 & 128.

21 Mikolajczyk, p. 87, citing World Health Organization, *A Global Response to Elder Abuse and Neglect: Building primary health care capacity*, WHO Geneva: 2008, available at: [http://www.who.int/ageing/publications/elder\\_abuse2008/en/](http://www.who.int/ageing/publications/elder_abuse2008/en/) [accessed 27 August 2019], p.1.

[...] contemporary binding international law usually does not take into account the vulnerability of older persons. In addition, the ambiguity of the age criterion makes the definition of this category of persons much more subtle than other easily-identified groups, such as those suffering from racism, sexism or homophobia. Therefore the protection of older persons – if limited only to the prohibition of age discrimination – is incomplete.<sup>22</sup>

Beverly McLachlin proposed in her speech that we should think of elder law as a problem of access to justice and that without access to justice, the dignity that is the right of every person will be denied to the older people in our society. McLachlin posited three ways we can promote access to justice for the elderly: 1) specialization to improve legal services to the elderly; 2) legal reform through protective legislation and impact litigation; and 3) education and social sensitization.<sup>23</sup>

### **CONCLUSION**

Ageism is not just about age discrimination – ageism must also be about dignity – an aspect of dignity is security. Elder abuse, often stemming from discriminatory attitudes, denies the elderly the security they are entitled to as human beings.<sup>24</sup>

How can the law protect older adults and minimize abuse while still maintaining the human rights of older adults and avoid ageist actions? Beverly McLachlin made several suggestions, including minimizing the barriers to criminal and civil prosecutions. Changes in law and education may alleviate some of those barriers. McLachlin also suggested that lawyers and jurists work together to inform the public about the prevalence and illegality of elder abuse: “[o]ur society once swept child abuse under the rug. It must not permit the same thing to happen in the case of older abuse. The abuse of a vulnerable person is a moral and legal wrong, whatever the age of the victim.”<sup>25</sup>

Older adults not only should be free from ageism and ageist stereotypes, they should be free from financial, emotional, physical and sexual abuse. The law and society need to be vigilant in protecting those that may be vulnerable and susceptible to abuse and undue influence due to mental or physical incapacity. Every person, regardless of age, is entitled to live in dignity. This means being able to live in security, to be free from discrimination and abuse, and to be entitled to make one’s own choices to the maximum degree possible.

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22 Barbara Mikołajczyk, “International Law and Ageism” 2014 Polish Yearbook of International Law, Vol. 34 pp.83-107 at p.106. [“Mikołajczyk”]

23 McLachlin, *supra* note 19, p. 123.

24 McLachlin, *supra* note 19, p. 118.

25 McLachlin, *supra* note 19, p. 120.

## CHAPTER 3: DECISIONAL CAPACITY

### INTRODUCTION

At law, there is no single definition of “capacity”. The *Substitute Decisions Act, 1992*<sup>1</sup> (the “**SDA**”), which is the legislation in Ontario that addresses various capacity decisions and their corresponding criteria, simply defines “capable” as “mentally capable,” and provides that “capacity” has a corresponding meaning. This broad definition is used for the reason that each particular task or decision undertaken by a person has its own corresponding capacity characteristics and determining criteria.

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the standard or factors for determining requisite decisional capacity.<sup>2</sup> There is no capacity “test” *per se*, rather there is a standard to be applied, or factors to be considered in the assessment of requisite decisional capacity to make a certain decision at a particular time.

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

The assessment of capacity is a less-than-perfect science, both from a legal and a medical perspective. Capacity determinations are complex. In addition to professional and expert evidence, lay evidence can be relevant to assessing capacity in many situations. Equally complicated is the fact that the standard of assessment varies, and this too can become a difficult obstacle to overcome in determining capacity and in resolving disputes involving the quality and integrity of assessment reports. Adding further to the complexity in contentious settings, often seen in an estate litigation practice, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long-past decision made by an individual, alive or deceased. The evidentiary weight given to these assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity. The

<sup>1</sup> *Substitute Decisions Act, 1992*, SO 1992, c 30. (“*SDA*”)

<sup>2</sup> *Starson v Swayze*, [2003] 1 SCR 722. [“*Starson*”]

admissibility of retrospective capacity assessments was most recently upheld by The Honourable Justice Sanfilippo in the decision of *Slover v Rellinger*.<sup>3</sup>

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 differing circumstances. It is incorrect to describe an individual as globally “incapable” or similarly “capable,” and there is no standard or factors prescribed to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a specific task or decision at a moment in time.

## **CAPACITY IS DECISION SPECIFIC**

Capacity is *decision* specific in that, for example, as determined by the SDA, 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. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, separate or divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making personal care decisions, but not capable of managing property, or capable of granting a power of attorney document, but not capable of making a will.

## **CAPACITY IS TIME SPECIFIC**

Capacity is *time* specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for “good” and “bad” days where capacity can and does fluctuate. For example, an otherwise capable person may lack capacity when under the influence of alcohol. Indeed, in situations where an individual suffers from a non-reversible, unremitting, and/or progressive disorder, that person may not be decisionally incapable, and may have the requisite capacity to make certain decisions at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney, or to make a will, can vary over time.<sup>4</sup>

The factor of time specifically as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may impact the probative value of the expert evidence proffered.

<sup>3</sup> *Slover v Rellinger*, 2019 ONSC 6497.

<sup>4</sup> *Palahnuk v Palahnuk Estate*, [2006] OJ No 5304 (SC); *Brillinger v Brillinger-Cain*, [2007] OJ No 2451 (SC); *Knox v Burton* (2004), 6 ETR (3d) 285 (Ont SC). [“*Palahnuk Estate*”]

A drafting solicitor who applies the legal standard for determining requisite capacity at the time that instructions are received may have the preferred evidence.<sup>5</sup>

## **CAPACITY IS SITUATION SPECIFIC**

Lastly, capacity is *situation* specific in that under different circumstances, an individual may have differing capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, for instance, an individual while in their own home may have capacity that may not be displayed in a lawyer's or doctor's office.

Although each task has its own specific capacity standard or factors to consider, it is fair to say that in general, capacity to make a decision is demonstrated by a person's ability to understand all the information that is relevant to the decision to be made, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court of Canada decision of *Starson v Swayze*, is helpful in elucidating capacity considerations.<sup>6</sup> Although the decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act, 1996* (the "**HCCA**"), there are similar themes in all capacity determinations.

Writing for the majority, Major J., made several points about capacity. First, his Honour held that the presence of a mental disorder must not be equated with incapacity, and that the presumption of legal capacity can only be rebutted by clear evidence.<sup>7</sup>

Major J. emphasized that the ability to understand and process information is key to capacity. The ability to understand the relevant information requires "the cognitive ability to process, retain and understand the relevant information."<sup>8</sup> Then, a person must "be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof."<sup>9</sup> A capable person requires the "ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences."<sup>10</sup>

A person should not be deemed incapable of failing to understand the relevant information and/or appreciate the implications of a decision if possessing the ability to comprehend the information and consequences of a decision.

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5 *Palahnuk Estate, ibid*, para 71.

6 *Starson, supra* note 2.

7 *Starson, supra* note 2, para 77.

8 *Ibid*, para 78.

9 *Ibid*, para 78.

10 *Ibid*, paras 80-81 [emphasis in original].



Major J. also recognized that the subject of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.<sup>11</sup> A capable person is entitled to be unwise in his or her decision-making. In the oft-cited decision of *Re Koch*, Quinn J. wrote 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.<sup>12</sup>

## **PRESUMPTIONS OF CAPACITY AT LAW**

The purpose of the *SDA* is dual: to protect vulnerable individuals while at the same time respecting their autonomy.

The *SDA* incorporates tools to protect the autonomy of individuals who find themselves subject to its provisions. The statutory provisions are in recognition of the significance attributable to the potential loss of an individual's autonomy as a result of proceedings under the *SDA*.

As part of the protections afforded to individuals who find themselves subject to the provisions of the *SDA*, the legislation sets out presumptions of capacity and directs when such presumptions can be relied upon.

Under subsection 2(1) of the *SDA*, a person who is eighteen years of age or more is presumed to be capable of entering into a contract.

Under subsection 2(2) of the *SDA*, a person who is sixteen years of age or more is presumed capable of giving or refusing consent in connection with his or her own personal care.

Under subsection 2(3) of the *SDA*, a person is entitled to rely upon the presumption of capacity with respect to another person unless reasonable grounds exist to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be. This presumption of capacity does not apply in respect of a contract entered into or a gift made by a person while his or her property is under guardianship or within one year before the creation of the guardianship.

Presumptions at law of capacity stand unless and until such presumption is legally rebutted.<sup>13</sup>

<sup>11</sup> *Ibid*, para 79.

<sup>12</sup> *Re Koch*, [1997] OJ No 1487 (QL), para 89 [*"Koch"*].

<sup>13</sup> *Palahnuk Estate, Brillinger v Brillinger-Cain, Knox v Burton*, all *supra* note 4.



Another example of these protections under the *SDA* is the requirement that individuals undergoing capacity assessments be given “rights” advice, that is, fulsome information on their legal rights to refuse an assessment or challenge the outcome of an assessment.<sup>14</sup>

The *SDA* requires that an individual whose capacity is at issue in a proceeding be served with notice of the proceedings. The individual, regardless of capacity, has the right to take part in the proceedings and have access to a lawyer, and, as noted below, if such person does not already have counsel, section 3 of the *SDA* provides for the appointment of counsel.

Section 3(1)(b) of the *SDA* provides for a further presumption of capacity. It sets out that a person who is represented by a lawyer appointed pursuant to section 3 of the *SDA* is “deemed to have capacity to retain and instruct counsel.”<sup>15</sup> Section 3 of the *SDA* is discussed in more detail below.

## **CAPACITY CONSIDERATIONS: GUARDIANSHIP OF PROPERTY**

When an individual is found to be incapable of managing property, a guardian of property may be appointed for that individual, if that individual does not already have an appointed attorney under a power of attorney document and if the requirements of the appointment can be met. A guardian of property is either a court-appointed or statutory guardian who manages the financial affairs of a person who is declared mentally incapable of doing so for themselves.

## **CAPACITY TO MANAGE PROPERTY**

The standard for determining the requisite capacity to manage property is found in section 6 of the *SDA*. Capacity to manage property is defined as:

- (a) The ability to understand the information that is relevant to making a decision in the management of one’s property; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.<sup>16</sup>

Although the factors in assessing capacity to manage property are straightforward, a finding of incapacity to manage property is not easily made. This assessment is not one that is conducted informally.

<sup>14</sup> *SDA*, *supra* note 1, s. 78(2)(b).

<sup>15</sup> *SDA*, *supra* note 1, s.3(1)(b).

<sup>16</sup> *SDA*, *supra* note 1, s.6.

Under regulations to the *SDA*, there is a class of designated “capacity assessors” who may be requested to assess an individual’s legal capacity with respect to managing property by conducting capacity assessments.<sup>17</sup>

Restrictions respecting capacity assessments have been legislated in recognition of the serious ramifications of a finding of incapacity on a person’s autonomy and ability to make future decisions. As Justice Quinn stated in *Re Koch*:

The mechanisms of the *SDA* and the *HCCA* are, as I stated at the outset, formidable. They can result in the loss of liberty, including the loss of one’s freedom to live where and how one chooses.<sup>18</sup>

Any procedure by which a person’s legal status can be altered (which is the inevitable result on a finding of mental incapacity) must be cloaked with appropriate safeguards and capable of withstanding rigorous review.<sup>19</sup>

In *Re Koch*, Justice Quinn also charged assessors with the responsibility of exercising extreme diligence in their assessments and reports: they are obliged to “maintain meticulous files,” to inform the subject of his or her right to refuse to be interviewed, to carefully explain the “*significance and effect*” of a finding of incapacity to the person being assessed, to inform the subject that he or she may have a lawyer or friend in the interview, to carefully probe answers provided by the subject and to seek verification of answers, all the while taking caution not to be influenced by a party “harbouring improper motives.”<sup>20</sup>

Justice Quinn emphasized also that for someone to be found incapable, the incapacity must be such that it is sufficiently serious to override the primacy of that person’s right to make his or her own choices. His Honour stated:

The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes [*SDA* and *HCCA*].<sup>21</sup>

The purpose of capacity provisions under the *SDA* were addressed in *Re Phelan*:

<sup>17</sup> *Substitute Decisions Act, 1992*, O Reg 460/05: CAPACITY ASSESSMENT

<sup>18</sup> *Koch*, *supra* note 12, para 69.(1).

<sup>19</sup> *Koch*, *supra* note 12, para 69.(3) [emphasis in original]. In this case, Mrs. Koch, the allegedly incapable person, had been assessed for her capacity to manage property under the *SDA*, as well as her capacity to consent to placement in a care facility under the *HCCA*.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Koch*, *supra* note 12, para 19.

The *Substitute Decisions Act* is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.<sup>22</sup>

Only qualified assessors can assess capacity in respect of property and personal care, and the factors considered in determining capacity in these respects have been said to be higher than those for granting or revoking power of attorney documents for property or personal care. That said, our court has also found there to be no higher or lower threshold; rather, the factors to be applied and considered in determining decisional capacity are simply different.

## **CAPACITY AND COURT APPLICATIONS FOR GUARDIANSHIP**

In a court application for guardianship, the evidence presented must be sufficient to satisfy the court that it can make a finding that the person is incapable of managing property. There can be no court-appointed guardian of property (as opposed to a statutory guardian, discussed below) without a finding of incapacity by the courts first.

The *SDA* does not stipulate what type of evidence is required with respect to capacity, but it should be third-party independent evidence, if at all possible.<sup>23</sup> This type of evidence would include either a report, or letter of affidavit from a physician or psychologist, or it could be a capacity assessment requested for the purposes of an application pursuant to section 22 or 72 of the *SDA* (distinct from an assessment under section 16 of the *SDA* which is discussed below). It is quite rare for a court to make a finding of incapacity without independent evidence. However, if it is not possible to obtain third-party independent evidence of incapacity to manage property, compelling anecdotal evidence should be included.<sup>24</sup> This anecdotal evidence may be enough to convince a court to order that the alleged incapable person submit to a capacity assessment pursuant to section 79 of the *SDA*.

An order for a court-ordered capacity assessment pursuant to section 79 of the *SDA* must include

22 *Phelan, Re* (1999), 1999 CarswellOnt 2039, 29 E.T.R. (2d) 82, 99 O.T.C. 130 (Ont. S.C.J.), para 20.

23 Law Society of Ontario "How to Have a Guardian of Property Appointed through Court Application", online: <https://lso.ca/lawyers/practice-supports-and-resources/practice-area/estates-and-trusts/how-to-have-a-guardian-of-property-appointed-throu>, at page 6 [accessed on November 23, 201

24 *Ibid*, page 7.

specific information, such as the name of the proposed assessor and the place of the assessment. If a capacity assessor has been asked to provide evidence for a court application for property guardianship, the assessor is providing an opinion, one that the court may accept or not. Capacity assessors sometimes make statements in their assessments for court purposes that they “find X incapable.”<sup>25</sup> This is likely incorrect, since it is the court that makes that finding, based on the evidence presented. Similarly, lawyers for applicants too often draft affidavits setting out that “Dr. Y has found X to be incapable of managing property.” This, too, is arguably incorrect.<sup>26</sup>

The court is prohibited from finding a person incapable of managing property and appointing a guardian if there is an alternative course of action that does not require the court to make a finding of incapacity and is less restrictive of the person’s decision-making rights than the court appointment of a guardian.<sup>27</sup> Other options, such as the appointing of an attorney under a continuing power of attorney for property document, should be canvassed if the individual has the requisite capacity to make such an appointment.

## **STATUTORY GUARDIAN OF PROPERTY**

Sections 15 and 16 of the *SDA* provide for the Office of the Public Guardian and Trustee (the “**PGT**”) to become the statutory guardian of property for an allegedly incapable person. Such appointments do not involve court applications. Instead, there are two ways for someone to be deemed incapable and a statutory guardian appointed.

The first circumstance, or means of appointing a statutory guardian of property, is if a person is admitted to a psychiatric facility, at which point the *Mental Health Act*<sup>28</sup> (the “**MHA**”) requires that a physician assess the person’s capacity to manage property.<sup>29</sup> Following the initial assessment, an attending physician is authorized by the *MHA* to assess the patient further, at later times, to determine whether the patient is capable of managing property.<sup>30</sup> If the assessing physician finds the patient to be incapable of managing property, the physician is required to issue a formal certificate of incapacity and deliver a copy of the certificate to the PGT.

The second circumstance, or means of appointing a statutory guardian of property, is via an assessment by an authorized capacity assessor under the *SDA* and its regulations.<sup>31</sup> Unless the

25 *Ibid.*

26 *Ibid.*

27 *SDA*, *supra* note 1, s. 22(3).

28 *Mental Health Act*, RSO 1990, c M 7. (“*MHA*”)

29 *Ibid.*, s. 54(1).

30 *Ibid.*, s. 54(2).

31 *SDA*, *supra* note 16. “Assessor” is defined at subsection 1(1) of the *SDA* as “a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity.” The training of capacity assessors is managed and conducted by the Capacity Assessment Office: online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php> [accessed on November 23, 2019].

assessment is ordered by a court (discussed above), one has the right to refuse to have one's capacity to manage property assessed by an assessor.<sup>32</sup>

A person can only request that another person's capacity be assessed in limited circumstances: the assessment must be requested in the prescribed form; the person requesting the assessment must indicate that there are reasonable grounds to believe that the alleged incapable person is not capable of managing property; and, the person requesting the assessment must indicate that reasonable inquiries have been made, and it has been found that there is no power of attorney for property that authorizes an attorney to manage the alleged incapable person's property or any other relatives who would seek to act as guardian of property.<sup>33</sup> If the PGT is appointed as the statutory guardian of property, certain persons may apply to the PGT to replace it as a guardian through an administrative process.<sup>34</sup>

Any individual can apply to the Consent and Capacity Board for review of their capacity.<sup>35</sup> An application will be brought under the *MHA* if a person has been found incapable by a physician while in a psychiatric facility and under the *SDA* if found incapable by a capacity assessor.

## **CAPACITY CONSIDERATIONS: GUARDIANSHIP OF THE PERSON**

A "guardian of the person" may be appointed when an individual is determined to be incapable of making personal care decisions and there is no attorney appointed under a power of attorney for personal care document.

Unlike a guardian for property, there are no statutory guardians of the person and such a guardian will only be appointed by the court. A court can appoint a guardian of the person for an incapable person, for example, where there is no attorney appointed under a power of attorney for personal care document, or where the appointed attorney resigns or becomes incapable, and in circumstances where the court is satisfied there is not a less restrictive option.

## **CAPACITY TO MAKE PERSONAL CARE DECISIONS**

The standard of assessment to be applied to establish requisite capacity to make personal care decisions is found in section 45 of the *SDA*. The factors to be applied for determining the capacity required for managing personal care are:

<sup>32</sup> *SDA*, *supra* note 1, s. 78 and s. 79(1).

<sup>33</sup> *SDA*, *supra* note 1, s. 16(2).

<sup>34</sup> *SDA*, *supra* note 1, s. 17.

<sup>35</sup> <http://www.ccboard.on.ca/scripts/english/index.asp> [accessed on November 23, 2019].

- (a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.<sup>36</sup>

As set out above, there is a presumption of capacity at law if a person is 16 years of age or older, such that they are presumed to be capable of making their own personal care decisions.<sup>37</sup>

Since there are various tasks that fall under the umbrella of “personal care,” a person may be capable with respect to one or more personal care decisions, and not capable with respect to others. The court has the power to order a capacity assessment with respect to personal care decisions pursuant to section 79 of the *SDA*.

Capacity to make personal care decisions can only be assessed by a qualified assessor, as defined under the *SDA* and its regulations. Unless an assessment is ordered by a court, an individual has the right to refuse to be assessed, and still even then may refuse such an assessment. The principle of the careful protection of an individual’s dignity and autonomy as found in *Re Koch*,<sup>38</sup> hold equally for personal care decision making.

A court must be satisfied and make a finding that a person is incapable of making decisions in at least one aspect of their personal care before a guardian of the person will be appointed. As with a guardian for property, the court will not appoint a guardian of the person if the need for making personal care decisions can be met by an alternative course of action that does not require the court to find the person incapable of personal care, or there is a less restrictive option for the person’s decision-making rights.

### **SECTION 3 COUNSEL**

Pursuant to section 3(1) of the *SDA*, where an individual whose capacity is in issue in a proceeding brought under the act does not have counsel, the PGT may be directed by the court to arrange legal representation for that person (otherwise referred to as “Section 3 Counsel”).

As set out above, section 3(1)(b) of the *SDA* includes a presumption of capacity, such that a person who is represented by a lawyer appointed pursuant to section 3 of the *SDA* is deemed to have capacity to retain and instruct Section 3 Counsel.

<sup>36</sup> *SDA*, *supra* note 1, s. 45.

<sup>37</sup> *SDA*, *supra* note 1, s. 2(2).

<sup>38</sup> *Koch*, *supra* note 12.

## **THE DUTY OF THE PGT TO ARRANGE FOR SECTION 3 COUNSEL**

The PGT would, in the ordinary course, be served with the application or motion materials seeking the appointment of Section 3 Counsel.<sup>39</sup>

The PGT has a duty to arrange legal representation for a person alleged to be incapable in proceedings before the Ontario Superior Court of Justice under the *SDA* where so ordered or directed by the court pursuant to section 3 of the *SDA*. When an order or endorsement is made by the court under section 3 of the *SDA*, counsel for any of the parties is expected to provide a copy of the endorsement or order to the PGT. Once the PGT receives the order or endorsement, it will take steps to arrange for a lawyer.<sup>40</sup>

More than one Section 3 Counsel may be appointed. That is, if the appointed Section 3 Counsel's services are terminated by the client, the court has discretion under the *SDA* to direct the PGT to arrange legal representation for the individual once again. It is important to note that "The Court is not obliged to make such a direction and may decide to continue the proceeding and adjudicate even if the person is unrepresented."<sup>41</sup>

## **PROFESSIONAL RESPONSIBILITY OF SECTION 3 COUNSEL**

The role of Section 3 Counsel attracts a unique set of professional duties and responsibilities. Unfortunately, there is limited guidance for persons acting in the role of Section 3 Counsel as to how to approach these duties and responsibilities. There continue to be, no doubt in part due to the lack of clear guidance available on the issue, a number of complaints raised against lawyers acting as Section 3 Counsel, in the form of complaints to the Law Society of Ontario,<sup>42</sup> as well as claims alleging negligence.<sup>43</sup>

Section 3 Counsel are obliged to consider obligations set out in the *Rules of Professional Conduct* and related Commentaries, as well as the *Rules of Civil Procedure* and review the PGT Information Update which is published by the Ministry of Attorney General.

39 *SDA*, *supra* note 1, subsections 69(0.1)(4), 69(1)(5), 69(2)(4), 69(3)(5), and 69(4)(4).

40 Government of Ontario, Ministry of the Attorney General, "Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992," available online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.php> (hereinafter "PGT Information Update") [accessed on November 23, 2019].

41 Between A Rock And A Hard Place: The Complex Role and Duties Of Counsel Appointed Under Section 3 of the Substitute Decisions Act, 1992" by Kimberly A. Whaley and Ameena Sultan, *Advocates Quarterly*, November 2012, Volume 40, Number 3 at p. 5. See also *Kwok v Kwok*, 2019 ONSC 3549 (CanLII); also see Alexander Procope "the Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward" 22<sup>nd</sup> Estates and Trust Summit, October 16, 2019, found online at: <http://pbplawyers.com/2019/10/18/presentation-on-the-role-of-section-3-counsel-at-the-2019-estates-and-trusts-summit/>.

42 Law Society of Ontario, Protecting the Public, the Complaints Process, online: <https://lso.ca/protecting-the-public/complaints/complaints-process> [Accessed on November 23, 2019].

43 *Newell v Felker* (August 7 2012), Edward J. Doc. CV-11-422094 (Ont SCJ).



The *Rules of Professional Conduct* require that, despite a client's disability, a lawyer must attempt to maintain, as much as possible, a normal solicitor-client relationship with a client.<sup>44</sup> This applies equally to Section 3 Counsel. If, however, the client can no longer make the requisite decisions, the lawyer may have to take steps to have a litigation guardian appointed.

Rule 7 of the *Rules of Civil Procedure* sets out the rules respecting the representation of parties under disability. The definitions at Rule 1.03 provide for the meaning of "disability" as circumstances where a person is a minor or "mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not."<sup>45</sup> The definition of a party under disability also includes a person who is an "absentee within the meaning of the *Absentees Act*."<sup>46</sup>

Rule 7.01(1) of the *Rules of Civil Procedure*, provides that unless the court or statute provides otherwise, parties under disability must be represented by a litigation guardian in proceedings. Rule 7.01(2) provides a specific exception for applications under the *SDA* where the appointment of a litigation guardian is not required in a proceeding for the appointment of a guardian of property or guardian of the person. Litigation guardians for defendants or respondents generally must be court appointed, and Rule 7.03 sets forth the procedure and evidence required for a motion to appoint a litigation guardian. Where no litigation guardian is available, either the Office of the Children's Lawyer ("**OCL**") or PGT may be appointed as litigation guardian, depending on the age of the person under disability.<sup>47</sup> Rule 15 requires that a litigation guardian must be represented by counsel.

Settlement of litigation involving parties under a disability requires court approval, with the terms of settlement being reviewed by the OCL or the PGT, depending on the nature of the disability. The OCL or the PGT may provide a report on the merits of the settlement for the court's consideration.<sup>48</sup>

The PGT Information Update states that besides reviewing the *Rules of Professional Conduct* and the *Rules of Civil Procedure*, it is:

also important for lawyers to review case law, academic works and continuing education materials touching upon the subject of legal representation in this context and capacity law issues generally.<sup>49</sup>

44 *Rules of Professional Conduct*, see Rule 3.2-1 "Quality of Service"; Rule 3.2-9 "Client with Diminished Capacity"; 3.3-1 "Confidentiality – Confidential Information"; Rule 3.7-1 "Withdrawal from Representation"; and Rule 5.1-1 "Advocacy" and corresponding Commentary.

45 Rule 1.03 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194.

46 *The Rules of Civil Procedure*, *supra* note 45.

47 Rule 7.04(1) of the *Rules of Civil Procedure*.

48 Rule 7.08 of the *Rules of Civil Procedure*.

49 PGT Information Update, *supra* note 40, p. 5.



If possible, Section 3 Counsel should attempt to determine the client's instructions and wishes directly from the client. In some situations, the lawyer may attempt to determine the client's wishes or directions through medical practitioners, family members, caregivers and friends of the client.

If the client's wishes or directions in the past or at present have been expressed to others, then consideration should be given to presenting the evidence in court.<sup>50</sup>

It is important to note that the lawyer must not become a substitute decision maker for the client in the litigation. Section 3 Counsel cannot act as litigation guardian to make decisions in the proceeding even if it appears to be in the best interests of the client. Best practices of Section 3 Counsel would indicate steps taken to ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.<sup>51</sup>

As with any lawyer in a solicitor-client relationship, Section 3 Counsel is required to act pursuant to the instructions of the client. This requires clarification and emphasis because Section 3 Counsel act for those whose capacity is in question such that there may be a tendency for counsel to hesitate to follow the client's instructions. The situation is different where there are no instructions. In mostly all other solicitor-client scenarios, the relationship is expressly terminated by the client expressly, or by the client's failure to give instructions, which then gives a lawyer grounds to withdraw from the record.<sup>52</sup> Section 3 of the SDA does not expressly or otherwise permit a lawyer to act without instructions. Rather, it permits the solicitor to consider any instructions received to have been instructions received from a capable person as opposed to an incapable person.<sup>53</sup>

There is a growing precedent base of court and tribunal decisions involving Section 3 Counsel appointments that shed light on this very complex role of counsel in challenging circumstances.<sup>54</sup>

50 PGT Information Update, *supra* note 40, p. 5.

51 *Ibid.*

52 Rule 3.7-7 of the *Rules of Professional Conduct*, *supra* note 43.

53 SDA, *supra* note 1, s. 3.

54 *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Gen Div); *Meseneil (Attorney of) v Kumer*, 2000 CarswellOnt 1926 (SC); *Tepper v Branidis* (2001), 102 ACWS (3d) 1043, 2001 CarswellOnt 307 (SC); *Canada Trust Co. v York* (February 7, 2002), Doc. 086/93, [2002] OJ No. 435 (SCJ); *Ziskos v Miksche* (2007), 161 ACWS (3d) 651, 2007 CarswellOnt 7162 (SC); *Sly v Curran* (2008), 168 ACWS (3d) 855, 2008 CarswellOnt 7788 (SC); *Abrams v Abrams* (2008), 173 ACWS (3d) 606, 2008 CarswellOnt 7788 (SC); *Righter v Righter* (November 5, 2008), Doc. 03-20/08 (Ont.SC); *Woolner v D'Abreu* 2009 CarswellOnt 6479 (SC, Div.Ct); *Teffer v Schaeffers* 2008 CarswellOnt 5447 (SC); *Baily v Baily* (2009), 55 ETR (3d) 198, 2009 CarswellOnt 8124 (SC); *PGT v Harkins* (2009), 175 ACWS (3d) 1203, 2009 CarswellOnt 1535 (SC); *Bon Hillier v Milojevic* (2010) 184 ACWS (3d) 688, 2010 ONSC 435; *Cherry v Cherry* (2011), 204 ACWS (3d) 868, 2011 ONSC 4574; *Farrell (Re)* (October 21, 2011), Doc. 03-089 (SC); *DeMichino v DeMichino*, 2011 ONSC 142; and *Salzman v Salzman* 2011 77 ETR (3d) 301 (Ont. SC), *Kwok v Kwok*, 2019 ONSC 3549 (CanLII).

## **CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PROPERTY**

The factors to be applied in assessing capacity to grant or revoke a Continuing Power of Attorney for Property (“**CPOAP**”) are found at section 8 of the SDA. A person is capable of granting a CPOAP if he or she possesses the following:

- (a) Knowledge of what kind of property he or she has and its approximate value;
- (b) Awareness of obligations owed to his or her dependants;
- (c) Knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney document;
- (d) Knowledge that the attorney must account for his or her dealings with the person’s property;
- (e) Knowledge that her or she may, if capable, revoke the continuing power of attorney;
- (f) Appreciation that unless the attorney manages the property prudently its value may decline; and
- (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.<sup>55</sup>

The factors to be applied in ascertaining capacity for revoking a CPOAP are the same as that for granting a CPOAP. One is capable of revoking a CPOAP if one is capable of granting same.<sup>56</sup> If, after granting a CPOAP, the grantor becomes incapable of granting a CPOAP, the document remains valid, as long as the grantor had capacity at the time it was executed.<sup>57</sup>

The factors to be applied in determining requisite capacity to grant or revoke a CPOAP are often referred to being as less stringent than those required for the capacity to manage property. Again, the factors are simply different.

In fact, one need not have the capacity to manage one’s own property to have the requisite capacity to grant or revoke a CPOAP. If the grantor is incapable of managing property, any CPOAP made is still valid as long as the requisite standard or factors for capacity for granting that CPOAP were met at the time the CPOAP was made.<sup>58</sup>

55 SDA, *supra* note 1, s.8(1).

56 SDA, *supra* note 1, s.8(2).

57 SDA, *supra* note 1, s.9(2).

58 SDA, *supra* note 1, s.9(1).

Assessments of capacity to make or revoke a CPOAP need not be conducted only by certified capacity assessors, although they certainly can be completed by assessors.

Indeed, it is the responsibility of the solicitor retained to draft the document, to assess the client's capacity to grant or revoke a power of attorney, either for property or for personal care, when asked to prepare such documentation for a client.<sup>59</sup> This does not mean to suggest that a solicitor in discharging this duty of care may not recommend, encourage or suggest a formal assessment by an assessor in cases where litigation is likely, or in borderline cases, all in an effort to protect the autonomy of the individual and the decision made.

## **CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PERSONAL CARE**

The factors to be applied in granting or revoking a Power of Attorney for Personal Care (“**POAPC**”) are found at section 47 of the SDA. A person is capable of granting a POAPC if the person has:

- (a) The ability to understand whether the proposed attorney has a genuine concern for a person's welfare; and
- (b) The appreciation that the person may need to have the proposed attorney make decisions for the person.<sup>60</sup>

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking one.<sup>61</sup>

A POAPC is valid if at the time it was executed, the grantor was capable of giving a POAPC, even if that person was incapable of managing personal care at the time of execution.<sup>62</sup> The only exception however is if the POAPC incorporates specific instructions for personal care decisions. Those instructions are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.<sup>63</sup>

The factors to be applied in assessing capacity to grant or revoke a POAPC have been referred to as less “stringent” (more correctly considered as “different”) than those for granting or revoking a CPOAP. The factors applied in determining requisite capacity to grant a CPOAP incorporate a significant amount of information that the grantor (i.e. the person making the power of attorney document) must be able to comprehend, whereas, for a POAPC, the grantor is only required to be

59 *Egli v Egli*, 2005 BCCA 627. In this case, the trial judge placed greater importance on the evidence of the drafting solicitor than that of a physician in finding that Mr. Egli had the requisite capacity to execute the POA in question.

60 SDA, *supra* note 1, s. 47(1).

61 SDA, *supra* note 1, s. 47(3).

62 SDA, *supra* note 1, s. 47(2).

63 SDA, *supra* note 1, s. 47(4).

able to understand whether the proposed attorney for personal care has the grantor's best interests in mind, and that the POAPC means that the proposed attorney may be authorized to make such personal care decisions on their behalf. Again, the determination is relevant.

Moreover, as noted above, the onus for determining capacity to grant or revoke a POAPC falls squarely on the solicitor who has been retained to draft the document.

## **CAPACITY TO MAKE A GIFT**

There are no statutory criteria for determining the requisite capacity to make a gift. The common law factors that are applicable depend, in part, on the size and nature of the gift.

In general, however, the criteria to be applied is whether the person possesses:

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

The law on capacity to make a gift is set out in the 1953 decision of the British Columbia Supreme Court in *Royal Trust Co. v Diamant*.<sup>64</sup> In that case, the court held that an *inter vivos* transfer (i.e. transfer between living people) is not valid if the transferor (i.e. the person making the transfer) had "such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."<sup>65</sup>

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

A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it...<sup>66</sup>

Citing earlier case law on the capacity to gift, the Court in *Dahlem (Guardian ad idem of) v Thore* 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.**<sup>67</sup>

<sup>64</sup> *Royal Trust Co. v Diamant*, [1953] 3 DLR 102 (BC SC).

<sup>65</sup> *Ibid*, para 6.

<sup>66</sup> *Re Bunio (Estate of)*, 2005 ABQB 137, para 4.

<sup>67</sup> *Dahlem (Guardian ad litem of) v Thore* [1994] BCJ No. 809 (BC SC). para 6 [emphasis added].

In his study, *Gifts: a Study in Comparative Law*, 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 standards or framework for determining capacity in various jurisdictions. Referring to American law, Professor Hyland states:

...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.<sup>68</sup>

While the approach is similar to that outlined in the Canadian cases referenced above, it is somewhat more onerous than the simple understanding of the nature of the gift and its effect, in that it requires donors to understand the “extent of their property.” This is more aligned with the requirement to possess the capacity to manage property.

Professor Hyland also points out that in analyzing whether an individual has the requisite capacity to give a gift, courts will look at the circumstances surrounding the gift, and in particular, the gift itself to determine the donor’s capacity. Most importantly, Professor Hyland raises the consideration of the criteria determined on a balance of probabilities by reviewing all the circumstances of the gift:

Though this is easily stated, the proof difficulties are often intractable. It is often impossible to separate the capacity question from all of the facts and circumstances of the transaction. The fact that a donor may be old, sick or absent-minded is not enough to prohibit the gift. If the gift seems reasonable, the courts are likely to conclude, that the donor was competent. If the gift is difficult to explain, the court may reach the opposite conclusion. In other words, the capacity to make a gift may depend on the gift the donor is attempting to make.<sup>69</sup>

Professor Hyland highlights the problem by proposing that a capable person is fully entitled to make a decision, and give a gift that others may perceive as foolish. Nevertheless, where a person’s capacity is in question, a foolish and inexplicable decision could very much be evidence of that person’s incapacity. Professor Hyland explains: “An unnatural and unreasonable disposition of property may be shown as bearing on the issue of mental condition.”<sup>70</sup>

As Professor Hyland does not address Canadian law in his book, it is possible that this view is particularly American. Canadian case law emphasizes autonomy, and indeed the right to be foolish as long as the person is capable. However, it is true that courts will look at the decisions people

68 Hyland, R., *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009), p. 222. [“Hayland”]

69 Hyland, *supra* note 69.

70 Hyland, *supra* note 69, pages 222 to 223.

make and the reasons they give for them, as well as the intent behind them,<sup>71</sup> in an attempt to assess the person's capacity to make those decisions, and as such, it is possible that the gift in question can have a bearing on whether the donor has capacity

### **NATURE AND EXTENT OF GIFT – A FACTOR**

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

In the English case of *Re Beaney*,<sup>72</sup> the judge explained this difference in approach regarding the capacity to give gifts, or to make gratuitous transfers, 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 compromise most of the estate, Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. In an earlier case, *Mathieu v Saint-Michel*, the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, notwithstanding that the gift was not the donor's sole asset of value.<sup>73</sup> The principle appears to be that once the gift is significant relative to the donor's estate, even if it is less than the entirety of the estate, then the standard for testamentary capacity applies in determining if the gift is valid.

### **CAPACITY TO ENTER INTO REAL ESTATE TRANSACTIONS**

There is no set standard or factors for determining the requisite capacity to enter into a real estate transaction. To determine which standard is applicable it is important to consider the nature of the real estate transaction.

<sup>71</sup> *Pecore v Pecore*, [2007] 1 SCR 795; *Madsen Estate v Saylor*, [2007] 1 SCR 838.

<sup>72</sup> *Re Beaney*, [1978] 2 All ER 595 (Ch.D.).

<sup>73</sup> *Mathieu v Saint-Michel*, [1956] SCR 477 at 487.

When determining capacity in real estate transactions, such as purchasing or selling real property, courts generally consider whether the individual in question had capacity to enter into a contract.<sup>74</sup> This means that a person requires the ability to understand the nature of the real estate transaction, and the ability to appreciate the impact of that transaction on their interests.

In cases where the person in question is undertaking a real estate transaction to make a gift, then the standard for capacity to make a gift is relevant. This may be applicable in cases where an individual transfers a property for nominal consideration, or places someone on title to their property. In such instances, the transaction is considered a gift, rather than a contract.

Where that gift is a substantial gift, or otherwise affects the individual's testamentary dispositions, then it is arguable that the standard of testamentary capacity applies. Depending on the size of the gift, it may venture into the territory of a testamentary transaction. That is to say, if the size of the gift is significant, and would affect the size of the client's estate, then arguably it is a testamentary disposition. It is worth noting that since most real estate transactions are of significant value compared to an individual's estate, then most gratuitous transfers of real property would require testamentary capacity.

Where the gift is significant in value, the onus is on the real estate lawyer to ensure the client has capacity, and clear enquiry into and well-documented notes on the issue of capacity are warranted.

### **CAPACITY TO MAKE A WILL (TESTAMENTARY CAPACITY)**

The law on capacity to make a will is established in the common law.

The legal criterion for determining requisite capacity to make a will was established in the 1800's by the English case of *Banks v Goodfellow*. Testamentary capacity is defined as the:

- (a) Ability to understand the nature and effect of making a will;
- (b) Ability to understand the extent of the property in question; and
- (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.<sup>75</sup>

In order to make a valid will, a testator need not have a detailed understanding of the points listed above. The testator requires a "disposing mind and memory," which is defined as a mind that

<sup>74</sup> See for example: *Park v Park*, 2013 ONSC 431; *de Franco v Khatri*, 2005 CarswellOnt 1744, 303 RPR (4th) 190; *Upper Valley Dodge v Estate of Cronier*, 2004 ONSC 34431.

<sup>75</sup> *Banks v Goodfellow*, (1870) LR 5 QB 549.



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.”<sup>76</sup>

Testamentary capacity does not depend on the complexity of the will in question. One is either capable of making a will or not capable of making a will. 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.”<sup>77</sup>

The question of testamentary capacity focuses on the time at which instructions are given, not necessarily when the will is executed. Though, as our case law expands on this point, we know this to be a factor.<sup>78</sup> The rule in *Parker v Felgate* provides that even if the testator lacked testamentary capacity at the time the will was executed, the will is still valid if:

- (a) The testator had testamentary capacity at the time he or she gave the lawyer instructions for the will;
- (b) The will was prepared in compliance with those instructions; and
- (c) When the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his or her own previous instructions.<sup>79</sup>

The requirements for due execution of a will are set out in the *Succession Law Reform Act*<sup>80</sup> (the “**SLRA**”).

Courts have cautioned that the rule in *Parker v Felgate* can only be applied where the instructions for the will (referred to in (a) above) were given to a lawyer. In other words, even if the testator provided instructions to a non-lawyer at a time when the testator had testamentary capacity, and the layperson then conveyed those instructions to a lawyer, the resulting will could not be valid if the testator lacked testamentary capacity on the date of its execution.<sup>81</sup>

76 *Leger et al. v Poirier*, [1944] SCR 152, at 153.

77 Robertson, G., *Mental Disability and the Law in Canada*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1994), p. 214.

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

79 *Parker v Felgate*, (1883), 8 PD 171.

80 *Succession Law Reform Act*, RSO 1990, c S. 26, s. 4.

81 *Re Fergusson’s Will*; *Fergusson v Fergusson* (1981), 43 NSR (2d) 89 (CA); *Re Griffin’s Estate* (1978), 21 Nfld. & PEIR 39 (PEI CA), leave to appeal to SCC refused 24 Nfld. & PEIR 90n (SCC).



The threshold capacity required to make a will is, as previously stated, often defined as higher than the capacity required to grant a power of attorney document, for property or for personal care.<sup>82</sup> In fact, it simply involves different criteria applied to a certain decision. The thresholds are different.

Notably, a testator need not be capable of managing property in order to have testamentary capacity. A finding that a person is incapable of managing their own affairs does not automatically lead to a finding that they lack testamentary capacity. The question of whether the testator understood the nature of their assets and the impact of making a will may be distinct from the question of whether they have capacity to manage their property.

A solicitor drafting a will is obliged to assess the client's testamentary capacity prior to preparing a will. The drafting lawyer must ask probing questions to be satisfied not only that the testator can communicate clearly, and answer questions in a rational manner, but also that the testator has the ability to understand the nature and effect of the will, the extent of their property and all potential claims that could be expected with respect to their estate.<sup>83</sup>

In the case of *Laszlo v Lawton*, the Supreme Court of British Columbia examined the effect of delusions on testamentary capacity. In this case, the deceased believed that she could communicate telepathically with objects by touching them; that characters on television were communicating with her; and, that unidentified individuals had stolen significant amounts of money from her, among other irrational beliefs. However, these delusions were not obviously connected to her decision to disinherit her husband's family who, on the evidence, were her previously-named beneficiaries and deserving of her generosity.<sup>84</sup>

There was evidence that the deceased was still possessed of her cognitive facilities – that is, her ability to reason and remember – at the time she made her will, in spite of the delusions (although it should be noted that there was also some evidence that she was confused and forgetful at times).

The court was left with an apparent dilemma. On the one hand, the deceased suffered from inexplicable and irrational beliefs that had only emerged in recent years; and the will was a significant departure from her previous will, as excluded family members who could be expected to benefit, and made irrational bequests to two charities with which the deceased and her husband had no affiliation. On the other hand, there was some evidence that the deceased did not suffer from significant cognitive defects when she made the will in question, and there is an apparent rule of law that non-vitiating delusions alone do not invalidate a will.

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82 *Penny v Bolen*, 2008 CanLII 48145 (Ont. SC), para. 19: "There are different tests for the capacity to make a Power of Attorney for personal care and for property. A person may be incapable of managing property but capable of making a Power of Attorney for Property. With respect to Powers of Attorney for Personal Care the capacity threshold is much lower than for Power of Attorney for Property which is lower than the capacity required to execute a will."

83 *Murphy v Lamphier*, [1914] OJ No. 32 (CA); *Hall v Bennett Estate*, 2003 CanLII 7157 (Ont CA), para. 58

84 *Laszlo v Lawton*, 2013 BCSC 305. [*"Laszlo"*]

The court reconciled these opposing factors by accepting the evidence of an expert who explained that the onset of a delusional disorder “often heralds an unrecognized and, therefore, untreated somatic illness, impacting brain function or degeneration of the brain itself.” Justice Balance explained as follows:

It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator’s mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.

...

In my view, consideration of non-vitiating delusions in this broader sense where the evidence suggests that all or some of the testator’s delusions accompany progressive degenerative brain disease like Alzheimer’s does not run afoul of the rule in *Banks* or its lineage.<sup>85</sup>

Ultimately, the court found that the testator lacked capacity, but not because she suffered from delusions. Rather, the court was not convinced on the evidence that the deceased understood the nature and quantum of her estate.

It remains to be seen whether the weight of scientific authority continues to support this opinion and whether other courts adopt this method of examining delusions as a feature of mental function at large, but notable it does seem to fit tidily into the legal analysis under *Banks v Goodfellow*.

Two other discussions in this case are worth noting. The court made some interesting observations about the use of Mini Mental State Examinations (“**MMSE**”) results on the law of capacity. The deceased had twice submitted to an MMSE around the time she made her will. She scored very well both times (i.e. the test showed no or minimal cognitive impairment). The court gave little weight to the test results, saying that the ubiquitous “MMSE is a rather blunt tool”, which has a limited ability to detect frontal lobe dysfunction or deficits in executive functioning, which are common in Alzheimer’s disease. Without more evidence of its reliability, it is impossible to determine the relative importance of its role in determining testamentary capacity.<sup>86</sup>

<sup>85</sup> Laszlo, *supra* note 86, paras 227 and 229.

<sup>86</sup> Laszlo, *supra* note 86, para 99.

The court also made interesting observations on the fluidity of capacity. As a generality, in the older adult, capacity will often emerge and worsen over time. However, capacity in any given case is not static. It can fluctuate slightly or wildly. There may be periods of incapacity interspersed with periods of lucidity. Appearances can be deceiving, since a person who seems rational may not have capacity and a person who seems compromised may be capable. A diagnosis of dementia is not equivalent to a finding of testamentary incapacity; testamentary capacity is a legal concept rather than a medical one, and both medical and lay evidence feature importantly.

## **CAPACITY TO REVOKE A WILL**

A testator who seeks to revoke a will requires testamentary capacity, as outlined above.

This is clear in the case where a testator revokes a will by executing a subsequent will or testamentary document.

When dealing with revocation by physical destruction, however, for that decision to be a capable decision, the testator must be able to understand the nature and effect of the destruction and revocation at the time the will is destroyed, and must have testamentary capacity at the time of the destruction. If the testator lacks that ability at the time of the destruction of the will, then the will is not deemed properly revoked.<sup>87</sup> It is extremely important, as a result, to know when precisely a will was destroyed, and if at that time the person was capable of revoking the will.

As revocation requires testamentary capacity, in cases where a testator makes a will and then subsequently and on a permanent basis is found to no longer possess testamentary capacity, the testator cannot revoke that will. The only exception being if the testator marries (and has capacity to marry), at which time the will is effectively revoked subject only to exceptions at section 16 of the *SLRA*.<sup>88</sup>

## **CAPACITY TO MAKE A CODICIL**

Subsection 1(1) of the *SLRA* defines a “will” as including:

- (a) A testament,

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87 This principle is outlined in the English case of *Re Sabatini* (1969), 114 Sol. J 35 (Prob. D.), as well as in Canadian case law in *Re Beattie Estate*, [1944] 3 WWR 727 (Alta. Dist. Ct.) at 729-730, and *Re Drath* (1982), 38 AR 23 (QB) at 537. For more detailed discussion on revocation and destruction of wills, please see *Mental Disability and the Law in Canada*, *supra* note 77, 224 to 225.

88 *Re Beattie Estate*, *supra* note 89.

- (b) A codicil,
- (c) An appointment by will or by writing in the nature of a will in exercise of a power, and
- (d) Any other testamentary disposition. (“testament”).

Since a codicil is included in the definition of a “will,” the criteria for determining capacity to make a will, that is, testamentary capacity, applies equally to a codicil.

## **CONCLUSION**

Issues of capacity, whenever they arise, can require a complex balancing of the need to respect the individual’s dignity and autonomy, with the equally important need to protect the potentially vulnerable. Solicitors must take care not to presume that the presence of a medical condition or a lack of capacity to execute a specific task is determinative of capacity to execute another task. At the same time, lawyers must satisfy themselves that the grantor has the capacity to execute the documents in question, keeping in mind the tests outlined above, and the need to be alert for red flags of undue influence. Failure to do so will only be to the grantor’s detriment later, if allegations of incapacity arise after the fact, and there is insufficient evidence to demonstrate that the solicitor in question did his or her due diligence.

## CHAPTER 4: INTER VIVOS UNDUE INFLUENCE

### ***SUMMARY OF INTER VIVOS UNDUE INFLUENCE***

*Inter vivos* undue influence is an attack used to set aside gifts and other *inter vivos* wealth transfers, such as settlements into trust or transfers into joint tenancy. Traditionally, it has been viewed as including two branches of cases. The first is actual undue influence, also called direct undue influence or undue influence by conduct. The second is presumed undue influence, also called undue influence by relationship. The leading case dealing with *inter vivos* undue influence remains *Allcard v. Skinner*<sup>1</sup> a decision of the English Court of Appeal in 1887. Lord Justice Lindley stated that the core principle behind both branches of undue influence was the same:<sup>2</sup>

What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin v. Baseley* is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

That rationale was repeated in the Supreme Court of Canada by Wilson J.A. in *Goodman Estate v. Geffen*:

The equitable doctrine of undue influence was developed, as was pointed out by Lindley L.J. in *Allcard v. Skinner*, 36 Ch. D. 145, [1886-90] All E.R. Rep. 90 (C.A.), not to save

<sup>1</sup> *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.).

<sup>2</sup> *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.), at pages 182-183.

people from the consequences of their own folly but to save them from being victimized by other people.... In the context of gifts and other transactions, equity will intervene and set aside such arrangements if procured by undue influence.<sup>3</sup>

The core principle and rationale behind it was re-stated in the House of Lords decision in *Royal Bank of Scotland Plc v. Etridge (No. 2)*.<sup>4</sup>

The tool under discussion is broad and flexible. Undue influence extends to situations where there has been “some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating.”<sup>5</sup>

The division into two branches remains important. Undue influence by relationship is based on a finding by the court that a relationship of potential dominance is present. The impact of that relationship can be described as follows:<sup>6</sup>

The presence of that relationship changes the manner in which the court deals with the gift and does so in three ways. First, it changes the level of sensitivity the court will employ in assessing the conduct. Inside such a relationship the mildest of pressure can amount to undue influence. Outside of such a relationship the conduct must be more direct and aggressive. Courts police certain relationships and will not allow gifts to stand unless the transaction can be justified against a strict standard of fairness. Second, and related to the first, the relationship may be of a type that creates duties to the ward. For that reason, conduct by way of omissions can amount to undue influence when those omissions constitute a failure to discharge that duty. Third, the presence of the relationship, coupled with a gift that cannot be accounted for by normal motives, brings the presumption of undue influence into play. The presumption allows the court to conclude, as a factual inference, that the gift must have been the product of some unseen and unrecorded conduct on the part of the person receiving it. That factual inference gives an advantage to the challenger in litigation over a gift, particularly if the evidence available as to the gift itself is thin.

The onus of proof in dealing with equitable undue influence remains at each step and stage with the attacker, regardless of whether undue influence is alleged in the context of a relationship of trust and confidence or outside of that relationship. The standard of proof is the normal civil standard, the balance of probabilities.

3 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 24.

4 *Royal Bank of Scotland Plc v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 (Eng. H.L.).

5 *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.), at page 181.

6 John E.S. Poyser, *Capacity and Undue Influence*, 2<sup>nd</sup> ed (Toronto: Carswell, 2019), at pages 525-526.

*Inter vivos* undue influence can be distinguished from testamentary undue influence. Testamentary undue influence only deals with wills, codicils and other testamentary wealth transfers coming into operation at death, and is only available where overbearing coercive pressure has been brought to bear that effectively overcomes the free will of the will-maker. Testamentary undue influence renders a wealth transfer void, while *inter vivos* equitable undue influence, renders a wealth transfer voidable. The presumption of undue influence is clearly applicable to gifts and other *inter vivos* wealth transfers but with no proper application to wills and other testamentary wealth transfers.<sup>7</sup>

Various points canvassed in this summary receive expanded treatment in the material that follows.

## **ONUS AND STANDARD OF PROOF FOR INTER VIVOS UNDUE INFLUENCE**

The onus to prove *inter vivos* undue influence is on the party who alleges it. Failing to discharge the onus means failing to establish undue influence. Onus is a non-issue where evidence is available to the court to make a clear finding that undue influence was operative, or not operative, in the making of the gift in question.

Onus was dealt with by Lord Nicholls in 2001 in the House of Lords in *Royal Bank of Scotland Plc v. Etridge (No. 2)*:

Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule.<sup>8</sup>

Lord Hobhouse spoke to the same issue in a concurring judgment (emphasis added):

The wife or other person alleging that the relevant agreement or charge is not enforceable must prove her case. She can do this by proving that she was the victim of an equitable wrong. This wrong may be an overt wrong, such as oppression; or it may be the failure to perform an equitable duty, such as a failure by one in whom trust and confidence is reposed not to abuse that trust by failing to deal fairly with her and have proper regard to her interests. Although the general burden of proof is, and remains, upon her, she

<sup>7</sup> *Seguin v. Pearson*, 2018 CarswellOnt 5617, 2018 ONCA 355, 290 A.C.W.S. (3d) 898, 36 E.T.R. (4th) 1 (Ont. C.A.), at paras. 10 and 11. British Columbia now has special rules under which the presumption does apply to wills by statutory enactment.

<sup>8</sup> *Royal Bank of Scotland Plc v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 (Eng. H.L.) (referred to periodically in this text by the short form “*Etridge*”) at paragraph 13. *Etridge* dealt with undue influence in the context of a series of guarantees given to banks where members of couples signed papers to personally guarantee the obligations of their spouses, but included an effort to summarize the law relating to *inter vivos* undue influence. The judgment by Lord Nicholls was the most ambitious on point, and was subject to express agreement and approval by Lord Clyde (at paragraph 91) and Lord Hobhouse (at paragraph 100).



can discharge that burden of proof by establishing a sufficient prima facie case to justify a decision in her favour on the balance of probabilities, the court drawing appropriate inferences from the primary facts proved.<sup>9</sup>

Where the presumption of undue influence applies the legal onus remains on the attacker. Only an evidentiary burden attaches to the defender. The operation of the presumption of undue influence as an evidentiary tool was dealt with at length by the Supreme Court of Canada in the 1991 decision *Goodman Estate v. Geffen*.<sup>10</sup> The presumption of undue influence was described by Wilson J.A. as the “evidentiary companion” to the doctrine of undue influence.<sup>11</sup> Sopinka J.A. commented at length on the nature and characteristics of the presumption. Those comments began by noting:

The presumption of undue influence is a presumption of law. As such, its influence on the resolution of the issue is limited to the burden of proof. Text writers and courts are divided on whether presumptions of law affect only the evidential burden or both the evidential burden and the legal burden.<sup>12</sup>

The presumption forces the party defending the gift to point to evidence, “it is applied against the burdened party if the evidence, after being weighed, fails to persuade.”<sup>13</sup>

The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.<sup>14</sup> No higher standard is ever applicable. The Supreme Court of Canada made that point abundantly clear in *C.(R.) v. McDougall*.<sup>15</sup>

## **UNDUE INFLUENCE BY CONDUCT (“ACTUAL UNDUE INFLUENCE”)**

Actual undue influence is a broad tool to protect the vulnerable from unfair transactions and captures a broad spectrum of victimizing conduct. The judicial approach can be summarized as follows:<sup>16</sup>

9 *Royal Bank of Scotland Plc v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 (Eng. H.L.), at paragraph 107.

10 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.).

11 *Ibid.*, [Goodman] at paragraph 21.

12 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 94.

13 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 97.

14 *C.(R.) v. McDougall* (2008), 2008 S.C.C. 53, J.E. 2008-1864, 83 B.C.L.R. (4<sup>th</sup>) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6<sup>th</sup>) 1, 297 D.L.R. (4<sup>th</sup>) 193, 169 A.C.W.S. (3d) 346, 61 C.R. (6<sup>th</sup>) 1, 380 N.R. 82, 260 B.C.A.C. 74, 439 W.A.C. 74, [2008] 3 S.C.R. 41, 2008 CarswellBC 2041 (S.C.C.).

15 *C.(R.) v. McDougall* (2008), 2008 S.C.C. 53, J.E. 2008-1864, 83 B.C.L.R. (4<sup>th</sup>) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6<sup>th</sup>) 1, 297 D.L.R. (4<sup>th</sup>) 193, 169 A.C.W.S. (3d) 346, 61 C.R. (6<sup>th</sup>) 1, 380 N.R. 82, 260 B.C.A.C. 74, 439 W.A.C. 74, [2008] 3 S.C.R. 41, 2008 CarswellBC 2041 (S.C.C.).

16 *Supra*, note 6, Poyser, *Capacity and Undue Influence*, page 542.



Courts of equity will set aside a transaction where a person confers a gift or other advantage on another whenever the gift-maker's intent is secured by unacceptable means. Overt coercion clearly justifies intervention. You cannot force a person to make a gift against his or her will and expect to keep it. More broadly, you cannot fool, or cheat, or manipulate a person into making a gift, leaving fairness behind, and expect to keep it. Where a gift-maker has been persuaded to make a gift, and the efforts to persuade call the consent of the gift-maker into question, the court is free to overturn the gift. Gifts are not allowed where the participation of the gift-maker cannot fairly be treated as the expression of the gift-maker's free will. Broadly put, undue influence by conduct is characterized by intent manufactured by inappropriate means.

The traditional language used to describe conduct that justified setting aside a gift was language of culpability: "unfair," "improper," "coercion," "overreaching," "cheating," "fraud," and "wrongful."<sup>17</sup> More recent judicial language leaves culpability aside and describes the offending conduct in more functional terms, setting aside gifts where the conduct prevents the gift-maker "from exercising an independent judgment,"<sup>18</sup> or stating that influence is considered to be undue "whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will."<sup>19</sup>

### **UNDUE INFLUENCE BY RELATIONSHIP ("PRESUMED UNDUE INFLUENCE")**

The courts of equity recognized that people can become vulnerable, and that a vulnerable person often seeks and needs the support of a friend or family member in getting through life. They can succeed so long as they are buttressed. The relationship between the person requiring the support and the person giving it is one that can easily be abused. If nephew handles financial affairs for an uncle, and the uncle trusts the nephew enough to do it, the uncle will not look over the nephew's shoulder. If the affairs are complex, and the uncle is diminishing in capacity, the uncle may not be capable of understanding what is going on even if the uncle does look. The courts took the position that if one person reached out and provided support to another in that sort of circumstance, the person in the position of power in the relationship would be expected to act honourably. Taking a significant financial advantage out of the relationship was possible, but only if the person receiving it ensured that the transaction, viewed globally, was fair, just and reasonable. Put another way, when one person puts their arm around another and offers protection, the person receiving the

17 *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.), at page 181 (per Lord Lindley), and at page 171 (per Cotton L.J.). Words repeated *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at paragraph 6 (per Rinfret J.).

18 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at paragraph 23 (per Duff J.).

19 *Royal Bank of Scotland Plc v. Etridge* (No. 2), [2001] UKHL 44, [2002] 2 A.C. 773 (Eng. H.L.) at paragraph 7.

protection should not have to reach down and guard their wallet. Courts of equity felt a moral repugnance when these principles of fairness were violated.

A policy point that underlies this area of law:<sup>20</sup>

Presumed undue influence might be better called “undue influence by relationship.” A web of relationships underlie our society that are laudatory, relationships where one person is seen to take another under his or her wing. Those relationships work to the advantage of the weak or those who need protection. The protector is expected to operate selflessly in that context, or to take reward in carefully controlled or sanctioned ways. The courts, as a matter of policy, will not allow a transaction to stand in that context that works to the detriment of the ward, or to the selfish advantage of the person extending protection. A relationship that ought to operate with nobility will not be allowed to affect an ignoble result. When it does the courts are ready to set it aside on the grounds of undue influence.

## QUALIFYING TRANSACTIONS

The doctrine of equitable undue influence grew up as a measure to attack and overturn *inter vivos* gifts, but applies to any other *inter vivos* transaction that is significant in the financial life of the person making it. Courts of equity would not intervene unless the transaction was significant in that way. It must be “large or immoderate,”<sup>21</sup> or “so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act.”<sup>22</sup>

The requirement for significance can be contrasted to the common law principles that apply to attacking a wealth transfer transaction on the grounds of lack of mental capacity, a common law construct. A transaction can be set aside for lack of capacity whether large or small, significant or inconsequential.

Equitable undue influence is not limited to gifts. It would apply equally to settling property into a trust, or creating a joint tenancy. It may also be applicable to the act of marriage or the act of executing a power of attorney. It does not, however, apply to last wills and testaments or other testamentary wealth transfers, a point confirmed in Ontario with the Court of Appeal decision in *Seguin v. Pearson*, repeating the traditional and correct view that the presumption has no application

20 *Supra*, note 6, Poyser, *Capacity and Undue Influence*, p. 553.

21 *McKay v. Clow*, [1941] S.C.R. 643, [1941] 4 D.L.R. 273, 1941 CarswellPEI 4 (S.C.C.), at para 39.

22 *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.), at p. 185.

to wills, and applies only where *inter vivos* wealth transfers are under consideration.<sup>23</sup> The same distinction was confirmed in Saskatchewan with the 2018 Court of Appeal decision in *Karpinski v. Zookewich Estate*.<sup>24</sup> The law of probate never allowed entry to equitable undue influence. A person who is giving away their assets at death can, and perhaps should, give significant portions of wealth to helpers who have buttressed their independence by selfless effort. That feels fair and proper. The landscape is very different when contemplating significant gifts during life. Those impoverish the donor, and it feels wrong for the person to accept any advantage unless the donor has been protected and fully advised throughout.

## QUALIFYING RELATIONSHIPS

What kind of relationship will attract the doctrine of equitable undue influence? The Supreme Court of Canada made an effort to answer that question nearly one-hundred years ago in *Bradley v. Crittenden*.<sup>25</sup> An elderly gentleman had a significantly younger girlfriend, he was eighty-five and she was closer to fifty. He made a gift to her of valuable bank stock before passing away eight months later. His estate challenged the gift on the grounds of undue influence. The Supreme Court upheld the gift by a three to two majority. Rinfret J. characterized the relationship as one of pure friendship and took the position that friendship of the character between the man and the woman was not generally sufficient at law to invoke the presumption of undue influence:<sup>26</sup>

The doctrines of equity do not require that the principle and the rule should be extended to relationship resulting from pure friendship, even were the friendship of such a character that the donor reposed confidence and trust in the donee. As said by Fletcher Moulton, L.J., in *Coomber v. Coomber* [1911] 1 Ch. 723, at 729: “The nature of the fiduciary relation must be such that it justifies the interference.”

In the case at bar, there was no proof of any fiduciary relation so called, nor, in our view, proof of any confidential relationship such as is necessary to raise the presumption of undue influence. The only relationship established was one of deep affection and of the high regard in which the deceased held the respondent. We agree with the majority of the Court of Appeal that such affection, in itself, “provides a good reason” for the gift and affords a satisfactory explanation of the motive which prompted the donor to make it.

23 *Seguin v. Pearson*, 2018 CarswellOnt 5617, 2018 ONCA 355, 290 A.C.W.S. (3d) 898, 36 E.T.R. (4th) 1 (Ont. C.A.), at paras. 10 and 11.

24 *Karpinski v. Zookewich Estate*, 2018 CarswellSask 344, 2018 SKCA 56 (Sask. C.A.), at para. 29 (“It is clear ... that the party alleging testamentary undue influence has the onus of proving its existence and the rebuttable presumption of undue influence, as it exists in the context of *inter vivos* gifts, is not applicable.”)

25 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.).

26 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at paras 11 and 12.

Cannon J. disagreed, finding that the relationship was sufficient to invoke the presumption as the man and woman “stood towards one another in a relationship implying special confidence.”<sup>27</sup> Lamont J. also concluded that the relationship triggered the principles of equitable undue influence and reviewed the facts at length before doing so. The elderly gentleman had proposed six times. She declined to marry him. Still, they saw each other two or three times a week and kissed when they met and when they parted. They vacationed together. On one trip, each of them bought neighbouring parcels of land as investments. Importantly, the elderly gentleman trusted her to manage both parcels thereafter. There were other signs of trust and confidence. The elderly gentleman remained competent, but signed a power of attorney that nominated her to handle financial affairs for him should need arise. He left her with blank cheques on all of his accounts to use on his behalf. He gave her the combination to his safe. The power of attorney and cheques were never used, but provided evidence of the trust he placed in her, and the power she enjoyed over him if she chose to exert it. They kissed, making the relationship personal, but she managed at least one of his investments, making the relationship financial as well. Taking all of that together,<sup>28</sup> Lamont J. was of the view that the relationship justified the application of equitable undue influence:<sup>29</sup>

I am unable to conceive of the deceased having any greater confidence in the respondent had there been a formal engagement between them than that which the evidence shews actually existed. She says she refused his offer of marriage when first made. If so it must have been a refusal which did not repel, for his visits continued and, for over two years, his proposal was at intervals renewed. She occupied a fiduciary relation towards him in respect of the Vancouver property, and she admits that hers was the stronger mind and the stronger personality.

The giving to the respondent of a general power of attorney and the cheques one month after he made the transfer of the shares, shews the special confidence he had in her, as does also his making her residuary legatee under the holograph will, with a direction to distribute the fund in accordance with his verbal instructions, and his giving to her the combination of his safe which he gave to no other person. Further, although he was living with Mrs. Bradley, his relations with the respondent were so intimate that, on his last visit to her (January 6, 1931), he took her his coat to mend, and she admits that she often pressed his clothes. All this indicates how intimate and confidential was the relationship existing between them. In addition to these confidential relations there is the admitted fact that she informed the deceased as to what constituted a holograph

27 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at para 19.

28 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), the details of the relationship were canvassed by Lamont J. at paras 37 to 43 and parag 50.

29 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at paras 49 and 50.

will and the requirements necessary for its validity. In doing so there may have been nothing whatever of calculation in her action, but a holograph will appears in which she is designated the residuary legatee. Both the will and the transfer of the shares were kept secret. It is, as I read the authorities, just in cases of this kind that the courts have insisted upon the application of the rule.

While it was the financial connection between that appears to have swayed Lamont J.<sup>30</sup> the whole of the fact pattern was relevant and the repeated proposals of marriage suggested a power over him and the opportunity to dominate him if she chose to abuse that power.

The Supreme Court of Canada focused on the power to dominate in considering this question again in *Goodman Estate v. Geffen*.<sup>31</sup> A woman suffered from mental illness, and agreed to settle a house into a trust. She maintained a life estate. The validity of the trust was challenged. Capacity was not at issue. There was no evidence of actual undue influence. The court focused on the relationship between the parties involved and whether it attracted equitable undue influence.<sup>32</sup> Wilson J. commented on the relationship necessary to trigger the presumption:<sup>33</sup>

What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in *Morgan*, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as “confidence” and “reliance” do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of “influence” one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. .... To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

30 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at paragraph 45.

31 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.).

32 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 28.

33 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 41.

La Forest J. then covered the same ground:

As my colleague has noted, the first issue to be considered is whether the circumstances in this case are such as to give rise to a presumption of undue influence. Wilson J. concludes that such a presumption will arise only when the parties are in a relationship of “influence,” where one person is in a position to dominate the will of another. I agree with this.<sup>34</sup>

The Ontario Court of Appeal focused on the potential for domination in the 2015 decision in *Foley v. McIntyre*: “Where the potential for domination inheres in the relationship between the transferor and transferee, the presumption of undue influence applies...”<sup>35</sup> Inasmuch as the purpose of the doctrine of equitable *inter vivos* undue influence is to protect people from victimization, the phrase “potential for domination” links in nicely to that purpose. Still, repeating a point made earlier, the type of relationship that will qualify or not qualify to trigger the presumption of undue influence is necessarily elastic and defies any effort at labeling.

### **THE IMPACT OF A SPECIAL RELATIONSHIP**

As noted earlier, a finding that a special relationship underlies a gift has three impacts when considering equitable undue influence.

The first is evidentiary. The presumption of undue influence is available as a means to prove that undue influence occurred, discussed earlier. This means that the party attacking a gift need not point to a specific event that amounted to the alleged undue influence. Some ephemeral conduct on some date is presumed to have occurred that somehow amounted to undue influence. No direct or circumstantial evidence of the event needs to be called. The undue influence is presumed to have been exerted behind closed doors.

The second impact of a finding of special relationship deals with conduct threshold:

The presence of a special relationship changes the conduct threshold amounting to undue influence. Outside of a special relationship, some measure of persuasion or mild pressure may be perfectly permissible. Inside a special relationship, that same conduct will generally poison the gift. An equitable duty extracts a high standard of the person who bears it. A person obliged to protect another is generally held accountable for any predatory behavior, no matter how mild and whether intentional or unintentional.<sup>36</sup>

34 *Goodman Estate v. Geffen* (1991), 80 Alta. L.R. (2d) 293, [1991] 5 W.W.R. 389, 127 N.R. 241, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4<sup>th</sup>) 211, [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, J.E. 91-1059, 1991 CarswellAlta 91 (S.C.C.), at paragraph 81.

35 *Foley v. McIntyre* (2015), 125 O.R. (3d) 721, 2015 CarswellOnt 7680, 8 E.T.R. (4<sup>th</sup>) 175 (Ont. C.A.), at para. 28.

36 *Supra*, note 6, Poyser, *Capacity and Undue Influence*, p. 571.



*Allcard v. Skinner*<sup>37</sup> is a leading case in England and in Canada. The gift-maker joined a religious order and gifted all of her worldly goods to the order shortly after she joined it. Most entrants gave their goods not to some other charity but to the order itself, and so did she. It was encouraged. The rules of the order expressly stated that gifts made to the order would not be returned to anyone who left. She left the order fourteen years later and attempted to get her property back. There had been no coercive conduct. There was no direct request that the woman leave her assets to the order. Yet there was indirect conduct nonetheless in creating the rules and the social structure that governed the order. The rules by which the sisters were governed created the natural expectation that the sisters would leave their property to the order. In the words of Lindley L.J.:

The vow of poverty and the rule as to poverty obliged each sister to give away all her property. But the rule did not require her to give it, or any of it, to the sisterhood. She could give it to her relations or to the poor if she wished. But it would be idle to suppose that a sister would not feel that she ought to give some of her property at least to the sisterhood; and it would be equally idle to suppose that she would not be expected to do so.

The gift was set aside and the woman was allowed to get at least some of her wealth back. The conduct was exceptionally mild, but still sufficient to declare the gift voidable in the context of an underlying relationship of trust and confidence. The organizers of the sisterhood were genuine. They did not take personal advantage. The order itself pursued genuine charitable ends. Still, the conduct in establishing the order amounted to undue influence in the case of individual entrants.

The third impact of a finding of special relationship deals with equitable duties. Equity imposes duties over relationships of trust or confidence, impressing the person in the dominant position with a duty of “care and providence.”<sup>38</sup> If an advantage is taken, it can be sustained only if the transaction can be defended as unrelated to and independent from the relationship itself. The court has to conclude that the gift-maker was acting in a way emancipated from the influence of the relationship in making the gift. Independent legal advice is sometimes sufficient to defend the gift in the face of these duties, but not always so. The Supreme Court of Canada commented on this in *Bradley v. Crittenden* on the following terms:

Then, there is another class of cases “in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him.” Instances of these would be the position of solicitor to client, trustee to cestui que trust, guardian to ward; that of husband and wife, or of

37 *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.).

38 *Huguenin v. Baseley* (1807), 14 Ves. 273, 33 E.R. 526 (Eng. Ct. Ch.).

parent and child. In those instances, where the donor relies on the donee for guidance and advice, the doctrine of equity, as expounded in *Huguenin v. Baseley* (1807) 14 Ves. 273 and such other cases, intervenes on the principle of presumed undue influence and introduces the rule that, while fiduciary relations of that character exist between donor and donee, it is, generally speaking, impossible to rebut the presumption, unless the donor had competent and independent advice.<sup>39</sup>

This does not demand a finding that the person receiving the gift was a fiduciary. All that is required is a relationship of trust or confidence sufficient to awaken the equitable attention of the court.

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39 *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.), at para 7.



# CHAPTER 5: POWER OF ATTORNEY FOR PROPERTY

## **INTRODUCTION**

As people age, more and more individuals are or should be, turning their minds to planning for potential future illness, disability, or incapacity and its impact on their financial and personal well-being. Many are executing power of attorney (“**POA**”) documents as part of their plan. The POA document has long been viewed as one way in which a person can legally protect his or her health and financial interests by planning in advance for when he or she becomes ill or incapable of making decisions.

WEL Partners has written a book on Powers of Attorney. For a detailed review of this subject matter, the book can be found on our website at <http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>. In the next three chapters, we will explore this topic by reviewing the relevant legislation that deals with the different types of POA, the requirements to execute a valid POA, the requirements to terminate a POA, recent case law on the matter, the duties and standard of care required from a person acting as an attorney, and much more.

## **WHAT IS A POWER OF ATTORNEY**

A POA, at its core, is a form of agency between the grantor and the attorney acting under the POA. A POA has been specifically defined in jurisprudence as:

An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. An instrument authorizing another to act as one’s agent or attorney.<sup>1</sup>

At common law, a general power of attorney terminates upon the grantor’s subsequent mental incapacity or death. The common law relating to powers of attorney has, however, been substituted in Ontario by statute.

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<sup>1</sup> *Leung Estate v. Leung*, 2001 CarswellOnt 1972, para 7.

## **TYPES OF POWER OF ATTORNEY**

In Ontario, there are three types of POA. There is a power of attorney under the *Powers of Attorney Act*<sup>2</sup> (“**POAA**”), a continuing power of attorney for property (“**CPOAP**”) under the *Substitute Decisions Act*<sup>3</sup> (“**SDA**”) and a power of attorney for personal care (“**POAPC**”) under the SDA.

### **POWER OF ATTORNEY FOR PROPERTY – POWERS OF ATTORNEY ACT**

The POAA has only three Sections. This Act governs general POA’s but without imposing formality on the document. The general POA contemplated by this Act does not survive the incapacity of the grantor. The language of the POAA refers to the “donor” which is different from that of the SDA which refers to the giver of the POA as the “grantor.” This Act does not set out any of the formalities dealing with a prescribed form, validity or execution requirements, as does the SDA.

A general POA, if coupled with an interest, in other words, if adequate consideration is given, and if the POA was given for the purposes of securing a benefit to the donee/grantee, is not revoked by death, incapacity or bankruptcy. As with the construction, or drafting of any document, certainty with respect to the revocability is best achieved within the document itself, wherein it can state the extent of the power being given. There appears to be a great deal of English case law on this subject and there are evidentiary rules with respect to the irrevocability on death, incapacity or bankruptcy, and some Canadian case law which also, should be considered.<sup>4</sup>

### **CONTINUING POWER OF ATTORNEY FOR PROPERTY – SUBSTITUTE DECISIONS ACT**

An individual who manages the property of an incapable person is either an attorney under a CPOAP,<sup>5</sup> or a guardian of property,<sup>6</sup> court-appointed,<sup>7</sup> or a statutory guardian for property.

Under a CPOAP, a donor appoints a party of their choice to act as guardian of the donor’s property.

<sup>2</sup> *Powers of Attorney Act*, R.S.O. 1990, c. P.20. (“POAA”).

<sup>3</sup> *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, as amended (“SDA”).

<sup>4</sup> *Spooner v. Sandilands* (1842) 1 Y & C Ch Cas 390; *Wilkinson v. Young* [1972] 2 OR (HCJ) 239-241 (cited by Justice Farley in, *Clarica Trust Co. v. Yoo* 2002 CanLII 10474 (ON SC)); *Smith v. Humchitt Estate* 1990 BCJ No. 298 SC, are useful cases to refer to in determining the degree of certainty with respect to irrevocability on death and irrevocability generally; *Fridman’s Law of Agency*, 7<sup>th</sup> Edition, Butterworths 1996, appears to indicate that irrevocable powers do not terminate on the bankruptcy of the principal.

<sup>5</sup> SDA, *supra* note 3, s. 38(1).

<sup>6</sup> SDA, *supra* note 3, s. 31(1).

<sup>7</sup> SDA, *supra* note 3, s. 22(1).

In the absence of a valid continuing power of attorney, a certificate under the *Mental Health Act*<sup>8</sup> (“**MHA**”) can be issued certifying that a person is incapable.<sup>9</sup> The Ontario Public Guardian and Trustee (the “**PGT**”) becomes the statutory guardian of an individual’s property. The PGT is considered the office of the “last resort” and will canvass family or those who have a close relationship with the incapable party to determine if anyone would be willing to take over the management of the incapable party’s property. The person who takes over the statutory guardianship by way of an Application from the PGT is also regarded as the statutory guardian.<sup>10</sup>

The CPOAP is commonly used to ensure that the financial affairs of a person are managed for any number of reasons, including during a period of incapacity.

## **CAPACITY**

A person is considered incapable of managing property if “unable to understand information that is relevant to making a decision in the management of one’s own property or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.”<sup>11</sup>

The validity of a CPOAP is dependent on the grantor having the requisite decisional capacity to grant a CPOAP. The attorney needs to be appointed before the grantor becomes incapable of giving one. The validity, or operation of a CPOAP can also be restricted to specific dates or contingencies.

The *SDA* sets out stringent guidelines regarding the requirements for the capacity to grant POA’s. There are different standards and requirements for capacity depending on the required task. For example, a different analysis is required for determining the requisite capacity to grant a CPOAP, or determining the capacity to grant a POAPC, or the requisite capacity to execute a Will, all of which is different still from the determination of requisite capacity to marry or make an *inter vivos* gift.

Section 8 of the *SDA* sets out the factors used to assess capacity to grant a CPOAP:

**8(1)A person is capable of giving a continuing power of attorney if he or she,**

- a) knows what kind of property he or she has and its approximate value;
- b) is aware of obligations owed to his or her dependants;
- c) knows 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;

8 *Mental Health Care Act*, R.S.O. 1990, c.M.7. (“*MHA*”)

9 *SDA*, *supra* note 3, s. 15.

10 *SDA*, *supra* note 3, s. 17(1).

11 *SDA*, *supra* note 3, s. 6.

- d) knows that the attorney must account for his or her dealings with the person's property;
- e) knows that he or she may, if capable, revoke the continuing power of attorney;
- f) appreciates that unless the attorney manages the property prudently its value may decline; and,
- g) appreciates the possibility that the attorney could misuse the authority given to him or her."<sup>12</sup>

Notably, there is a distinction between the capacity to *grant or revoke* a CPOAP and determining the requisite decisional capacity to *manage* property. A CPOAP is valid if the grantor, at the time of executing it, is capable of giving it, even if incapable of managing property.<sup>13</sup>

The powers granted to an attorney acting on behalf of an incapable person are extensive. An attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will.<sup>14</sup> These powers are subject to the provisions of the SDA and any court-imposed conditions.<sup>15</sup>

The case of *Descharnais v. Toronto Dominion Bank*<sup>16</sup> dealt with an RRSP beneficiary designation. The British Columbia Supreme Court ruled that such a designation was testamentary and an attorney under the B.C. *Power of Attorney Act* was not permitted to exercise a testamentary power. The beneficiary designation was declared invalid. Portions of the case were overturned on appeal, however, the British Columbia Court of Appeal expressly noted there was no challenge to the finding that the designation was testamentary.<sup>17</sup>

Strathy J., as he then was, also compared beneficiary designations to testamentary disposition in the Ontario case of *Richardson (Estate Trustee of) v. Mew*, stating:

I agree with the submission . . . that the designation of a beneficiary under a life insurance policy is akin to a testamentary disposition. . . Counsel. . . could point to no authority to the effect that an attorney can change the designation.<sup>18</sup>

In *Hanson Estate*,<sup>19</sup> the Ontario Superior Court of Justice concluded that the owner of a life insurance policy who was mentally competent but physically disabled could validly instruct another

<sup>12</sup> SDA, *supra* note 3, s. 8(1).

<sup>13</sup> SDA, *supra* note 3, s. 9(1).

<sup>14</sup> SDA, *supra* note 3, s. 7(2), 31(1) & 38(1).

<sup>15</sup> SDA, *supra* note 3, s. 31(3), 38(1).

<sup>16</sup> *Descharnais v. Toronto Dominion Bank*, 2001 BCSC 1695, rev'd in part 2002 BCCA 640.

<sup>17</sup> *Descharnais v. Toronto Dominion Bank*, 2002 BCCA 640.

<sup>18</sup> *Richardson Estate v. Mew*, 2008 CanLII 63218 (ONSC), para. 66.

<sup>19</sup> *Hanson Estate*, 2016 ONSC 2382.

person (who was also the policy-holder's attorney under a POA) to change a beneficiary designation on his policy. However, as the policyholder was still "mentally competent", the individual signing the document was doing so as an agent and not in his role as an attorney. The Court noted that the insurer, in this case, was asking the wrong question, instead of asking whether the beneficiary designation could be altered by an attorney as a testamentary disposition, they should have asked whether the beneficiary designation was a valid declaration pursuant to the requirements of the *Insurance Act*.<sup>20</sup> The Court concluded that this was a valid change in the beneficiary designation as contemplated by the terms of the *Insurance Act*.

There are several scholarly articles on the potential for legislative changes regarding beneficiary designations by substitute decision-makers that are available for further comment in this confusing area.<sup>21</sup>

The lawyer drafting a POA document (or Will or testamentary document) has a legal obligation to assess the client's mental capacity to make the decision to execute the document. Lawyers, however, for the most part, are not trained to undertake such assessment, and this is particularly so in cases where incapacity is not obvious.

Capacity Assessment is the formal assessment of a person's mental capacity to make decisions about property and personal care. Under the *Substitute Decisions Act*, many situations require capacity assessments to be conducted by specially qualified assessors who must follow specific guidelines. The Capacity Assessment Office is responsible for the training of capacity assessors, considering applications for financial assistance from those unable to pay the full cost of a required assessment and the development of the assessment guidelines. The Capacity Assessment office has a roster listing all the registered capacity assessors in accordance with the region they practice.<sup>22</sup>

There are many cases that deal with decisional capacity in the estates context which set out the applicable principles, and too, set out the considerations for the potential of undue influence which applies equally to POA situations as well as Will drafting preparation and execution.<sup>23</sup>

20 *Insurance Act*, R.S.O. 1990, c 1.8

21 See Alberta Law Reform Institute, *Beneficiary Designation by Substitute Decision Makers*, Alberta Law Reform Institute, 2014 CanLII Docs 353, online: <http://www.canlii.org/t/2cwc>, [accessed on 2019-05-29]; Aoife Quinn, Jason M Chin and Archie Rabinowitz, *The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It?*, 2016 54-1 *Alberta Law Review* 41, 2016 CanLII Docs 29, online: <https://commentary.canlii.org/w/canlii/2016CanLII Docs29>, [accessed on 2019-05-29].

22 Ontario Ministry General, The Capacity Assessment Office, online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#list> [accessed on November 24, 2019]

23 See *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549; *Scott v. Cousins*, [2001] 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (SCJ); *Ostrander v. Black* [1996] O.J.; *Vout v. Hay* [1995] 2 SCR; *Banton v. Banton* (1998), 164 D.L.R., *Murphy v. Lamphier* (1914) 31 O.L.R. 287 at 318; *Schwartz v. Schwartz*, 10 D.L.R. (3d) 15, 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A.; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.; *Key v. Key* [2010] EWHC 408 (ch.) (Baill); *Laszlo v. Lawton*, 2013 BCSC 305, *Dmyterko Estate v. Kulikovsky* (1992), CarswellOnt 543, *Wingrove v. Wingrove* (1885) 11 PD 81 at 82; *Shrader v. Shrader*, [2013] EWHC 466 (ch); *Gironda v. Gironda*, 2013 CarswellOnt 8612; *Tate v. Guegueirre* 2015 ONSC 844 (Div. Ct.).

There have also been many cases dealing with the relevant criteria set out in the SDA regarding requisite capacity to grant a POA, including a CPOAP.

For example, in *Nguyen-Crawford v. Nguyen*, the Ontario Superior Court of Justice found that as the grantor did not speak English and there was an absence of evidence that the POA and legal advice relating to it were translated for the grantor by someone other than the person being granted the power, there was no basis for concluding that the grantor had the specific capacity, that being the understanding of the nature of the document and the authority conferred, to execute it.<sup>24</sup>

In *Abrams v. Abrams*, an application was brought for an order that the applicant's mother and father be assessed regarding the capacity to grant a POA. Several affidavits and medical reports were filed on behalf of the mother alleging she had capacity as well as opposing affidavits and testimony that she did not. Justice Brown, with respect to the issue of capacity to grant a POA, clarified that while the person may be incapable with respect to some decisions, they still may have the capacity to grant or revoke a POA.<sup>25</sup>

### **FORMAL REQUIREMENTS OF EXECUTION OF A CONTINUING POWER OF ATTORNEY**

A CPOAP is defined under the SDA as a:

...continuing power of attorney if,

- a) it states that it is a continuing power of attorney; or,
- b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property.<sup>26</sup>

The execution requirements of a CPOAP include that it be executed in the presence of two witnesses, each of whom shall sign the CPOAP as a witness. The SDA lists certain people that can't be witnesses; namely: the attorney or attorney's spouse or partner, the grantor's spouse or partner, a child of the grantor, or a person whom the grantor has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship or who has a guardian of the person, and a person who is less than eighteen years of age.<sup>27</sup>

The CPOAP is effective immediately except that Section 7 of the SDA provides that the document may direct that it comes into effect on a "specified date," or when a "specified contingency" happens,

<sup>24</sup> *Nguyen-Crawford v. Nguyen* 2010 ONSC 6836, paras. 73-74.

<sup>25</sup> *Abrams v. Abrams* 2009 CanLII 12798 (ON SCDC), para. 34.

<sup>26</sup> SDA, *supra* note 3, s. 7(1).

<sup>27</sup> SDA, *supra* note 3, s. 10(2).

sometimes referred to as a “triggering event”. For instance, incapacity may be the specifying event. If the POA specifies that the power does not become effective until incapacity, there should be a determining event, failing which the SDA offers guidance.<sup>28</sup>

Examples of “specified contingencies” include:

- a) The language of the power of attorney provides that the authority only begins when the donor is incapacitated;
- b) The language of the power of attorney creates a “Ulysses” contract;<sup>29</sup>
- c) On an event which is specified, so that incapacity is deemed to have occurred;
- d) On the presentation of doctor’s letters;
- e) Where there is a third-party protection clause in the power of attorney; and
- f) When the donor has directed his or her lawyer not to release the power of attorney unless the donor asks for it or the donor, in the opinion of the lawyer, is incapable.

An important consideration is the potential difficulty in using “specified contingencies” in determining the time of activation of the CPOAP. Third-party financial institutions, and others will need to rely on the terms of the triggering event in order to permit the attorney to direct the financial affairs of the grantor/donor. Accordingly, in drafting for specified contingencies, consideration must be given to potential third parties who will need some reliable indicator that the specific contingency of, for example, ‘incapacity’ has in fact occurred, and, that it has continued to occur, and that the grantor/donor has not recovered because of medication or other medical change.

One possibility is to consider the inclusion of the following type of clause in the POA. Notably, unless one has absolute trust in the appointed attorney, this clause could well be a recipe for disaster:

For the sake of certainty, any document that is an original or notarial certified document signed by [*named attorney or some other person*] stating that I am not capable of financial decision-making shall be sufficient proof to all persons dealing with [*named attorney*] of the truth of the statement in the said document, and no third party shall be obliged to make any inquiry into the truth of such statement.

Another possibility is to instruct the lawyer in writing that the CPOAP is to be delivered to the attorney if, in the lawyer’s opinion, the donor is unwilling or unable to make decisions.

<sup>28</sup> SDA, *supra* note 3, s. 9.

<sup>29</sup> A “Ulysses Clause” is one where the grantor executes a POAPC waiving their right to apply for a review of the finding of incapacity and may not apply to the CCB for a review of the finding of incapacity. POAPC containing Ulysses’ clauses are relatively uncommon and are only effective if they comply with specific requirements in the SDA.



A requirement that there be, for example, two letters from qualified capacity assessors under the *SDA* certifying the incapacity of the donor is also a possibility. It is very difficult to have continuous letters obtained from assessors/doctors unless of course, the letters state that the donor will not recover.

The most efficient or preferable form of CPOAP is one that does not contain triggering events. Rather, the donor and the lawyer have reviewed the trustworthiness of the attorney, the possibility that the power granted to the attorney can be abused, and the likelihood that other family members will be suspicious of the use of the POA.

### **TERMINATION OF A CONTINUING POWER OF ATTORNEY**

A CPOAP drafted in accordance with the *SDA* may survive the mental incapacity of the grantor,<sup>30</sup> and this is why the terminology “continuing” is used. The *SDA* provides guidelines for resignation,<sup>31</sup> revocation,<sup>32</sup> and termination of a POA.<sup>33</sup> A person is capable of revoking a CPOAP if capable of giving one.<sup>34</sup>

A CPOAP terminates upon a new one being executed unless the document provides for multiple POA to exist. Care should be taken in drafting a CPOAP where one already exists for property in another jurisdiction, since the new document may unintentionally revoke the existing document in other jurisdictions. Similarly, the problem is not overcome by providing for the new POA document to simply cover “worldwide assets” since such assets may not be covered by the Ontario POA, and therefore, when drafting the new CPOAP, care should be taken so that it co-exists with the POA in the foreign jurisdiction.

Section 11 of the *SDA* deals with the resignation of an attorney under a CPOAP:

**11.(1) An attorney under a continuing power of attorney may resign but, if the attorney has acted under the power of attorney, the resignation is not effective until the attorney delivers a copy of the resignation to,**

- a) the grantor;
- b) any other attorneys under the power of attorney;

30 *SDA, supra* note 3, s. 7(1) and s. 14. Note: CPOAP made under the *POAA* prior to April 3, 1995, may survive the grantor's incapacity if specifically provided.

31 *SDA, supra* note 3, s. 11.

32 *SDA, supra* note 3, s. 12(2).

33 *SDA, supra* note 3, s. 12(1).

34 *SDA, supra* note 3, s. 8(2).



- c) the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person; and
- d) unless the power of attorney provides otherwise, the grantor's spouse or partner and the relatives of the grantor who are known to the attorney and reside in Ontario, if,
  - i. the attorney is of the opinion that the grantor is incapable of managing property, and,
  - ii. the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.

**(1.1) Exception** – Clause (1)(d) does not require a copy of the resignation to be delivered to,

- a) the grantor's spouse, if the grantor and the spouse are living separate and apart within the meaning of the *Divorce Act* (Canada); or
- b) a relative of the grantor, if the grantor and the relative are related only by marriage and the grantor and his or her spouse are living separate and apart within the meaning of the *Divorce Act* (Canada).

**(2) Notice to other persons** – An attorney who resigns shall make reasonable efforts to give notice of the resignation to persons with whom the attorney previously dealt on behalf of the grantor and with whom further dealings are likely to be required on behalf of the grantor.

The *SDA* is silent as to the formalities required for the execution of resignations of attorneys under a *POA*. Although there is no prescribed form in accordance with the *SDA* for resignations, and since it is the attorney resigning as opposed to the grantor granting or revoking a *POA*, it makes perfect sense that there is no need to have the same formalities of execution, but it is my practice to always obtain two witnesses and to have the resignations executed in the presence of two witnesses, each of whom signs the form of resignation as witness.

The revocation of a *CPOAP* is governed by s. 12(2) of the *SDA*. A revocation must be in writing and must be executed in the same way as a *CPOAP* with the grantor who is revoking/signing the revocation in the presence of two witnesses who also sign the revocation in the presence of the grantor and each of the others.

If the suspicion is that a *POA* has been obtained from an incapable person, it is recommended that a capacity assessment be considered in accordance with Sections 22 and 55 of the *SDA*.

There is no statutory reference in the *SDA* as to who assesses the capacity of a person to give a *CPOAP*. Section 9 of the *SDA* states that a *CPOAP* is valid if the grantor, at the time of executing it,

was capable of giving it, even if not capable of managing property. A lawyer assisting the grantor in preparing a CPOAP should be satisfied that the grantor is mentally capable for this purpose.

Detailed notes of the lawyer assisting the grantor in entering into the POA should be maintained on file. The notes should include references as to who was present when the POA was executed, and why the lawyer believed that the grantor was mentally capable. As guidelines to the inclusion in lawyers' notes, reference should be made to the definition of capacity to give a CPOAP as set out in the SDA.

If your situation is one where it is likely that the capacity of the grantor may be challenged, it is advisable to consider an assessment before the CPOAP is executed as a preventative and/or protective measure.

If the grantor of the CPOAP is not capable at the time of execution of the POA, the document, and everything done under it, is void *ab initio*. The responsibility then falls upon a third party dealing with the attorney to make enquiries and to be satisfied that the grantor of the POA had the requisite capacity when the POA was granted and that the appointment has not been subsequently terminated. It is important to give notice to all parties who may rely upon the POA that there has been a revocation, resignation or termination.

## **CONCLUSION**

A POA is viewed as a beneficial planning tool because of its flexibility, the power terminating on death and active from the date it is executed. Customization is optional, and therefore a CPOAP is a useful tool. In certain circumstances, trusts may be better suited for the management of assets in the event of incapacity. There are many advantages to a trust document, including the benefit of continuity on death. This is only an aside for consideration as an alternative, either way, careful and considered planning should prevail.

## CHAPTER 6: POWER OF ATTORNEY FOR PERSONAL CARE

### INTRODUCTION

An attorney under a Power of Attorney for Personal Care (“**POAPC**”) only came into effect as a result of legislative reforms which were brought into effect in 1992, included the *Substitute Decisions Act, 1992* (“**SDA**”),<sup>1</sup> the *Consent to Treatment Act, 1992*,<sup>2</sup> the *Advocacy Act, 1992*,<sup>3</sup> and the *Consent and Capacity Statute Law Amendment Act, 1992*,<sup>4</sup> all of which legislation came into force in 1995, with subsequent amendments.

In 1996, the *Health Care Consent Act* <sup>5</sup> (“**HCCA**”) replaced both the *Consent to Treatment Act 1992*, and the *Consent and Capacity Statute Law Amendment Act, 1992*. The *HCCA*, governs health care issues in the areas of consent to treatment, treatment, admission to a care facility, Consent and Capacity Board reviews, and intervention and personal assistance services.<sup>6</sup>

The *HCCA* is concerned with consent to specific treatment and other personal care decisions as well as the means for giving substitute consent where a patient is found to be incapable.

The authority for both an attorney for personal care, and a guardian of the person is found in Part II of the *SDA*. The *SDA* provides guidance regarding the execution of a POAPC,<sup>7</sup> revocation,<sup>8</sup> resignation,<sup>9</sup> and termination.<sup>10</sup>

Notably, this type of document is a flexible vehicle for assisting the grantor with personal care decisions when, and if it becomes necessary to do so, and is sometimes informally, referred to as a “Living Will” which may contain advance directives for care.

1 *Substitute Decisions Act, 1992*, SO 1992, c.30 (“*SDA*”)

2 *Consent to Treatment Act, 1992*, SO 1992, c 31, Repealed since 1996-03-29.

3 *Advocacy Act, 1992*, SO 1992, c 26, Repealed since 1996-03-29.

4 *Consent and Capacity Statute Law Amendment Act, 1992*, SO 1992, c 32

5 *Health Care Consent Act, 1996*, SO 1996, C.2, Schedule A. (“*HCCA*”).

6 *HCCA, ibid*, Part 1 General, s. 1(a)-(f).

7 *SDA, supra* note 1, s.48

8 *SDA, supra* note 1, s. 50.

9 *SDA, supra* note 1, s. 52.

10 *SDA, supra* note 1, s. 53.

A POAPC is never used except in circumstances where the grantor is incapable of making a decision either because the grantor is generally unable to make decisions, or is not able to make specific decisions.<sup>11</sup> An Attorney, under a POAPC, can make decisions concerning health care, nutrition, shelter, clothing, hygiene or safety. Some health care decisions made by the substitute decision-maker are also covered by the *HCCA*.

### **FORMAL REQUIREMENTS FOR A VALID POAPC**

The POAPC requirements are set out at Section 46 of the *SDA*. A POAPC must be written,<sup>12</sup> but need not be in any particular form.<sup>13</sup> The *SDA* prohibits the persons who provide health care for compensation, or residential social or support services to a grantor for compensation from acting as an attorney under a POAPC except insofar as the person is the spouse, partner or relative of the grantor.<sup>14</sup>

A POAPC is valid if, at the time it was executed, the grantor was capable of giving it, even if the grantor was incapable of personal care.<sup>15</sup>

A POAPC must be executed in the presence of two witnesses, who sign the document as witnesses.<sup>16</sup> The list of people who cannot be witnesses is the same for a POAPC as it is for a Continuing Power of Attorney for Property (“**CPOAP**”),<sup>17</sup> and includes: the attorney or attorney’s spouse, the grantor’s spouse or partner, a child of the grantor, or a person whom the grantor has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship or who has a guardian of the person, a person who is less than eighteen years of age.<sup>18</sup>

### **RESIGNATION AND REVOCATION**

An attorney under a power of attorney for personal care may resign at any time, but if the attorney has acted under the power of attorney, the resignation is not effective until the attorney delivers a copy of the resignation to: the grantor; any other attorneys under the power of attorney; the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person; and, unless the power of attorney provides

11 *SDA, supra* note 1, s. 49.

12 *SDA, supra* note 1, s. 46(1).

13 *SDA, supra* note 1, s. 46(8).

14 *SDA, supra* note 1, s. 46(3).

15 *SDA, supra* note 1, s. 47(2).

16 *SDA, supra* note 1, s. 48(1).

17 *SDA, supra* note 1, s. 48(2).

18 *SDA, supra* note 1, s. 10(2).

otherwise, the grantor's spouse or partner and the relatives of the grantor who are known to the attorney and reside in Ontario, if the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.<sup>19</sup>

The provision further provides that the resignation notice need not be delivered to the grantor's spouse or relative through marriage in cases where the grantor and the spouse are living separate and apart within the meaning of the *Divorce Act* (Canada).<sup>20</sup>

An attorney who resigns shall make reasonable efforts to give notice of the resignation to persons with whom the attorney previously dealt on behalf of the grantor and with whom further dealings are likely to be required on behalf of the grantor.<sup>21</sup>

The revocation of a POAPC is governed by Section 53(2) of the *SDA*.<sup>22</sup> The revocation process respecting a POAPC is similar to the process respecting a CPOAP. It must be in writing and must be executed in the same way as the POAPC, with the grantor who is revoking signing the revocation in the presence of two witnesses who also sign the revocation in the presence of the grantor and each of the others.

## **ATTORNEYS UNDER A POAPC**

A person is considered to be incapable of personal care if he or she is "not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene, safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision."<sup>23</sup>

A person may therefore have personal care decisions made on his or her behalf by one or more attorneys acting under a POAPC which, like the CPOAP, is executed at a time when such person has the requisite decisional capacity to give such a POA, or alternatively, under a court-appointed guardianship of the person. The Public Guardian and Trustee is normally only a guardian of last resort. The Public Guardian and Trustee may be an attorney if consent is obtained in writing before the POA is executed.<sup>24</sup>

It is crucial for attorneys to understand that an attorney under a POAPC is not a care provider, but rather a substitute decision-maker.

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19 *SDA, supra* note 1, s. 52.(1)

20 *SDA, supra* note 1, s. 52.(1.1)

21 *SDA, supra* note 1, s. 52.(2)

22 *SDA, supra* note 1, s. 53(2): "A revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care."

23 *SDA, supra* note 1, s. 45.

24 *SDA, supra* note 1, s. 45(2).

The *SDA* does not contain any provision for the compensation of an attorney for personal care. No Regulations exist to date under the *SDA* that are applicable to compensation for personal care. It is likely that the reason for such an absence of regulation stems from the premise that personal care decisions are ethical decisions and arguably, compensation should not be taken. Additionally, personal care decisions are not easily quantifiable, whereas property decisions lend themselves more easily to calculation. Drafting considerations may include recovery for expenses and disbursements of the attorney.

While there is no statutory framework for compensation for providing personal care services, case law supports the general proposition that a court can fix and award such compensation when presented with an adequate record.<sup>25</sup> In fixing and awarding compensation, the court is guided by the overarching principles of reasonableness and proportionality.

The case of *Re Brown*, addressed the issue of payment for the provision of personal care services. The outcome of the court deliberations on the issue of compensation concluded that while compensation for personal care is sound in principle, the court could not award compensation since no evidentiary basis upon which to calculate the value of services and the reasonableness of the amount of the claim was put forward.<sup>26</sup>

Most recently, in *Daniel Estate (Re)*, the Ontario Superior Court awarded compensation of over \$135,000.00 to two attorneys under a POAPC for providing personal care services to an elderly couple for over six years. The attorneys presented affidavit evidence with an estimate of the hours and frequency of care provided and hired a Certified Canadian Life Care Planner to quantify the compensation sought. The Honourable Justice Di Luca concluded:

When I assess the range of services provided over the number of years indicated, in the context of the Daniels' financial means and the impact that those services had in terms of the Daniels' independence and dignity, I have no hesitation concluding that the amount sought is reasonable and proportionate in the circumstances.<sup>27</sup>

Practically speaking, if compensation is to be awarded it is prudent to provide for such compensation in the POA itself.

25 *Re Brown* (1999) 31 ETR (2d) 164, 1999 CarswellOnt 4629 at para. 3; *Childs v. Childs*, 2015 ONSC 4036 at paras. 30-32, upheld on appeal 2017 ONCA 516; and *Cheney v. Byrne (Litigation Guardian of)*, 2004 CarswellOnt 2674 (SCJ).

26 *Re Brown* (1999) 31 ETR (2d) 164, otherwise for *quantum meruit* argument.

27 *Daniel Estate (Re)*, 2019 ONSC 2790, at para. 29.

## **CAPACITY TO GRANT POAPC**

Section 47 of the *SDA* sets out the criteria to be applied to determine whether the grantor has the requisite capacity to grant or revoke a POAPC. A person is capable of giving a POAPC, if the person has:

- a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and,
- b) The appreciation that the person may need to have the proposed attorney make decisions or the person.<sup>28</sup>

The factors to be applied to determine requisite capacity to grant or revoke a POAPC are noticeably different than those for granting or revoking a CPOAP. While the criteria to be applied for assessing capacity to grant a CPOAP incorporate a significant amount of information that the grantor must be able to comprehend, for a POAPC, the grantor is only required to be able to understand whether the proposed attorney for personal care has the grantor's best interests in mind, and that the POAPC means the proposed attorney may be authorized to make such personal care decisions for the grantor.

As with a CPOAP, there is a distinction between the capacity to *grant or revoke* a POAPC, and the capacity to *manage* personal care.

## **"USE OF FORCE" PROVISIONS**

Section 50 of the *SDA* allows a POAPC to contain special provisions that can authorize the use of force by an attorney.

A "use of force" provision is only effective if certain requirements to demonstrate the grantor's capacity are met. The grantor must indicate, either at the time of executing the POAPC or within 30 days thereafter, that they understand both the provision's effect and the requirements to revoke it. A capacity assessor must also, within 30 days of execution, make a statement that he or she has assessed the grantor's capacity, and, based on specified facts, found the grantor to be capable of understanding this information.<sup>29</sup>

A "use of force" provision can allow an attorney to use or authorize force "that is necessary and reasonable in the circumstances" to obtain an assessment of the grantor's capacity, to take the

<sup>28</sup> *SDA*, *supra* note 1, s. 47.

<sup>29</sup> *SDA*, *supra* note 1, s. 50(1).



grantor to “any place for care and treatment” or to detain and restrain the grantor in some such place. The grantor can also make a provision to waive certain rights to apply to the Consent and Capacity Board for a review of a finding of incapacity.<sup>30</sup>

A POAPC can contain conditions or restrictions on its “use of force” provision, as long as they are consistent with the SDA.<sup>31</sup>

A grantor can revoke a “use of force” provision if they undergo a capacity assessment no more than 30 days before the revocation. The assessor must confirm, based on specified facts, that the grantor was capable of personal care at the time of the assessment.<sup>32</sup>

The SDA indemnifies attorneys, police, and all other people against actions arising from properly authorized use of force.<sup>33</sup>

### **WHEN A POAPC BECOMES EFFECTIVE**

The POAPC becomes effective only when the donor of the POA is not capable of making decisions, either generally or specifically. The attorney can make a personal care decision if it is authorized by the HCCA, or if they have reasonable grounds to believe that the grantor is incapable unless the POAPC contains a requirement that the grantor’s incapacity is confirmed.<sup>34</sup> If the POAPC contains such a requirement and does not specify a method by which to confirm incapacity, the default method is by notice to the attorney from a capacity assessor who has assessed the grantor.<sup>35</sup>

Similar difficulties occur with the POAPC, as with triggering events in a CPOAP, regarding issues of the grantor’s capacity. The authority to act arises when the donor is not capable of personal care decisions, and in providing for specified contingencies for illnesses such as schizophrenia, bipolar disorder, obsessive-compulsive disorder, and clinical depression. These are diseases of the brain that affect a person’s reasoning and some individuals do not recognize that while they are ill, the symptoms of their condition will respond to medication. Therefore, they do not seek treatment. If hospitalized, they may be unwilling or unable to comply with treatment plans after discharge. When this occurs, the individual may require involuntary treatment to protect his or her life and avoid tragic social and personal consequences. How the lawyer drafts around the need for involuntary treatment is an on-going and complicated issue.

30 SDA, *supra* note 1, s. 50(2).

31 SDA, *supra* note 1, s. 50(3).

32 SDA, *supra* note 1, s. 50(4).

33 SDA, *supra* note 1, s. 50(5).

34 SDA, *supra* note 1, s. 49(1).

35 SDA, *supra* note 1, s. 49(2).



## **EXPRESSING WISHES IN A POAPC**

The attorney under a POAPC is required to make decisions on the incapable person's behalf in accordance with the *SDA*, and decisions on the incapable person's behalf to which the *HCCA* applies.<sup>36</sup> Where the *HCCA* does not apply, the attorney must make decisions on the incapable person's behalf with the following principles as guidelines:

- a) If the attorney/guardian knows of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, the guardian shall make the decision in accordance with the wish or instruction.
- b) The attorney/guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.
- c) A later wish or instruction expressed while capable prevails over an earlier wish or instruction.
- d) If the attorney/guardian does not know of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, the guardian shall make the decision in the incapable person's best interests.<sup>37</sup>

Where neither the *SDA*, nor, the *HCCA* applies, the attorney acting under a POA must also have regard to the known wishes or instructions of the incapable person expressed at a time when the person had the requisite capacity. Similarly, such an attorney must use reasonable efforts to ascertain and then to act in accordance with the wishes or instructions of the incapable person, or otherwise to act in the best interests of the incapable person. In order to act in accordance with the best interests, the attorney must consider the values and beliefs of the individual in question, current wishes, if ascertainable, and general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.<sup>38</sup>

The first problem with expressing wishes in a POAPC is that a person's wishes, values or beliefs may change, but often the POA does not get updated accordingly. That is why the *HCCA* recognizes that later wishes prevail over prior ones – even when the prior wishes were in writing and the later ones were not.<sup>39</sup>

<sup>36</sup> *SDA*, *supra* note 1, s. 66(2.1).

<sup>37</sup> *SDA*, *supra* note 1, ss. 66(3) & 67.

<sup>38</sup> *SDA*, *supra* note 1, ss. 66(4) & 67.

<sup>39</sup> *HCCA*, *supra* note 5, s. 5.

The second problem is convincing health care professionals that the POAPC is *not* consent to treatment. It is no more than a guide to the named attorneys as to what the person's wishes, values, and beliefs are relevant to the treatment decision. Some other jurisdictions consider an advance directive to be consent to treatment, and health practitioners trained there or trained in jurisdictions that do not address the issue legally at all, continue to believe that the wish expressed in a POA authorizes them to treat the person without consent.

The third and most common problem is the failure of the grantor to convey sufficient information to named attorneys regarding expressions of wishes. Attorneys for personal care occasionally reject the wish expressed in the POAPC because it is contrary to their own religious beliefs (withdrawing treatment, for example, with the intent of allowing death) or because they believe it contrary to the religious beliefs of the grantor. Or they simply refuse to accept it.

It is therefore vital that a person contemplating a POA have discussions with proposed attorneys to ensure they have an understanding of the person's treatment wishes, the religious and cultural beliefs the person would want to be respected at end of life and to ensure that the proposed attorney is willing to respect the grantor's expressed wishes.

The attorney under a POAPC document is increasingly viewed as a planning tool for the end of life, which arguably would be beneficial if the grantor includes the involvement of family and/or close friends. While the POA assists its grantor in being able to set out extensively the grantor's wishes with respect to personal care if so desired, quite often the document does not contain detailed instructions. As such, discussion with family members or proposed attorneys could benefit the grantor by facilitating a forum within which can be discussed the grantor's wishes and instructions. This is particularly important when considering the subject is not only sensitive to the proposed attorney or family members, but also to the grantor of such a power.

A lawyer does not necessarily have to be involved in such planning, but at the very least could inform an attorney or the grantor as to the benefits of advanced care planning within the family context, or as appropriate if the grantor does not have family, which will facilitate matters for everyone involved.

Where an attorney is not able to make a decision on behalf of an incapable person, perhaps because to provide the proper care would be to go against the wishes of the grantor of the POA, then there is a provision within the legislation to go before the Consent and Capacity Board to obtain a decision on the attorney's behalf.

Similarly, an attorney for personal care again may request the direction or assistance of the court on any issue arising under a POA either on behalf of the incapable person, or that person's dependants.<sup>40</sup>

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40 SDA, *supra* note 1, s. 68(1).

## **CONCLUSION**

While a POAPC is an important tool in taking steps to ensure that an incapable person's interests are protected, it is important to recognize the extent to which it engages with difficult issues regarding the grantor's capacity, health, and values. It confers extensive responsibilities on an attorney, some of which are elaborated on in Chapter 7, and is often the subject of legal disputes. As with a CPOAP, a grantor of a POAPC and their lawyer must plan carefully.

# CHAPTER 7: DUTIES OF AN ATTORNEY

## INTRODUCTION

An attorney for property acting pursuant to a Continuing Power of Attorney for Property (“**CPOAP**”) or an attorney for personal care acting pursuant to a Power of Attorney for Personal Care (“**POAPC**”), is tasked with the very important duty of making decisions on behalf of the incapable grantor. In carrying out this mandate, attorneys are considered fiduciaries and are bestowed with numerous duties under the governing legislation, in equity and common law. The purpose of this Chapter is to provide an overview of these duties and the consequences of such if they are not fulfilled.

## WHAT IS A FIDUCIARY?

A fiduciary is normally someone who acts on a vulnerable person’s behalf, with a duty to act in that person’s interests. Where a fiduciary relationship between two persons exists in the legal sense, there exists a relationship of trust, or confidence which gives rise to an equitable duty of faithfulness, fidelity, and loyalty.

In a British Columbia Supreme Court of Canada case, *Hodgkinson v. Simms*,<sup>1</sup> the dissenting Judges, Sopinka and McLachlin, considered the notion of “vulnerability” in the context of fiduciary relationships. This very lengthy case raises issues concerning whether a fiduciary duty arises and what a fiduciary duty is. According to Sopinka and McLachlin JJ, who refer to the dissenting reasons of Wilson J, in *Frame v. Smith*,<sup>2</sup> concerning the meaning of vulnerability “..the “scope for the exercise of ... discretion or power” in the fiduciary and to the power of the fiduciary to “unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests” (emphasis added)”.

Wilson J., also referred to the beneficiaries as being;

...at the mercy” of the fiduciary...Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame*

1 *Hodgkinson v. Simms*, [1994] 3 SCR 377.

2 *Frame v. Smith*, [1987] 2 SCR 99.

v. *Smith* (set out below). It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other...vulnerability does not mean merely “weak” or “weaker” it connotes a relationship of dependency, and “implicit dependency” by the beneficiary on the fiduciary.

Wilson J, in *Frame v. Smith* identified the following characteristics of a fiduciary relationship:

- 1) The fiduciary has scope for the exercise of some discretion or power;
- 2) The fiduciary can unilaterally exercise that power or discretion so, as, to affect the beneficiary’s legal or practical interests; and,
- 3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary power.<sup>3</sup>

The decision in *Re Koch*,<sup>4</sup> is a clear illustration of how “vulnerability” may arise in respect of physical circumstances rather than mental. This decision also demonstrates that “vulnerability” can exist whether or not, there is a fiduciary relationship. *Re Koch* is an appeal case from the Consent and Capacity Board. An excerpt from Justice Quinn’s decision:

The assessor\evaluator must be alive to an informant harbouring improper motives. Higgins should have done more than merely accept the complaint of the husband, coupled with the medical reports (the shortcomings of which are chronicled above), before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband’s lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.

The physical impairment suffered by Ms. Koch in these proceedings was Multiple Sclerosis. Vulnerability is not necessarily limited to the elderly or those with physical or mental impairments, but can also arise as a result of other circumstances.

Justice D. Brown noted the impact of power of attorney (“**POA**”) litigation on vulnerable grantors in the case of *Baranek Estate*:

<sup>3</sup> *Frame v. Smith*, [1987] 2 SCR 99, para 60.

<sup>4</sup> *Re Koch* 33 O.R. (3d) 485.

The so-called “battle of competing powers of attorney” is emerging as a growing area of litigation. This is a most unhealthy development. I suspect that when the Legislature passed the Substitute Decisions Act back in 1992 it intended to put in place a legal framework which would protect the affairs of the vulnerable elderly, not spawn a new breed of litigation which would see the hard-earned money of the vulnerable being exposed to claims for the payment of legal fees incurred by those whom they had appointed to protect their interests. . . I am signaling that the inter-attorney litigation which erupted in this case is symptomatic of a much larger problem which, as Ontario’s population ages, risks turning into a very serious social issue. Indeed, I think the time may have arrived for the Legislature of this province to look into this problem of litigation involving competing powers of attorney, especially involving subsequent powers of attorney made during the latter periods of a person’s life when they are vulnerable to pressure, in order to see whether new protections are required to ensure that the assets of the vulnerable are used for one purpose only – the satisfaction of the needs of the vulnerable elderly while they are alive.<sup>5</sup>

## **ATTORNEYS AS FIDUCIARIES AND THE GOVERNING LEGISLATION**

An attorney is a fiduciary, and in that regard, it is expected of an attorney that the duties entrusted to the attorney be exercised diligently, with honesty, integrity, in good faith, and in the best interests or benefits to the incapable person and the incapable person’s dependents if applicable.<sup>6</sup>

In the appeal of *Richardson Estate v Mew*, the Ontario Court of Appeal addressed the fiduciary duty of an attorney with respect to changing beneficiary designations:

After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson’s benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancelling of the Policy or a cessation of the premium payments would have been for Mr. Richardson’s benefit.<sup>7</sup>

The *Trustee Act*,<sup>8</sup> does not apply to the exercise or performance of an attorney’s duties, although

<sup>5</sup> *Baranek Estate* 2010 ONSC 6375, para. 6.

<sup>6</sup> *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, at ss. 32(1) and 38(1), (“SDA”)

<sup>7</sup> *Richardson Estate v. Mew*, 2009 ONCA 403, para. 51.

<sup>8</sup> *Trustee Act*, R.S.O. 1990 c. T. 23.

similar fiduciary obligations apply equally to attorneys. Some of the common law principals governing fiduciary conduct have been codified under the *Trustee Act*, but have not been similarly codified in the *Powers of Attorney Act* (“**POAA**”),<sup>9</sup> nor, in the *Substitute Decisions Act* (“**SDA**”),<sup>10</sup> including issues such as prudent investment obligations and indemnification of attorneys. It is arguable that because a principal is always under a duty to indemnify his agent, there is an implied promise to indemnify the agent.

An attorney for an incapable grantor is an agent of that person who carries out the instructions of the grantor and is considered as the principal. An attorney in this position is a fiduciary owing a duty only to the grantor, and should, therefore, keep written documentation of instructions.

The many duties and responsibilities for attorneys, either for property or personal care, make it essential that an attorney or grantor of such power is educated such that each role assumed may be fulfilled to the best of one’s ability while understanding the extent of the authority, and scope of duties and liabilities granted or received.

## **COMMON LAW DUTIES OWED BY ATTORNEYS FOR PROPERTY AND PERSONAL CARE**

At common law, the so-called power is not really a power but is merely a manifestation of the authority given by the principal to the agent. A POA confers authority to act as the agent. It is not a direction to act. The agent must pay regard to the subsequent orders of the principal (the grantor) after the POA has been given.

A fiduciary has the power to alter the principal’s legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. A fiduciary:

- a) must use reasonable care in acting;
- b) must not obtain secret profits;
- c) must account;
- d) must not allow personal interests to conflict with those of the principal;
- e) cannot make, change or revoke a Will on behalf of the donor; and
- f) cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

<sup>9</sup> *Powers of Attorney Act*, R.S.O. 1990, c. P.20.

<sup>10</sup> *SDA*, *supra* note 6.

The POA can be tailored to the specific wants and needs of the grantor. In other words, it can be used to grant:

- a) a specific, or limited authority;
- b) general authority granting the power to do all that is permissible under the governing principles and legislation;
- c) a continuing authority, meaning that it will survive subsequent incapacity; and
- d) it can deal not only with property matters but, also personal care matters as well.

A POA must be in writing and, therefore, the courts have construed the authority conveyed by the power strictly. There is a wealth of English and Canadian common law on the strict construction of Powers of Attorney.<sup>11</sup>

### **STATUTORY DUTIES OF ATTORNEYS UNDER THE SDA**

The SDA sets out the framework within which decisions regarding the management of property, and personal care are made. The SDA is a collection of statutory duties and obligations for attorneys and is codified in such a form so as to prescribe the rules, so to speak, for the attorneys.<sup>12</sup>

The SDA applies not only to attorneys under a POA, but also to statutory guardians and to court-appointed guardians. The SDA sets out separately the types of duties applicable to attorneys for property, and for personal care.

The duties and responsibilities are similar as regards property and personal care, but differences do exist. The SDA divided the provisions into decisions involving property, and personal care.

The many duties and responsibilities for attorneys, either for property or personal care, make it essential that an attorney or grantor of such power is educated such that each role assumed may be fulfilled to the best of one's ability while understanding the extent of the authority, and scope of duties and liabilities granted or received.

The Judgment of the Honourable Mr. Justice Cullity (as he then was) in *Banton v. Banton*,<sup>13</sup> discusses many of the principles regarding an attorney's performance of responsibilities before

11 See, for example, *Taylor v. Wallbridge* (1879) 2 SCR 616; *British North American Mining Company v. Pigeon River Lumber Company* (1912) 3 OWN 701 (CA).

12 "Checklist: Duties of an Attorney Under Power of Attorney for Property" online: [http:// www.welpartners.com/resources/ WEL\\_CapacityChecklist\\_POA\\_Property.pdf](http://www.welpartners.com/resources/WEL_CapacityChecklist_POA_Property.pdf); and "Checklist: Duties of an Attorney Under Power of Attorney for Personal Care", online: [http://www.welpartners.com/resources/ WEL\\_CapacityChecklist\\_POA\\_PersonalCare.pdf](http://www.welpartners.com/resources/WEL_CapacityChecklist_POA_PersonalCare.pdf)

13 *Banton v. Banton*, [1998] 164 DLR (4<sup>th</sup>) 176, 1998 CanLII 14926 (ONSC).



and after the grantor loses capacity as well as the differences between an attorney and a trustee. The Honourable Justice Cullity discussed the authority of an attorney and stated that there were differences concerning such authority when a donor had mental capacity, and when the donor lost mental capacity. Some of the specific duties and obligations of an attorney for Property include the following:

- 1) Manage a person's property in a manner consistent with decisions for the person's personal care;<sup>14</sup>
- 2) Explain to the incapable person the attorney's powers and duties;<sup>15</sup>
- 3) Encourage the incapable person's participation in decisions;<sup>16</sup>
- 4) Consult with the incapable person from time to time as well as family members, friends and other attorneys;<sup>17</sup>
- 5) Determine whether the incapable person has a Will and preserve to the best of the attorney's ability the property bequeathed in the Will;<sup>18</sup> and,
- 6) Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into consideration the value of the property of the incapable person, including standard of living, and other legal obligations.<sup>19</sup>

The attorney must exercise discretion in dealing with the incapable person's property as to whether, or not, the best interests of the person warrant such action, transaction or dealings. The attorney for property also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines under the SDA.<sup>20</sup>

As with the duties of an attorney under a CPOAP, an attorney for personal care must also explain the attorney's powers and duties to the incapable person and encourage participation in decisions.<sup>21</sup>

The attorney must facilitate the incapable person's contact with family members and/or relatives and friends as well as consult with such persons from time to time.<sup>22</sup>

14 SDA, *supra* note 6, s. 31(1.2).

15 SDA, *supra* note 6, s. 32(2).

16 SDA, *supra* note 6, s. 32(3).

17 SDA, *supra* note 6, s. 32(4), 32(5).

18 SDA, *supra* note 6, ss. 33, 35.1(1), 35.1(2), 35.1(3).

19 SDA, *supra* note 6, s. 37(1), 38(1).

20 SDA, *supra* note 6, s. 37(2)(3)(4)(5) & (6).

21 SDA, *supra* note 6, s. 66(2).

22 SDA, *supra* note 6, s. 66(6).

The attorney must also facilitate the incapable person's independence and assist in choosing the least restrictive and intrusive courses of treatment or action.<sup>23</sup>

Specifically, the attorney under a POAPC must not use any means of confinement, monitoring devices, restraint, detention of the incapable person physically, or through the use of drugs, and shall not consent on the incapable person's behalf to the use of such measures, unless specifically used to prevent personal harm, or harm to another. Additionally, the use of electric shock treatments should not be given or consented to on the incapable person's behalf unless in accordance with the *Health Care Consent Act*.<sup>24</sup>

An attorney for personal care is required to keep extensive records of decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, including the names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.<sup>25</sup>

An attorney under a POAPC also must exercise powers diligently and in good faith.<sup>26</sup> No proceedings for damages shall be commenced against an attorney for personal care for anything done or admitted in good faith in connection with the attorney's powers and duties under the *SDA*.<sup>27</sup>

## **REMOVAL OF ATTORNEYS**

What do you do when you want to challenge an attorney under a CPOAP or POAPC, and you want to challenge the power granted?

One option is to compel a resignation of the attorney. Section 11 of the *SDA* deals with the resignation of an attorney under a CPOAP.<sup>28</sup> Similarly, the resignation of an attorney for personal care is addressed in Section 52 of the *SDA*.<sup>29</sup>

A revocation of the POA document is another option. The revocation of a CPOAP is governed by Section 12(2) of the *SDA*.<sup>30</sup> The revocation of a POAPC is governed by Section 53(2) of the *SDA*.<sup>31</sup>

<sup>23</sup> *SDA*, *supra* note 6, s. 66(8) & 66(9).

<sup>24</sup> *SDA*, *supra* note 6, s. 66(10).

<sup>25</sup> *SDA*, *supra* note 6, s. 66(4.1), O. Reg. 100/96.

<sup>26</sup> *SDA*, *supra* note 6, s. 66(1).

<sup>27</sup> *SDA*, *supra* note 6, s. 66(19) & s. 67.

<sup>28</sup> *SDA*, *supra* note 6, s. 11.

<sup>29</sup> *SDA*, *supra* note 6, s. 52.

<sup>30</sup> *SDA*, *supra* note 6, s. 12(2): "The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney."

<sup>31</sup> *SDA*, *supra* note 6, s. 53(2): "The revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care."

Revocations must be in writing and executed in the same way as the POA. The formalities for execution are as set out in Sections 10 and 48 of the *SDA*.

Keep in mind if as a lawyer you are attempting to effect a resignation or revocation from someone other than your client, it is prudent to consider recommending independent legal advice to protect your client.

If the objective is to challenge the granting of a POA to a particular person, your options are to seek the willing resignation of the attorney and have proper resignations effected ensuring independent legal advice for the resigning attorney; or, assuming that the grantor is capable, obtain a revocation in accordance with the applicable Sections of the *SDA*, again ensuring that independent legal advice is obtained; or, again assuming that the grantor is capable of arranging for a new POA to be executed. The requirements for resignation and revocation under the *SDA* are described in more detail in Chapter 5 for CPOAP, and in Chapter 6 for POAPC.

If the suspicion is that a POA has been obtained from an incapable person, it is recommended that a capacity assessment be considered in accordance with Sections 22 and 55 of the *SDA*. Assessments are not covered by the Ministry of Health and Long-Term Care or the Ontario Health Insurance Plan and therefore advice must be given to the client respecting the costs of the assessment process and the legal consequences to the assessed person.

It is important to consider the date upon which the POA was executed in conjunction with the timing of the capacity assessment. If the two dates are close in time, it may be that the grantor did not have the capacity to grant the POA in accordance with the requirements of Sections 8 and 47 of the *SDA*. However, it should be noted that capacity and/or incapacity is not static and may fluctuate based on individual circumstances. In order to challenge the validity of the POA, proceedings must be brought before the court to challenge the validity of the document.

Often when a POA document is attacked on grounds of incapacity, an alternative allegation is made that the grantor was unduly influenced to execute the POA, and therefore, the POA should be set aside. In general, to establish undue influence, the burden of proof rests with the party alleging it. Simple influence is not enough; the grantor's free will must be overborne. Notably, however, where a relationship is not one of equals and there is an abuse of power undue influence may be established.<sup>32</sup>

A drafting lawyer should take extensive and detailed notes on the assessment of a client's capacity

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32 *Seguin v. Pearson*, 2018 CanLII 355 (ONCA) at para. 11. For more information on undue influence see "Undue Influence Checklist: Estates and Related Matters" online: [http://welpartners.com/resources/WEL\\_Undue\\_Influence\\_Checklist.pdf](http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf)

and document any potential for undue influence. A formal assessment, done by a designated capacity assessor may give the drafting lawyer and client, better certainty, and may also form persuasive evidence if needed by a court in the event of litigation.<sup>33</sup>

## **CONCLUSION**

Although the very term “power of attorney” implies broad authority to act on an incapable person’s behalf, attorneys must carefully navigate the various legal and ethical duties that accompany this authority. As in any fiduciary relationship, it is the incapable person’s interests, and often their wishes, that must guide the attorney’s decisions. It is advisable that an attorney under a CPOAP or a POAPC seek legal advice in order to best understand and fulfill their duties.

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33 For more on capacity in an estates practice see “Capacity Checklist: The Estate Planning Context” and “Summary of Capacity Criteria” online: [http://www.welpartners.com/resources/WEL\\_CapacityChecklist\\_EstatePlanningContext.pdf](http://www.welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf); and [http://www.welpartners.com/resources/WEL\\_SummaryofCapacityCriteria.pdf](http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf)

## CHAPTER 8: GUARDIANSHIP

### INTRODUCTION

In this chapter, we will discuss in a summarized manner the types of guardianship that an incapable individual may be a party to, and the mechanisms used to obtain same in the province of Ontario.

Individuals who are unable to manage their own finances and personal care and who are not capable of making their own financial or personal care decisions are vulnerable and may be susceptible to abuse. Guardianship, a choice of last resort, is one means of managing the affairs of individuals under disability. There are various guardianship regimes recognized under the *Substitute Decisions Act*<sup>1</sup> (“**SDA**”), The *Children’s Law Reform Act*<sup>2</sup> (“**CLRA**”) and the Rules of Civil Procedure.<sup>3</sup> Across these regimes, there are two basic categories of guardianship: of the person, and of property. This chapter will only look at guardianship in the context of adults.

For a detailed review of this subject matter, WEL Partners has written a book on the topic of Estate Litigation on Guardianship that can be found on our website at: <http://welpartners.com/resources/WEL-on-guardianship.pdf>.

### GUARDIANSHIP UNDER THE SUBSTITUTE DECISIONS ACT

The purpose of the *SDA* is to protect the vulnerable while at the same time ensuring that the dignity, privacy, and autonomy of the individual are “assiduously protected.”<sup>4</sup> The *SDA* presumes a person is capable.<sup>5</sup> Sections 22(3) and 55(2) of the *SDA* require that a court “shall not” appoint a guardian if it is satisfied that the need for decisions can be satisfied by an alternative course that is less restrictive of the person’s decision-making rights.

Guardians of property and of the person are fiduciaries. These obligations are codified under subsections 32(1) and 66(1) of the *SDA*.

- 1 *Substitute Decisions Act*, 1992, SO 1992, c 30.
- 2 *Children’s Law Reform Act*, RSO 1990, c C.12.
- 3 *Rules of Civil Procedure*, RRO 1990, Reg 194. (the “*Rules*”)
- 4 *Park v Park*, 2010 ONSC 2627, para 47, [2010] OJ No 1840.
- 5 *SDA*, *supra* note 1, s 2(1).

There are a number of ways a guardian can be appointed under the *SDA*. The first is an open-court hearing by way of application, while the second is by way of a summary disposition under sections 72, 74 and 77 of the *SDA*. The summary method of appointment avoids the involved parties having to attend court but requires more by way of documentary evidence before the application can be considered by a judge. Generally, the summary method for the appointment is utilized where the guardianship appointment is unopposed.<sup>6</sup>

If a certificate is issued under the *Mental Health Act*<sup>7</sup> (“**MHA**”) certifying that a person who is a patient of a psychiatric facility is incapable of managing property, and that person has not appointed an attorney, the Public Guardian and Trustee (the “**PGT**”) becomes the person’s statutory guardian.<sup>8</sup> A person may request that a capacity assessor perform an assessment of his/her own capacity or of another person’s capacity to determine whether the PGT should become the statutory guardian.<sup>9</sup> If the assessor finds the person incapable of managing property, statutory guardianship takes effect as soon as the incapable person receives a copy of the certificate issued by the assessor indicating that lack of capacity.<sup>10</sup> Statutory guardianship is different from other types of guardianship due to its automatic mechanism. Once the above-mentioned criteria occur, the guardianship is triggered.

Once a statutory guardianship takes effect, any of the following persons may apply to the PGT to replace the PGT as an incapable person’s statutory guardian:

- 1) the incapable person’s spouse or partner;
- 2) a relative of the incapable person;
- 3) the incapable person’s attorney under a continuing power of attorney, if the power of attorney was made before the certificate of incapacity was issued but does not give the attorney authority over all of the incapable person’s property; and
- 4) a trust corporation within the meaning of the *Loan and Trust Corporations Act*,<sup>11</sup> if the incapable person has a spouse or partner who consents in writing to the application.<sup>12</sup>

6 *Ibid*, s 77(1).

7 *Mental Health Act*, RSO 1990, c M.7.

8 *SDA*, *supra* note 1, s 15.

9 *Ibid*, s 16(1).

10 *Ibid*, s 16(5).

11 RSO 1990, c L.25.

12 *SDA*, *supra* note 1, s 17(1).

## **GUARDIANSHIP OF PROPERTY**

A guardian for property can be court appointed to manage the financial affairs of a person who is declared mentally incapable of doing so.

Before appointing a guardian for property, the court must be satisfied that the following two conditions are met:

- 1) the person is incapable of managing property; and
- 2) as a result of such incapacity, it is necessary for decisions to be made by a person authorized to do so.<sup>13</sup>

In the absence of these two conditions, a guardian should not be appointed.<sup>14</sup>

A person is incapable of managing property if the person “is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”<sup>15</sup>

In deciding who should be appointed a guardian, a court shall consider whether the proposed guardian is the acting attorney under a continuing attorney for property, the incapable person’s wishes (if they can be ascertained) and the closeness of the relationship between the proposed guardian and the incapable person.<sup>16</sup>

Guardians under the *SDA* cannot be the same people who provide health care, residential, social, training or support services to the incapable person for compensation. The exception is where the person providing the services is a spouse, partner or relative or is the person’s attorney for property or personal care.<sup>17</sup>

The court shall not appoint the PGT as a guardian unless the guardianship application proposes the PGT as guardian, the PGT consents and there is no other “suitable” person available and willing.<sup>18</sup>

The wishes of the incapable person play an important role in deciding who should be appointed a guardian, as was recognized in *Lazaroff v Lazaroff*. The court there held that the incapable person’s wishes that her sister not be appointed should be respected; the PGT was appointed instead.<sup>19</sup>

<sup>13</sup> *Ibid*, s 22(1).

<sup>14</sup> *Deschamps v Deschamps*, [1997] OJ No 4894 at para 11, 75 ACWS (3d) 1130 (SC).

<sup>15</sup> *SDA*, *supra* note 1, s 6.

<sup>16</sup> *Ibid*, s 24(5).

<sup>17</sup> *SDA*, *supra* note 1, s 24(1).

<sup>18</sup> *Ibid*, s 24(2.1).

<sup>19</sup> *Lazaroff v Lazaroff*, 2005 CarswellOnt 7007, 23 ETR (3d) 75 (SC).

An order appointing a guardian may:

- 1) require a guardian to post security in a manner and amount the court considers appropriate;
- 2) make the appointment for a limited period as the court considers appropriate; and
- 3) impose such other conditions on the appointment as the court considers appropriate.<sup>20</sup>

When considering who should be appointed guardian where there are conflicting guardianship applications, the court's main focus will be the best interests of the incapable person.<sup>21</sup>

A guardian for property can do anything the incapable person could normally do in relation to his/her own property. This includes collecting and depositing income, paying bills, making purchases, selling assets, handling investments, managing real estate and looking after legal matters. The only matter of a financial nature that a guardian of property cannot do is make, or change, a will on behalf of the incapable person.<sup>22</sup>

An application to appoint a guardian of property for an incapable person must include:

- 1) the proposed guardian's consent;
- 2) a management plan for property in the prescribed form (if the guardian is not the PGT); and
- 3) a statement signed by the applicant, indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application. The statement must describe the manner in which the person was informed, or if it was not possible to give the person the necessary information, the statement must describe why it was not possible.<sup>23</sup>

The guardian may be required to post a bond pursuant to section 25(2)(b) of the *SDA*. The courts have been strict with requiring guardians to post a bond. Often the PGT is of the position that a bond should be posted.

In an application to appoint a guardian for property the following parties must be served with the application material:

- 1) the person alleged to be incapable of managing property;
- 2) the attorney under his or her continuing power attorney, if known;

<sup>20</sup> *SDA*, *supra* note 1, s 25(2).

<sup>21</sup> *Napper v Edwards* (1997), 16 ETR (2d) 309 at para 2, 69 ACWS (3d) 737 (Ont Gen Div)

<sup>22</sup> *SDA*, *supra* note 1, s 31.

<sup>23</sup> *Ibid*, s. 70(1).



- 3) his or her guardian of the person, if known;
- 4) his or her attorney for personal care, if known;
- 5) the PGT; and
- 6) the proposed guardian of property.<sup>24</sup>

The notice of application and accompanying documents shall also be served on all of the following persons by ordinary mail sent to the person's last address:

- 1) the spouse or partner of the person who is alleged to be incapable;
- 2) the person's children who are at least 18 years;
- 3) the person's parents; and
- 4) the person's brothers and sisters who are at least 18.

## **GUARDIANSHIP OF THE PERSON**

A guardian of the person will be appointed where an individual is incapable of personal care. Notably, a finding of incapacity to manage one of the mandated categories of personal care is not a finding that a person is incapable of all. Section 55(1) of the *SDA* provides that a court may appoint a guardian of the person where:

- 1) the person is found to be incapable of personal care; and
- 2) the incapacity results in a need to have decisions made on his/her behalf by a person who is authorised to do so.

Under section 45 of the *SDA*, a person is incapable of personal care if:

The person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Partial guardianships have been viewed as a way of protecting the dignity of those found to have some type of incapacity relating to their personal care who, at the same time, are still partially able to care for themselves.

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<sup>24</sup> *Ibid*, s 69(1).

The court may make an order for partial guardianship of the person if the court finds that the incapable person is only incapable with respect to some but not all of the functions referred to in section 45 of the *SDA*.<sup>25</sup> Any court order tied to guardianship of the person shall specify whether it is full or partial.<sup>26</sup> In addition, the court may make the appointment for a limited period of time or impose conditions to the guardianship as it sees fit.<sup>27</sup>

Similar to the provisions for a guardian for property, a guardian for personal care may not be a person who provides health care, residential, social, training or support services to the incapable person for compensation. The only exceptions are where the person providing the services is an attorney under a Power of Attorney for Personal Care, the incapable person's guardian of property, an attorney under a Continuing Power of Attorney for Property or the court is satisfied there is no one else who could be the guardian for personal care.<sup>28</sup>

Where the guardianship is not applied for under the summary procedure, the court shall consider the following when appointing a guardian for personal care:

- a) whether the proposed guardian is an attorney under a Continuing Power of Attorney for Property;
- b) the incapable person's current wishes (if they can be ascertained); and
- c) the closeness of the relationship of the applicant to the incapable person, and if the applicant is the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.<sup>29</sup>

An application for guardianship of the person requires the consent of the guardian, evidence of incapacity and that a guardianship plan be filed with the court. The plan explains what the guardian will do if appointed to care for the incapable person. The guardian has an obligation to encourage the independence of the incapable person where it is feasible. A plan of guardianship is in a prescribed form,<sup>30</sup> and may be amended with the approval of the PGT.<sup>31</sup>

Where there has been a court order for full guardianship, the guardian may:

- a) exercise custodial power over the person under the guardianship, determine his or her living arrangements and provide for his or her shelter and safety;

25 *SDA*, *supra* note 1, s 60(1).

26 *Ibid*, s 58(3).

27 *Ibid*, s 58(2).

28 *Ibid*, ss 57(1), 57(2), 57(2.1), 57(2.2).

29 *Ibid*, s 57(3).

30 O. Reg. 26/95 Form 3.

31 *SDA*, *supra* note 1, s. 66(16).

- b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;
- c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;
- d) have access to personal information, including health information and records, to which the person could have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;
- e) on behalf of the person, make decisions to which the *Health Care Consent Act, 1996*<sup>32</sup> applies, and make decisions about the person's health care, nutrition and hygiene;
- f) make decisions about the person's employment, education, training, clothing and recreation and about any social services provided to the person; and
- g) may exercise the other powers and perform the other duties as stated in the court order.<sup>33</sup>

For partial orders for guardianship of the person, the court shall specify which functions the person is found to be incapable of and the guardian may exercise the powers that are specified in the order.<sup>34</sup>

An application to appoint a guardian of the person for an incapable person must include:

- 1) the proposed guardian's consent;
- 2) a guardianship plan in the prescribed form (if the guardian is not the PGT); and
- 3) a statement signed by the applicant, indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application. The statement must describe the manner in which the person was informed, or if it was not possible to give the person alleged to be incapable the information, then it must describe why it was not possible to do so.<sup>35</sup>

In an application to appoint a guardian of the person the following parties must be served with the application material:

- 1) the person alleged to be incapable of personal care;

<sup>32</sup> SO 1996, c 2, Sched. A.

<sup>33</sup> SDA, *supra* note 1, s 59(2).

<sup>34</sup> SDA, *supra* note 1, s 60.

<sup>35</sup> *Ibid*, s 70(1).

- 2) the attorney under his or her continuing power attorney, if known;
- 3) his/her guardian of property, if known;
- 4) his/her attorney for personal care, if known;
- 5) the PGT; and
- 6) the proposed guardian of the person.<sup>36</sup>

The notice of application and accompanying documents shall also be served on all of the following persons by ordinary mail sent to the person's last address:

- 1) the spouse or partner of the person who is alleged to be incapable;
- 2) the person's children who are at least 16 years;
- 3) the person's parents; and
- 4) the person's brothers and sisters who are at least 16.<sup>37</sup>

## **STATUTORY GUARDIANSHIP**

A statutory guardianship does not require the court appointment of the guardian. The guardianship is predicated on the basis that the incapable person has not granted a continuing power of attorney for property to anyone.

The PGT becomes an incapable person's statutory guardian in one of two ways: First, if a person is a patient in a psychiatric facility and a certificate is issued under the *Mental Health Act* certifying that the patient is incapable of managing property, the PGT *de-facto* becomes the person's statutory guardian.<sup>38</sup> Second, if a capacity assessor issues a certificate of incapacity stating that the person is incapable of managing property, the PGT becomes the person's statutory guardian of property.<sup>39</sup>

It is important to realize that if the allegedly incapable person refuses the capacity assessment then the statutory guardianship cannot proceed and a court application will be necessary.<sup>40</sup>

After becoming a person's statutory guardian of property, the PGT must ensure that the person is informed, in a manner that the PGT considers appropriate, that the PGT has become the person's

<sup>36</sup> *Ibid*, s 69(3).

<sup>37</sup> *SDA, supra* note 1, s 69(6).

<sup>38</sup> *Ibid*, s 15.

<sup>39</sup> *Ibid*, s 16.

<sup>40</sup> *Ibid*, s 78.

statutory guardian of property and that the person is entitled to apply to the Consent and Capacity Board for a review of the assessor's finding that the person is incapable of managing property.<sup>41</sup>

Under the *SDA* a capacity assessment under section 16 cannot be carried out if a Continuing Power of Attorney is known to exist.<sup>42</sup> If a capacity assessment takes place and the person is found to be incapable of managing property then subsequently a power of attorney is found, the statutory guardianship is terminated and the attorney becomes the statutory guardian, once the power of attorney document and a written undertaking signed by the attorney to act as set out in the power of attorney are provided to the PGT.<sup>43</sup>

An incapable person's spouse or partner, a relative, an attorney under a continuing power of attorney or a trust corporation (if the incapable person's spouse consents in writing) may apply to the PGT to replace the PGT as statutory guardian.<sup>44</sup> The application to the PGT must be accompanied by a management plan.<sup>45</sup>

The PGT shall appoint the applicant as the incapable person's statutory guardian of property if the PGT is satisfied that the applicant is suitable to manage the incapable person's property and that the management plan is appropriate.<sup>46</sup> The PGT must also consider the incapable person's wishes and the closeness of the applicant's relationship to the person.<sup>47</sup> As a condition to an appointment to replace the PGT, the PGT may require the applicant post security. However, the court may order on an application that security be dispensed with or that the amount of security be reduced and subject to conditions.

If the PGT refuses the application for a replacement, there shall be written reasons given to the applicant.<sup>48</sup> If the applicant disputes the refusal by giving the PGT notice in writing, the PGT shall apply to the court to decide the matter.<sup>49</sup> It must be remembered, however, that a person can always bring a guardianship application to unseat the statutory guardian and is not restricted to applying to the PGT as a replacement.

## **TEMPORARY GUARDIANSHIP UNDER THE SDA**

Under the *SDA*, the PGT is obligated to investigate any allegation that a person is incapable of

41 *Ibid*, s 16(6).

42 *Ibid*, s 16(2)(b).

43 *SDA*, *supra* note 1, s 16.1.

44 *Ibid*, s 17(1).

45 *Ibid*, s 17(3).

46 *Ibid*, s 17(4).

47 *Ibid*, s 17(5).

48 *Ibid*, s 18(1).

49 *Ibid*, s 18(2).

managing property and that serious adverse effects are occurring or may occur. If as a result of the investigation the PGT has reasonable grounds to believe that the prompt appointment of a temporary guardian of property is required to prevent serious adverse effects, the PGT shall apply to the court for an order appointing it as temporary guardian of property. The court may appoint the PGT as a temporary guardian for a period not exceeding 90 days.<sup>50</sup>

In a judgment that is reported as a schedule to another judgment in *Brown v Glawdan*, the court appointed the PGT as a temporary guardian on its own accord.<sup>51</sup>

## **LITIGATION GUARDIANS UNDER THE RULES OF CIVIL PROCEDURE R.R.O. 1990, REGULATION 194 52**

Persons under disability must be represented by a litigation guardian in civil litigation proceedings unless a court orders otherwise. Rule 7 of the Rules of Civil Procedure sets out the rules respecting the representation of parties under disability. The definitions in Rule 1.03 defines a person under a disability as a minor, someone who is “mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not,” or an “absentee within the meaning of the *Absentees Act*.”

Rule 7.01(1) provides that, unless the court or a statute provides otherwise, parties under disability must be represented by a litigation guardian in proceedings. In addition, under Rule 7.08 no settlement by or against a party with a disability is binding without the approval of a judge. The OCL or the PGT may provide a report on the merits of the settlement for the court’s consideration where the court requests such a report.

Litigation guardians for Defendants or Respondents generally must be appointed by the court. Rule 7.03 sets forth the procedure and evidence required for a motion to appoint a litigation guardian. Where no litigation guardian is available, either the Children’s Lawyer or the PGT is appointed as litigation guardian, depending on the age of the person under disability.

Rule 15 requires that a litigation guardian be represented by counsel.

A litigation guardian may do anything that a regular party in a proceeding is authorized to do. The litigation guardian must diligently attend to the interests of the person under disability and take all steps necessary for the protection of the person’s interests, including the commencement and conduct of a Counterclaim, Cross Claim or Third Party Claim.<sup>53</sup>

50 SDA, *supra* note 1, s 27.

51 *Brown v Glawdan*, [1998] OJ No 5309 (SC).

52 *Rules of Civil Procedure*, *supra* note 3.

53 *Rules of Civil Procedure*, *supra* note 3, Rule 7.05.

## **CONCLUSION**

This chapter has provided the reader with a brief explanation of the various guardianship regimes in the Province of Ontario with a description of the obligations placed upon each type of guardian. WEL Partners' book on guardianship provides a more in-depth analysis of the topics that have been broached in this chapter. It must always be remembered that the overriding theme in guardianship is to create a means of holding someone responsible to advance, protect, promote and maintain the interests of the vulnerable person as an accountable fiduciary.

# CHAPTER 9: PREDATORY MARRIAGES

## INTRODUCTION

Civil marriages are solemnized with increasing frequency under circumstances in which one party to the marriage is decisionally incapable of understanding, appreciating, and formulating a choice to marry. Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the “predatory marriage”.

The overriding problem with such marriages today is that they are not easily challenged. The current standard or factors to be applied for ascertaining the requisite “capacity to marry” as developed at common law are anything but rigorous. Consequently, requisite capacity is often found by a court, even in the most obvious cases of exploitation. Predatory and exploitive marriages are more likely than not, to withstand challenge because the common law has not kept pace with the reality of the current property rights legislative regime.

Decisions concerning the capacity to marry and divorce are evolving in the law. Historically, courts have viewed the contract of marriage as a ‘simple’ contract, not requiring a high degree of intelligence to comprehend. This same threshold for determining the requisite decisional capacity to marry has been equated to the requisite decisional capacity to divorce.<sup>1</sup> Issues related to the capacity to marry and divorce are of increasing importance in our society, particularly since marriage and divorce carry with them significant financial and property rights and consequences. In some provinces, marriage revokes a testamentary document and divorce revokes bequests to a prior spouse. Modern cases appear to be moving the law along in the direction of developing more detailed factors that should be considered when determining the requisite decisional capacity to marry that both reflect and accord with the real-life financial implications of marriage or divorce. Importantly, each of these cases has its own unique facts, defining characteristics and evidence to be weighed and considered. These recent decisions would seem to have had the benefit of extensive probative medical evidence in their success, which is not often the case.

<sup>1</sup> *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff’d (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161 (S.C.C.), [“Calvert”].



## **CAPACITY TO MARRY AND PREDATORY MARRIAGES**

The law presumes that a person is capable unless and until such presumption is legally rebutted. Legal capacity is decision, time, and situation/context-specific.<sup>2</sup> The law prescribes decisional capacity requirements in different contexts. For instance, the capacity required to grant a power of attorney for property differs from the capacity required to grant a personal care power of attorney, which differs still from the capacity required to actually manage or direct the management of one's property or personal care.<sup>3</sup> And, importantly, as the law currently stands, the decisional capacity to marry may exist despite incapacity in other legal decisions or matters.<sup>4</sup>

Assessing capacity is an imperfect science, which further complicates its determination.<sup>5</sup> In addition to professional and expert evidence, lay evidence can also be determinative, if not more so in some situations.<sup>6</sup> The standard and reliability of the capacity assessment conducted varies and this too can become an obstacle that may need to be overcome in determining capacity with some degree of compelling accuracy.<sup>7</sup>

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

Certain statutes prevent a marriage commissioner from issuing a license to, or solemnizing the marriage of, someone known to lack capacity to marry, or whom the commissioner believes on reasonable grounds to lack mental capacity to marry,<sup>8</sup> is incapable of giving a valid consent,<sup>9</sup> or who has been certified as mentally disordered.<sup>10</sup>

In Manitoba, certain rigorous precautions exist. For instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that the individual is able to understand the nature of marriage and its duties and responsibilities.<sup>11</sup> In fact, a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered will be guilty of an offence and liable on summary conviction to a fine.<sup>12</sup>

2 *Kimberly Whaley et. al, Capacity to Marry and the Estate Plan (Aurora: Canada Law Book, 2010) at 46.*

3 *Ibid at 47.*

4 *Ibid at 45.*

5 *Ibid at 48.*

6 *Ibid at 48.*

7 *Ibid at 48.*

8 The Ontario *Marriage Act*, R.S.O. 1990, c. M.3, s. 7.

9 *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut), s. 18.

10 The *Marriage Act*, CCSM c. M50, (Manitoba), s. 20.

11 *Ibid*, s. 20(2).

12 *Ibid*, Subsection 20(3).

Section 7 of Ontario's *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what he/she knows, or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.<sup>13</sup>

In British Columbia, it is a criminal offence to issue a license for a marriage, or to solemnize a marriage, when the authority in question knows or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.<sup>14</sup> The B.C. legislation further provides that a caveat can be lodged with an issuer of marriage licenses against the issuing of a license to persons named in the caveat.<sup>15</sup> Once lodged, the caveat prevents the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it.<sup>16</sup> However, there are no reported cases citing Section 35 of the B.C. legislation, which suggests that offences under this legislation, if they occur, are not prosecuted.

In spite of the various legislative provisions on the issuance of marriage licenses and solemnizing marriages, it appears there is no diligence in heeding the provisions, as marriages continue to be solemnized where there is it is clear that one party lacks capacity and failed properly to give consent.

## **MARRIAGE AND PROPERTY LAW: CONSEQUENCES OF A PREDATORY MARRIAGE**

To truly appreciate why predatory marriages can be so problematic, it is necessary to understand what financial and property entitlements are gained through marriage. Put in context, it is also important to note that in many Canadian provinces, marriage automatically revokes a Will or other testamentary document. An exception applies where there is a declaration in the Will that it is made specifically in contemplation of marriage.<sup>17</sup>

This revocation of a Will upon marriage can raise serious consequential issues when a vulnerable adult marries but yet lacks the requisite capacity to make a new Will thereafter or dies before a new Will can be executed.

13 The Ontario *Marriage Act*, R.S.O. 1990, c. M.3, s. 7.

14 *Marriage Act*, RSBC 1996, c. 282, (British Columbia), s. 35.

15 *Marriage Act*, RSBC 1996, c. 282, (British Columbia), s. 23.

16 *Marriage Act*, RSBC 1996, c. 282, (British Columbia), s. 23(2).

17 Marriage revokes a Will in all provinces except, British Columbia, Alberta and Quebec. See the *Wills Act*, RSNB 1973, c W-9 (New Brunswick), *Probate Act*, RSPEI 1988, c P-21 (PEI), *Wills Act*, RSNL 1990, c W-10 (Newfoundland), *Succession Law Reform Act*, RSO c S 26 (Ontario), *The Wills Act*, CCSM c W 150 (Manitoba), *The Wills Act*, 1996, c W-14.1 (Saskatchewan), *Wills Act* RSNWT (Nu), 1988 c W-5 (Nunavut, Northwest Territories), and *Wills Act*, RSY 2002 c 230 (Yukon).

Some provinces have now recognized this inequity as an issue and have enacted legislation to prevent revocation of Wills upon marriage. Marriage does not revoke a Will in Quebec. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that Act marriage now no longer revokes a Will.<sup>18</sup> British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("**WESA**") came into force.<sup>19</sup> Under WESA, marriage now no longer revokes a Will. Ontario and the other common law jurisdictions have not followed suit.

In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily-mandated property rights as between spouses. In Ontario, the surviving spouse is entitled to elect and apply to either take pursuant to the intestate succession provisions as set out in the *Succession Law Reform Act* (the "**SLRA**"), or to elect to receive an equalization payment pursuant to the Ontario *Family Law Act* ("**FLA**").<sup>20</sup>

There are legitimate and important policy reasons underlying this statutorily-imposed wealth-sharing regime. Using the marital property provisions of Ontario's *FLA* as an example, section 5(7) of the *FLA* sets out its underlying policy rationale as follows:

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

Arguably however, this policy rationale does not really apply to a predatory marriage situation, the typical hallmarks of which include: one party is significantly older than the other and holds the bulk, if not all of the property, wealth and finances in the relationship; there are no children of the union, and the other party offers little by way of financial contribution. Such a relationship is not, as the property legislation presumes, an equal contribution partnership, whether financial or otherwise.

As is apparent, in some provinces, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate and intestate succession, to such an extent that spouses are given priority over the heirs of a deceased person's estate. For example, Ontario's *SLRA* permits, under Section 58, a spouse to claim proper and adequate support as a dependent of a deceased, whether married or living

<sup>18</sup> *Wills and Succession Act*, SA 2010, c W-12.2. (Alberta).

<sup>19</sup> *Wills, Estates and Succession Act*, SBC 2009 c 13 (WESA).

<sup>20</sup> *Family Law Act*, RSO 1990, c F.3, s 5 (FLA).

common law. Interestingly, in the decision of *Blair v. Cooke (Allair Estate)*<sup>21</sup> Belleghem J. determined that two different women, simultaneously spouses of the deceased, were not precluded from both obtaining a support award from the Estate.

## MODERN CASE LAW

### ***Banton v. Banton (Ontario)***<sup>22</sup>

When Mr. Banton was 84 years old, he made a Will leaving his property equally among his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer, castrated, and in a weakened physical state. He required a walker. He was also, by all accounts, depressed.

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

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

Justice Cullity found that Mr. Banton did not have testamentary capacity to make the Wills in 1994 and 1995 and that the Wills were obtained through undue influence. In spite of these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors to determine requisite testamentary capacity, and capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care, and capacity to marry according to the provisions of Ontario's *Substitute Decisions Act*<sup>23</sup> ("**SDA**").<sup>24</sup>

21 *Blair v. Cooke (Allair Estate)*, 2011 ONSC 498 ["*Blair*"].

22 *Banton v. Banton* 1998, 164 D.L.R. (4th) 176 ["*Banton*"].

23 1992, SO 1992, c 30. ("**SDA**").

24 *Banton*, *supra* note 22, para 33.

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion in the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."<sup>25</sup> Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions whether duress makes a marriage void or voidable, and if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.<sup>26</sup> In reaching this conclusion, Cullity J. drew a significant distinction between the concepts of "consent" and of "capacity," finding that a lack of consent neither presupposes nor entails an absence of mental capacity.<sup>27</sup>

The Court commenced its analysis of requisite decisional capacity to marry with the "well-established" presumption that an individual will not have capacity to marry unless capable of understanding the nature of the relationship and the obligations and responsibilities it involves.<sup>28</sup> In the Court's view, however, the factors to be met are not particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

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

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

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

<sup>25</sup> *Banton*, *supra* note 22, para 136.

<sup>26</sup> *Banton*, *supra* note 22, para 137. In Canadian law, a marriage may be either void or voidable. It is void if either party lacks capacity to marry, in which case anyone with an interest, such as a child of a previous marriage, or the personal representative has standing to attack the marriage on that ground. In contrast, undue influence and duress render a marriage voidable only. In this case, only the parties have standing to contest the validity of the marriage and only while both parties are living. Other interested persons lack standing, although not all courts seem to be aware of the distinction. See Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 ETPJ 24, §3.2.

<sup>27</sup> *Banton*, *supra* note 22, para 140.

<sup>28</sup> *Banton*, *supra* note 22, para 142.

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

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

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

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

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

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19<sup>th</sup> century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It is only with the enactment of the SDA that the line between capacity of the person and capacity respecting property has been drawn more sharply. In light of the foregoing, His Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, “to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate.”

Despite articulating what would, at the very least, be a dual standard to be applied for determining decisional capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of



managing his property, Justice Cullity held somewhat surprisingly, that Mr. Banton did have the capacity to marry Ms. Yassin and declined to find the marriage invalid or void. Justice Cullity made this determination in spite of the fact that he found that at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "*judgment was severely impaired and his contact with reality tenuous.*" Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v. Reane.*" Notably, earlier in his reasons, Cullity J., stated that *Browning v. Reane* is the source to which the "*additional requirement*" is attributed, which requirement goes beyond a capacity to understand "*the nature of the relationship and the obligations and responsibilities it involves*" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's own person *and property*. That said, unfortunately, there was no known expert evidence put forward to the court either in the form of retrospective or concurrent evidence on Mr. Banton's capacity to marry. Justice Cullity may not have had available to him the evidence to consider any other result particularly given the restricting and limiting common law standard for determining the capacity to marry. Perhaps with the appropriate evidence including, if available, medical evidence there could have been a different outcome.

### ***Feng v. Sung Estate (Ontario)*** <sup>29</sup>

In 2003, five years post *Banton*, Justice Greer advanced the considering factors and application of the law in determining the requisite decisional capacity to marry in *Re Sung Estate*. Mr. Sung, then recently widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were quickly married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share of his intestate estate. Mr. Sung's children sought a declaration that the marriage was void *ab initio* on the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, on the basis of duress, coercion and undue influence of a sufficient degree to negative consent.

In rendering her decision, Justice Greer found that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party took steps to have it so declared prior to Mr. Sung's death.<sup>30</sup> That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

<sup>29</sup> 2003 CanLII 2420 (ONSC).

<sup>30</sup> *Feng v. Sung*, 2003 CanLII 2420 (ONSC) at para. 51.

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

Justice Greer moreover stated that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the requisite mental capacity to enter into the marriage. In reaching this conclusion, Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen*, where "the court noted that the person must also have the capacity to take care of his/her own person and property." Applying those principles, Greer J., found that the evidence was clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was capable of writing cheques, he was forced to rely on a respirator operated by Ms. Feng. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the factors for determining capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate, supra*: "...a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."<sup>31</sup> Because Mr. Sung married Ms. Feng based on an erroneous belief that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and moreover that it required execution by both parties to make it legally effective.

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

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the requisite capacity to enter into the marriage with Ms. Feng.<sup>32</sup> The Court of Appeal endorsed Justice Greer's decision, although it interestingly, remarked that the case was a close one.

31 *Feng v. Sung*, 2003 CanLII 2420 (ONSC) at para.62.

32 *Feng v. Sung Estate* [2004] O.J. No. 4496 (ONCA.).



***Devore-Thompson v. Poulain (BC)***<sup>33</sup>

In a 2017 decision, the British Columbia Supreme Court set aside a marriage based on the lack of requisite decisional capacity to marry and declared the marriage void *ab initio*. The claim was brought by a family member after the death of the incapacitated party. The Court also set aside two Wills based on the testator's lack of testamentary capacity. This lengthy decision was the first since the 2014 case of *Ross-Scott v. Potvin*<sup>34</sup> to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry. A few cases have followed suit and are reviewed below.

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

In early 2007 Ms. Walker saw Dr. Maria Chung who prepared a consultation report. The report recommended that Ms. Walker's driver's license be revoked before she injured herself or others. Dr. Chung continued to care for Ms. Walker after the initial consultation and provided evidence at the trial. Following Dr. Chung's advice, Ms. Walker made a new Will as of February 16, 2007, and appointed her niece as her attorney under a power of attorney for property. As of May 17, 2007, Ms. Walker also signed a representation agreement appointing her sister and her niece as her representatives under the *Representation Agreement Act* ("**RAA**"),<sup>35</sup> giving them each independent authority to make health and personal care decisions on her behalf.

Her affairs were in order and everything was settled. Or so the niece thought. It was discovered later (discussed below) that Ms. Walker had executed a new Will in 2009 and granted new powers of attorney. On September 14, 2010, A Certificate of Incapability was issued pursuant to s. 1(a) of the *Patients Property Act*,<sup>36</sup> declaring Ms. Walker incapable of managing her legal and financial affairs. The Public Guardian and Trustee (the "**PGT**") was appointed committee of the estate. Ms. Walker died on December 26, 2013.

33 *Devore-Thompson v. Poulain*, 2017 BCSC 1289 [*"Devore"*].

34 *Ross-Scott v. Potvin*, 2014 BCSC 435, [*"Ross-Scott"*].

35 *Representation Agreement Act*, R.S.B.C. 1996, c. 405. (RAA)

36 *Patients Property Act*, R.S.B.C. 1996, c. 349.

Unknown to Ms. Walker's caring niece, while Ms. Walker's health was deteriorating significantly she was being "preyed on"<sup>37</sup> by a younger man for financial gain. Ms. Walker met this man, Mr. Floyd Poulain in 2006 at the local mall when he asked her for five dollars and her address and phone number. Ms. Walker and Mr. Poulain went on to have dinner together and thus began Mr. Poulain's "campaign".<sup>38</sup>

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

Justice Griffin, in her decision, noted:

I find there to be a high probability that Ms. Walker sat in front of [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and Ms. Walker was quite determined not to let on that she was having cognitive difficulties.<sup>39</sup>

Justice Griffin found difficulty placing any weight on the evidence provided by the lawyer; noting that nothing in his evidence suggested that based on his standard practices he was able to detect Ms. Walker's testamentary capacity.

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

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

<sup>37</sup> Devore, *supra* note 28, para 4.

<sup>38</sup> Devore, *supra* note 28, paras 132 & 255.

<sup>39</sup> Devore, *supra* note 28, para 294.

guard. Mr. Poulain testified that it was her idea. Mr. Poulain was unable to recall any material details of the wedding under cross-examination; including who the witnesses were (they were supplied by the marriage commissioner). There was one photograph produced at trial where Ms. Walker and Mr. Poulain were together and her facial expression was vacant. The marriage commissioner's evidence was unhelpful on the issue of whether Ms. Walker had the capacity to marry as he could not remember the marriage ceremony and does hundreds of ceremonies. He had "no practice of testing for capacity" (the Court noted that "it is not suggested he should have") and simply asked the parties to say "I do not" and "I do" to the standard questions.<sup>40</sup>

Justice Griffin noted it was likely that Ms. Walker was prompted on what to say at the ceremony and went along with it and the fact that the marriage ceremony took place was of little help in determining capacity. When Dr. Chung learned about the marriage from the niece, she made an urgent referral to the PGT stating her opinion that Ms. Walker was incapable of entering into a marriage relationship. Dr. Chung continued to be of the opinion, at the trial of this matter, that Ms. Walker was not capable of consenting to marriage and not capable to sign the 2009 Will.

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

...concerted efforts by Mr. Poulain to try to get access to Ms. Walker's funds at Scotiabank post-marriage: repeated contact with [the lawyer]; approaching the Scotiabank; and approaching another bank.<sup>41</sup>

When the niece learned of the involvement of the second lawyer she informed the lawyer of her power of attorney and her suspicions of Mr. Poulain. Nevertheless, the lawyer "pressed on for a while" including preparing a new power of attorney appointing Mr. Poulain as Ms. Walker's attorney. The authenticity of this document was at issue since the niece claimed that she was with Ms. Walker until 4:00 p.m. on the date it was purportedly signed and Ms. Walker never mentioned an

<sup>40</sup> Devore, *supra* note 28, para 303.

<sup>41</sup> Devore, *supra* note 28, para 252.

appointment with a lawyer. It wasn't until the PGT's office communicated with the lawyer that he wrote a letter to Mr. Poulain concluding that he ought not to represent Mr. Poulain.

The day after the new power of attorney was purportedly signed, Ms. Walker had a fall in her condominium and was taken to the hospital. A note was found after Ms. Walker was in hospital in which Mr. Poulain had written "will you please go over to the bank and with draw \$40,000. . . it is really really important".<sup>42</sup>

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

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

I find it likely on the evidence that Mr. Poulain had long been fanning the fire of Ms. Walker's anxiety and paranoia by suggesting that the plaintiff was unfairly restricting her access to her own money, and that the intensity of these efforts increased after the Marriage.<sup>43</sup>

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

Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."<sup>44</sup> Referring to *Hart v. Cooper*,<sup>45</sup> Justice Griffin confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates."

<sup>42</sup> Devore, *supra* note 28, para 253.

<sup>43</sup> Devore, *supra* note 28, para 262.

<sup>44</sup> Devore, *supra* note 28, para 43.

<sup>45</sup> *Hart v. Cooper* [1994] B.C.J. No. 159 (B.C.S.C.) at para 33.

Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert*<sup>46</sup> Justice Griffin observed:

The common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the "lowest level of understanding" in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce.<sup>47</sup>

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

As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level.

The fact that Ms. Walker told some people that she had married Floyd Poulain does not overcome all of the evidence as to her disordered thinking. This does not mean she had any understanding of what it means to be married.

It is also clear that Ms. Walker's mental capacity had diminished to such an extent that by 2010 she could not have formed an intention to live with Mr. Poulain, or to form a lifetime bond. She did not understand, at that stage, what it meant to live together with another person, nor could she understand the concept of a lifetime bond.

Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage.

I find on the whole of the evidence, given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its implications at the time of the Marriage including: who she was marrying in the sense of what kind of person he was; what their emotional attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her

46 *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161 (S.C.C.), [*"Calvert"*].

47 *Devore*, *supra* note 28, paras 44, 46 and 48.

life on a day to day basis and in future.

I conclude that Ms. Walker did not have the capacity to enter the Marriage.

Since I have concluded that Ms. Walker did not have the capacity to enter the Marriage, the Marriage is void ab initio. Because the Marriage is void ab initio, s. 15 of the Wills Act does not apply and, therefore, the Marriage does not revoke the prior wills.<sup>48</sup>

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

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

The question of capacity with respect to marriage will, no doubt, often be more complicated than it was in this case as the niece's evidence was strong, with several credible witnesses. Nevertheless, this is a strong precedent for future claims to set aside predatory marriages for lack of capacity. This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, and in this instance, the evidence indicated that the lawyers failed to follow best practices. The testimony regarding the preparation of the 2009 Will and 2010 power of attorney suggested that no inquiries were made of the deceased's capacity. Instead, notations made by a party, with a vested interest in the changes to the Will, were accepted as instructions.

### ***Hunt v. Worrod (Ontario)***<sup>49</sup>

In this 2017 decision, Kevin Hunt, father of two adult sons, was severely injured in an ATV accident and sustained a catastrophic brain injury. Before his accident, Mr. Hunt was involved with Ms. Worrod in an on-again and off-again relationship. Three days after Mr. Hunt returned home from the hospital he disappeared. He did not have his medications with him. When his sons tracked him down at a hotel (by obtaining particulars from his credit card) they learned that Ms. Worrod had made arrangements to marry Mr. Hunt and that the wedding had already taken place. The

<sup>48</sup> *Devore*, *supra* note 28, paras 343 to 349.

<sup>49</sup> *Hunt v. Worrod* 2017 ONSC 7397, further reasons, 2018 ONSC 2133, 2018 ONSC 7397. The case was under appeal on the costs decision that awarded costs against Legal Aid Ontario. However, the Ontario Court of Appeal overturned the costs decision in 2019 ONCA 540. Leave to appeal the costs decision to the Supreme Court of Canada has been filed. [*"Hunt"*]



police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues that the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, whether the marriage was *void ab initio*?

Justice Koke started the court's analysis by citing *Ross-Scott v. Potvin*:

A person is capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.<sup>50</sup>

Justice Koke recognized the need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how marriage affected his legal status or contractual obligations.<sup>51</sup> Justice Koke went on to conclude that a finding by a Court that an individual has the capacity to marry, as set out in *Ross-Scott v. Potvin*, requires that that person "entering into a marriage contract understand the duties and responsibilities which a marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original].<sup>52</sup>

Justice Koke thoroughly examined the significant amount of evidence dealing with the issue of capacity presented at trial. This evidence came both in the form of expert medical testimony and medical reports as well as the oral testimony of lay witnesses. A number of medical professionals had found that prior to the marriage and shortly after, Mr. Hunt demonstrated the following severe cognitive and physical impairments, among others:

- Significant impairments to his executive functioning, such as his ability to make decisions, organize and execute tasks;
- A neurologically based lack of awareness of his deficits and impairments, making it difficult for him to experience fully what is happening around him as well as to infer consequences of events which might jeopardize his personal safety;
- He demonstrated little emotional reactivity as well as apathy, demonstrated by a lack of initiation and motivation;

<sup>50</sup> *Hunt, supra* note 44, para 9.

<sup>51</sup> *Hunt, supra* note 44, para 10.

<sup>52</sup> *Hunt, supra* note 44, para 83.

- He should not be left alone and continued to need supervision for safety reasons as well as to remind him to take his medications;
- His driver's license was revoked;
- He had difficulty initiating conversation and needed cuing to provide additional information; and,
- He had a limited range of motion in his left shoulder, difficulties with balance, some residual left neglect, and his ability to walk was impaired when he performed more than one task at a time.

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

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

After reviewing this extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be void *ab initio*. Unlike the majority of predatory marriage cases that make it to trial, this case is markedly different since Mr. Hunt is not an older person and he is still living. This meant that, while clearly vulnerable, a consideration of his personal autonomy and his safety and wellbeing in the future was necessary.

Due to the nature and extent of Mr. Hunt's injuries from his accident, extensive medical evidence for the period surrounding the marriage was available to the Court. Of particular importance were the contemporaneous capacity assessments with respect to property and personal care that had been conducted and were available to the Court. This is unusual, as predatory marriage cases often involve an older adult who may not require regular medical attention. As a result, there is often limited medical evidence from the period surrounding the marriage available. Alienation is another common element of predatory marriages, where the unscrupulous opportunist chooses to wedge him or herself in between the older adult and their friends and family. While Ms. Worrod did attempt to alienate Mr. Hunt from his sons and influence his actions, since the sons were his guardians, they were able to do what they could to protect him and continue to make decisions in his best interest.



***Chuvalo v. Chuvalo (Ontario)***<sup>53</sup>

Over the last few years, George Chuvalo’s children were in a fierce legal battle with Joanne Chuvalo, their father’s spouse. His children, in their capacity as his attorneys under powers of attorney, brought divorce proceedings against Joanne on behalf of Chuvalo. Joanne however, seemingly sought to reconcile and not divorce Chuvalo in spite of separation.<sup>54</sup> In their Application, the children, on behalf of their father, reportedly raised allegations of kidnapping, brainwashing, extortion, and reckless spending and alleged that Joanne preyed on George Chuvalo’s vulnerable mental state to “extort cash money”.<sup>55</sup>

In January 2018, a three-day hearing of an application was heard in part, focusing at that time on the sole issue of whether Chuvalo had the requisite capacity to decide to reconcile with Joanne.<sup>56</sup> The application as a whole also centered on the greater issue of divorce but that issue was put over to a trial. At the outset of the hearing, the parties agreed that the evidence demonstrated that George Chuvalo lacked the requisite decisional capacity to instruct his counsel. Therefore the PGT was appointed as his representative pursuant to rule 4(3) of the *Family Law Rules* (akin to a Litigation Guardian in estate proceedings).<sup>57</sup>

In her decision dated January 12, 2018, Justice Kiteley decided that Chuvalo “does not have capacity to decide whether to reconcile” with Joanne and further noted that she need not decide whether he has the capacity to divorce.<sup>58</sup> Justice Kiteley relied on the expert opinion of Dr. Richard Shulman, a geriatric psychiatrist, and also referenced the opinion of Dr. Heather Gilley, a geriatrician. Dr. Shulman set out the legal criteria applicable to assessing whether an individual possesses the requisite decisional capacity to make a particular decision as follows:

1. The ability to understand information relevant to making the decision (for example relevant facts); and
2. The ability to appreciate the consequences of making or not making the decision (relevant to the context of the situation-specific nature of decisional capacities).

Dr. Shulman had assessed George and testified that earlier in the spring of 2017, he was able to

53 *Chuvalo v. Chuvalo* 2018 ONSC 311. [*“Chuvalo”*].

54 Mary Ormsby, “The Fight Over Boxing Legend George Chuvalo”, The Toronto Star, November 3, 2017, online: <https://www.thestar.com/news/canada/2017/11/03/the-fight-over-boxing-legend-george-chuvalo.html> [accessed on November 24, 2019]; Mary Ormsby, “George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules”, The Toronto Star, January 13, 2018, online: <https://www.thestar.com/news/gta/2018/01/13/george-chuvalo-lacks-capacity-to-decide-on-his-marriage-judge-rules.html> [accessed on November 24, 2019].

55 *Supra* note 49, “The Fight Over Boxing Legend George Chuvalo”.

56 *Chuvalo*, *supra* note 48, paras 16-17.

57 *Chuvalo*, *supra* note 48, paras 4-5.

58 *Chuvalo*, *supra* note 48, paras 70 & 17.

understand and appreciate what he was doing, why he was doing it, and whether he wanted to do it as far as the divorce proceedings were concerned. He explained that George had an adequate understanding of the fact that he was then separated and was pursuing a divorce, and he had consistently indicated that divorce, rather than reconciliation, was his preferred option.<sup>59</sup>

Some months later, in November of 2017, Dr. Shulman again assessed George and noted that his cognitive ability had declined sharply and that he was at that time no longer able to “appreciate the consequences of his choices in regard to the matrimonial proceedings” which involve a “realistic appraisal of outcome and justification of choice.”<sup>60</sup> Justice Kiteley accepted the evidence and expert opinion of Dr. Shulman.<sup>61</sup>

In addition to the expert evidence, “[a]fter laying the evidentiary groundwork” Justice Kiteley “ruled that, based on Ms. O’Hara’s<sup>62</sup> special skill and based on Ms. Chuvalo’s knowledge and experience, each of them could form an opinion as to whether Mr. Chuvalo had the *ability to decide where he wants to live*. Each witness said he had that ability and that he expressed his desire to live with Ms. Chuvalo” [emphasis in original].<sup>63</sup>

Justice Kiteley began her analysis with a review of the decision in *Calvert v. Calvert*,<sup>64</sup> which dealt primarily with the issue of whether the applicant wife had the capacity to form the requisite intention to separate from her husband. In that case, the Court relied on the expert evidence of Dr. Molloy in finding that the applicant had the requisite capacity to separate from her husband. Dr. Molloy opined that to be competent to make a decision, a person must: understand the context of the decision; know his or her specific choices; and appreciate the consequences of the choices.<sup>65</sup>

Her Honour additionally, considered and cited, *Banton v. Banton*<sup>66</sup> and *Feng v. Sung Estate*,<sup>67</sup> relying on the following principles: “an individual will not have the capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves”;<sup>68</sup> and “a person must understand the nature of the marriage contract, the state of previous marriages, one’s children and how they may be affected.”<sup>69</sup> Justice Kiteley also relied on the principle adopted in *Hunt v. Worrod*:

59 *Chuvalo*, *supra* note 48, para 34.

60 *Chuvalo*, *supra* note 48, paras 33 & 35.

61 *Chuvalo*, *supra* note 48, paras 44-48

62 Ms. Chuvalo’s sister.

63 *Chuvalo*, *supra* note 48, para 29.

64 *Calvert*, *supra* note 41.

65 *Chuvalo*, *supra* note 48, para 52. *Calvert*, *supra* note 42, at para 72.

66 *Banton*, *supra* note 22.-

67 *Feng v. Sung Estate*, 2003 CanLII 2420 (ON SC).

68 *Chuvalo*, *supra* note 48, para 55.

69 *Chuvalo*, *supra* note 48, para 56.

The consensus of opinion from the medical experts and witnesses, evidence which I note was un-contradicted by other medical experts, is that Mr. Hunt lacked the ability to understand the responsibilities or consequences arising from a marriage, and that he lacked the ability to manage his own property and personal affairs as a result of the injuries he sustained on June 18, 2011.<sup>70</sup>

The Court concluded that the requirement for an individual to understand and appreciate the consequences of making or not making a decision to reconcile was consistent with the medical parameters outlined in Dr. Shulman's report as well as the jurisprudence (referenced).<sup>71</sup> Justice Kiteley found that George Chuvalo expressed a wish to live with his wife, but explained that "there is no evidence that he understood whether there would be consequences to a decision to 'live with' his wife. Indeed, there are consequences such as changing the financial status quo between them . . . There are other consequences such as the emotional impact if the attempted reconciliation fails."<sup>72</sup>

Counsel for Joanne submitted that there was no evidence that George ever intended to separate. The Court acknowledged that by finding that George Chuvalo lacked the capacity to decide whether to reconcile, it appeared to be implicit that there was a separation. Her Honour did not decide whether Chuvalo did separate from Joanne, and held that if it was at issue, it would be addressed in the future trial. At the close of the hearing, Justice Kiteley encouraged the parties to focus on George Chuvalo's 'best interests' and to "bury the hatchet and co-operate to develop a plan that will work in the best interests of George in his remaining years while he continues to experience inevitable decline."<sup>73</sup> Her Honour found that Joanne was not successful and was not entitled to her costs. It is noted incidentally, that in a separate proceeding, the Court addressed Joanne's attempt to seek guardianship of her husband and in which she disputes the validity of the power of attorney granted to George's two children.<sup>74</sup>

## **CONSIDERATION OF EQUITABLE AND OTHER REMEDIES**

Since contesting the validity of a marriage on the ground of incapacity is an imperfect approach, it has become apparent to the authors as advocates, that we need to explore other potentially available rights and remedies to react to what is actually happening in today's society. The purpose of this section is to consider other grounds, including equitable grounds, upon which a court has the jurisdiction to set aside a predatory marriage as a nullity, that is, to declare it void *ab initio*, as if it never happened, and also to remedy the wrongs caused by a predator spouse. Recent cases have

70 Hunt, *supra* note 44, para 91. Chuvalo, *supra* note 49, at para 58.

71 Chuvalo, *supra* note 48, para 59.

72 Chuvalo, *supra* note 48, paras 60-61.

73 Chuvalo, *supra* note 48, para 69.

74 *Supra* note 49 "George Chuvalo Lacks Capacity to Decide on his Marriage, Judge Rules".

awarded equitable and common law remedies in cases of financial elder abuse,<sup>75</sup> but so far such remedies have not yet been applied in Canada in cases of predatory marriages.

### ***The Doctrine of Undue Influence***

The equitable doctrine of undue influence is often relied on to set aside a will or *inter vivos* gift that was procured by undue influence. The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions when an individual exerts such influence on the grantor or donor that it cannot be said that his or her decisions are wholly independent.

We propose that the same doctrine, if proved, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the consequence of the marriage effectively results in a gift to the predator. In *Ross-Scott v. Potvin*, the only surviving relatives of the deceased, Mr. Groves, sought to have his marriage annulled on grounds of undue influence and lack of capacity. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability. With respect to undue influence, Justice Armstrong had this to say:

I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must prove the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.<sup>76</sup>

While the evidence was not sufficient for the Court to find undue influence in this situation, if proved, the undue influence doctrine should be available to set aside a predatory marriage.

### ***The Doctrine of Unconscionability***

The doctrine of unconscionability is typically used to set aside a contract that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts and, while

<sup>75</sup> See for example: *Gironda v. Gironda*, 2013 ONSC 4133, additional reasons 2013 ONSC 6474 – undue influence; *Fowler Estate v. Barnes*, 1996 CarswellNfld 196 (SC TD) – undue influence and rescission; *Granger v. Granger*, 2016 ONCA 945, reversing 2015 ONSC 1711, 9 E.T.R. (4th) 281, and 2015 ONSC 6238 – unjust enrichment, undue influence, and equitable compensation; *Servello v. Servello*, 2015 ONCA 434, 9 E.T.R. (4th) 169, affirming 2014 ONSC 5035 – undue influence, failure to provide independent legal advice, *non est factum*, and mistake, as well as the maxim that he who comes into equity must come with clean hands, and denial of a claim for contribution; *Danilova v. Nitiyuk*, 2017 ONSC 4016 – damages for breach of fiduciary duty; *Stewart v. Stewart*, 2014 BCSC 766 – unjust enrichment with equitable set-off; *Waruk v. Waruk*, 1996 CarwellBC 2463 (C.A.) – injunctive relief.

<sup>76</sup> *Ross-Scott*, *supra* note 29, para 240.

it is closely related to undue influence, they are separate and distinct. A claim of undue influence attacks the sufficiency of consent. Unconscionability arises when unfair advantage is gained by an unconscientious use of power by a stronger party against a weaker. In order to be successful, such a claim will need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker party, which left him or her in the power of the stronger party and proof of substantial unfairness of the bargain. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just and reasonable.<sup>77</sup>

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on the ground that there is an inequality of bargaining power and accordingly it would be an improvident bargain if the predator would be entitled to all of the spousal property and financial benefits that come with marriage.<sup>78</sup>

### ***Using a Statute as an Instrument of Fraud***

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of predatory marriages. In the context of trusts of land, the *Statute of Frauds*<sup>79</sup> provides that a declaration or a creation of trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the statute. However, equity will not allow the statute to be used as an instrument of fraud and the court will direct that the property is held on a constructive trust for the beneficiary if the oral express trust is proved. A marriage is also based on, and sanctioned by, legislation.<sup>80</sup> The predator relies on the statute to enforce his or her claim. However, a predator spouse's claim is fraudulent because the predator persuaded his or her spouse by devious means to enter into the marriage. A court of equity should not allow the statute to be used in this way and should restore the property the predator received to the rightful heirs.

### ***No One Shall Profit from His or Her Own Wrongdoing***

Instead of the remedy of attacking the validity of the marriage itself, another tool that could reasonably be applied in attacking the injustice of predatory marriages is challenging the predator

77 *Morrison v. Coast Financial Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713. See also the case of *Smith v. Croft* 2015 CanLII 3837 (ONSCSM) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at \$18,000 from an elderly neighbour with dementia for \$2,000.00.

78 See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v Coast Finance Ltd.*, 1965 CarswellBC 140 (S.C.J.)

79 (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9 ("repealed"); RSNS 1989, c. 442,s5; RSO 1990, c.S.19, s.9.

80 See, e.g., *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, e. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

spouse's right to inherit from the older adult's estate either under a Will or under legislation. Seeking a declaration that the predator spouse is barred or estopped from inheriting is a remedy based on public policy. "No one shall profit from his or her own wrongdoing" is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased's Will, on the deceased's intestacy, or otherwise. Canadian courts have found that the property does pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.<sup>81</sup> It is also clear that a beneficiary will not inherit if the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,<sup>82</sup> or where a testator was coerced by the beneficiary into making a bequest.<sup>83</sup> The comparable common law principle is *ex turpi causa non oritur actio*, i.e., a disgraceful matter cannot be the basis of an action. It is discussed below.

Two New York decisions provide a compellable analysis of these concepts and their applicability to predatory marriages and relied upon them. The facts in *the Matter of Berk*,<sup>84</sup> and *Campbell v. Thomas*,<sup>85</sup> are quite similar. In both cases, a caretaker used her position of power and trust to secretly marry an older adult when capacity was an issue. After the older person's death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to the greater of 1/3 of the estate or \$50,000). The children of the deceased argued that the marriage was "null and void" as their father lacked the capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court's declaration and as such, not void *ab initio*. The predatory spouse maintained her statutory right to a share of the estate.

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This principle, often referred to as the "Slayer's Rule", was first applied in New York in *Riggs v. Palmer*,<sup>86</sup> to stop a murderer from recovering under the Will of the person he murdered. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that might otherwise flow from his wrongdoing. New York courts have also used this rule to deny a murderer the right to succeed in any survivorship interest in his victim's estate.

81 *Lundy v. Lundy* 1895 24 SCR 650.

82 *Kenell v. Abbott* (1799) 31 E.R. 416.

83 *Hall v. Hall* (1868) L.R. 1 P.& D. 481.

84 *In the Matter of Berk*, 71 A.D. 3d 710, NY: Appellate Div., 2<sup>nd</sup> Dept., 2010.

85 *Campbell v. Thomas*, 897 NYS2d 460 (2010), 73 AD3d 103 (2010) [*"Campbell"*].

86 *Riggs v. Palmer*, 115 N.Y. 506 [1889].



The court recognized that while the actions of the predatory spouses were not as “extreme” as those of a murderer, the required causal link between the wrongdoing and the benefits sought was, however, even more direct. A murdering beneficiary is already in a position to benefit from his victim’s estate when he commits the wrongdoing, but it was the wrongdoing itself (the predatory marriage) that put the spouse in a position to obtain benefits. The court held that the predator spouse should not be permitted to benefit from this wrongful conduct any more than a person who coerces his way into becoming a beneficiary in a Will.<sup>87</sup>

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements and this principle should also be used to invalidate a predatory marriage.

### ***Unjust Enrichment***

The principle of unjust enrichment is well developed in Canadian law, initially largely in the context of co-habitation property disputes. To be successful in unjust enrichment, one must satisfy a three-part test:

- 1) That the defendant was enriched;
- 2) That the plaintiff suffered a corresponding deprivation; and
- 3) That the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.<sup>88</sup>

In the New York case of *Campbell* the Appellate Division noted also that because the predatory spouse altered the older adult’s testamentary plan in her favour, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.<sup>89</sup> The principle of unjust enrichment should also be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be considered to be a juristic reason to deny relief since the marriage was motivated by the wrongful desire to obtain control of the older adult’s

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87 Note that the dispute in *Matter of Berk* is still ongoing. In one subsequent decision the court determined the standard and burden when relying on the equitable doctrine that one should not profit from her wrongdoing: the children of the deceased bear the burden of proving wrongdoing by a preponderance of evidence: See *Matter of Berk*, 133 AD 3d 850 (2015) and 2016 NY Slip Op 76663(U). Most recently in May of 2017 the Surrogate Court barred the wife from testifying at trial. At issue was a New York statute colloquially called the “Dead Man’s Statute” which bars testimony from individuals with a pecuniary interest in the estate from testifying. See *Matter of Berk*, 2488/2006 and Amaris Elliott-Engel “Testimony of Wife Barred in Surrogate Court Case”, New York Law Journal (May 19, 2017) online: <http://www.law.com/newyorklawjournal/almID/1202786791972>.

88 See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 SCR 834 (SCC); *Garland v. Consumers’ Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).

89 *Campbell*, *supra* note 81, para 119.

property.

### ***Civil Fraud / Tort of Deceit***

An approach based on fraud, either common law fraud or equitable/constructive fraud is also worthy of consideration. In the usual predatory marriage situation, the predator spouse induces the older adult to marry by perpetrating a false representation that the marriage will be a “real” marriage (which the predator spouse knows is false, a trick, a misrepresentation). The older adult relies on the representation, marries the predator spouse, and suffers damage as a result (either through money given to the predator spouse or through the various rights that a spouse takes under legislation), which deprives the older adult of significant property rights. A case could be fashioned so that the predator’s behaviour meets the required elements to qualify and succeed in an action of civil fraud as a result of the following:

- 1) A false representation made by the defendant;
- 2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- 3) The false representation caused the plaintiff to act (inducement); and
- 4) The plaintiff’s actions resulted in a loss.<sup>90</sup>

Canadian jurisprudence has many decisions analyzing civil fraud/tort of deceit in the context of marriage in “immigration fraud” cases where one spouse falsely represents that he/she is entering into a “true” marriage when in fact the marriage was entered into simply to attain Canadian residency.<sup>91</sup> The courts have been reluctant to set aside this type of marriage as a fraud.

In *Iantsis v. Papatheodorou*, the Ontario Court of Appeal confirmed that civil fraud will not usually vitiate consent to a marriage, *unless* it induces an operative mistake. For example, a mistake as it relates to a party’s identity, or that the ceremony was one of marriage.<sup>92</sup> This case has been cited with approval many times and continues to be considered as the leading case. The Court’s reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.

Alleging fraud when one party to the marriage has character flaws not anticipated by the other is not

<sup>90</sup> *Bruno v. Hyrniak*, 2014 SCC 8, at para. 21.

<sup>91</sup> See for example *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Iantsis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).

<sup>92</sup> *Iantsis v. Papatheodorou*, [1971] 1 O.R. 245 (C.A.) [*Iantsis*].



something the court wishes to advance as is evinced by the following select comments of the Court:

First, on a principled approach it may be difficult to differentiate immigration fraud from other types of fraud. In *Grewal v. Sohal* 2004 BCSC 1549 (CanLII), (2004), 246 D.L.R. (4th) 743 (B.C.S.C.) the fraud consisted of the defendant fraudulently representing his marital intentions for immigration purposes and fraudulently representing that he did not have an alcohol or drug addiction. **One can think of many other misrepresentations such as related to education, health or assets that might induce a decision to marry and which could be made fraudulently. If a fraud as to fundamental facts that ground the decision to marry is generally a ground for annulment, this certainly raises the spectre of an increase in the volume of costly litigation.**

Even assuming that the law can logically extend to permit annulment on the basis of immigration fraud and not on other grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]<sup>93</sup>

The Court's message is, effectively, "*caveat emptor*" – the spouses ought to have conducted their due diligence before marriage.<sup>94</sup> Predatory marriages are easily distinguishable from immigration fraud cases if for no other reason than that a person under disability may not be and likely is not, for many obvious reasons, in a position to conduct any due diligence.

Although it may be difficult for an older spouse to have a marriage set aside on the grounds of civil fraud or tort of deceit, he or she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar*, involved a wife who was awarded damages for civil fraud in an immigration fraud case where the court notably stated:

The four elements of the tort of deceit are: a false representation, knowledge of its falsity, an intent to deceive and reliance by the plaintiff with resulting damage. [. . .]

I find the defendant misrepresented his true feelings towards the plaintiff and his true motive for marrying her order to induce her to marry him so he could emigrate to Canada. I find the plaintiff married the defendant relying on his misrepresentations of true affection and a desire to build a family with her in Canada.

The defendant's misrepresentations entitle the plaintiff to damages resulting from her reliance on them.<sup>95</sup>

93 *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC), at paras 23-24. [*"Grewal"*]

94 *A.A.S. v. R.S.S.*, 1986 CanLII 822 (BC CA), para 25. [*A.A.S.*]

95 *Raju v. Kumar* 2006 BCSC 439, at paras 69-71. [*"Raju"*]

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting the groom's immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre- and post-marriage long distance calls.<sup>96</sup>

### ***Ex Turpi Causa Non Oritur Actio***

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"<sup>97</sup> or "illegal, wrongful or of culpable immorality"<sup>98</sup> in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. Arguably a Court should not assist a predatory spouse to recover the benefits from a marriage that was obtained through the predator's devious, unscrupulous and anti-social means. The unscrupulous predator should not be entitled to financial gain arising from the "anti-social" or "immoral" act of a predatory marriage. A predatory spouse alters an older adult's life and testamentary plan by claiming entitlements in the same manner as if he or she coerced the testator to add his or her name to a Will.

### ***Non Est Factum***

*Non est factum* is the plea that a deed or other formal document is declared void for want of intention, and has been used to set aside contracts when a party signs a document with a fundamental misunderstanding about the nature or effect of the document.<sup>99</sup>

*Non est factum* is a defence developed in common law and not the court of equity. However, it could be applicable to a predatory marriage situation when the predator attempts to enforce some right arising from the marriage and the victim entered into the marriage with a fundamental misunderstanding about the nature or effect of executing the marriage document.

96 *Raju, supra* note 91, at paras 80-83. See also the case of *RKS v. RS*, 2014 BCSC 1626, where the Court dismissed a claim alleging the tort of deceit. A wife alleged that she was induced into marrying her husband on false representations that he was heterosexual, while in fact he was not. The wife also sought an annulment of the marriage citing non-consummation. The Court dismissed the claim and refused to grant an annulment as there was no evidence that the groom or groom's family made any false representations to either the bride or her family with an intent to deceive the plaintiff into marrying him. Prior to the wedding the plaintiff and her family had asked many questions about the defendant's background, his education, his financial situation and the kind of woman he was looking to marry. The Court found that the wife's claim for damages for the tort of deceit had to fail as it found that the husband never made any representations, prior to the wedding, about his sexual orientation. Furthermore the wife could not prove with medical or other evidence that the marriage was not consummated. The husband testified that it had been consummated. The Court denied the wife's claim for an annulment and granted a divorce instead.

97 *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.

98 *Hall v. Hebert* 1993 2 S.C.R. 159.

99 *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [192] 2 SCR 774.

## ***Lack of Independent Legal Advice***

The older adult in predatory marriages is often deprived of the opportunity to seek and obtain independent legal advice before marrying. Lack of independent legal advice is an oft-considered factor in the setting aside of domestic contracts. Whether such arguments could be extended to set aside the marriage itself is a consideration worthy of a court's analysis.

Courts have consistently held that “*marriage is something more than a contract*”.<sup>100</sup> Thus, there could well be judicial reluctance to extend contract law concepts and use them as a vehicle to set aside actual marriages, as opposed to simply setting aside marriage contracts. It is unclear whether such arguments extend to parties other than those to the marriage. If the victim dies, such arguments may be difficult to pursue. However, parties such as the children of the older adult are impacted by the union. This is a different approach to that of cases where capacity is challenged on the grounds of incapacity and the marriage is then declared to be void *ab initio*, since these unions can be challenged by other interested parties.

## ***Saskatchewan's New Legislation To Tackle Predatory Marriages***

Justice Minister Don Morgan recently introduced a new Bill to amend *The Marriage Act*, 1995 and to make consequential amendments to *The Wills Act*, 1996.<sup>101</sup> The Bill passed first reading on October 31, 2019. The Bill aims to protect seniors from being preyed upon by spouses who try to gain control of their assets by allowing the court to declare that a valid marriage was not effected or entered into if the court determines that one of the parties did not provide valid consent to enter into a marriage.<sup>102</sup>

Once the new legislation is passed, family members, any other person who has a close personal connection to one of the parties to the marriage, or the Office of the Public Guardian and Trustee, if it is the guardian of person or property or an administrator of one of the parties to the marriage, will be able to apply to Court for a declaration that the marriage be declared invalid, by bringing supporting documents from a medical professional explaining the mental capacity of the exploited spouse.<sup>103</sup>

With the aim of prohibiting predatory marriages, the Bill also prohibits a marriage of a minor under the age of 16.<sup>104</sup>

100 See *Ciresi (Ahmad) v. Ahmad*, 1982 CanLII 1228 (ABQB); *Feiner v. Demkowicz (falsely called Feiner)*, 1973 CanLII 707 (ONSC); *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075; *Iantsis v. Papatheodorou*, 1970 CanLII 438 (ONCA); *J.G. v. S.S.S.*, 2004 BCSC 1549; *Torfehnejad v. Salimi*, 2006 CanLII 38882 (ONSC) at para. 92; and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 (H.L.).

101 Bill 175, An Act to amend *The Marriage Act*, 1995 and to make consequential amendments to *The Wills Act*, 1996, 4<sup>th</sup> Sess, 28<sup>th</sup> Leg, Saskatchewan, 2019.

102 Bill 175, section 32.1(1), of the proposed new changes to *The Marriage Act*, 1995. c M-4.1

103 Bill 175, section 32.1(2) and 34, of the proposed new changes to *The Marriage Act*.

104 Bill 175, section 19(1) and (2), of the proposed new changes to *The Marriage Act*.

Lastly, the Bill seeks to revoke the current state of the law, that a marriage or a common-law relationship invalidates an existing will.<sup>105</sup>

There has been a growing call for change from seniors' advocates and estate lawyers who want the Ontario government, as well as other governments, to protect the elderly from marriage entrapment by amending the loose capacity to marry rules in Ontario's *Marriage Act*, R.S.O. 1990, c.M.3, to preclude predatory marriages, and to amend the relevant sections of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, where a marriage revokes a will, in order to take away the advantages that would come to a predator upon marriage.

Both Albert H. Oosterhoff, Professor Emeritus, Faculty of Law at Western University, and Kimberly Whaley were members of an Ontario Bar Association Working Group to address the issue of predatory marriages. To initiate the discussion, Professor Oosterhoff drafted a statute called *Predatory Marriages Prevention Act*. The intended purpose of the Act is not to be the final answer or solution to the problem, but merely the starting point of a conversation. The main purpose of the draft is to frustrate the designs of predators and deny them access to the property and estates of the victims.

Attached to this chapter as Schedule "A" is the draft *Predatory Marriages Prevention Act*.

We continue to advocate change to address this serious abuse and societal challenge.

## CONCLUSION

While many provinces have legislated out of the 'revocation-upon-marriage' provisions in their succession or probate statutes, this is merely one small step towards the development of a more cohesive approach to preventing financial abuse through predatory marriages. Innovative ideas, like the caveat system in British Columbia, require consistent implementation to be effective. In the absence of clear legislation defining the requisite capacity to marry, the common law remains unclear.

In Canada, cases appear to be moving in the direction of developing an appropriate consideration of factors for ascertaining the capacity to marry—one which best reflects and accords with the real-life financial implications of death or marital breakdown on a marriage in today's aging society. Still, it would appear that our courts continue to be haunted by the old judicial adage that "the contract to marry is a very simple one." This, combined with the reluctance on the part of our courts to

<sup>105</sup> Bill 175, section 16 and 17 of the proposed new changes to *The Wills Act*, 1996.

“attribute inordinate weight to the proprietary aspects of marriage,” has meant that the factors for determining the requisite capacity to marry are much less stringent than those used to determine testamentary capacity or to determine the capacity to manage property.

The consequences of Canada’s ongoing deference to the common law factors are as puzzling as they are problematic from a social perspective as well as a public policy perspective. Essentially, this means that a person found incapable of making a Will may revoke his/her Will through the act of marriage. As well, in refusing to require that a finding of capacity to manage property forms a prerequisite to a finding of capacity to marry gives free rein to would-be (predatory) spouses to marry purely in the pursuit of a share in their incapable spouse’s wealth, however vast or small it may be. After all, as stated, a multitude of proprietary rights flow from marriage.<sup>106</sup>

Until our factors to determine the requisite capacity to marry are refined, such that they adequately take into consideration the financial implications of marriage, all those with diminished decisional capacity will remain vulnerable to exploitation through marriage. This is likely to become an ever-increasing and pressing problem as an unprecedented proportion of our society becomes, with age, prone to cognitive decline. Hopefully, we will see some of the suggested equitable approaches gaining some traction in the near future.<sup>107</sup>

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106 See Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 119. <http://www.canadalawbook.ca>.; and also see Kimberly A. Whaley “Capacity & Predatory Marriages - A Cross-Canada Perspective”, November 8, 2019, Isaac Pitblado Lectures, Winnipeg, page 114, online: <http://welpartners.com/resources/WEL-Cross-country-Predatory-Marriage-Pitblado-Lectures.pdf>

107 *ibid*

**SCHEDULE “A” TO CHAPTER 9****PREDATORY MARRIAGES PREVENTION ACT**

11 September 2018 – Revised 12 April 2019

**EXPLANATORY NOTES**

Changing demographics have resulted in a significant increase in the senior population and it is expected that this trend will continue.

Today, seniors are housed mostly in retirement and nursing homes. This has increased the possibility and incidence of various abuses directed toward seniors.

This Act is directed toward the prevention of one particular kind of abuse, namely predatory marriages. Predatory marriages have occurred with increasing frequency in the last couple of decades. A “predatory marriage” is a marriage in which one person by one or more of guile, subterfuge, promises, undue influence, fraud, or pressure, persuades a second person to enter into marriage with the first person or with another person for the purpose of acquiring control of the assets of the second person during the latter’s lifetime and to that person’s estate after that person’s death. The second person often has limited capacity and is susceptible because of age and limited capacity to these kinds of influences. Such marriages deprive the second person’s legitimate heirs of their rightful inheritance and enrich the other person unjustly.

A number of cases have been reported on predatory marriages in the past quarter century. In dealing with them, the courts have been stymied by three issues:

- (a) the very weak common law “definition” or “test” of capacity to marry;
- (b) the inability of interested persons to contest the validity of a marriage in many cases;
- (c) the statutory rule that provides for revocation of a will when a person marries; and
- (d) the statutory right of a married person to make an equalizing claim against the estate of the other spouse under the Ontario *Family Law Act* and under similar legislation in other jurisdictions.

This Act includes a strengthened statutory definition of marriage; enables interested persons to contest the validity of a marriage and to file a caveat to prevent the issuance of a marriage license and the solemnization of a marriage; and repeals the statutory rule that revokes a will on marriage. The latter rule has never formed part of the law of Quebec and was repealed in Alberta in 2012 and in British Columbia in 2014.

Section 7.5 derives from the British Columbia *Marriage Act*, ss. 23 and 24.

## **PREDATORY MARRIAGES PREVENTION ACT**

1. The *Marriage Act*, R.S.O. 1990, c. M.3, is amended by adding thereto the following sections:

7.1 A person has capacity to marry if the person is:

- (a) capable of understanding the nature of the contract of marriage, the rights it confers, and the obligations it imposes;
- (b) capable of understanding the state of previous marriages, the relationship with his or her children, and the effect the marriage will have on the children and other heirs; and
- (c) able to take care of both his or her own person and property.

7.2 A person lacks capacity to marry if he or she is unable to satisfy one or more of the criteria in section 7.1.

7.3 (1) An issuer shall indicate on the prescribed form that the issuer is satisfied that the applicant has and, if both parties make the application, have capacity to marry under the provisions of s. 7.1.

(2) Any person solemnizing a marriage must satisfy himself or herself that the parties have capacity to marry under the provisions of s. 7.1 and complete the prescribed form to that effect.

7.4 (1) The following persons have standing to contest the validity of a marriage:

- (a) either party to the marriage;
  - (b) an attorney or guardian for property or personal care of a party to the marriage;
  - (c) a child of a party to the marriage;
  - (d) the Public Guardian and Trustee; and
  - (e) anyone with a financial interest.
- (2) Any of the persons mentioned in subsection (1) may contest the validity of a marriage on the ground of either or both lack of capacity of one of the parties as defined in s. 7.2, or the fact that the marriage was entered into as a result of undue influence, fraud, or duress exercised by the other party to the marriage or by any other person.
- (3) Proceedings to contest the validity of a marriage for the circumstances described in subsection (2) may be brought by a party to the marriage while both parties are living, or by



any other person mentioned in subsection (1) while either or both parties to the marriage are living or after the death of one or both of the parties.

(4) If the court finds that one or more of the grounds listed in subsection (2) is established, it shall declare the marriage void.

(5) If the court finds that none of grounds listed in subsection (2) is established, it shall declare the marriage valid.

7.5 If the court declares a marriage valid under subsection 7.4(5), but the sole or primary reason one party entered into the marriage, as determined by the court, was to obtain control of the other party's property while both are living or after the other party's death, or both, the marriage is valid, but the party who entered the marriage for the reasons stated is not entitled to the other party's property under the other party's will or intestacy, pursuant to an equalizing claim under the *Family Law Act*, or in any other way.

7.6 (1) On paying the prescribed fee, a person may lodge a caveat with an issuer of marriage licenses against the issuance of a license for the marriage of a person named in the caveat.

(2) If a caveat is lodged with the issuer, is signed by or on behalf of the person who lodged it, and states the person's place of residence and the ground of the objection on which the caveat is founded, no marriage license may be issued by the issuer until:

(a) the issuer has inquired into the matter of the caveat and is satisfied that it ought not to prevent the issuing of the license; or

(b) the caveat is withdrawn by the person who lodged it.

(3) If the issuer decides against the person lodging the caveat, that person may appeal, upon two clear days' notice to the issuer, to the Divisional Court for judicial review under the *Judicial Review Procedure Act*.

2. The *Succession Law Reform Act*, R.S.O. 1990, c. S.26 is amended by repealing the following provisions:

(a) Paragraph 15(a); and

(b) Section 16.

3. This Act applies to:

(a) existing marriages unless a will has already been revoked by the marriage; and

(b) future marriages.



## CHAPTER 10: ELDER FINANCIAL ABUSE

### INTRODUCTION

Elder financial exploitation touches all of us. We may have aging parents, relatives, colleagues, customers, clients, patients, friends or neighbours who could become victims or who show signs of diminished capacity or financial exploitation. Elder financial abuse is, unfortunately, a serious problem in our society that is likely to increase as our population ages and Canada faces a large demographic shift. According to the Canadian Department of Justice, financial abuse is the most commonly reported type of abuse against older adults.<sup>1</sup> It has gained increasing attention from financial regulators, firms and professionals, with new measures introduced over the past years at both provincial and federal levels. Chapter 1 listed the various forms of financial elder abuse.

### DEFINITION

The National Initiative for the Care of the Elderly (**“NICE”**) defines older adult financial abuse as, “Theft or exploitation of a person’s money, property or assets.”<sup>2</sup>

A more detailed definition refers to:

Financial exploitation of an older person by another person or entity, that occurs in any setting (e.g. home, community, or facility), either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability.<sup>3</sup>

A distinction could be drawn between financial abuse involving a relationship of trust that has been violated by family members, friends or other persons who are known (professional advisors such

- 1 Lisa Ha and Ruth Code, Department of Justice, An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Section of the Ottawa Police Service, 2013, online: [http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13\\_1/p1.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13_1/p1.html) [accessed on 30.07.19] and *Backgrounder Elder Abuse Legislation*, 2012, online: <https://www.canada.ca/en/news/archive/2012/03/elder-abuse-legislation.html> [accessed on 30.07.19].
- 2 *National Initiative for the Care of the Elderly “Preventing and Intervening in Situations of Financial Abuse: Ontario”* online at: <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario>. (“NICE”).
- 3 Marie-Therese Connolly et al., *The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Societal Crisis* 24 (2014).

as accountants, lawyers, or financial services providers or caregivers) or it could be financial fraud against older adults involving scams, investment fraud or identity theft perpetrated by strangers.

### **WHY ARE THE ELDERLY IN PARTICULAR VULNERABLE TO FINANCIAL EXPLOITATION?**

Three interrelated sets of factors are at work when dealing with the elderly and their vulnerability to financial exploitation, namely: health-related effects of aging; financial and retirement trends; and demographic trends.<sup>4</sup>

It should not be forgotten that financial exploitation not only has negative consequences on financial well-being but often has significant negative effects on individuals' physical and mental health.

### **WHO CAN BE A VICTIM?**

No person is shielded from becoming a victim of fraud. Fraudsters target everyone and anyone can be a “sucker”. While some studies suggest that older adults are less likely to be a fraud victim since they have more life experience, the reality is that older adults are more vulnerable to becoming victims and easy targets of financial exploitation due to the factors mentioned above.<sup>5</sup>

The story of Marian Simulik (“**Ms. Simulik**”), city treasurer for the City of Ottawa, is an example of how no one is shielded from being a victim of a scam and how important it is to be aware and vigilant of scam trends. In July of 2018, Ms. Simulik received a spoofed email that impersonated the manager of the City of Ottawa and tricked her into wire-transferring nearly \$128,000 CAD to an American bank account. Ms. Simulik only realized that she had been a victim when she received another email from the fraudster acting again as the city manager, requesting a further transfer of \$154,238 USD. This time, Ms. Simulik was sitting with the city manager in a city council meeting where she inquired about the payment personally. She was advised that no such payment request was ever sent by him. The fraud incident was promptly reported and an investigation was commenced by the Office of the Attorney General (“**OAG**”). The fraud was also reported to the Ottawa Police Service; however, the police could not help because the wire transfer had been completed. The OAG found that the city staff lacked fraud awareness.<sup>6</sup>

4 White Paper- June 2018- U.S Securities and Exchange Commission, Office of the Investor Advocate: Elder Financial abuse & Elder Financial Exploitation: Why it is a concern, What regulators are doing about it, and looking ahead, written by Stephen Deane, online: <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

5 C. Steve Baker “Sweepstakes, Lottery and Prize Scams A Better Business Bureau study of how “winners” lose millions through an evolving fraud”(June 2018), at 5, online: <https://www.bbb.org/globalassets/local-bbbs/council-113/media/scam-studies/sweepstakes-lottery-and-prize-scams-study-final.pdf> (“**BBB Study**”) [accessed on 10.10.19]

6 Beatrice Britneff “Scam email impersonating Ottawa city manager tricked treasurer into wiring \$128K to fraud supplier”, Global News, April 8, 2019, online: <https://globalnews.ca/news/5141545/ottawa-treasurer-tricked-email-city-manager/> [accessed on 11.10.19]

## STATISTICS

There are large gaps in data and empirical research. The U.S. has Adult Protective Services at the state level, which may provide different types of services, to different populations. Eligibility for those services, response times and education and training of its workers may vary both with and amongst states. Nonetheless, a federal initiative in the U.S. is underway to build a national data system of APS data called the National Adult Maltreatment Reporting System.

Why is data important? Data helps inform policies about elder abuse and justify the need for adequate funding and resources. The Elder Justice Roadmap, a report reflecting 750 stakeholders and experts state “Comprehensive data collection is critical to inform efforts to detect, respond to, and prevent elder abuse, to shape policy, and to allocate resources where they’re most needed.”<sup>7</sup>

Although gaps in data will remain given low reporting rates, the U.S. is further ahead in its data-gathering efforts than we are in Canada.

Canada has no nationwide or systematic collection and reporting of data on cases of elder abuse. Moreover, there is significant underreporting of abuse. Consequently, there are no accurate statistics on the matter.

The 2015 National Survey on the Mistreatment of Older Canadians studied the prevalence of elder abuse and neglect. Led by Dr. Lynn McDonald, this large, multi-year study found that 8.2% of older Canadians had been subject to elder abuse or neglect in the past year and more than 5% specifically reported elder financial abuse.<sup>8</sup>

This same study concluded that elder abuse is overwhelmingly perpetrated by individuals close to the older person: in two-thirds of cases, the perpetrator is a family member, close friend, or caregiver. In some cases, the abuser may be the only person with whom the older adult has contact, and could be the older person’s informal care provider. These numbers are consistent with other studies in the U.S., UK, Israel, and Germany, as well as by the World Health Organization.

The study did not include persons who had mental capacity issues or persons in long-term care facilities. Thus, experts believe the study’s results may still underestimate the scale of the problem—particularly because elder abuse allegations are often not believed, underreported, poorly tracked, or little-understood by third parties.

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7 The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis, online: <https://www.justice.gov/file/852856/download>. P. 28.

8 NICE, “National Survey on the Mistreatment of Older Canadians,” (2015) online: <https://cnpea.ca/en/resources/studies/68-the-national-survey-on-the-mistreatment-of-older-canadians-a-prevalence-study> [accessed on 11.10.19]

According to a survey conducted by the Canadian Securities Association in 2017, one-in-five, or 18%, of the participants thought they have been approached about a fraudulent investment opportunity, 21% of the 18% were adults 65 years or over and only 33% reported the fraudulent investment, of which 34% were 65 years or over. Email spam was the most common way respondents were introduced to the fraudulent opportunity (44%), followed by cold calls (21%). It reported that 20% of the respondents did not know where to report fraud.<sup>9</sup>

According to a study conducted by Better Business Bureau (“**BBB**”),<sup>10</sup> issued in 2018, the new scheme currently being promoted by fraudsters, involves telling people they have won a large amount of money in a lottery, or sweepstakes. However, in order to claim the prize, the victim needs to pay the taxes in respect of the prize upfront.

The BBB study showed that in 2017 alone, the total loss reported from lottery scams and sweepstakes in the U.S and Canada amounted to \$117 million. The Federal Trade Commission Internet Crime Complaints Centre and the Canadian Anti-Fraud Centre received around 150,000 complaints in respect of the above scams.

The study found that individuals between the ages of 65 and 74 years; those who had experienced a serious negative life event in the previous two years; such as divorce, death of a family member or close friend, serious family injury or illness, or loss of a job; those who had a greater willingness to take risks; and those who anticipated that their income over the next three years would be the same or would decline were more susceptible to becoming victims of a scam.<sup>11</sup>

## **POPULAR SCAMS AND FRAUD INVESTMENTS TARGETING SENIORS**

There are a variety of scams happening in our society, and the way that people are being defrauded continues to evolve. Fraudsters constantly re-invent the wheel and add a new twist to prey on potential victims. Unfortunately, by the time people catch on and the government agencies and institutions warn the public, it is often too late. Currently, the popular scams/investment fraud targeting older adults are listed below:

9 Canadian Securities Association, 2017, CSA Investor Index (November 2017), at 53, online: <https://www.securities-administrators.ca/investortools.aspx?id=1011> [accessed on 11.11.19]

10 *BBB Study*, *supra* note 5, p. 5

11 *Ibid.*

## (a) Scams

**A Charity Scam** involves scammers collecting money by pretending to be a real charity. Victims are either approached on the street, at their home, over the phone, or on the Internet. Emails and collection boxes may even be marked with the logos of genuine charities. Often, the scammer will exploit a recent natural disaster or famine that has been in the news. Other scammers play on people's emotions by pretending to be from charities that help children who are ill. Scammers can try to pressure you to give a donation and refuse to provide details about the charity, such as their address or their contact details.<sup>12</sup> All registered charities in Canada are overseen by the Canada Revenue Agency and listed in its database at <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities-listings.html>.

**An Emergency Scam** usually targets loving grandparents, taking advantage of their emotional state. The typical scam starts with a grandparent receiving a phone call from someone claiming to be his or her grandchild. The "grandchild" goes on to say they're in trouble and need money immediately. The caller will ask questions, getting the victim to reveal personal information. They'll also swear the person to secrecy, saying they are embarrassed and don't want other family members to find out what's happened.<sup>13</sup>

**A Romance Scam** happens when a scammer sends messages and a good-looking photo of themselves, or of someone they claim to be, on a real dating site. Once the victim is charmed, the scammer will start asking for money. They may claim to have a very sick family member or be in a desperate situation for which they need your help. Once the money is sent, the scammer often disappears.<sup>14</sup> Romance scams cost Canadians more than \$22.5 million in 2018, surpassing all other forms of fraud in terms of money lost, according to the Canadian Anti-Fraud Centre ("**CAFC**").<sup>15</sup>

- In situations where the fraudster is offshore or the money that has been sent is untraceable, there is very little that the police can do, either because they have no investigative authority in the foreign jurisdiction or because it is too late and the money is gone.
- Unfortunately, the victims of such scams have no remedy available to them and the fraudsters will rarely be held accountable for their actions.

12 Competition Bureau Canada "The Little Black Book of Scams- Your Guide to Protection against fraud", first published by the Competition Bureau Canada 2012 and reproduced with permission from the Australian Competition and consumer Commission, page 18, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03074.html> [accessed on 20.11.19]

13 *Ibid*, p. 14.

14 Competition Bureau Canada "The Little Black Book of Scams- 2nd Edition", p. 11, online: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-IBBS2-EN.pdf/\\$file/CB-IBBS2-EN.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-IBBS2-EN.pdf/$file/CB-IBBS2-EN.pdf) [accessed on 20.11.19]

15 Daniel Otiso, "No 1 scam: Romance fraud cost Canadians more than \$22.5M in 2018", February 13, 2019, CTV News, online: <https://www.ctvnews.ca/lifestyle/no-1-scam-romance-fraud-cost-canadians-more-than-22-5m-in-2018-1.4294076>. [accessed on 20.11.19]

- The situation is different when the fraud is committed by a person that is known to the elderly individual as most civil and/or criminal remedies are available to them. Therefore, it is very important to increase the public's awareness and put in place mechanisms that will act as preventative measures, rather than addressing the matter after the scam/fraud has taken place.

In 2018, Global News interviewed a senior lady who was diagnosed with early signs of dementia and lost about \$140,000.00 after becoming a target of a fake suitor who stole her money. After losing her husband and feeling lonely, she joined an online dating site, match.com. The imposter began his aggressive pursuit online, sent her pictures of him and listened to her issues. Once she was hooked, the money requests started.

Initially, the fraudster requested \$12,000.00 USD which she sent, then again he requested \$80,000 USD as he claimed he had been jailed in India, which she sent despite her bank manager advising her that it is a scam and should not send the money. Only when the imposter asked her to send money for the third time did the elderly lady realize that she had been scammed and should go to the police to report it. By that time, it was unfortunately too late.

The scam cost her her independence. She had to move out of her house and sell her car, as she couldn't afford to live there anymore. She knew that retrieving the money was almost impossible but she wanted her story to be shared, in the hopes of warning others who might fall victim to such a scam.<sup>16</sup>

**A Prize Scam** happens, when victims are contacted via an email, a letter, text message, social media or phone call, and are advised that they have won, or have a chance at winning a prize or lottery. The “winner” must first purchase something or pay an advance fee such as taxes to receive the prize. The scammers will usually request the victim to respond quickly or risk missing out. They may also urge the individual to keep their winnings private or confidential, to ‘maintain security’ or stop other people from getting the prize by mistake. Scammers do this to prevent the person from seeking further information or advice from independent sources.<sup>17</sup>

In 2017, CBC News reported the story of a senior from Norfolk County who was scammed out of \$152,000 over a period of time, after being told by an unknown caller that he had won an International Sweepstakes Lottery valued at \$24.9 million USD, and needed to send money via wire transfers to cover taxes. The wire transfers were sent to addresses in San Francisco and New

16 Sean O'Shea, “Romance scam costs Ontario senior \$140K”, January 1, 2019, Global News, online: <https://globalnews.ca/news/4806823/romance-scam-ontario-senior/> [accessed on 10.10.19]

17 The Australian Competition & Consumer Commission, accessed on April 15, 2019, online: <https://www.scamwatch.gov.au/types-of-scams/unexpected-winnings/unexpected-prize-lottery-scams>. [accessed on 20.11.19]

Jersey, and then it was subsequently transferred to a number of unknown individuals. Unfortunately for this victim, no legal recourse was available as there was very little that the police could do since the money and the perpetrator were in a foreign jurisdiction.<sup>18</sup>

### **(b) Investment Fraud**

Investment fraud generally refers to a wide range of deceptive practices that scammers use to induce investors to make investing decisions. These practices can include untrue or misleading information or fictitious opportunities. Investment fraud may involve stocks, bonds, notes, commodities, currency or even real estate.<sup>19</sup>

The Ontario Securities Commission's ("**OSC**") Get Smart about Money lists several common investment scams:<sup>20</sup>

An **Advance Fees Scheme** involves a victim being persuaded to pay money upfront in order to take advantage of an investment opportunity promising significantly more in return. But the scammer takes the money and the victim never hears from them again. Advance fee scams are also used to defraud individuals who have been the victims of an earlier fraud. Fraudsters will contact victims, telling them that, for an upfront fee, they will help to recover earlier losses. Instead, they abscond with the upfront fees they collect and investors suffer additional losses (the upfront fees paid).

A **Forex Scam** promotes easy access to the foreign exchange market, often through courses or software. Online foreign exchange (forex) currency frauds are often operated in foreign jurisdictions. They promote high returns coupled with low risks from investments in forex contracts and often lure investors with the concept of leveraging their investment to control a significant amount of foreign currency for a relatively small initial investment. In these scams, an investor's money will not be invested as claimed, and when the money is wired into an offshore account it will be difficult, if not impossible, to recover the funds.

**Cryptocurrency Frauds** are increasing in popularity, and are extremely speculative, high-risk investments that are not suitable for most people. Cryptocurrencies can also be vehicles for individuals to carry out fraud and manipulation. As stated in the Canadian Securities Administrators ("**CSA**") Staff Notice 46-307, cryptocurrencies raise investor protection concerns "due to issues

18 "Senior loses \$152,000 in 'International Sweepstakes Lottery' scam", CBC News, November 1, 2017, online: <https://www.cbc.ca/news/canada/hamilton/sweepstakes-scam-vehicle-phone-call-norfolk-county-1.4381597> [accessed on 20.11.19]

19 FINRA Investor Education Foundation, Types of Investment Fraud, online: <https://www.saveandinvest.org/protect-your-money-spot-and-avoid-fraud/types-investment-fraud>. [accessed on 15.04.19]

20 Ontario Securities Commission – Get Smart about Money- 8 common investment scams found online at: <https://www.getsmarteraboutmoney.ca/fact-cards/8-common-investment-scams/>. (OSC). [accessed on 10.10.19]



around volatility, transparency, valuation, custody, and liquidity, as well as the use of unregulated exchanges. Also, investors may be harmed by unethical practices or illegal schemes, and may not understand the properties of the investment products that they are purchasing.”<sup>21</sup> For example, the CSA issued an Investor Alert on June 6, 2018, entitled “Caution urged for Canadians investing with crypto-asset trading platforms”.<sup>22</sup>

**Offshore Investing Scams** promise large profits if an individual sends their money “offshore” to another country alleging that it will do so by lowering or avoiding taxes, but the person could end up owing the government money in back taxes, interest, and penalties, and/or simply have the money disappear to the fraud. In addition, the individual would likely not be able to take their case to a civil court in Canada as they are dealing with another jurisdiction’s legal process.

**Pension Scams** target people who have their retirement savings in a Locked-in Retirement Account (“**LIRA**”), a Life Income Fund (“**LIF**”) or a locked-in retirement income fund (“**LRIF**”). It may cost an individual more in the long run than merely the loss of money for their retirement. Normally one cannot withdraw money from a *LIRA* until they reach a certain age, usually 55 or older. The scam is promoted as a special “RRSP loan” that lets a person access their locked-in funds.<sup>23</sup>

**Ponzi or Pyramid Schemes** have been used time and again and continue to be used to defraud investors. While they may appear easy to spot, that often is not the case:

Successful fraud looks just good enough to be true. By mimicking the persuasive strategies, communications streams, and payment mechanisms of legitimate commerce, skilled fraudsters give few indications that their offers are scams. Fraudsters’ methods anticipate informed, skeptical consumers by providing numerous markers of legitimacy, authenticity, and appeals to trust. The means by which fraudsters contact targets and obtain money mirror trends in everyday transactions, with the internet outpacing all other mechanisms.<sup>24</sup>

A Ponzi Scheme lures investors in with the promise of high returns. The fraudster pays investors from funds contributed by new investors and steals the rest. The schemes require a consistent flow of money from new investors to continue. Ponzi schemes tend to collapse when it becomes difficult to recruit new investors or when a large number of investors ask to cash out. In Ponzi schemes,

21 Canadian Securities Administrators, Staff Notice 46-307 Cryptocurrency Offerings, online: [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_csa\\_20170824\\_cryptocurrency-offerings.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170824_cryptocurrency-offerings.htm) (CSA) [accessed on 10.10.19]

22 CSA Investor Alert: Caution urged for Canadians investing with crypto-asset trading platforms” June 6, 2018,

23 FSCO’s website online: <https://www.fSCO.gov.on.ca/en/pubs/News-Releases/Pages/20010726-pensionscams.aspx>. [accessed on 20.11.19]

24 Martha Deevy, Shoshana Lucich, & Michaela Beals, Scams, Schemes & Swindles: A Review of Consumer Financial Fraud Research, online: Financial Fraud Research Center at 6, online: <http://fraudresearchcenter.org/wp-content/uploads/2012/11/ScamsSchemes-Swindles-FINAL-On-Website.pdf> [accessed on 20.11.19]

investors typically deal with someone who is not registered and investors receive “interest” payments or account statements but the investment is not legitimate. Most investors do not get their money out and the promoters of the scheme vanish, taking the money with them.<sup>25</sup>

**Pump and Dump Scams** are scams where fraudsters attempt to get investors to put their money into stocks that are alleged to be under-valued, in an effort to artificially inflate their value. These stocks are promoted through fictitious emails, social media messages, and news releases. The investors are unaware that the person or company contacting them owns a large quantity of the stock and that the company is not legitimate. As the investors buy the shares the share price increases. Once the price hits a targeted amount, the fraudster sells the shares and the stock price plummets, leaving the investors holding securities with little or no value. A pump and dump is a form of market manipulation that directly harms individual investors.”<sup>26</sup>

## **INDICATORS TO ASSIST IN DETECTING INVESTMENT FRAUD/SCAMS**

The Competition Bureau of Canada (the “**Bureau**”) is an independent law enforcement agency. One of its responsibilities is the administration and enforcement of the *Competition Act*.<sup>27</sup> The types of anti-competitive activities investigated by the Bureau include false or misleading representations, deceptive notice of winning a prize, multi-level marketing plans and schemes of pyramid selling, deceptive telemarketing and deceptive marketing practices. The Bureau has published two editions of “**THE LITTLE BLACK BOOK OF SCAMS - YOUR GUIDE TO PROTECTION AGAINST FRAUD**”.<sup>28</sup> The booklets are an easy read; they have been translated into many different languages to accommodate the diversity of Canada’s population. The booklets list the most common scams, with the aim to increase people’s awareness, and provides a list of “Red-Flags” to keep an eye out for in respect of each scam/fraud.

## **ENTITIES / INITIATIVES SEEKING TO COMBAT FRAUD/ FINANCIAL ELDER ABUSE**

Elder Financial abuse has gained increasing attention from financial institutions, firms, and professionals alike. The role-players recognize that to be able to address this issue effectively, there is a need to intensify the efforts to raise awareness of elder abuse; improve the knowledge transfer

25 Canadian Foundation for the Advancement of Investor Rights\_“A Canadian Strategy to Combat Investment Fraud” (August 2014), online: <https://faircanada.ca/wp-content/uploads/2014/08/FINAL-A-Canadian-Strategy-to-Combat-Investment-Fraud-August-2014-0810.pdf> (FAIR Canada). [accessed on 20.11.19]

26 FAIR Canada, *supra* note 23.

27 *Competition Act*, R.S.C., 1985, c. C-34

28 Competition Bureau Canada “the Little Black Book of Scams- Your Guide to Protection against fraud”, first published by the Competition Bureau Canada 2012 and reproduced with permission from the Australian Competition and consumer Commission, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03074.html> [accessed on 10.10.19]

and information dissemination among those who work in the field on best practice, research and intervention strategies; educate and train professionals of different disciplines who interact and provide services to seniors in order to detect abuse, to report it in accordance with protocols, and to take appropriate legal action; implement action plans based on needs and research; increase the resources for the community responses to elder abuse; and constant review the laws to ensure that adequate protection measures are in place.

Chapter 17 lists some of the entities and organizations that are working to combat elder abuse in general; included in the list are entities that specifically address elder financial abuse. These institutions are constantly seeking to increase people's awareness of the different types of elder financial abuse. They offer tips and tools on how to stop fraudsters in their tracks and what to do in the event of becoming a victim. Furthermore, they make recommendations on how to improve the current system.

### ***THE AVAILABLE REMEDIES: CIVIL AND CRIMINAL***

Chapters 11 and 12 discuss the civil and criminal remedies available to a victim of financial abuse. The available remedies depend on who the perpetrator is. In situations where the fraudster is offshore, or the money that has been sent to the fraudster is untraceable, there is very little that the victim and/or the police can do. This is because the police have no investigative authority in the foreign jurisdiction or because it is too late and the money is gone.

Unfortunately, victims of such scams rarely have a remedy available to them and the fraudsters will not be held accountable for their actions. The situation is different when the fraud is committed by a person that is known to the older adult, as most often, civil and/or criminal remedies are available.

The story of Leslie Harrison ("**Mr. Harrison**"), illustrates the difference in the availability of civil and/or criminal remedies to a victim who has been defrauded by a person that is known to the older adult as opposed to being defrauded by a stranger.

The victim, Mr. Harrison, a 75-year-old man with autism, was defrauded in a variety of ways by his neighbour, Michael Kennedy ("**Mr. Kennedy**").<sup>29</sup>

Mr. Kennedy unduly influenced Mr. Harrison to take out two mortgages on his property, the proceeds of which were withdrawn by Mr. Kennedy from the victim's bank account.

29 Bill Sawchuk "Fraud leaves senior destitute", Niagara Falls Review, June 23, 2015, online: <https://www.niagarafallsreview.ca/news-story/8181024-fraud-leaves-senior-destitute/> [accessed on 20.11.19]; "Community rallies for defrauded senior", Niagara Falls Review, June 24, 2015, online: <https://www.niagarafallsreview.ca/news-story/8181057-community-rallies-for-defrauded-senior/> [accessed on 20.11.19]

Mr. Harrison was defrauded approximately in the sum of \$200,000.00. His mortgage payments were in arrears, and he was about to lose his home that was fully paid.

The bank manager, who suspected unusual activity on Mr. Harrison's account, contacted the fraud unit of the police department and an investigation was commenced. The evidence against the accused, Mr. Kennedy, was substantial and he was criminally charged and ultimately convicted of fraud over \$5,000.

At the same time, the Office of the Public Guardian and Trustee (the "**PGT**") was contacted to assist the vulnerable adult.

It is imperative to increase the public's awareness in the context of the older adult, as well as to develop mechanisms that will act as preventative measures, rather than redress after the scam/fraud has taken place on a continuing and ongoing basis

## **CONCLUSION**

Since elder financial abuse continues to exist, the public, the police, the community and those involved with older adults must be aware of its devastating effects and how important it is to keep a watchful eye out for older family members, neighbours, and acquaintances. Various government organizations, financial regulators and institutions continue actively to seek to raise awareness, educate the public, and improve the framework for detection and prevention of elder financial abuse. Despite such efforts, there is a need for greater collaboration and coordination between such entities in order to achieve effective results and to detect and prevent such abuses from happening rather than dealing with them after the fact. We should keep in mind that all of us could become at risk as we grow older.

# CHAPTER 11: ELDER ABUSE AND THE CIVIL LAW REMEDIES

## INTRODUCTION

In order for elder abuse, a societal problem, to be properly addressed, it is imperative that instances of elder abuse are brought to light and remedied in the judicial system. When the abuse of older adults is suspected or detected, remedies (which are intended to right the wrong and/or punish the wrongdoer) are available under the *Criminal Code of Canada*<sup>1</sup> (the “**Criminal Code**”) or by way of civil court proceedings that can be commenced by the victims themselves or by individuals on their behalf.

While criminal and civil proceedings can be brought at the same time and can proceed simultaneously, the remedies available under the two procedural avenues differ, as do the objectives behind and potential outcomes of criminal and civil proceedings.

Based on the facts of any given case, there may be circumstances where bringing criminal proceedings is more appropriate than filing a civil lawsuit and vice versa.

Oftentimes, victims of elder abuse are not aware of the civil and/or criminal remedies that are available to them, or of the important differences between these two options.

The following two chapters will discuss the legal remedies that are available via civil and criminal proceedings to address instances of elder abuse and to deliver justice to both the victims and perpetrators of elder abuse.

## CIVIL PROCEEDINGS OVERVIEW

As opposed to criminal proceedings, which are commenced by the Crown under the *Criminal Code* against alleged perpetrators, civil proceedings are lawsuits between private parties. While only the Crown can bring a criminal charge, anyone can commence a civil action in court. However, while civil proceedings are open to the public, there are still many barriers that litigants must overcome in order to achieve justice in going the civil route.

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1 *Criminal Code*, R.S.C., 1985, c. C-46 (“*Criminal Code*”).

Firstly, the time and cost of civil litigation may be too burdensome for many individuals to take on. Civil proceedings are expensive to fund, lawyers are costly, and civil litigation can take many years to unfold. Quite often, victims of elder abuse simply do not have the time or financial resources available to fund civil proceedings. On the other hand, the Crown has extensive time and financial resources at its disposal and may be better equipped to advance proceedings in circumstances where the *Criminal Code* applies.

If an individual chooses to commence civil proceedings, it is important that they understand the objective behind civil remedies. While criminal proceedings are meant to punish perpetrators for their crimes (with jail time, fines, etc.) civil remedies are mainly concerned with restitution of victims: placing the victim back into the place or into the condition he or she would have been in had the wrongful act never happened.

In order to succeed in civil proceedings, the plaintiff (the elder victim or the individual who brings the claim on their behalf) must prove on a “balance of probabilities” that the alleged wrongdoing took place. This means that the plaintiff must produce enough evidence to establish that it is *more-likely-than-not* that the misconduct occurred.

## **CIVIL REMEDIES IN THE ELDER ABUSE CONTEXT**

As discussed in earlier chapters, financial abuse against older adults can be committed by people who owe a “fiduciary duty” to the victim and subsequently breach that duty (i.e. substitute decision-makers such as Guardians of Property or Power of Attorney) or by other unscrupulous individuals who take advantage of the elder victim. Potential perpetrators can be the family or friends of the victim, acquaintances, or third parties who take advantage of the vulnerable older adult.

The *Substitute Decisions Act*<sup>2</sup> (“**SDA**”) outlines the authority that is conferred upon and granted to substitute decision-makers such as Guardians of Property or Powers of Attorney for Property (“**POAP**”), the fiduciary duties that substitute decision maker owes to the grantor or incapable adult, and the potential liability which those individuals face should they breach their duty.

The following is a summary of some of the civil remedies that a Court can order to address instances of financial elder abuse.

### **“Removal” of an Attorney under a Continuing Power of Attorney for Property**

A Continuing Power of Attorney for Property (“**CPOAP**”) is commonly used to make sure that the

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2 *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (“**SDA**”).

financial affairs of a person are looked after during times when that person (the grantor) can no longer look after his/her affairs alone, either temporarily, as agent, and/or permanently when the grantor becomes incapable. Notably, the CPOAP is effective immediately upon execution unless there is a provision or “triggering mechanism” in the document itself, which says that it is only to come into effect on a certain date or upon a certain event, such as the incapacity of the grantor. The CPOAP also continues following the grantor becoming incapable.

This means that the powers granted to an attorney under a CPOAP are extensive and far-reaching. An Attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to legislative governance and various court-imposed conditions.

The SDA particularizes the obligations and duties of an attorney under a power of attorney (“**POA**”), and specifically notes that this is a fiduciary position and an attorney’s powers must be exercised diligently, with honesty and integrity and in good faith for the grantor’s benefit.<sup>3</sup> The SDA further sets out that a substitute decision maker in this capacity will be liable for damages that result from a breach of the fiduciary duty.<sup>4</sup>

The SDA prescribes the court procedure for holding an attorney accountable for its actions.<sup>5</sup> As noted, elder financial abuse often involves the misuse of powers granted under a Power of Attorney document.

If an Attorney for Property has acted improperly or breached his or her duty to the grantor, the Court can order that the attorney be removed as an attorney and can prohibit the grantee from acting as an attorney under a POA. A Court can further order that an attorney who has breached their duties pay damages to the victim for such breach, or pay for the victim’s costs of any legal proceedings.

### ***Order to “Account” (Produce Evidence of How the Money was Spent)***

Another civil remedy available to address money wrongfully taken by an attorney under a CPOAP is to order an accounting to be provided by the attorney, tracking all transactions undertaken on behalf of the grantor, (i.e., to provide financial documents and back-up to show how he or she was spending the money). That process is called an “accounting” and a court has the authority to compel an accounting under section 42 of the SDA.

Section 42 of the SDA sets out that the grantor of the Power of Attorney, a dependent of the grantor,

<sup>3</sup> SDA, *supra* note 2, s.32.

<sup>4</sup> SDA, *supra* note 2, s.33.

<sup>5</sup> SDA, *supra* note 2, s.42.



the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor of the grantor, or any other person with leave of the Court may apply for an order that an attorney pass their accounts or produce an accounting.

Upon a fiduciary being ordered to Account, an accounting application would proceed in the civil courts pursuant to the *Rules of Civil Procedure*.<sup>6</sup>

At the hearing of an accounting application under the *SDA*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney, and determine whether or not there was any impropriety or a breach of fiduciary duty.

Judges have broad discretion in an accounting application. They can make a wide range of orders and inquire into all conduct of the attorney. If it is found that the attorney failed to meet the obligations under the *SDA*, it is open to the Court to make a finding that there has been a breach of fiduciary duty.

### ***Repay Money Improperly Taken***

If the Court finds that an attorney under a POAP or CPOAP improperly took money from the grantor, failed to properly manage the grantor's property, did not pursue another who for example did not repay a "loan" to the older adult, or committed civil fraud on the older adult etc., the Court can order the repayment of those amounts, plus interest, and legal costs incurred by the attorney. Of course, the Court can also order the removal of the attorney.

In these instances, a Court will consider whether the funds were put towards the grantor's best interests, or used with the grantor's consent, or whether the attorney or fiduciary simply took the funds for their own use or benefit or used them inappropriately.

### ***"Setting Aside" a Transfer of Title or Bank Account into Joint Names***

Older adults may, from time to time, transfer real property or bank accounts into a joint tenancy with one or more of their adult children, or another individual. Sometimes, this is a planning technique used to avoid estate administration tax on the theory that title to the parent's property once dead automatically transfers to the adult child on survivorship.

Older adults may also add their adult children to their bank accounts to permit their children to assist them with bill payments and other financial matters. Often times, individuals who wish to avoid paying probate taxes and/or fees of professionals who draft wills, also use joint bank accounts

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6 Rules 74.16 – 74.18 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

with ‘rights of survivorship’, as an estate-planning tool. “Rights of survivorship” simply means that when one joint owner dies the surviving joint owner automatically owns the entire asset.

However, oftentimes the elder adult does not realize the legal ramifications of placing their property into joint tenancy. They may not understand the “Right of Survivorship” and may not intend for the third party to take the entire asset upon the elder’s death. The elder adult may simply be using the joint ownership as an estate-planning tool, or for convenience purposes, without any intent to gift the property they have transferred.

Obtaining “rights of survivorship” on a joint bank account can be as simple as checking off a box on the application form. This is where the trouble arises. An older adult opens a joint account with another individual, or places their real property into joint tenancy. The older adult dies. The surviving joint owner who is jointly named on the property may say that ALL of the money is theirs now. Others may cry foul and claim that the elder adult actually intended to retain the property for his or her estate beneficiaries. That’s where civil litigation can begin and remedies achieved. A civil court can make a declaration that the money or property belonged to the elder adult, was never meant to be gifted to the other joint owner and order that title be returned to the elder adult or their estate and/or that any money taken be returned as well.

What is crucial in these cases is determining the true intention of the elder adult. Did they intend to gift the property they put into joint tenancy to another person upon the elder’s death? Or did the elder person always intend to maintain ownership over the property, only putting it into joint ownership for convenience purposes.

### ***Setting Aside Property Transfers due to Undue Influence or Incapacity***

A common civil remedy for instances of elder financial abuse is the setting aside of property transfers or transactions which were improperly carried out, for example, during times when the elder adult lacked capacity or was being unduly influenced to make the transaction.

Oftentimes, perpetrators will prey upon vulnerable and enfeebled elders and have property transferred or other transactions undertaken when the elder person is not capable of making such transfer, or by “unduly influencing” the weakened elderly person into entering into the transaction.

Section 6 of the *SDA* sets out that a person is “incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision”. If it is determined by a Court that an elder transferred property or entered into a transaction relating to their property at a time when they were incapable of managing their property, the Court can order that the transaction be set aside on the grounds of incapacity.

Usually, in these cases, the Court will require expert medical evidence that speaks to whether the elder victim had or did not have the requisite capacity at the relevant time. If the medical evidence can establish that there was a lack of capacity at the time the transfer took place, the Court can order the transfer null and void.

Even in cases where the elder victim may have had the requisite cognitive capacity, courts can still order that transactions be set aside if it is found that the elder was coerced, or unduly influenced, into making the transfer by the perpetrator.

Having a transaction unwound on the grounds of undue influence can be difficult, as the plaintiff must prove that the transfer resulted from influence exerted by the perpetrator, who was in a position of dominance or influence over the victim, and essentially caused the victim to enter into the transaction against the latter's will. In these cases, courts will examine the nature of the relationship, and the actions of the alleged perpetrator, in determining whether the transfer was a result of undue influence. The transfer can then be set aside if it is found to have been a product of undue influence.<sup>7</sup>

### ***Restitution through Unjust Enrichment/Constructive Trust or Resulting Trust***<sup>8</sup>

In circumstances where property has been transferred to the perpetrator from the victim, and it is found that it was not the victim's intention to make a gift of that property, the Court can declare that although the abuser may have "legal" title to property, the "beneficial" title belongs to the elder adult. In other words, while the name on the property is that of the abuser, the property really belongs to the older adult. This may occur where an abuser has been "unjustly enriched".

An abuser has been unjustly enriched where a benefit has been given to the abuser (the older adult made payments on the abuser's mortgage, or made the abuser a joint tenant on title), to the detriment of the older adult and there is no lawful reason for it to have happened.

If the Court finds that the abuser has been unjustly enriched then the Court can order that money be paid to the older adult or order that property the abuser holds is being held "in trust" for the older adult or for their estate.

### ***Setting Aside or Declaring a Predatory Marriage as "Void"***

Another form of financial abuse is where an older adult inadvertently transfers property or beneficial rights through a predatory marriage, as discussed in Chapter 9.

<sup>7</sup> *Geffen v. Goodman Estate*, [1991] 2 SCR 353 (S.C.C.).

<sup>8</sup> For a further review of restitution as a remedy in the context of elder abuse, Graham Webb, Executive Director at Advocacy Centre for the Elderly ("ACE") has written an article titled "Restitution for the Elderly Client", found online at: <http://seniorsfirstbc.ca/wp-content/uploads/2016/08/Restitution-for-the-Elderly-Client-Graham-Webb.pdf>.

Predatory marriages are ones where unscrupulous opportunists prey upon, in particular, older adults with diminished reasoning ability purely for financial gain through the contract of marriage. Marriage brings with it a wide range of property and financial entitlements. Marriage revokes a Will. The overriding problem with predatory marriages is that they are not easily challenged at common law. Recent cases indicate that success in righting this type of wrong depends on the existence of sufficient, compelling medical evidence of incapacity.

The traditional way is to argue that the older adult did not have the requisite capacity to enter into the marriage. However, the older adult will likely be considered capable of marriage if they can 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, they might be required to have the requisite capacity to manage property and make personal care decisions.

The historical case law developing the understanding that marriage is a simple task not requiring a high degree of intelligence has established a criterion that is increasingly easily met, and therefore courts often find that the older adults were capable even in the most obvious cases of exploitation.

### **DOCTRINE OF UNCONSCIONABLE PROCUREMENT**

Another avenue to set aside a transaction that has occurred between an elderly victim and a perpetrator is through the doctrine of unconscionable procurement. The doctrine renders an *inter vivos* wealth transfer transaction voidable, not void, and normal equitable defences apply. The doctrine applies only where the wealth transfer is significant or improvident.<sup>9</sup>

At issue is the donor's "necessary level of understanding to make a transaction conscionable when it takes place in circumstances that suggest, on a *prima facie* basis, the contrary. It is a matter of flawed intent."<sup>10</sup>

The onus is on the party attacking the transaction to prove, on the civil standard of a balance of probabilities that it was unconscionably procured.<sup>11</sup> Once the basic elements have been established by the attacker (a significant benefit and the active involvement on the part of the person obtaining that benefit in the procurement or arrangement of the transfer) then there is a presumption that the donor of the gift did not truly understand what she was doing in making the transaction. The court is to look at the impugned transactions with its moral sense awakened and with a view to determining whether it would be unconscionable to allow the transaction to stand. This equitable doctrine does not require proof of incapacity or undue influence.

<sup>9</sup> John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada, 2014), p. 602. ["Poyser"]

<sup>10</sup> *Ibid*, p. 571.

<sup>11</sup> *Ibid*, pages. 570 and 580-81.

## **CASE LAW HIGHLIGHTING CIVIL REMEDIES FOR ELDER ABUSE**

### **Carey v. Carey <sup>12</sup>**

In this case, a mother was suffering from dementia and two capacity assessors agreed that she was incapable of managing both her property and her personal care. The mother's legal counsel also concluded that she was incapable of instructing her lawyer.

There were seven siblings in total fighting over the care of their mother and what was in her "best interests" including, where she should live. There were also allegations of elder and financial abuse. The mother was being shuttled between the two homes of her attorneys under a POA, that of her son Arthur from Saturday to Tuesday and then with her other son Douglas from Wednesday to Saturday.

There were disputes on when the mother could have contact with her other five children. The other siblings called the police to pay a number of "wellness" visits on their mother alleging "elder abuse". The Police visited multiple times and confirmed her well-being. At no time did the officers report any concerns. Neither did the doctor or dentist who also saw the mother.

One of the main questions for the Court was whether the two sons should be removed as attorneys. The Court concluded that there was strong and compelling evidence of misconduct and /or neglect by Arthur (who worked in concert with Douglas). Just some of the misconduct included:

- Arthur failed to adequately explain how he spends his mother's \$42,000 per year pension income when she has no independent housing costs, no car, etc;
- Arthur failed to adequately account for how increased mortgage funds were utilized;
- Arthur and Douglas failed to obey a number of Court Orders requiring disclosure;
- There was credible evidence regarding the mother's missing jewelry and that Arthur pawned it;
- At the very least, the attorneys had "shown little skill in using her funds in a responsible manner to secure her financial best interests";
- Whatever Arthur may have done or neglected to have done, Douglas failed to step in; and
- Arthur and Douglas failed in their duties to foster regular contact between the mother and her other siblings.

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<sup>12</sup> Carey v Carey, 2018 ONSC 4564.

The Honourable Justice Kurz found that the two-part test set out in the case of *Schaefer's Estate*,<sup>13</sup> (that there must be strong and compelling evidence of misconduct or neglect and the Court must consider whether the best interests of an incapable person are being served) had been met and the judge ordered the removal of Arthur as the attorney and Douglas as the alternate attorney.

### ***McMaster v. McMaster***<sup>14</sup>

In *McMaster*, a mother appointed her two sons as joint attorneys under a CPOAP. However, she decided not to tell one of her children that he was appointed as her attorney (or forgot to do so).

The son who knew he was an attorney, and had access to all of his mother's assets, used her life savings to invest in rather dubious business ventures, including a go-kart business. By the time the other son discovered his brother's actions, the mother's assets were depleted by almost \$2 million.

The Court removed the perpetrator son as the attorney and ordered that he provide an accounting for the money.

The son was also ordered to pay over \$25,000.00 in legal costs.

### ***Mroz v. Mroz***<sup>15</sup>

In this Ontario Court of Appeal decision, an adult daughter convinced her widowed mother to transfer the title of the mother's house (her only significant asset) into joint ownership with her daughter. On the mother's death, the daughter claimed that she was the sole owner of the house.

However, the mother's Will said that two of her grandchildren were to receive portions of the proceeds of the sale of her house upon her death. The daughter ignored the Will, sold the mother's house (without notifying her family until the day the sale closed), and kept the proceeds for herself.

She argued that the money was hers, as she was the sole owner, and she had no obligation to give any money to the grandchildren. The Court found otherwise.

While the evidence showed that the mother wanted the daughter to be "looked after" and to receive some of the proceeds from the sale of the house, the Will clearly stipulated that the grandchildren were to receive a portion of the proceeds as well, and there was no evidence that the mother intended to make a gift of the house to the daughter.

The Court found that the mother had not "gifted" the house to the daughter but that the daughter was merely holding the house in trust for her estate.

<sup>13</sup> (2008) 93 OR (3d) 447 (SCJ).

<sup>14</sup> *McMaster v. McMaster* 2013 ONSC 1115.

<sup>15</sup> *Mroz v. Mroz* 2015 ONCA 171.

***Servello v. Servello*** <sup>16</sup>

In another Ontario Court of Appeal case, a son had his mother's house transferred to the son and the mother as joint tenants, shortly after the father/husband had died.

The mother did not understand, at the time, that she was transferring ownership of her home to herself and her son jointly, and instead was under the impression that she was executing a POA in favour of the son. Also, at this time the son was living with the mother, and she was relying heavily on him for support after the death of her husband. Not only was the mother grieving the loss of her husband at this point, her first language was Italian and her comprehension and reading in English was limited so she did not understand the documents she was signing.

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that her son had acquired a right of survivorship in her home. The son refused to restore title to the property to his mother. She sought an order from the court restoring her as the property's sole owner.

The Court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, on the grounds of undue influence, finding that

....the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence.”

“This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina [the mother] did not receive independent legal advice, and accordingly the two deeds which gave Antonio [the son] an interest in the land should be set aside on this basis as well.”<sup>17</sup>

The transfer was set aside as the mother was found to have been vulnerable to the influences of her adult son, and she did not receive the required independent legal advice before the transfer took place. This case is a classic example of a relationship of dependency; influence and dominance (as the mother and son shared in *Servello*) giving rise to a finding of undue influence.

***Gefen v. Gaertner*** <sup>18</sup>

In this 2019 case, the Ontario Superior Court of Justice had to determine whether the elderly mother (Henia) intended to bestow significant benefits on one of her three sons (Harvey) and his immediate

<sup>16</sup> *Servello v. Servello*, 2014 ONSC 5035 (CanLII) [accessed on 2019-11-13].

<sup>17</sup> *Supra* note 13, paras 48 and 49.

<sup>18</sup> *Gefen v. Gaertner*, 2019 ONSC 6015



family and whether she fully appreciated the effect, nature, and consequence of so doing. A claim had been brought by the other sons (Harry and Yehuda's Estate), against Harvey and his family who benefited from the transactions, for unconscionable procurement.

Before dealing with the merits of the claim, the Court had to determine whether the son attacking the transactions had standing to bring the claim. It is worth noting that the elderly mother was defending the transactions in favour of Harvey.

Harvey alleged that only Henia (or her estate) had standing to complain about any alleged unconscionable procurement that would amount to an "equitable fraud" upon her. Counsel for Henia also argued that this doctrine could not be applied where the donor was alive and had not been declared incompetent.

Harry, the son attacking the transactions, pointed to authority where a potential beneficiary can advance a claim for unconscionable procurement in a case where the donor was still alive.<sup>19</sup> Harry was a beneficiary under the mirror wills drafted by Henia and her deceased husband.

The Court noted that although the authority used by Harry was an old authority, the other parties did not provide other authority that established that this doctrine could only be advanced by the donor of the gift (or her estate if the donor was no longer alive).

The Court stated:

...this is an equitable doctrine that is intended to protect vulnerable persons from others who might procure their assets away. It is logical that, in a circumstance where the vulnerable person is still alive, their vulnerability could prevent them from advancing such a claim.<sup>20</sup>

Therefore, Harry was given standing to pursue this claim.

The Court looked at the nature and scope of the Gefen family assets, which provided important context for the consideration of the unconscionable procurement claim as the doctrine applies only where the wealth transfer is significant or improvident. The elderly mother had made significant *inter vivos* gifts and benefits to the one son and his immediate family from 2011 onwards, in the sum of approximately \$25.26 million.

The basic elements to raise the presumption of unconscionable procurement in respect of the transactions had been established. Firstly, Harvey was actively involved in the arrangements for and documentation of the transactions in question by which Henia conferred significant benefits on him and his immediate family members. Secondly, by these transactions, Henia had divested herself of

<sup>19</sup> *Lavin v Lavin* (1880), 27 Gr. 567 (Ont.Ch.), affirmed (1882), 7 O.A.R. 197 (C.A).

<sup>20</sup> *Gefen*, *supra* note 17, para 167

at least half of her significant net worth and had confirmed indebtedness to Harvey secured by her remaining assets, in favour of Harvey. In these circumstances, there is a presumption that Henia did not truly appreciate the nature, effect, and consequences of these transactions to render them fair and reasonable.<sup>21</sup>

Harvey and Henia maintained that the evidence of Henia's knowledge, understandings, wishes, and capacity, recorded by Dr. Shulman in his notes and capacity assessments, were persuasive evidence that Henia did appreciate the nature, effect, and consequences of the identified contracts, gifts, transfers and conveyances.

The Court noted Dr. Shulman's opinion, a Geriatric Psychiatrist, when he testified that Henia was able to talk at length about contracts she was planning to sign with Harvey to compensate him for past and future property management services, about the gifts she planned to give to Harvey and his daughter and she was able to name the properties specifically. She did the same when Dr. Shulman assessed her for a second time. Dr. Shulman was satisfied that the rationale for the gifts was very clear in Henia's mind. He further concluded that Henia understood the nature and objects of her bounty, that she was not someone who was particularly susceptible or vulnerable to influence, although he acknowledged that the question of whether she had been unduly influenced by Harvey in respect of these transactions was not a medical question but was rather a legal question. Dr. Shulman was of the opinion that Henia was capable of making substantial monetary gifts to Harvey and Ashley, as she wished to do. The court stated that "this goes to the question of whether the gift was valid but does not determine the question of whether it is voidable under the doctrine of unconscionable procurement." <sup>22</sup>

The Court noted that:

...[the] ultimate determination of the reliability of the statements Henia made to Dr. Shulman, and his assessment of her capacity and understanding of the significant transactions that she was entering into with Harvey and Ashley at the time, is in part a function of whether both Henia and Dr. Shulman had a full appreciation of the facts underlying the rationale for those transactions. <sup>23</sup>

The Court had accepted that there was a theme in what Henia appeared to be seeking to accomplish in the transactions with Harvey and his family. Henia wanted to reward Harvey for his hard work and loyalty out of "her" half of the Gefen Family Assets. What she appeared to have done was to gift "her" half of their commercial real estate holdings to Harvey and his family. However, it seemed that she

<sup>21</sup> Gefen, *supra* note 17, para 180.

<sup>22</sup> Gefen, *supra* note 17, para 184.

<sup>23</sup> Gefen, *supra* note 17, para 188.

went further than this by her forgiveness of past debts owing by Harvey, and her acknowledgement of debts said to be “owing” to Harvey for significant additional amounts that were secured by the remainder of her assets (the other half). These transactions were significant. Absent justification, they were presumptively imprudent.”<sup>24</sup>

The Court looked at each of the corresponding documents, and the rationale given by Henia to Dr. Shulman for entering into the transactions during her assessments, to determine whether both Henia and Dr. Shulman had a full appreciation of the facts underlying the rationale for those transactions. The Court noted that Dr. Shulman had not been furnished with some of the transaction documents relevant to Henia’s assessment and her capacity to enter into such transactions.

The Court accepted the capacity assessment reports and the evidence of Dr. Shulman in respect of those transactions where Dr. Shulman was furnished with a copy of the documentation, as it was shown that the elderly mother had a full appreciation of the facts underlying the rationale for those transactions.<sup>25</sup>

## **CONCLUSION**

Since elder financial abuse continues to exist, the community and those involved with older adults must be aware of its devastating effects and how important it is to keep a watchful eye out for older family members, neighbours, and acquaintances. Despite the existence of several remedies that address elder financial abuse once it is detected or reported, the remedies remain under-utilized, unknown or simply unavailable to some. Even though, civil proceedings are open to the public, there are still many barriers that litigants must overcome in order to achieve justice in going the civil route. Firstly, the time and cost of civil litigation may be too burdensome for many individuals to take on. Secondly, victims of elder abuse simply do not have the time or financial resources available to fund civil proceedings. The importance of putting in place measures that would prevent the abuse from taking place cannot be over-emphasized.

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<sup>24</sup> Gefen, *supra* note 17, para 189.

<sup>25</sup> At the time of writing, the decision was appealed as it relates to the mutual wills claim, but no appeal was launched relating to unconscionable procurement.

## CHAPTER 12: ELDER ABUSE AND THE CRIMINAL LAW REMEDIES

### **INTRODUCTION**

The *Criminal Code of Canada*<sup>1</sup> (the “**Criminal Code**”) can play a pivotal role in protecting older adults from abuse and exploitation, as there are remedies available in criminal law that can be used to address elder abuse. Select criminal offenses that are codified within the *Criminal Code* can be particularly useful in deterring and punishing perpetrators of elder abuse.

In addition to the civil remedies that are available to individual members of the public and discussed in Chapter 11, criminal remedies are available to the Crown in bringing charges against those suspected of elder abuse.

Oftentimes, law enforcement officials themselves are unaware of the specific provisions in the *Criminal Code* that can be applied in remedying instances of elder abuse. Further, in some cases, police may, appropriately or not, decline to pursue matters of suspected elder abuse on the basis that these issues do not appear criminal in nature, and are dismissed as mere civil matters, to be dealt with privately. This is obviously a misapprehension, as there are in fact many sections of the *Criminal Code* that are under-utilized and can, in fact, be used effectively to combat elder abuse.

This chapter provides an overview of criminal proceedings in the elder abuse context, and how statutory remedies available in criminal law can be helpful when elder abuse is suspected or detected.

### **CRIMINAL PROCEEDINGS OVERVIEW**

Criminal proceedings are commenced by the Crown, or government prosecutors, who bring charges against individuals suspected of committing a crime.

In many cases, this avenue is advantageous because the government has extensive resources to bring proceedings, while private individuals in the context of civil proceedings may have limited finances and other resources to support court proceedings.

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1 *Criminal Code*, R.S.C., 1985, c. C-46 (the “*Criminal Code*”).

At the same time, criminal proceedings can be difficult, as they require the cooperation of individuals (including the victim and/or witnesses) who may not be willing to cooperate in the prosecution. Instances of elder abuse do not always attract criminal charges, as they should, because oftentimes victims of elder abuse may be unwilling or unable to extricate themselves from or report an abusive situation. This is especially true in circumstances where the perpetrator is a loved one, or where the older adult relies on the perpetrator for care and support, as is often the case.

When criminal proceedings are commenced, the criminal law focuses on bringing the perpetrator to justice through punitive measures, which also are intended to serve as a deterrent to potential future perpetrators. The objectives of criminal remedies are twofold: to punish the wrongdoer, and discourage future misconduct with punitive sentences like fines and incarceration.

In order for the Crown to successfully prosecute an accused perpetrator, it must be shown on the evidence that the alleged wrongdoing took place “beyond a reasonable doubt”. This is a higher and more difficult burden of proof to achieve than the “balance of probabilities” standard we find in civil law. Therefore, in cases where there may not be sufficient evidence to establish, with near certainty, that the elder abuse occurred, civil proceedings may be more appropriate.

### **CRIMINAL REMEDIES IN THE ELDER ABUSE CONTEXT**

While the *Criminal Code* does not provide for the specific offence of “elder abuse”, or “financial abuse” there are certain offences under which a perpetrator of elder abuse could be charged, including the following provisions of the *Criminal Code*:

- Section 215: Failing to provide the necessities of life (criminal neglect);
- Section 220: Causing death by criminal negligence (where neglect or negligence leads to death of older adult);
- Section 264.1: Uttering threats;
- Section 265: Physical assault;
- Section 271: Sexual assault;
- Section 279: Unlawful confinement;
- Section 322: Theft;
- Section 331: Theft by a person holding a power of attorney;

- Section 336: Criminal breach of trust (unlawful conversion of trust assets);
- Section 342: Theft or forgery of a credit card;
- Section 346: Extortion;
- Section 366: Forgery;
- Section 386-388: Fraud; and
- Section 423: Intimidation

Any of the above criminal offenses can be used to prosecute instances of elder abuse, depending on the fact-specific nature of the abuse committed.

Notably, Section 718 of the *Criminal Code* (“Purpose and Principles of Sentencing”), which was introduced in 2013, now provides criminal courts with additional factors that are to be considered when determining the appropriate sentencing in criminal proceedings.

Of particular relevance to instances of elder abuse, Section 718 notes that criminal sentences should be increased in circumstances where there is evidence that:

- the offence was motivated by age, or mental or physical disability (s. 718.2(a)(i));
- the offender abused a position of trust or authority in relation to the victim (s. 718.2(a)(iii);  
or
- the offence had a significant impact on the victim, considering the victim’s age and other personal circumstances, including their health and financial situation (s. 718.2(a)(iii.1))

A review of the provisions noted in this section reveals how many criminal remedies and statutory guidelines are available to address instances of elder abuse.

The following case comments are examples of criminal court cases where the abuse of older adults has been remedied by criminal courts.

**COURT DECISIONS HIGHLIGHTING CRIMINAL REMEDIES FOR ELDER ABUSE*****R v. Kaziuk*<sup>2</sup> - Section 334 (Theft), 380 (Fraud), 331 (Theft by Person Holding a Power of Attorney)**

The case of *R v Kaziuk* is noteworthy because it is one of the few reported decisions in Canada, which cites section 331 of the criminal code - *theft by a person holding a power of attorney* - despite the fact that this provision was enacted in 1984. A power of attorney for property (“**POAP**”) carries with it significant power and authority granted to the holder of the POAP. Recall that an attorney for property is vested with the authority to do anything that the grantor of the POAP could do with their personal property, short of making a Will. This leaves an elderly grantor of a POAP vulnerable to financial abuse, if the holder of the power of attorney determines to misuse their power. However, surprisingly, s. 331 of the *Criminal Code* appears to be under-utilized.

In the *Kaziuk* case the offender was ultimately charged with regular theft and fraud provisions found in the *Criminal Code*, however the Honourable Justice Baldwin writing for the Court in this case did conclude “*that the s.331 offence had been proven by the Crown beyond a reasonable doubt*” and that even though the accused was not charged with this offence it was an “*aggravating sentencing factor pursuant to s.725 (1)(c) of the Criminal Code*”.

The facts of the case are as follows. The accused, Mr. Kaziuk, was the only child of Ms. Kaziuk, a widow who was 88 years old at the time of trial. When her husband died a few years earlier, Ms. Kaziuk held assets and property well in excess of one million dollars; yet, at trial, she was more or less penniless and living in a homeless shelter. Her son had mortgaged her various properties under a POAP. He subsequently defaulted on the mortgages and Ms. Kaziuk lost the vast majority of her assets.

The Crown sought a total sentence of 3-4 years of jail time. However, Justice Baldwin sentenced Mr. Kaziuk to the maximum 10-year sentence for theft of over \$5,000.00 and ordered a concurrent 10-year prison sentence for fraud. The judge made the following comments as part of the sentencing decision:

This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim. The victim was his elderly Mother who was extremely vulnerable to him as her only child. ...Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could ... In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm.<sup>3</sup>

<sup>2</sup> *R v Kaziuk*, 2011 ONCJ 851. [“*Kaziuk*”]

<sup>3</sup> *Kaziuk*, 2012 ONCJ 34 (CanLII), paras 85, 86, 96, and 102.



Mr. Kaziuk appealed. The Court of Appeal upheld the trial court's conviction, but determined that the sentence proffered "...was excessive having regard to sentences imposed in similar cases". The Court of Appeal accordingly reduced the 10-year sentence to 8 years, but in doing so, observed, "[w]e agree with the trial judge's observations about the offender."<sup>4</sup>

Mr. Kaziuk sought leave to appeal to the Supreme Court of Canada but it was not granted.<sup>5</sup>

### ***R v Taylor*<sup>6</sup> - Section 380 (1) (Fraud)**

The case of *R. v. Taylor* is another notable example where a court used the abuse of trust and authority by the perpetrator as an aggravating factor considered in sentencing.

The facts of the *Taylor* case are as follows. Ms. Dokaupé was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable to abuse. She employed a caregiver whom she relied upon for her daily needs. At the caregiver's suggestion, Ms. Dokaupé executed a POAP in the caregiver's favour. Ms. Dokaupé also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the POA to obtain a bank card for Ms. Dokaupé's savings account. She then drained Ms. Dokaupé's bank account of \$126,000, leaving only \$17,000. The caregiver used that money for her own personal benefit.

The caregiver subsequently left Ms. Dokaupé's employment, and when Ms. Dokaupé's new caregiver reviewed Ms. Dokaupé's bank statements, she told Ms. Dokaupé that it looked like the prior caregiver had robbed her and called the police. The police charged the former caregiver with fraud and obtained expert reports confirming that Ms. Dokaupé was capable of managing her property, both throughout the period in question and during the victim's subsequent discussions with police. Unfortunately, Ms. Dokaupé died before the trial took place. In her absence, the Crown relied on Ms. Dokaupé's witness statements that had been recorded by the police. The judge accepted Mrs. Dokaupé's evidence and the expert's evidence and sentenced the accused to 21 months in prison.

The convicted caregiver appealed the conviction on the grounds that Ms. Dokaupé's recorded statements were hearsay and inadmissible, and on the basis of mitigating factors that should have reduced the severity of the sentence. In dismissing the appeal, the Honourable Justice Rosenberg wrote:

...this was a serious offence. The appellant voluntarily placed herself in a position of

4 *Kaziuk*, 2013 ONCA 217, para 4.

5 *Kaziuk*, 2013 CanLII 64666 (SCC).

6 *R v Taylor*, 2012 ONCA 809. [*"Taylor"*]

trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over \$126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.<sup>7</sup>

Both the *Taylor* and *Kaziuk* decisions provide clear examples that, when dealing with cases of elder abuse, courts will consider the fact that perpetrators have taken advantage of vulnerable individuals and abused positions of power or trust as factors that go toward increased sentences.

### ***R v. Davy*<sup>8</sup> - Section 215 (Failure to Provide Necessaries of Life)**

Section 215 of the *Criminal Code* sets out that a person is under a legal duty to provide the necessaries of life to another individual that is in their "charge" if the following two conditions are met:

- (a) The dependent individual is unable to withdraw themselves from the other person's charge for reasons of detention, age, illness, mental disorder, or other cause; and
- (b) The dependent individual is unable to provide themselves with the necessaries of life for whatever reason.

In such circumstances, the law imposes positive duties upon the able adult to provide adequate care and the necessaries of life for the vulnerable adult. Failing such duty can result in criminal charges.

This case, *R. v. Davy*, provides a particularly heinous example of a situation where the necessaries of life were not provided by those who were under a duty to do so, and criminal charges resulted.

The facts of *Davy* are as follows. A daughter and son-in-law were charged in 2011 and convicted in 2015 under s. 215 of the *Criminal Code* for failing to provide the necessaries of life to the daughter's elderly and vulnerable mother. The mother lived in a house with her daughter and son-in-law and she suffered from severe dementia and from other serious medical conditions and was incapable of making personal care decisions for herself.

When the police received a call to the house they found the overpowering smell of cat urine, the

<sup>7</sup> *Taylor*, *supra* note 6, para 36.

<sup>8</sup> *R v Davy*, 2015 CanLII 10885 (ON SC).

presence of filth and feces, and the entire house was in complete squalor. The mother was found naked on a bare mattress in a room with blacked-out windows, and she was covered in her own vomit. When examined by health care professionals she was dehydrated, emaciated, anemic, and suffered from internal bleeding and had a fractured right hip. She died shortly after being discovered by first responders; she was 77 years of age.

The daughter and son-in-law had looked after the mother for approximately 8 years prior to this incident and were attorneys under a POA for Personal Care for the mother.

Because of the mother's poor health, she could not provide for herself. She was unable, by reason of her severe dementia and physical diseases, to withdraw herself from the charge of her daughter and son-in-law. The daughter and son-in-law were therefore duty-bound to provide the mother with the necessities of life: food, water, shelter, adequate care, medical treatment of health conditions requiring treatment and protection from harm.

It was abundantly clear that they failed to provide these necessities of life, they had breached their lawful duty and they were each sentenced to 12 months in jail.

The Court had this to say in rendering its judgment:

This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the mother] suffered from severe dementia and was vulnerable.<sup>9</sup>

***R v Hooyer*<sup>10</sup> - Section 331 (Theft by Person Holding a Power of Attorney) and Section 380 (Fraud)**

In *Hooyer* a long-time family friend of an older adult couple was charged and convicted of theft and fraud contrary to sections 331 (theft by person holding a power of attorney) and 380 (fraud) of the *Criminal Code*.

The accused, Mr. Hooyer, had helped this elderly couple with chores around the house, drove them to appointments and performed other tasks for the couple for many years. The husband developed dementia and was moved into a long-term care facility. The wife was the husband's attorney for property until she died. Mr. Hooyer was the substitute attorney for property under the POA and the named residual beneficiary in the couple's wills. After the wife died, Hooyer assumed control over the husband's property under the POA. Over the course of 7 years, he moved into their home,

<sup>9</sup> *Supra* note 8, para 13 of the Analysis.

<sup>10</sup> *R v Hooyer*, 2016 ONCA 44.

purchased a \$37,000.00 vehicle for himself, spent \$15,000 on another vehicle for a friend of his and spent the rest of the husband's money on various daily expenses.

By the time the long term care facility and the bank called the police in 2011, notifying them of suspicious activity, the husband was left with \$18.00 in his bank account, \$13,000 in back taxes on his home and \$16,000 owing to the care home. In total it was found that Hooyer stole over \$375,000.00 of the husband's assets and investments. It was also determined that he defrauded Veteran's Affairs Canada ("**VAC**") of over \$2000.00 as he submitted invoices from the facility to VAC claiming partial reimbursement and then kept the money himself.

At trial, Mr. Hooyer argued that no laws were broken because there were no limitations to his power set out in the Power of Attorney document and that the husband told him he could use the money as if it were his own. It was Hooyer's argument that he did not have the requisite criminal mental intent (*mens rea*) to commit the offence as he honestly believed he was entitled to do what he did with the husband's property.

The Court disagreed with Mr. Hooyer and convicted him of theft by a person holding a power of attorney and of fraud under the *Criminal Code*. The Court ruled that an attorney in Hooyer's position is a fiduciary with fiduciary duties and obligations and that he knew or should have known of his responsibilities to act in the best interests of the husband grantor. The Court found that Mr. Hooyer knew the assets belonged to the husband when he used them for his own benefit, and breached his fiduciary duty as attorney.

On the theft charge, Mr. Hooyer was sentenced to 2 years less a day and ordered to pay \$378,552.67 in restitution to the husband's estate (the husband died in 2013). On the fraud charge, he was sentenced to 6 months in prison to be served concurrently with the theft charge and ordered to pay full restitution to VAC. His appeal of his conviction and sentences was dismissed.

The case of *Hooyer* is an example of the potential for abuse that exists when an unscrupulous individual takes advantage of the authority conferred to them under a Power of Attorney document. It is also a reminder of the various remedies at the disposal of a criminal court and the court's ability to dish out punitive measures to punish perpetrators of elder abuse.

***R v Bruyns*<sup>11</sup> - Section 322 (Theft), Section 380(1) (a) (Fraud over \$5000), and S. 336 (Criminal Breach of Trust)**

In *Bruyns*, a daughter was charged with theft, fraud and criminal breach of trust in relation to her conduct regarding her father's property.

<sup>11</sup> *R v. Bruyns* 2016 ONCJ 207.

It was found that the accused daughter had used her father's money to pay her own personal bills that caused him to default on payments to the long-term care facility where he was residing. That facility took no steps against him however, as the daughter repaid the entire amount after the charges were laid. The question before the court was whether the daughter took the money with an "honest but mistaken belief" that she was entitled to loan his money to herself in these particular circumstances. The POA document had a clause that stated:

My attorneys shall also be authorized to make expenditures on my behalf for the purpose of making gifts or loans to my friends and relatives . . .if, in the absolute discretion of my attorneys, they have reason to believe that I would have made such gifts or loans if I were capable of doing so personally. <sup>12</sup>

The daughter believed her father would have loaned her the money if he were mentally capable.

The Court disagreed. When the father had loaned her money in the past it had not caused him to go into debt or to default on his other financial obligations, unlike the current "loan" to the daughter. Past loans also did not put him at risk of being denied any services, such as those that the long-term care facility provided. There was no reason to believe that the father would have made the loan if he were capable of doing so personally.

Furthermore, the Court agreed with the Crown's argument that the daughter had breached her fiduciary and statutory duties under sections 32 and 66 of the *Substitute Decisions Act*.<sup>13</sup> The Court found that the Crown had proven beyond a reasonable doubt all of the essential elements of the offences charged except there was a reduction in the value of the money taken. Therefore, she was found guilty of theft and fraud *under* \$5000 (instead of over). And she was found guilty of criminal breach of trust.

At a sentencing hearing, the daughter was sentenced to a suspended sentence with probation for 18 months and terms of her probation required that she could no longer act as an attorney for her father.<sup>14</sup>

### ***R v Curreri* <sup>15</sup> - Section 380 (1)(a) (Fraud over \$5,000)**

In *R v Curreri*, a son was charged under section 380 (1)(a) of the *Criminal Code*, for committing fraud over \$5,000.00 against his 96-year-old father. The son fraudulently transferred and mortgaged 8 properties in Toronto and Ajax that were owned by his father. The fraud came to light when the

<sup>12</sup> *Supra* note 11, para 11.

<sup>13</sup> 1992, S.O. 1992, c. 30.

<sup>14</sup> 2016 ONCJ 527

<sup>15</sup> *R v Curreri*, 2016 ONSC 3598

father mentioned to his daughter that he was considering selling one of his properties to cover his funeral expenses and any estate taxes and asked his daughter to check to see if the property was in his name alone or was it held jointly with his deceased wife. The daughter and father were shocked to learn that all of his properties were in strangers' names and mortgaged to persons unknown. They went straight to the police.

The son was assisted in his fraud by a legal assistant at a real estate law firm. Both were found guilty in June 2016. Both the son and legal assistant were sentenced to two years less a day to be served in the community (house arrest). The son was also ordered to pay restitution.<sup>16</sup> The Law Society of Ontario also disciplined the lawyer for being duped by the son and the assistant. The lawyer admitted to professional misconduct and was fined \$25,000.00.

### ***R v Fernandez*<sup>17</sup> - Section 267 (b) (Assault causing bodily harm)**

The case of *Fernandez* provides an example of how criminal courts will handle instances of physical elder abuse, in addition to financial abuse. The accused, Mr. Fernandez was a personal support worker at a long-term care facility who punched a 97-year-old woman, causing severe bruising. He was found guilty of assault causing bodily harm. Fernandez initially denied the abuse, yet later admitted to committing the offence during his presentence report. He apologized to the victim and her family.

The Court in *Fernandez* specifically flagged this case as an instance of elder abuse, and noted that such crimes call for sentences that deter and denunciate such acts. The Court held that:

This is a case of what is sometimes referred to as 'elder abuse', that is, abuse of an elderly person by his or her caregiver. I agree with Crown counsel that the principles of deterrence and denunciation are of particular importance in such cases.<sup>18</sup> [...]

Mr. Fernandez was sentenced to a term of imprisonment for six months, to be served in the community and probation.

### ***R v Saucier*<sup>19</sup> - Section 380 (1) (Fraud over \$5,000), Sections 368 (1) & 366 (1) (Forgery, Uttering a Forged Document)**

The case of *Saucier* involved a financial advisor who stole (defrauded and misappropriated funds) from his elderly retired clients over a period of three years. In doing so the perpetrator forged

<sup>16</sup> *R v Curreri*, 2017 ONSC 5652.

<sup>17</sup> *R v Fernandez*, 2018 ONCJ 272

<sup>18</sup> *Ibid*, para 17.

<sup>19</sup> *R v Saucier*, 2018 ONSC 7266 and 2019 ONSC 3611.

financial documents and used the forged documents to misappropriate the financial assets of his elderly clientele. The clients paid Mr. Saucier money expecting that it would be used for their life insurance premiums. Instead, Saucier deposited the money into two bank accounts he controlled personally. Ultimately however, when the clients asked for their money back, the money was repaid.

The accused in this case was found guilty of 10 counts of fraud over \$5,000, 4 counts of uttering forged documents and 1 count of forgery.

In the sentencing decision, the Court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The Court made sure to note that these were elderly and vulnerable victims, and this was considered an aggravating factor during sentencing:

Many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. ... Their need to have the accused to translate documents and make out their cheques because of language and literacy issues...<sup>20</sup>

Mr. Saucier was sentenced to 15 months in jail.

## **CONCLUSION**

The police, the community and those involved with older adults must always be aware of the devastating effects of abuse, and how important it is to keep a watchful eye out for older family members, neighbours, and acquaintances. Several remedies exist to address elder financial abuse once it is suspected, detected or reported, but many may be under-utilized, unknown or simply unavailable to some. In certain instances, civil remedies will be more appropriate, especially where the evidence cannot prove all elements of a criminal charge beyond a reasonable doubt. The lesser civil burden of proving the wrong on a balance of probabilities will be more easily reached. However, where the elements of a criminal charge can be met by the evidence, criminal courts may be better equipped to deal with the abuse, especially when the victim may lack the resources or ability to advance a claim in civil courts.

It is important to note the specific provisions in the *Criminal Code* that can be relied upon to address instances of elder abuse. Further, the criminal courts in recent years have emphasized the especially egregious nature of elder abuse crimes, and this is reflected in weightier sentences for crimes that are committed against the elderly and vulnerable.

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<sup>20</sup> 2019 ONSC 3611, para 15.c.



# **CHAPTER 13: PRIVACY LAW, DISCLOSURE OBLIGATIONS AND THE OLDER ADULT CLIENT**

## ***INTRODUCTION***

Effective representation of older adult clients requires some understanding of privacy law.

Lawyers may need to know the substantive, legal, practical and procedural matters involved in protecting and representing older adults' privacy interests.

An understanding of the rights and the limitations on who may receive private information or private health information about an older adult family member is also notably important.

This chapter will look at the intersection between privacy law and elder law including a glimpse of relevant legislation. Privacy law is complex, and this chapter is but a brief overview and not intended to be in any way comprehensive.

## ***PRIVACY LEGISLATION***

Privacy legislation creates rules about the collection, use, and disclosure of information about individuals and provides guidance on its collection, use, and disclosure that can generally be achieved with and without the consent of the individual.<sup>1</sup>

There are several instances when privacy legislation will be relevant in the elder law context. As an example, if there are allegations of elder abuse, police services will need to understand relevant provincial, territorial and federal privacy legislation in order to be able to access records and information relevant to the abuse investigations.

Or, for example, if someone suspects that their older adult family member is a victim of fraud or a money scam, a financial institution will have to understand the applicable privacy legislation and the institution's ability (or inability) to disclose personal information when such financial abuse is alleged.

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1 See National Initiative for the Care of the Elderly, Police Tool, online: [http://www.nicenet.ca/files/U\\_of\\_T\\_Nice\\_176064\\_Police\\_Tool.PDF](http://www.nicenet.ca/files/U_of_T_Nice_176064_Police_Tool.PDF)

Further, privacy legislation will also dictate when and what personal health information a health care provider can disclose to an older adult's family members.

This next section will look at two important pieces of privacy legislation, *The Personal Information Protection and Electronic Documents Act*<sup>2</sup> ("**PIPEDA**") and, the *Personal Health Information Protection Act*<sup>3</sup> ("**PHIPA**").

## **THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT**

*PIPEDA* is a federal statute that came into force on January 1, 2001. It applies to private-sector organizations across Canada that collect, use or disclose personal information in the course of a "commercial activity". The law defines a "commercial activity" as any particular transaction, act, or conduct, or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

*PIPEDA* is applicable in all provinces and territories unless the province/territory has passed provincial/territorial legislation that has been determined to be substantially like *PIPEDA* (i.e. Quebec, Alberta, and British Columbia).

Ontario, New Brunswick, Nova Scotia and, Newfoundland and Labrador have also adopted substantially similar legislation regarding the collection, use, and disclosure of personal health information.

Federally regulated organizations that conduct business in Canada are always subject to *PIPEDA*. These organizations include banks, and, authorized foreign banks; airports, aircraft and airlines; inter-provincial or international transportation companies; telecommunications companies; offshore drilling operations; and, radio and television broadcasters.

Under *PIPEDA*, "personal information" includes any factual or subjective information, recorded or not, about an identifiable individual. This includes information in any form, such as age, name, ID numbers, income, ethnic origin, or blood type; opinions, evaluations, comments, social status, or disciplinary actions; and employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).<sup>4</sup>

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2 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ("**PIPEDA**")

3 *Personal Health Information Protection Act*, 2004, SO 2004 c 3 Sch A. ("**PHIPA**")

4 See Office of the Privacy Commissioner of Canada Website, *PIPEDA*: [https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda\\_brief/](https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief/) [accessed on 15.08.19]

## CHAPTER 13: PRIVACY LAW, DISCLOSURE OBLIGATIONS AND THE OLDER ADULT CLIENT

Businesses subject to *PIPEDA* must follow 10 “fair information principles” to protect the personal information, as set out in Schedule 1 of *PIPEDA*. These principles are:

- 1) Accountability (an organization must appoint someone accountable for its compliance);
- 2) Identifying Purposes (must identify the purpose for collecting the personal information);
- 3) Consent (obtain knowledge and consent of the individual for the collection, use or disclosure of personal information – except where inappropriate i.e., disclosure is required and approved of in an investigation of a crime);
- 4) Limiting Collection (must be limited to collection which is needed and collected in a fair and lawful way);
- 5) Limiting Use, Disclosure, and Retention (unless consent is provided, or it is required by law, personal information can only be used or disclosed for the purposes for which it was collected);
- 6) Accuracy (must be accurate, complete and current);
- 7) Safeguards (must be protected by appropriate security measures);
- 8) Openness (must make detailed information about policies and practices publicly and readily available);
- 9) Individual Access (on request, an individual must be informed of the existence, use, and disclosure of their personal information); and
- 10) Challenging Compliance (an individual can challenge an organization’s compliance with the above principles).

As such, banks or other federally regulated businesses must abide by *PIPEDA* and these fair information principles when collecting and storing personal information of older adults and any requests to disclose such information. Generally, such personal information cannot be disclosed without the older adult’s knowledge and consent as confirmed by the third principle as mentioned above.

However, *PIPEDA* also allows disclosure *without* consent where such disclosure is “required by law”<sup>5</sup> or under the following circumstances that might apply to elder abuse, where it is:

made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure.<sup>6</sup>

Or, further, disclosure is permitted without consent, where disclosure is:

made on the initiative of the organization to a government institution, a part of a government institution or the individual’s next of kin or authorized representative and,

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse.<sup>7</sup>

This section does not apply exclusively to banks or to older adults, but those are the two categories for whom it appears that the clause is intended.

Police would be captured by the phrase “government institution” or “part of a government institution.” It also captures reports by banks to Offices of the Public Guardian and Trustee (the “**PGT**”) in provinces, such as Ontario, where legislation permits reporting of alleged financial abuse of mentally incapable adults (once incapacity is established).

This provision and its applicability to financial institutions is discussed in more detail below under “Privacy in Banking.”

## **PRIVACY ISSUES IN CARE: PERSONAL HEALTH INFORMATION PROTECTION ACT (PHIPA)**

There are several privacy issues that arise in health care and, in Ontario, they are governed by *PHIPA*. *PHIPA* came in to force on November 1, 2004. The majority of *PHIPA* governs “personal

<sup>5</sup> *PIPEDA*, *supra* note 2, s 7(3)(i).

<sup>6</sup> *PIPEDA*, *supra* note 2, s 7(3)(e).

<sup>7</sup> *PIPEDA*, *supra* note 2, s 7(3)(d.3).

health information” in the custody or control of “health information custodians” or “agents” of health information custodians. However, *PHIPA* also has broader application, for example, it contains restrictions on the use and disclosure of personal health information by non-health information custodians that receive personal health information from health information custodians.

A “health information custodian” includes a health care practitioner, a person who operates a group practice of health care practitioners who provide health care, a hospital, psychiatric facility, pharmacy, ambulance service, laboratory, long-term care home, medical office of health etc...<sup>8</sup>

An “agent” is a person who, with the authorization of a health information custodian, acts for or on behalf of the custodian in respect of personal health information.<sup>9</sup>

“Personal health information” includes any information regarding an individual’s health care, including medical records (e.g. hospital, doctor, dentist, and long-term care home records) and an individual’s OHIP number. It also includes information that identifies an individual’s substitute decision-maker or identifying information that relates to payments or eligibility for health care or donation of body parts or bodily substances.<sup>10</sup>

Express consent is required if a health care practitioner wants to transmit the personal health information of an individual to their spouse, partner or other family members, or to a health practitioner who is not participating in the individual’s care.

Anyone who has the right to give consent also has the right to refuse to consent or withdraw consent that was previously given. Giving, refusing or withdrawing consent to the disclosure of personal health information is the personal choice of any individual.

An individual is presumed to be capable of providing such consent unless a health care custodian has reason to believe otherwise. Under *PHIPA*, an individual is capable of providing consent if capable of understanding the information that is relevant to deciding whether to consent to the collection, use or disclosure; and appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing consent.<sup>11</sup>

An individual may be capable of consenting to the collection, use or disclosure of some aspects of personal health information, but not other parts.<sup>12</sup> Further, an individual may be capable at one point but not capable later.<sup>13</sup> Capacity is fluid. A health care custodian must assess the requisite

8 *PHIPA*, *supra* note 2, s 3(1).

9 *PHIPA*, *supra* note 2, s 2.

10 *PHIPA*, *supra* note 2, s 4.

11 *PHIPA*, *supra* note 2, s 21(1).

12 *PHIPA*, *supra* note 2, s 21(2).

13 *PHIPA*, *supra* note 2, s 21(3).

capacity of the individual in the specific circumstances of the collection, use or disclosure of the personal health information.

If an individual is found to be incapable of making a decision with respect to personal health information, a substitute decision-maker is permitted to make a decision on that individual's behalf.<sup>14</sup> The following is a list of possible substitute decision-makers, ranked in order of priority:

- a substitute decision-maker within the meaning of the *Health Care Consent Act*, if the collection, use or disclosure of information is connected to the decision of a substitute decision-maker about the individual's medical treatment;
- the guardian of the person, or of the property;
- the attorney for personal care, or for property;
- the representative appointed by the Consent and Capacity Board;
- the spouse or partner;
- a child or parent, including a children's aid society;
- a parent who has a right of access;
- a sibling;
- a relative; and
- the Public Guardian and Trustee, if no other persons meet the requirements.<sup>15</sup>

## **CIRCLE OF CARE**

While personal health information may not be disclosed without consent, there are certain circumstances where personal health information may be disclosed on *implied* consent.

The term "circle of care" is not a defined term in *PHIPA*, however, it is a term commonly used to describe the ability of certain health information custodians to assume an individual's implied consent to collect, use or disclose personal health information for the purposes of providing health

<sup>14</sup> *PHIPA*, *supra* note 2, s 5.

<sup>15</sup> *PHIPA*, *supra* note 2, s 26(1) and 26(6) and Information and Privacy Commissioner of Ontario, "Consent and Your Personal Health Information" online: <https://www.ipc.on.ca/health/consent-and-your-personal-health-information/> [accessed on 21.08.19]

care in circumstances defined in *PHIPA*.<sup>16</sup> For example, a family physician may disclose to a neurologist or geriatrician the personal health information of a patient when the family physician refers the patient for further treatment.

A health information custodian may only assume an individual's *implied* consent to collect, use or disclose personal health information if six conditions are met:

- 1) The health information custodian must fall within a category of health information custodians that are entitled to rely on assumed implied consent (i.e. health care practitioners, long-term care homes, etc.);
- 2) The personal health information to be collected, used or disclosed by the custodian must have been received from the individual, his or her substitute decision-maker or another custodian;
- 3) The custodian must have received the personal health information for the purpose of providing or assisting in the provision of health care to the individual;
- 4) The purpose of the collection, use or disclosure of personal health information by the custodian must be for the provision of health care or assisting in the provision of health care to the individual;
- 5) In the context of disclosure, the disclosure of personal health information by the custodian must be to another custodian; and,
- 6) The custodian that received the personal health information must not be aware that the individual has expressly withheld or withdrawn his or her consent to the collection, use or disclosure.

In the “circle of care” situation, if the patient is determined to be incapable of consenting to the collection, use, and disclosure of personal health information and has a substitute decision-maker in place, that substitute decision-maker may expressly withhold or withdraw consent to the collection, use and disclosure of the incapable person's personal health information. The custodian must comply with the substitute decision-maker's decision unless the collection, use or disclosure is required or permitted by *PHIPA* to be made without consent.

Therefore, implied consent for disclosure of personal health information can only be relied upon in certain situations. If a family member called a long-term care home to ask about the medication

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<sup>16</sup> Information and Privacy Commissioner of Ontario, “Circle of Care: Sharing Personal Health Information for Health-Care Purposes”, August 2015 at p 1.



that a patient is on, the long-term care home cannot rely on implied consent to disclose such information. The long-term care home would need express consent in this situation.

## **PRIVACY IN TREATMENT**

A requirement of privacy under *PHIPA* includes privacy in treatment. This means that if a health care provider provides treatment to an older adult in a public area, their treatments are discussed in a public area, or an older adult's information is available in a public area (i.e. charts left open on a table), the health care provider has breached the legislation.

## **PERSONAL RECORDS AND ACCESS TO INFORMATION**

Individuals have a right of access to their records of personal health information subject to certain exclusions and exceptions under the legislation.<sup>17</sup>

When a record contains any personal health information, it is first necessary to consider the application of *PHIPA*. If the requester is the individual to whom the personal health information in the record belongs or another person authorized under *PHIPA* (i.e. a substitute decision-maker), the requester may have a right of access to the record under *PHIPA*. If the requester is not a person authorized under *PHIPA*, then they have no right of access to the record under *PHIPA*.

For a deceased individual, *PHIPA* provides that the deceased individual's estate trustee (or, where there is no estate trustee, the person who has assumed responsibility for the administration of the estate) may exercise powers in respect of the individual's personal health information.<sup>18</sup> This includes the authority to request access to records of the deceased individual's health information.<sup>19</sup>

Patients have a right to see their medical charts at no cost and to have copies at a reasonable cost.<sup>20</sup>

In certain situations, the personal record will not be disclosed. Some examples: where the record

<sup>17</sup> *PHIPA*, *supra* note 2, s 52(1).

<sup>18</sup> *PHIPA*, *supra* note 2, s 23(1) 4.

<sup>19</sup> *PHIPA*, *supra* note 2, ss 25, 52-53. See also Order MO-3644 2018 CanLII 87762 (ON IPC) where a son requested specific records about his deceased mother, including her medical records in connection with a long-term care home operated by the municipality. The municipality denied access to any of his mother's personal health information on the ground that he was not entitled to this information under *PHIPA*, as he had not provided proof of his authority to request the records under *PHIPA* (i.e. no proof he was the estate trustee or administrator for her estate). He appealed. The adjudicator upheld the municipality's decision.

<sup>20</sup> See the decision of the Information and Privacy Commissioner of Ontario, Order HO-009 online: <https://decisions.ipc.on.ca/ipc-cipvp/phipa/en/135119/1/document.do> [accessed on 16.08.19] that set out a Fee Scheme of \$30.00 for the first 20 pages and \$0.25/page after that.

or the information in the record is subject to a legal privilege that restricts disclosure of the record to the individual, or the information in the record was collected or created primarily in anticipation of, or for use in a proceeding and the proceeding (and any appeals) have not been concluded.<sup>21</sup>

## **DISCLOSURE WITHOUT CONSENT**

Disclosure without either express or implied consent is also permitted under *PHIPA* in certain situations.<sup>22</sup> For example, a health care custodian working at an institution governed by the *Freedom of Information and Protection of Privacy Act*<sup>23</sup> (“**FOIPPA**”) and, the *Municipal Freedom of Information and Protection of Privacy Act*<sup>24</sup> (“**MFOIPPA**”) may make disclosure to assist with a police investigation.<sup>25</sup> On a date to be named, the legislation will be amended to also allow disclosure to an institution, or a law enforcement agency in Canada if “there is a reasonable basis to believe that an offence may have been committed and the disclosure is to enable the institution or the agency to determine whether to conduct such an investigation.”<sup>26</sup>

Disclosure without consent by public bodies, such as hospitals and government agencies as well as municipal bodies is also permitted “in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates.”<sup>27</sup>

The *Regulated Health Professions Act*<sup>28</sup> (“**RHPA**”) permits disclosure without consent for reasons that parallel the exceptions under personal information legislation, including to aid a police investigation, where required by another law, or “if there are reasonable grounds to believe that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons.”<sup>29</sup>

## **PRIVACY CONCERNS IN LONG TERM CARE & RETIREMENT HOMES**

Privacy is a common issue or concern for older adults living in either a long-term care home or a retirement home. In both situations, the older adult is living in a communal environment and often receiving health care treatments. Issues surrounding personal privacy, privacy with visitors, privacy in receiving treatment and personal records are all relevant.

21 *PHIPA*, *supra* note 2, s 52(1).

22 *PHIPA*, *supra* note 2, s 43(1)(f).

23 *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 (“**FOIPPA**”)

24 *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M 56 (“**MFOIPPA**”)

25 *FOIPPA*, *supra* note 23, s 42(1)(g); *MFOIPPA*, *supra* note 24, s 32(g).

26 *PHIPA*, *supra* note 2, s 43(1)(f); *FOIPPA*, *supra* note 23, s 42(1)(g).

27 *FOIPPA*, *supra* note 23, s 42(1)(h); *MFOIPPA*, *supra* note 24, s 32(h).

28 *Regulated Health Professions Act*, 1991 RSO 1991, c 18 (“**RHPA**”)

29 *RHPA*, *ibid*, s 36 (1).

## ***Long Term Care Homes***

Long-term care homes are designed to accommodate those with medical illnesses who may require 24/7 care. The provincial government subsidizes these homes.

The Ontario government enacted the *Long-Term Care Homes Act*<sup>30</sup> (“**LTCHA**”) with the important aim of strengthening the laws regarding the licensing of such facilities and in order to offer greater protection to the individuals who reside there.

Section 1 of the *LTCHA* states that:

The fundamental principle to be applied in the interpretation of this Act and anything required or permitted under this Act is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.

There is a “Residents’ Bill of Rights” set out under s. 3(1) of the *LTCHA*. This Bill of Rights sets out twenty-seven rights belonging to residents of the long-term care home. Some of those rights relate to privacy including:

- the right to be treated with courtesy and respect and in a way that fully recognizes the resident’s individuality and respects the resident’s dignity;
- the right to be afforded privacy in treatment and in caring for his or her personal needs;
- the right to have his or her personal health information within the meaning of the *PHIPA* kept confidential in accordance with that Act, and to have access to his or her records of personal health information, including his or her plan of care, in accordance with that Act;
- the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference; and,
- the right to meet privately with his or her spouse or another person in a room that assures privacy.<sup>31</sup>

## ***Retirement Homes***

Retirement homes are distinguished from long-term care homes, as retirement homes offer a

<sup>30</sup> *Long-Term Care Homes Act, 2007*, SO 2007 c 8 (“*LTCHA*”)

<sup>31</sup> *LTCHA*, *supra* note 30, s 3(1)1, 8, 11(iv), 14 and 21.

greater level of independence for residents while ensuring that they have the medical assistance they need. Residents cover the cost of their retirement home and care services. These are not subsidized in any way by the government and cater to older residents typically without serious medical conditions.

The Ontario government enacted the *Retirement Homes Act*<sup>32</sup> ("**RHA**") that governs retirement homes. Section 1 of the *RHA* outlines a similar purpose as that found in section 1 of the *LTCHA*:

The fundamental principle to be applied in the interpretation of this Act and any regulation, order or other document made under this Act is that a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choices about their care options.

Similarly, the *RHA* also has a Residents' Bill of Rights with eleven rights that belong to the residents of a retirement home, including the right to be afforded privacy in treatment and in caring for their personal needs.<sup>33</sup>

### ***Resident's Access to Records***

The fact that an individual is in a long-term care home or a retirement home does not mean that they do not have control over their personal health information, or do not have access to their records. Under *PHIPA*, if the person is capable, they still maintain control. If found to be incapable to give consent, their substitute decision-maker has the control.

Resident right no. 16 under the Residents' Bill of Rights in the *LTCHA* allows a resident to designate someone to be contacted if the older adult is being transferred or admitted to a hospital. This is not the same as authorizing a long-term care home to discuss the older adult's care details without the older adult's consent.

In the case of *PHIPA* Decision 70 – HR16-177,<sup>34</sup> a long-term care home contacted the Office of the Information and Privacy Commissioner of Ontario (the "**IPC**") to report a breach under *PHIPA*. The breach involved an employee who took two files containing the personal health information of two prospective residents home with her to review. On the way home, the employee lost the two files, which were never recovered. The IPC found that the long-term care home did not comply with section 12(1) of the *PHIPA*, which requires that health information custodians take reasonable

32 *Retirement Homes Act*, 2010, SO 2010, c 11 ("**RHA**")

33 *RHA*, *ibid*, s 51(1)7.

34 2018 CanLII 13993 (ON IPC).

steps to ensure that records of personal health information in their custody or control are protected against loss, among other things. The IPC also found that the Home responded correctly to the breach (by advising those affected, revising an employee manual to be clear that staff cannot remove files etc.) and that no further investigation was required.

### ***Personal Privacy in Homes***

As noted, the residents' bills of rights under both the *LTCHA* and the *RHA* provide for personal privacy for residents. For example, right no. 8 under the *LTCHA* states that "every resident has the right to be afforded privacy in treatment and in caring for his or her personal means." This means that an older adult is entitled to medical treatments and personal care done in private. This can be difficult in long-term care homes, as rooms do not have locks, for safety reasons. Roommates, staff, and visitors must always knock and announce themselves before they enter the room.

### ***Use of Surveillance Cameras***

Many homes have cameras in public areas for security reasons; however, these raise serious privacy issues. If the cameras capture a resident receiving treatment or images of their health information this would be the collection of personal health information for which arguably, consent should be given.

Some family members install cameras in residents' rooms, either as a way of keeping in contact (Skyping or communicating with the resident over the internet) or as a way to keep an eye on the care of their loved one, out of concern for possible mistreatment (or abuse).

Cameras in a resident's room cannot be used without the consent of the resident if they are competent. If the resident does not possess the capacity to make this decision, their substitute decision-maker may make the decision. However, keep in mind that installing such cameras can be viewed as an extreme invasion of privacy. A substitute decision-maker should weigh the privacy rights of an older adult against the risks that untoward or abusive behaviour is occurring (or the need for protection).

Special care should be taken to obtain the consent of a resident's roommate, (if they have one) or their roommate's substitute decision-maker if an individual wishes to place surveillance devices in a shared room.

Sometimes staff at the homes remove the cameras if they are found. Jane Meadus commented in an Advocacy Centre for the Elderly's ("ACE") Newsletter:

We know of no authority that allows homes to remove such private property, unless it is

a safety hazard. Staff sometimes refuse to enter a resident's room or cover cameras while providing care because they know they are being watched. Homes may claim that you cannot have a camera due to staff privacy concerns – ACE disagrees. We do not believe that staff have an expectation of privacy when providing care. However, there is a concern about roommates. Where possible, consent should be obtained for the use of a camera from the roommate or their substitute decision-maker. Cameras should strictly be limited to the space of the resident and not their roommate.<sup>35</sup>

Notably, such cameras should not have an audio function since it is an offence under the *Criminal Code*, to record a private conversation without the consent of the party, and it could capture a conversation between two staff members or visitors.<sup>36</sup>

While there are no regulations in Ontario dealing with cameras in long-term care or retirement homes, Quebec has created new rules governing the use of surveillance cameras in the province's long-term care homes. The regulation is a part of the adoption of Bill 115, *An Act to Combat Maltreatment of Seniors and Other Persons of Full Age in Vulnerable Situations*. The new regulatory regime took effect on March 7, 2018. The regulations are intended to protect the health and well-being of residents by allowing them to install video surveillance in their suites with or without permission of the long-term care facility.<sup>37</sup>

The Ontario Superior Court of Justice dealt with the issue of cameras in a *hospital* setting in the decision of, *Leopold Edwin Siberg v Bruyere Continuing Care Inc.*<sup>38</sup> The plaintiff's husband was a patient in a public hospital owned and operated by the defendant. She brought a motion for a mandatory injunction seeking two orders. The first order sought, was an order that she have unrestricted access to her husband for whom she was the attorney for personal care and property and litigation guardian. The second was for an order that video cameras she had installed in her husband's hospital room not be interfered with and not be obstructed. The wife first attempted to bring the motion *ex parte* (without notice to the hospital); however, the Court required that notice be given. The husband was 89 years old, had advanced dementia and a variety of medical conditions requiring medical attention. He had been waiting for over two years to be transferred to a long-term care facility. Over the two years, there had been ongoing disputes about the care provided. The wife catalogued several complaints and she believed a number of the staff members had assaulted, bullied or failed to respect her husband's dignity. The hospital initiated the investigations of the complaints, but the hospital was also concerned about protecting its staff from harassment by the

35 ACE Newsletter 2013, online: [http://www.advocacycentreelderly.org/appimages/file/ACE\\_Summer\\_Newsletter\\_Vol10\\_No1.pdf](http://www.advocacycentreelderly.org/appimages/file/ACE_Summer_Newsletter_Vol10_No1.pdf) [accessed on 21.08.19]

36 *Criminal Code*, RSC, 1985, c C-46, sections 183.1 and 184. ("*Criminal Code*")

37 See *Act Respecting Health Services and Social Services*, CQLR c S-4.2, section 505 (30).

38 2018 ONSC 4235.

wife and respecting the rights of other patients. At times, the wife was removed from the hospital and security guards were stationed outside her husband's room. She was told she could only visit her husband between 10:00 am and 3:00 p.m. unless there was an emergency. Further, the wife installed webcams, but when the staff entered the room they would cover or move them, arguing that they had not consented to have their images or actions streamed over the internet (although only the wife and her counsel had access to the video). The hospital then installed its own security cameras as well, which were under the control of hospital security.

The Court found that the wife did not meet the test for interlocutory injunctive relief (i.e. the evidence was not strong enough to show that the wife was "in the right and the hospital, was in the wrong"<sup>39</sup>) but the Court also concluded that "this does not mean that some form of order should not be granted." As both the hospital and the wife had video systems in place, Justice MacLeod made an order that the information generated by the video recordings:

....be tightly controlled and may not be released to any party or for any purpose other than the purposes of the court proceeding except as may be required for clinical purposes. Each party is to disclose to the other how the system operates, what safeguards are in place to prevent unauthorized access, what video or other record is being maintained and who controls the record.<sup>40</sup>

In the cost's decision,<sup>41</sup> the Court commented on the wife's first attempt to bring the motion *ex parte* noting: "While the issues of patient care and elder abuse are important and serious issues, the procedure adopted by the applicant, in this case, was ill-conceived and unjustified." The respondent was entitled to costs of \$16,000 on a substantial indemnity basis.

## ***Privacy and Visitors***

Long-term care and retirement homes are allowed to disclose the fact that someone is a resident of the home, their general health status and their location (i.e. room number).<sup>42</sup> However, if the resident does not want this information to be provided and withdraws their consent, the home must respect those wishes.

Residents are also entitled to meet with visitors privately. The long-term care home does not need to know what relationship the older adult has with the visitor or why they are visiting, they can just say that they are visitors. This maintains the older adult's privacy.

39 2018 ONSC 4235, para 23.

40 2018 ONSC 4235, para 29.

41 2018 ONSC 6460.

42 *PHIPA*, *supra* note 3, s 38(3).



Homes can ask visitors to sign in though, so they are aware of how many people are in the building in case of an emergency and to be able to track people if there is an outbreak of a communicable disease or illness.

Further, residents' right no. 21 under the *LTCHA* entitles residents with the right to meet with a spouse or other person in a room that assures privacy.

### ***Mandatory Reporting of Elder Abuse***

Reporting elder abuse is mandatory when an older adult resides in a long-term care home or a retirement home and elder abuse is suspected or has occurred. The law requires reporting by anyone who knows or has reasonable grounds to suspect that a resident has been or might be, harmed by any of the following:

- improper or incompetent treatment or care;
- abuse of a resident by anyone;
- neglect of a resident by a staff member or the owner of the home;
- illegal conduct;
- misuse or fraud involving a resident's money; or,
- misuse or fraud involving public funding provided to the home (long-term care homes only).<sup>43</sup>

This obligation to report applies to everyone except residents of the home. Members of regulated health care professions, social workers, and naturopaths must report even if the information is otherwise confidential. If these individuals fail to report abuse, they are guilty of an offence and may be fined up to \$25,000.00.<sup>44</sup>

### ***PRIVACY CONCERNS IN BANKING***

When there are allegations or suspicions of elder financial abuse, there is a delicate balancing act between respecting an older adult's privacy and attempting to prevent any financial harm to the older adult.

A well-meaning daughter may open her mother's mail including her bank statements or check her

<sup>43</sup> *LTCHA*, *supra* note 30, s 24(1).

<sup>44</sup> *LTCHA*, *supra* note 30, s 24(5) and s 182(2).

mother's bank account balance online even though her mother has not given her permission to do so. If the mother is capable of making her own financial decisions, and, the daughter is not an attorney under a power of attorney, the daughter should not be opening the bank statements without consent.

As noted above, financial institutions (federally regulated industry) are governed by *PIPEDA* and are required to maintain control over individuals' personal information. In other words, without an older adult's consent, the financial institution must keep the older adult's personal information private and not disclose it to (potentially well-meaning) family members.

Since the inception of *PIPEDA*, the banking industry and others sought an amendment to *PIPEDA* to allow disclosure to lawful authorities, next-of-kin, or other authorized representatives of personal information related to potential financial abuse. *PIPEDA* in its original form allowed banks to report suspected abuse to relevant authorities, such as to the police, or the Public Guardian and Trustee, where an organization had reasonable grounds to believe a law was being contravened. If no law was being contravened however, the organizations were constrained by *PIPEDA* on what actions they could take even if abuse was suspected.<sup>45</sup>

In 2015, Bill S-4, the *Digital Privacy Act* was enacted, and it made certain amendments to *PIPEDA*. One of these amendments is an additional section 7(3) (d.3). This section permits an organization, i.e. a financial institution, to disclose personal information without the knowledge, or consent of an individual in certain situations, one such situation being suspected financial abuse. A financial institution may make disclosure:

made on the initiative of the organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and,

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse.<sup>46</sup>

At the time this clause was proposed, there were some concerns that this clause could be

<sup>45</sup> The Canadian Bar Association/Canadian Corporate Counsel Association, Bill S-4 Digital Privacy Act Submissions, June 2014. Online: <http://www.cba.org/CMSPages/GetFile.aspx?guid=ab9dfd4e-a2a0-48fe-83e0-92900459e68e> [accessed on 19.08.19].

<sup>46</sup> *PIPEDA*, *supra* note 2, s 7(3)(d.3).

discriminatory as it was intended to apply to older adults, and that the list of people and organizations that may receive disclosure without consent was unnecessarily broad and unspecified. In particular, the terminology, “next-of-kin” or “authorized representative” was seen as problematic since financial abusers of older adults are most often those that could be described as, “next-of-kin,” or “authorized representatives.” The CBA Elder Law and Privacy and Access Law sections raised these concerns in a comment to the Government<sup>47</sup> on the proposed amendments, but despite these voiced concerns, the amendments came into force in 2015 as originally drafted.

According to the Government of Canada, this provision is intended to allow financial institutions to take measures to prevent financial abuse of elders, and other vulnerable customers, including for example, cases that involve unauthorized use of credit and debit cards, conflicting designations of powers of attorney, or misuse of powers of attorney, and joint bank accounts subject to abuse if the joint account holder uses the senior’s money for their own purposes.<sup>48</sup>

One potential step to avoid or flag elder abuse is for financial institutions to offer older adults the opportunity to meet with bank staff one-on-one periodically, where the older adult may feel more comfortable disclosing personal issues that impact their financial situation such as elder abuse.

### **CONCLUSION**

Privacy law is complex, but significant when dealing with older adults’ rights. This chapter highlights only, the various potential statutes that are applicable in various situations involving the care of older adults. Any company or individual dealing with older adults must be mindful of the applicable privacy legislation and specifically older adults’ right to privacy when dealing with the disclosure of personal information belonging to older adults.

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47 The Canadian Bar Association/Canadian Corporate Counsel Association, Bill S-4 Digital Privacy Act Submissions, June 2014. Online: <http://www.cba.org/CMSPages/GetFile.aspx?guid=ab9dfd4e-a2a0-48fe-83e0-92900459e68e> [accessed on 19.08.19].

48 Government of Canada, “Second Update Report on Developments in Data Protection Law in Canada, Report to the European Commission November 2017”, online: [https://www.ic.gc.ca/eic/site/113.nsf/vwapj/Second-Update-Report-ENGLISH-FINAL.pdf/\\$file/Second-Update-Report-ENGLISH-FINAL.pdf](https://www.ic.gc.ca/eic/site/113.nsf/vwapj/Second-Update-Report-ENGLISH-FINAL.pdf/$file/Second-Update-Report-ENGLISH-FINAL.pdf) [Accessed on 19.08.19]

# CHAPTER 14: PROFESSIONALISM AND ETHICS IN THE CONTEXT OF A VULNERABLE CLIENT

## **INTRODUCTION<sup>1</sup>**

A lawyer's duties and obligations to his clients are many in any retainer but are especially relevant in cases where vulnerability, capacity and undue influence are at issue. As the Honourable Justice Cullity stated in *Banton v Banton*:

A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.<sup>2</sup>

In this chapter, we will explore the sources of obligations and duties of counsel, capacity in the context of legal retainers, as well as case law relating to solicitors' negligence in the context of an incapable and vulnerable client.

## **SOURCES OF OBLIGATIONS AND DUTIES OF COUNSEL**

The duties and obligations that lawyers owe to their clients arise from professional rules of conduct, statutes, and jurisprudence. They serve as a guide for lawyers in navigating issues of capacity, undue influence and vulnerability.

### **Professional Duties**

Each province and territory's law society has rules or codes of professional conduct that outline the practice standards for lawyers. The rules and codes differ by varying degrees between each province and territory. This chapter will focus on the Law Society of Ontario's *Rules of Professional*

- 1 Kimberly A. Whaley, Principal, Whaley Estate Litigation. This chapter has been drafted from the published paper "Independent Legal Advice: Risks Associated With "ILA" Where Undue Influence and Capacity are Complicating Factors" (2017) Volume 47, Issue 4 The Advocate's Quarterly; and Kimberly A. Whaley and Kate Stephens, "A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability are at Issue In a Retainer", (2018) Volume 48, Issue 4 The Advocate's Quarterly.
- 2 (1998), 164 D.L.R. (4<sup>th</sup>) 176, 1998 CarswellOnt 3423, [1998] O.J. NO.3528 (Ont. Gen.Div.) at para.121, additional reasons (1998), 164 D.L.R. (4<sup>th</sup>) 176, 1998 CarswellOnt 4688. [*Banton*].

*Conduct* (the “**Rules**”) that relate to the duties an attorney owes to his/her client with diminished capacity.

The first thing a lawyer should establish is who the client is. This question should be revisited if other individuals are added on as parties, in order to avoid a situation where the interest of the lawyer or that of the parties is in conflict.

Establishing who the client is and who will provide instructions may be difficult where a client representative is involved. If a lawyer is asked to provide legal services to an individual who lacks legal capacity to give instructions or to enter into binding relationships, the lawyer must determine who the individual’s lawfully authorized representative is (e.g., a litigation guardian, an attorney acting under a Power of Attorney, or a trustee acting on behalf of a beneficiary). A lawyer should be clear as to who will be providing instructions on the client’s matter and should confirm this in writing.

The *Rules* define a “client” as a person who (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services, or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf.<sup>3</sup>

One of the most fundamental duties a lawyer owes a client is the duty of loyalty which encompasses many obligations that arise in a lawyer-client relationship.

In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candor and the duty of commitment to the client’s cause are aspects of the duty of loyalty.<sup>4</sup>

The duty of loyalty can be difficult to navigate, especially where a lawyer is concerned about the presence of undue influence or incapacity. The *Rules* provide guidance for lawyers acting for clients with diminished capacity.

When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.”<sup>5</sup>

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3 *Rules of Professional Conduct* at Rule 1.1-1 (Definitions) (the “*Rules*”).

4 *Ibid*, Rule 3.4-1[2] of the *Rules*.

5 *Supra* note 3, Rule 3.2-9 of the *Rules*.

## Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their 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 their 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.

[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 their 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.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

It is therefore incumbent on lawyers to investigate the capacity of clients and potential clients and to decline to act where the lawyer does not believe that the client has the capacity to retain and instruct counsel with respect to a given issue. If, however, the lawyer is satisfied that the client does have the requisite capacity, that lawyer should strive to make the lawyer-client relationship as normal as possible, keeping in mind the requirement for "a very high degree of professionalism" referenced in *Banton*.<sup>6</sup>

Lawyers must also be cognizant of the *Rules* around confidentiality when dealing with clients with

<sup>6</sup> *Banton*, *supra* note 2, para 121.

diminished capacity. The *Rules* provide that the duty of confidentiality is owed “to every client without exception.”<sup>7</sup>

The issue of confidentiality and older adults can be difficult in situations where the older adult client has family members who are highly involved in their lives, who assist them in their legal affairs and want to be updated with the older client’s affairs. A lawyer is required to adhere to the duty of confidentiality, except in cases where the client instructs the lawyer to divulge information to a particular individual.<sup>8</sup>

The *Rules* also require that a lawyer act honestly and ensure fairness in representing clients. This holds for clients who have potential capacity challenges as well. A lawyer “shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect.”<sup>9</sup>

While clients with potentially compromised capacity pose challenges for their lawyers, a lawyer who acts for such a client is still required to abide by all the duties as set out in the *Rules*.<sup>10</sup>

### ***Independent Legal Advice***

Another important concept outlined in the *Rules* for lawyers to remember is the concept of Independent Legal Advice (“**ILA**”). ILA is defined as a retainer where:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction,
- (b) the client’s transaction involves doing business with
  - i. another lawyer,
  - ii. a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
  - iii. a client of the other lawyer,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,

<sup>7</sup> *Supra* note 3, commentary 3 to Rule 3.3-1 of the *Rules*.

<sup>8</sup> *Supra* note 3, commentary 9 to Rule 3.3-1 of the *Rules*.

<sup>9</sup> *Supra* note 3, Rule 5.1 of the *Rules*.

<sup>10</sup> *Supra* note 3, Rule 3.2-9 of the *Rules*.



- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.<sup>11</sup>

The *Rules* suggest that a lawyer should consider requiring that the client obtain ILA: before the client consents to have the lawyer represent him or her despite a conflict of interest; before the lawyer accepts a joint retainer; and if the lawyer will receive payment for legal services by the transfer of a share, or of an interest in a property or enterprise, from a client. A lawyer must require the client to obtain ILA if the lawyer gives a loan to a client who is a related person, and a lawyer must advise the client to get a different lawyer to represent them if the lawyer gives a loan to a client who is not a related person.

Another more relevant scenario would include, for example, where an elderly parent owns a house and an adult child seeks to use the home as security to obtain a business loan from a financial institution. This happens more often than one would think and the parent arguably ought to receive ILA.

ILA is not necessary in every situation and is indeed a fact-specific consideration.

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

ILA can be an effective tool to mitigate the possibility of undue influence where one party to a transaction may be vulnerable or dependent on the other party. Lawyers should strongly consider requiring ILA where they have concerns that undue influence could be a factor in a transaction.

Several additional rules contained in the *Rules*, including rules regarding confidentiality and joint retainers, may require special attention where vulnerability, capacity, and undue influence are at issue.

Providing legal advice under a limited scope retainer with respect to this is especially true when meeting a client for the first time, knowing little about the client, having little background information and the client is older and possibly vulnerable, dependent or under disability.

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<sup>11</sup> *Supra* note 3, Rule 1.1-1 of the *Rules*.

The standard for providing proper ILA generally has been discussed in a number of decisions including *Goodman v. Geffen*,<sup>12</sup> *Inche Noriah v. Shaik Allie Bin Omar*,<sup>13</sup> and *Tulick v. Ostapowich*.<sup>14</sup>

Importantly, for lawyers, in *Inche* for example, an elderly woman gave a rather substantial gift to her nephew of almost the entire amount of her estate, leaving next to nothing to support herself. It was alleged that the nephew had unduly influenced the woman and that the gift should therefore fail. The legal issue became whether the presumption of undue influence was rebutted by the ILA and whether the ILA was adequate.

Lord Hailsham in the Privy Council stated:

Nor are their lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon further than to say it must be given *with a full knowledge of all relevant circumstances and must be such that a competent and honest advisor would give if acting solely in the interests of the donor*. [Emphasis added.]

In the present case, their lordships do not doubt that [the lawyer] acted in good faith; but he seems to have received a good deal of his information from the respondent [nephew]. He was not made aware of the material facts, that the property which was being given away constituted practically the whole estate of the donor and he certainly did not seem to have brought home to her mind the consequences to herself of what she was doing or the fact that she could more prudently and equally effectively have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their lordships view, the facts proven by the respondent are not sufficient to rebut the presumption of undue influence. [Emphasis added.]<sup>15</sup>

This case stands as authority for the proposition, that in providing ILA a lawyer must not only explain the nature and effect of the contract, guarantee or the transaction to the client, but must also have a broader understanding of the client's assets, the risk of the transaction and any alternatives for accomplishing the transaction without risk.

The Supreme Court of Canada observed that ILA addresses primary concerns, namely, that a person *understands* a transaction and, that a person enters into a transaction *freely and voluntarily*.

12 *Geffen v. Goodman Estate*, [1991] 2 SCR 353

13 *Inche Noriah binte Mohamed Tahir v. Shaik Allie bin Omar Abdullah Bahashuan*, 1928 CanLII 611 (UK JCPC) [*"Inche"*].

14 (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381, 12 A.C.W.S. (3d) 190 (Alta Q.B.).

15 *Inche*, *supra* note 13, p. 614.

This raises the importance of the interplay of capacity and undue influence in providing ILA. ILA is usually the best evidence to prove free will and is the best way to rebut the presumption of undue influence.

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

As noted by the court in *Coomber v. Coomber*:

It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.<sup>16</sup>

The Law Society of British Columbia has provided the following advice to us when giving ILA:

When giving independent legal advice, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences.

**You must consider whether the client has capacity and whether the client may be subject to undue influence by a third party.**

Further, if the client has communication issues -you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter.<sup>17</sup>

To meet the standard of a reasonably competent lawyer, it is somewhat trite to say that an ILA lawyer must determine whether the ILA client has the capacity to enter into the transaction for which the ILA is being provided.

Equally important, consideration of the fact that the ILA client is instructing free of undue influence must occur.

## **Statutory Duties**

Statutes are an additional source of duties for lawyers. In some instances, these statutory duties are

<sup>16</sup> 1981 CanLII 235 (ON SC), p. 730.

<sup>17</sup> The Law Society of British Columbia, Practice Resource, Independent legal advice checklist, found online at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-ila.pdf>

formalizations of the duties or tests developed in the common law. The tests and duties created by statute often vary between provinces, as different provincial legislatures choose different language for their statutes and adopt different amendments over time. In respect of this chapter, one statute in particular, the *Substitute Decisions Act*<sup>18</sup> (the “*SDA*”), is relevant to the issue of capacity. The *SDA* outlines the requisite test for capacity with respect to granting or revoking powers of attorney, and capacity to manage property and personal care.<sup>19</sup> The *SDA* also creates a special type of retainer between a lawyer and a client where that client’s capacity is at issue in a proceeding.<sup>20</sup> A lawyer in these cases is appointed under section 3 of the *SDA* and is referred to as section 3 counsel. Chapter 3 discusses this in greater detail.

### **Common Law Duties**

The Canadian law of wills and estates has developed from more than one-thousand-year-old traditions of British common law; needless to say, many centuries of jurisprudence have created a myriad of legal tests and imposed a variety of duties on lawyers. These tests and duties have changed over time in accordance with new social norms and technological advancement, meaning that one of the fundamental characteristics of the common law is that it is always subject to change at the discretion of judges. This is one reason why, to come full circle, one of the standard professional duties of lawyers is to engage in continuing legal education. For example, the legal test for testamentary capacity arises out of the common law, and it is the duty of the drafting solicitor, prior to drafting a will on behalf of a client to investigate the issue of testamentary capacity as it is defined in the common law and set out in the case of *Banks v Goodfellow*.<sup>21</sup>

## **CAPACITY, UNDUE INFLUENCE, AND VULNERABILITY**

Capacity, undue influence, and vulnerability are separate but interrelated concepts. Capacity and undue influence have specific legal meanings, while vulnerability is a broad term used to refer to situations where a lawyer should take greater care in assessing a client’s legal needs and instructions in order to effectively advocate for a client’s interests.

### **Capacity to Contract**

As discussed in chapter 3, capacity is fluid. A client’s ability to make decisions can change and fluctuate over time. Pursuant to the *SDA*, all persons who are eighteen years of age or older are

18 *Substitute Decisions Act*, 1992 S.O. 1992, c.30. (“*SDA*”)

19 *SDA*, *ibid*, ss 8 (1) and (2), 47(1) and (3).

20 *SDA*, *ibid*, s. 3.

21 (1870) L.R. 5 Q.B. 549.

presumed to be capable of entering into a contract.<sup>22</sup> 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.”<sup>23</sup>

There are no statutory criteria for determining the requisite capacity to contract. A cogent approach for determining requisite capacity to contract is set out in the Prince Edward Island Supreme Court decision of *Bank of Nova Scotia v. Kelly*. Capacity to enter into a contract (including real estate transactions) is defined by the following:

- 1) the ability to understand the nature of the contract; and
- 2) the ability to understand the contract’s specific effect in the circumstances.

In other words, a person capable of entering into a contract has the ability not only to understand the nature of the contract, but also the impact on their interests.<sup>24</sup>

In the above case, the Court emphasized that a person entering into a contract must exhibit an ability to understand all possible ramifications of the contract. The criteria to be applied for determining capacity to contract are based on the principle that a contract requires informed consensus on the part of the contracting parties. There must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation. It is where there is a want of rational and deliberate consent that contracts or conveyances are set aside.

It is not necessary that a client understand all the details necessary to pursue or defend their case.

Just as any person can hire an expert to handle complex affairs that are beyond their personal expertise, a client can rely on their lawyer or representative to understand the specific details and processes involved in their case.

The requirement for legal capacity varies significantly between different areas of the law and must be applied to the particular act or transaction which is in issue.

For example, a capacity analysis may be different for giving instructions about a complex corporate transaction as compared to a client who would like a lawyer to assist with his or her rights about living in a long term care home.

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22 SDA, *supra* note 18, s. 2(1).

23 SDA, *supra* note 18, s. 2(3).

24 (1973), 41 DLR (3d) 273 (PEI SC).

### ***Client Capacity to instruct counsel***

It is the obligation of the lawyer to interview the client for the purposes of determining if the requisite legal or decisional capacity exists for the client to understand the task at hand. Is the client entering into a contract? Is the client selling her house? Is the client executing a Will?

The person responsible to assess the decisional capacity of an individual depends on many factors, including the type of capacity being assessed or the decision that is being made.

For example, the *SDA* and the *Health Care Consent Act*,<sup>25</sup> require a particular individual to assess particular capacity determinations. For health treatment, the health practitioner who proposes the treatment is responsible for the assessment of the capacity of the patient.

As we have already discussed in chapter 3, there are a number of situations where the lawyer is responsible for assessing capacity – does your client have the capacity to instruct counsel? Enter a contract? Make a gift? Execute a Will?

While there is a rebuttable presumption that an adult client is capable of instructing counsel, it is important to note that the requisite capacity to instruct counsel involves the ability to understand the financial and legal issues at hand. As a lawyer, one will have to make a delicate and complex determination requiring careful consideration and analysis.

Overall, in order to have the capacity to instruct counsel, the client must be able to:

- 1) understand the context of the decision: what one has asked the lawyer to do and why; and
- 2) know one's own specific choices: be able to understand and process the information, advice and options the lawyer presents to them; and,
- 3) appreciate the consequences of one's choices: i.e. appreciate the pros, cons, and potential results of the various options.<sup>26</sup>

It is up to the lawyer to make the assessment, and decide if the client has the capacity to instruct counsel.

### ***Capacity to Litigate***

If a client does not have the requisite capacity to litigate, a litigation guardian may need to be

<sup>25</sup> *Health Care Consent Act 1996*, S.O. 1996, c. 2, Sched. A (“HCCA”).

<sup>26</sup> Ed Montigny, ARCH Disability Law Centre, “Notes on Capacity to Instruct Counsel”, [www.archdisabilitylaw.ca/?q=notes-capacityinstruct-counsel-0](http://www.archdisabilitylaw.ca/?q=notes-capacityinstruct-counsel-0)

appointed. Litigation guardians are necessary to protect parties “under disability,”<sup>27</sup> but also to protect opposing parties and court procedures. The test for whether a litigation guardian is required under Rule 7 of the *Rules of Civil Procedure* is:

- i. The person must appear to be mentally incapable with respect to an issue in the case and,
- ii. As a result of being mentally incapable, the person requires legal representation to be appointed by the Court.<sup>28</sup>

Jurisprudence has established the following additional factors to be considered when determining whether a person is capable of commencing an action (or continuing an action):

- a) A person’s ability to know or understand the minimum choice or decisions required to make them;
- b) An appreciation of the consequences and effects of one’s choices or decisions;
- c) An appreciation of the nature of the proceeding;
- d) A person’s ability to choose and keep counsel;
- e) A person’s ability to represent oneself;
- f) A person’s ability to distinguish between relevant and irrelevant issue; and,
- g) A person’s mistaken beliefs regarding the law or court procedures.<sup>29</sup>

If a client does not have, or no longer has, the capacity to litigate, a litigation guardian will likely need to be appointed.<sup>30</sup>

## **Capacity Assessments**

If a lawyer is uncertain about the capacity of his or her client to make a decision, then the lawyer may wish to advise the client that they will not agree to act until the client undergoes a capacity assessment that demonstrates that the client is capable with respect to their decision. However, a lawyer should be careful to ensure that such an assessment is actually required in order to take on or fulfill a given retainer, as a finding of incapacity represents a significant loss of independence for

27 *Rules of Civil Procedure* RRO 1990, Reg. 194, Rule 7.

28 *Huang v Braga* 2016 ONSC 6306 at para 18; and *Hengeveld v Ontario (Transportation)* 2017 ONSC 3600 at para

29 *Carmichael v Glaxosmithkline Inc.* 2019 ONSC 2037 at para 40.

30 Also, a note on “Section 3 Counsel”: Section 3 of the Substitute Decisions Act provides that in cases where an individual whose **capacity is in issue** in **proceedings under the legislation** does not have counsel, the Office of the PGT may be directed by the Court to arrange legal representation for that person (otherwise referred to as “Section 3 Counsel”).



an individual. This is a delicate balance to consider and requiring a capacity assessment must be reasonable in the circumstances.

A “capacity assessor” is someone who is qualified and designated to determine whether an individual is mentally incapable of certain types of decision-making as described under the provision of the *SDA*. In some circumstances, the *SDA* gives capacity assessors the exclusive authority to make such determinations. The training of capacity assessors is managed and conducted by the Capacity Assessment Office by the Ministry of the Attorney General.

Unless the assessment is ordered by a court, a person has the right to refuse to have his or her capacity assessed. Requesting a person’s capacity to be assessed can be undertaken in limited circumstances.

A capacity assessor’s opinion may be required if a person has made a power of attorney and specified in the document that their incapacity must be proven before the power of attorney can be used. If the individual does not mandate within the power of attorney document how incapacity is to be proven, a capacity assessor’s opinion is required.

Suggested best practices impress upon lawyers to first meet with clients and make their own determination of capacity of the client to instruct before recommending consideration of a referral to obtain a capacity assessment with rights advice.

By seeking out a capacity assessment first, before making a determination of capacity to instruct, the lawyer assumes that a health professional or some other assessor has more knowledge about the legal standards or criteria for determining capacity to instruct on the particular matter on which the client wants advice. Health professionals will not know the specific legal criteria for determining the requisite legal capacity to undertake a particular purpose unless the lawyer details the criteria of the decisional capacity to be determined

### ***Undue Influence***

Undue influence is separate but related to the concept of capacity. Therefore, it is possible that an individual is capable with respect to a decision, but that the presence of undue influence renders that decision invalid. It is therefore important for lawyers to investigate the potential for both incapacity and undue influence in the course of a retainer.

Undue influence is more substantial than mere influence, and requires the application of coercion such that the person being unduly influenced is made to do something that they do not want to

do.<sup>31</sup> Persuasion is allowed, but the will of a person cannot be overborne or dominated to the extent that their decisions are not truly their own.<sup>32</sup>

There are several “red flags” that lawyers should be aware of related to undue influence, and that may also indicate diminished capacity, including: new relationships, sudden changes in old relationships, a change in caregiver, paranoia and suspicion, a change in residence, and an over-reliance on one individual. In a typical case of undue influence, someone – be they a relative, friends, neighbour, spouse or caregiver – will find ways to become increasingly involved in the affairs of a vulnerable person to the exclusion of other friends and family. They may transfer assets into joint names, or have the vulnerable person execute new wills and powers of attorney.

Often, the undue influencer will bring the vulnerable person to a lawyer and may wish to be present throughout the interview. This is one of the reasons why it is important for a lawyer to meet with his or her client alone in order to investigate the potential for undue influence, keeping in mind that, as per W.N. Renke J., “The most effective control works regardless of presence.”<sup>33</sup>

### ***Vulnerability***

Vulnerability lacks a specific legal meaning, but is closely intertwined with capacity and undue influence in the sense that vulnerabilities resulting from any source – such as age, infirmity, disability, language barriers, or involvement in abusive relationships – may impair cognitive function and/or make an individual more susceptible to coercion or fraud.

## ***SOLICITOR’S NEGLIGENCE***

Unfortunately, and despite our best efforts, lawyers sometimes fail to adequately address issues of capacity and undue influence in a retainer. While not all mistakes amount to negligence, there are many instances where the conduct of a lawyer falls below the standard required by the law. In these instances, the appropriate party is likely to make a claim for solicitor’s negligence.

A claim for solicitor’s negligence, which falls under the broader category of professional negligence, turns on two factors:

- 1) the existence of a duty of care owed by the solicitor to the party claiming negligence, and
- 2) a finding that the solicitor’s actions were a departure from the applicable standard of care and so caused a loss to the plaintiff.

31 *Wingrove v. Wingrove* (1885), 11 PD 81 (Eng Prob Ct), at 82.

32 *Dmyterko Estate v. Kulikovsky*, 1992 CarswellOnt 543 (Gen Div).

33 *Re Kozak Estate*, 2018 ABQB 185, at 76.

A duty of care arises as a matter of course when a lawyer enters into a retainer with a client. As for the standard of care, per *1483677 Ontario Ltd. v. Crain*:

The applicable standard of care is that of a reasonably competent solicitor: *Ristimaki v. Cooper*. A lawyer who is retained must bring “reasonable care, skill and knowledge to the performance of the professional service which he [or she] has undertaken.” As well, “a solicitor’s conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer’s impugned conduct is judged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client’s instructions, and the experience and sophistication of the client.”<sup>34</sup> (footnotes omitted)

It is not enough to say that a solicitor made an error of judgment or showed ignorance of some particular point of law; instead, the plaintiff must prove that a reasonably competent solicitor would not have done so in order for the solicitor to be liable for damages.<sup>35</sup> Per *Alberta (Workers’ Compensation Board) v. Riggins*, “the measure of damages is the amount that would have been awarded but for the negligence of the lawyer, unless that amount is not collectible. If that amount would not be collectible from the original tortfeasor, then the plaintiff has no right to the damages in question.”<sup>36</sup>

Importantly, in the case of wills, the third-party beneficiary rule extends the duty of care owed to the testator by the drafting solicitor to beneficiaries under a negligently-drafted will. A classic example is the case of *Whittingham v. Crease & Co.*, where a lawyer asked the wife of one of the beneficiaries to be a witness to the will, thereby voiding any gifts made to that beneficiary under the will. The plaintiff beneficiary, in that case, was successful in his negligence claim and received as damages the difference between what he would have received under the will and what he did receive when the would-be gift was distributed under intestacy.<sup>37</sup>

## CASE LAW

A few cases are outlined below, some of which include findings of negligence against a lawyer and some of which do not. In every instance, the lawyer failed, at least in part, to live up to their duties in instances where clients were vulnerable.

<sup>34</sup> *1483677 Ontario Ltd. v. Crain*, 2015 ONSC 6217, 2015 CarswellOnt 15736, para 155.

<sup>35</sup> *Supra* note 29.

<sup>36</sup> 1992 ABCA 263, 1992 CarswellAlta 140, at 21.

<sup>37</sup> 1978 CarswellBC 456.

**Strong v. McCarron**<sup>38</sup>

This decision involved a claim against a solicitor, Ms. McCarron, by Larry Strong and Florence Strong, who received imperfect title to a property in which an unrelated party, Murray Steeves, retained a life interest pursuant (in part) to the Last Will and Testament of his wife, Dorothy Steeves. Dorothy's will required her estate trustee to seek Murray's consent before selling the matrimonial property.

Dorothy passed away on July 27, 1996. Ms. McCarron was retained by Normand and Shari Daigle in March of 1997 with respect to a purchase of the Steeves' marital home from Dorothy's Estate. (The Strong's are the parents of Shari Daigle and purchased the property from them in June of 1998.)

Ms. McCarron had knowledge of Murray's life interest in the property, but as he was ill in hospital around the closing date of the sale, never asked for or received his written consent to the sale as required by the will and by the *Statute of Frauds*.<sup>39</sup> Instead, Ms. McCarron relied upon a Statutory Declaration by one of Murray's daughters that he consented to the sale of the property and that the sale would be used to pay Dorothy's debts. Ms. McCarron also relied on s. 9 of New Brunswick's *Devolution of Estates Act*,<sup>40</sup> which empowers a personal representative to sell the property of a deceased, without consent of the beneficiaries, if the sale is in whole or in part to pay the debts of an estate. Ms. McCarron certified that the Daigles held free and unencumbered title to the property after the sale (which was not, in fact, the case).

Another of Murray's daughters later swore an affidavit that her father had never consented to the sale of the property. As for s. 9 of the *Devolution of Estates Act*, the court held that it does not apply where, as in this case, a lawyer has notice of a life interest in the property. Further, s. 9 was not appropriate to rely on where the only evidence that the sale was being used to pay debts was the Statutory Declaration. The Court held that Ms. McCarron had not acted in a manner consistent with a reasonably competent solicitor in failing to obtain Murray's consent to the transfer, inter alia. The Court held:

On the facts of this case, I conclude that the express grant of a life estate in a registered will would have caused a reasonably competent and prudent lawyer to obtain a written release of the life interest prior to closing. The specific bequest of the testatrix giving the right to her spouse Murray Steeves to use the property "as a home for my spouse until his death or remarriage, whatever first occurs" and the restriction on the sale with the "consent of my spouse" were not, in my view, ambiguous terms. They were clear signs that should have alerted McCarron to the need for Steeves' consent as a condition precedent to closing.

38 2003 NBBR 206, 2003 NBQB 206.

39 *Statute of Frauds*, RSNB 1973, c S-14.

40 *Devolution of Estates Act*, RSNB 1973, c D-9.

Faced with the actual notice of Steeves' interest as devised in the will, I am satisfied that a reasonably competent lawyer would not have relied on the existing statutory declaration or on section 9 of the Devolution of Estates Act in certifying to the purchasers that they were obtaining a marketable title to the property.<sup>41</sup>

As a result of Ms. McCarron's negligence, the Strongs' eventually learned, in the course of seeking mortgage financing, that Murray's life interest remained on title. Murray's life interest was held to be worth \$18,000, and pursuant to an agreement made before trial, Ms. McCarron paid the Strongs approximately \$30,000 in damages, interest and costs.

### ***Baron v. Mamak***<sup>42</sup>

This solicitor's negligence claim arose from the case of Juzumas v. Baron,<sup>43</sup> but this claim was brought not by the victim, as you might expect, but by the perpetrator.

By way of brief background, a younger woman met an elderly gentleman, Mr. Juzumas, when she began providing him with housekeeping services. Mr. Juzumas was born in Lithuania and spoke very little English. He had no family in Canada. The housekeeper was also born in Lithuania and she had been married several times before. The two married on the understanding that the housekeeper would look after Mr. Juzumas and take care of the house until his death, as he did not want to live in a nursing home. The housekeeper did not hold up her end of the bargain and preyed on the elderly man for financial gain, including by taking steps to have the title to his house transferred into the name of her son.

Eventually, through the assistance of a neighbour, the older man was able to bring a claim to have his home transferred back into his name and obtained a divorce, but not before suffering emotionally, physically, and financially from the actions of the housekeeper. Justice Lang, who presided over the original action, dismissed quantum meruit claims brought by the housekeeper and her son against Mr. Juzumas with costs.

The day before their marriage, the housekeeper and Mr. Juzumas attended at a lawyer's office and prepared a will naming the housekeeper as the sole executor and beneficiary of Mr. Juzumas' estate.

The lawyer did not meet with Mr. Juzumas separately. He did not arrange for an interpreter. There was no discussion with Mr. Juzumas as to the value of the house or whether a marriage

41 *Supra* note 33, para 36 and 37.

42 2018 ONSC 2169 (CanLII).

43 2012 ONSC 7220 (CanLII).

contract might be appropriate. Later Mr. Juzumas went to a different lawyer and executed a new will, leaving most of his estate to his niece in Lithuania. He left a bequest of \$10,000.00 to the housekeeper. When the housekeeper became aware of this new will she consulted with the original lawyer and decided that Mr. Juzumas' house, which formed a significant part of his estate, would be transferred to the housekeeper's son, subject to a life interest in favour of Mr. Juzumas. The housekeeper, her son, and Mr. Juzumas then had a brief meeting at the lawyer's office. The lawyer did not explain the concept of a "life tenancy" to Mr. Juzumas; there was no discussion about the value of the property being transferred during the meeting; and there was no interpreter present. There was a suggestion that the housekeeper had drugged Mr. Juzumas prior to the meeting.

After receiving the lawyer's confirmation letter in the mail confirming the transfer of the house, Mr. Juzumas contacted the lawyer on three separate occasions asking to reverse the transfer. The lawyer consistently advised him that the transfer could not be undone because it was "in the computer". With the assistance of his neighbour, Mr. Juzumas consulted another lawyer and ultimately brought an action to reverse the transfer. After failing in their claims, the housekeeper and her son brought a solicitor's negligence claim seeking damages from the lawyer who prepared the transfer of the house and various other documents.

The defendant lawyer conceded that his actions fell below the standard of care. Justice Gray noted that under the circumstances, the lawyer was clearly not in a position to represent both the housekeeper and her son on the one hand, and Mr. Juzumas on the other. He was obliged to obtain separate representation for Mr. Juzumas. Furthermore, the Honourable Justice Gray stated that it clearly would have been prudent to ensure that Mr. Juzumas understood what was going on given his limited language skills.

However, despite the lawyer's failure to meet the requisite standard of care, Justice Gray concluded that it was impossible to find that the breach of care caused any of the damages claimed by the plaintiffs, the housekeeper and her son. The transfer of the property from Mr. Juzumas to the son was the product of a scheme perpetrated by the plaintiffs on an elderly and unwell man. It was the product of their undue influence. Even if the defendant lawyer had fulfilled his duty of securing separate representation for Mr. Juzumas that would have simply prevented the transaction from occurring. Justice Gray dismissed the plaintiffs' negligence claim.

### ***Lizotte v. Lizotte***<sup>44</sup>

This decision concerns a deed executed in 1986 that conveyed all of the family farmlands to one

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<sup>44</sup> 2002 NBCA 29, 2002 CarswellNB 108.

brother, Léonil Lizotte, for no consideration. In this case, the vulnerability of the wronged party was the result of language barriers and a lack of legal sophistication.

Léonil's mother, Ida, his sister, Ella, and his brother, Rino, executed the deed believing that one or more of them would be entitled to the lands on Léonil's death. Importantly, both Ida and Rino had matrimonial homes located on the property that was transferred by the deed. However, Léonil had a son, who he told the parties about in 1996 after the execution of the deed, and who would, therefore, have inherited the whole family property if Léonil died intestate, which he did on December 30, 2000. Such an outcome was not in line with Rino's intentions and expectations when signing the transfer deed.

The New Brunswick Court of Appeal ultimately upheld the trial judge's decision to rescind the deed on the basis of mistake and confirmed the judge's findings that the solicitor who prepared the deed was negligent. The Court also upheld the trial judge's award of solicitor and client costs against the solicitor for the full amount required to compensate Rino for the legal fees incurred in asserting his legal rights.

The solicitor, Mr. McLaughlin, acted under a joint retainer between Rino and Léonil despite the fact that this was not an arm's length transaction, and without obtaining written permission from the parties or advising his clients that there was a conflict of interest, in addition to marital property issues, with respect to the transfer. Additionally, the deed was prepared in English, a language that Rino could not speak or write in. The Court, therefore, held that, on a number of bases, Mr. McLaughlin had failed to provide the services of a reasonably competent solicitor, and had failed to heed the rules of professional conduct with respect to joint retainers.

This case, therefore, highlights the duties and obligations of a solicitor where a client may be vulnerable as a result of language barriers, a lack of legal sophistication, and an over-reliance on the good intentions of family members. The red flags in this case – the lack of consideration, the language issue, the unresolved marital property issues – would have caused a reasonably competent solicitor to take the requisite steps to ensure that Rino, Ida and Ella had independent legal advice and understood the full consequences of the transfer, and the significant renunciation of their inheritance rights that it represented.

### ***Law Society of Upper Canada v. Farant*** <sup>45</sup>

This involves a disciplinary hearing for a lawyer who represented a vulnerable person who was eventually assessed as incapable of defending himself from exploitation.

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45 2005 ONLSHP 31, 2005 CarswellOnt 12061 (L.S.U.C. Hearing Panel).



In joint submissions, the lawyer admitted to charging unreasonable fees, breaching an order of the Court, and misleading his client. The Law Society Hearing panel held that:

The facts admitted by Mr. Farant raise matters which lie at the heart of a lawyer's obligations. The calling of a lawyer is to protect his client. The calling is highest where the client is vulnerable. Mr. Farant failed in this calling.<sup>46</sup>

The lawyer ended up receiving a 14-month suspension due to mitigating factors.

### ***Walman v. Walman Estate***<sup>47</sup>

In this case, the deceased, Murray, married his second wife, Estelle, in 1991, and made several property transfers and new wills that benefitted her significantly. Murray's two sons with whom he was close were disinherited. Murray had Parkinson's and Lewy Body dementia during this time, such that the first lawyer asked him to undergo a capacity assessment before drafting the wills. Instead, he and Estelle went to a different lawyer.

The Court held that Murray lacked testamentary capacity and was, in any event, unduly influenced in preparing the latter wills. The drafting solicitor did many things correctly, including meeting with Murray alone, keeping notes, and asking Murray questions about his assets.

However, the court held that in the circumstances, the lawyer had an obligation to address the substantial wealth transfers to Estelle, the disinheritance of Murray's sons, and Murray's health issues when investigating capacity and undue influence.

The Rules of Professional Conduct, statute, and the common law are essential in assisting a lawyer in these cases.

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

If the lawyer is confident that the client meets the applicable legal standard for requisite capacity, it should be clearly indicated in the file notes. The lawyer's notes should be thorough and carefully recorded and preserved.

The lawyer should take extra time in asking the client probing questions, to give the client a chance to answer carefully and to provide the client with as much information as possible about the legal decision or proceedings. All questions and answers should be carefully recorded in detail and it is important not to edit or interpret the client's comments.

<sup>46</sup> *Law Society of Upper Canada v. Farant* 2005 ONLSHP 31, 2005 CarswellOnt 12061 (L.S.U.C. Hearing Panel) at para 84.

<sup>47</sup> 2015 ONSC 185, 4 E.T.R. (4<sup>th</sup>) 82, 2015 CarswellOnt 350 (Ont.S.C.J.), add'l reasons 2015 ONSC 653, 4 E.T.R. (4<sup>th</sup>) 119, 248 A.C.W.S. (3d) 783.

Lawyers ought to exercise additional caution in circumstances where a third party who may benefit from a transaction brings the client to the office and/or appears overly involved in the process.

***Danchuk v. Calderwood*** <sup>48</sup>

This is a classic case involving the predatory marriage of a caregiver to an older adult, and includes the drafting of new wills, powers of attorney, and the creation of joint bank accounts and credit cards between the older adult and the caregiver. The older adult, George Danchuk, passed away on June 2, 1994, having been purportedly married on January 14, 1994, and having executed a new Last Will and Testament on February 3, 1994.

After George's separation from his second wife in 1986, his daughter from his first marriage, Sonja Calderwood, assisted him with the management of his day-to-day affairs. Her assistance became increasingly necessary as George began to suffer from the effects of dementia in the early 1990's. In the spring of 1993, Sonja hired Ida Ducolon, with whom she had been acquainted for several years, to assist with George's in-home care. After Ida began living with and assisting George, his friends and family report that he became increasingly isolated.

By the winter of 1994, George and Ida had "married" (though he was not actually divorced from his second wife), and George had executed a new will and powers of attorney in favour of Ida, completely unbeknownst to the rest of his family.

Ms. Heidi Bellis, the solicitor who prepared these documents for George, never met with him alone and noted concerns about George's capacity and that Ida was speaking for George at their meetings.

Nevertheless, Ms. Bellis felt satisfied that George had the requisite capacity to make a will and grant powers of attorney. At trial, however, the Honourable Justice Harvey held with respect to Ms. Bellis:

In keeping with what I understand to be the law applicable to the duty of a solicitor, in the circumstances here, I accept the submission of counsel for the defendants that she failed with respect to that duty.

In my view, in the particular circumstances here, at the outset:

- (1) she should have regarded the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;
- (2) she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the dependence of the deceased in giving instructions;

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48 1996 CarswellBC 2555.

(3) the inquiry should have confirmed whether the deceased had a prior existing will and, if such a will existed, what were the reasons for any variations or changes therefrom prompting the disposition being put forward;

(4) the inquiry should have encompassed why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney, a new power of attorney was to be given by the deceased to the plaintiff; and,

(5) collateral to (4), supra, the inquiry should have included some investigation of the health of the deceased.

In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.

If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense, including the medical assessment of the ongoing progression and state of senile dementia, I am satisfied the said will would not have been prepared by her at that time.

For these reasons, I attach little weight to the testimony of the solicitor.<sup>49</sup>

The trial judge held that the 1994 Will has invalid, and did not have to deal with the issue of the validity of the marriage, as George never divorced his second wife. Special costs were awarded to George's children and wife.

### ***Weldon McInnis v. John Doe*** <sup>50</sup>

This case concerns an assessment of a solicitor's accounts where the capacity of her client was at issue.

The assessments of a lawyer's account is conducted pursuant to the *Solicitor's Act*,<sup>51</sup> and is distinct from solicitor's negligence. Essentially, a lawyer is asked to prove the fees and disbursements incurred in the course of a retainer.

49 *Danchuk v. Calderwood* 1996 CarswellBC 2555 at paras 116-120.

50 2014 NSSM 13.

51 R.S.O 1990, c. S. 15

In this case, Ms. McGinty, a solicitor at Weldon McInnis, represented John Doe. John Doe's daughter, Jane Doe, gave evidence at the assessment hearing. The assessment concerned four accounts rendered by Ms. McGinty, totaling \$9,116.89, for legal services performed with respect to John Doe's Powers of Attorney while he was living at an assisted living facility in Halifax. The second account was purely to pay a disbursement, namely the medico-legal report of Dr. Brunet, which ultimately found that while John Doe was capable of granting a Power of Attorney and instructing counsel, he was not capable of managing his assets/property.

John Doe contacted Ms. McGinty because he no longer wanted Jane Doe to act as his attorney due to concerns about her management of his finances; because his daughter, bank, and assisted living facility would not accept his letter revoking the Power of Attorney that appointed his daughter; and because he wanted the ability to look for a different place of residence.

Ms. McGinty gave evidence that she was satisfied that John Doe was competent and had the capacity to instruct counsel, and that he was in need of legal services. Ms. McGinty also gave evidence that she ignored the comments from staff at John Doe's facility that he was incapable because her focus was on her client. Despite a request from Jane Doe, Ms. McGinty did not speak to Dr. Couture, the physician who oversaw Mr. Doe's care, because John Doe told her that he was biased.

Ms. McGinty decided to have John Doe's competency assessed by Dr. Brunet, after consultations with John Doe, in lieu of simply preparing new Power of Attorney documents for him. After the report was delivered on August 23, 2013, Ms. McGinty was unable to get an answer from John Doe, after several attempts, about who he wanted to act as his attorney. Subsequently, Ms. McGinty received a report from Dr. MacKnight, dated August 26, 2013, finding that John Doe was not competent to make decisions about his living situation, care, and finances. The report was silent as to John Doe's capacity to instruct counsel. Ultimately, John Doe instructed Ms. McGinty to close his file.

Jane Doe assessed Ms. McGinty's accounts, claiming that none should be paid: (1) on the basis that Ms. McGinty failed to take the reasonable steps of speaking with doctors and staff at John Doe's residence to confirm certain facts and allegations he made, and (2) that John Doe lacked the capacity to retain and instruct counsel.

In the first paragraph of the initial decision, the assessment officer, Adjudicator Richardson, identified some difficult questions facing lawyers when the capacity of a client is at issue:

The news is now replete with articles about the social impact of a growing population of older people. Many of these discuss the concurrent growth of people whose mental capacity is impaired in varying degrees by the aging process. Others discuss the problem of elder abuse. This context will on occasion raise difficult questions of client

assessment for lawyers. Is an allegation made by a client that his or her children are abusing him or her real, or a figment of suspicions born of declining mental faculties? Can a solicitor accept and act on the instructions of a client when there is reason to be concerned about the capacity of the client to give those instructions? What steps-if any-must or should or can a solicitor take to determine the mental capacity of his or her client prior to acting on those instructions? Under what circumstances can a solicitor charge such a client for following instructions that later prove to have been based on the client's delusions? How is the value of services provided under such circumstances to be assessed?<sup>52</sup>

Ultimately, Adjudicator Richardson held that Ms. McGinty's fees were reasonable, with a reduction, as the evidence before him did not suggest that John Doe was incapable of retaining and instructing counsel, relying on the task-specific test for capacity and the presumption of capacity. However, Adjudicator Richardson held that the disbursement for the report of Dr. Brunet was unreasonable, because, *inter alia*, Ms. McGinty advised John Doe to obtain such a report shortly after meeting with him and without the benefit of a review of his full medical file. The account for the disbursement was disallowed in its entirety. The assessment was appealed to the Nova Scotia Supreme Court of the case above. The Court held that the adjudicator in Small Claims Court misapplied the test of reasonableness with respect to Ms. McGinty's conduct in obtaining the capacity report from Dr. Brunet by failing to consider whether counsel's approach was reasonable in and of itself and instead analyzed her actions in the context of an alternative approach. The Court held that the disbursement incurred in obtaining the expert's report was reasonable, citing the ultimate responsibility of lawyers for the legal work they perform.

The Court further held that the adjudicator's reasons for finding Ms. McGinty's fees unreasonable lacked specificity, and so allowed an appeal of the issue of the outstanding legal bills.

## **CONCLUSION**

It is easy to see the difficulty for lawyers to balance the various duties they owe to their client when vulnerability, capacity and undue influence are at issue in a retainer. In every case, a lawyer has the duty of ensuring that his or her client has the requisite capacity to retain and instruct counsel, as any defense or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of undue influence or incapacity, but a lawyer must always be satisfied that they can act for a given client and fulfill all of the duties and obligations owed to that client.

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52     *Supra* note 45, para 1.

# CHAPTER 15: END OF LIFE DECISIONS, MEDICAL ASSISTANCE IN DYING

## **INTRODUCTION**

While at times it may seem that science has found a “cure” for death that is not the case. Death may be delayed but not denied. The result is some limited choice about when and perhaps how we want to die, and sometimes which decision to make for loved ones.

Broadly generalizing, we can divide “end of life decisions” into two categories: the decision we will make for ourselves if capable at the time and the decision we make for a loved one who is incapable to make his or her own decision. This chapter will focus on Ontario statutes dealing with this subject matter, although all provinces and territories have similar legislation.

## **SOME BACKGROUND CONSIDERATIONS AND DEFINITIONS**

An “end of life” decision often involves a plan of treatment, rather than a single decision. “Palliative care,” for example, is a process involving keeping a person as comfortable and pain-free as possible while not attempting to treat an underlying condition.

Capable patients make their own decisions. “Capacity”, as discussed in chapter 3 of this book, requires the ability to process, understand and retain information relevant to the decision and the ability to appreciate the likely consequences of the decision.<sup>1</sup> Capacity is both issue and time specific: you can be capable of some decisions and incapable of others and you may be capable at some times but incapable at others.<sup>2</sup>

Incapable patients must have their health care decisions made for them. In Ontario, the *Health Care Consent Act*<sup>3</sup> (the “**HCCA**”) and the case law that has developed in applying it requires the health practitioner to obtain consent to treatment from a capable patient. Capacity is presumed,

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1 *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sch A, s. 4(1) (“HCCA”).

2 *HCCA*, *supra* note 1, s 15(1) and (2).

3 *HCCA*, *supra* note 1.

regardless of the person's age or health.<sup>4</sup> If the health practitioner has reason to question the person's capacity, the practitioner is obliged to "assess" capacity and if the person is found to be incapable, then to:

- a) Advise the person of the finding of incapacity and the right to challenge it by application to The Consent and Capacity Board;
- b) Chart the finding of incapacity in the person's hospital chart and the reasons for it;
- c) Identify the correct substitute decision-maker<sup>5</sup> ("**SDM**") in accordance with the hierarchy of SDMs set out in the legislation;<sup>6</sup> and
- d) Obtain informed consent to a treatment proposal from the SDM or SDMs and ensure the consent reflects the principles the legislation set out for the giving of substitute consent.<sup>7</sup>

### ***Substitute Consent***

In brief, the principles of substitute consent require that the decisions reflect the patient's prior capable wishes relevant to the treatment decision.<sup>8</sup> If no relevant wishes have been expressed, then to make a decision based on the patient's "best interests," a term defined to include consideration of the patient's values and beliefs as well as "medical" best interests.<sup>9</sup>

### ***Informed, Voluntary Consent***

Whether the decision-maker is the patient or a substitute, the treatment team must obtain informed, voluntary consent to any end of life treatment decision.<sup>10</sup> An individual is entitled to a full explanation of the risks and benefits of all treatment options and the alternatives to them and is entitled to make the decision without coercion.

### ***Not Offering, Withholding, Withdrawing Treatments***

There is a legal difference between "not offering" or "not proposing" a treatment on the one hand

4 HCCA, *supra* note 1, s 4(2).

5 HCCA, *supra* note 1, s 56 defines a "substitute decision-maker" as a person who is authorized under section 58 to make a decision concerning a personal assistance service on behalf of a recipient who is incapable with respect to the service.

6 HCCA, *supra* note 1, s 20(1).

7 HCCA, *supra* note 1, s 11(1), (2), (3) and (4).

8 HCCA, *supra* note 1, s 21(1).

9 HCCA, *supra* note 1, s 21(2) (Best Interests).

10 HCCA, *supra* note 1, s 11 (Elements of Consent) and s 22(1).



and “withdrawing” or “withholding” a treatment on the other hand.<sup>11</sup> No judge in Canada has ever compelled a physician to offer a treatment, but the withholding or withdrawing of a treatment does require consent. As a general rule, anyway: In *Cuthbertson v. Rasouli*, the Supreme Court of Canada held that consent was required to withdraw treatment from an incapable patient because withdrawal was also a “treatment,” since it was done for a “health-related purpose.” However, the Court recognized that in some cases consent was not required, positing that perhaps it was not necessary to “re-prescribe” medication when the purpose for it had passed or it was not a successful treatment.<sup>12</sup> In the case of *Wawrzyniak v. Livingstone*, the court held that the significant change in the patient’s health and the fact that death was imminent regardless of what the treatment team did, entitled the treatment team to change the plan of treatment from “full code” to “Do Not Resuscitate” without consent.<sup>13</sup>

### **Choices at End of Life**

For discussion purposes only and recognizing how sweeping these generalizations are, here are the categories of “end of life” decisions:

- a) **“Do Everything”:** Some patients, for religious or other reasons, want to remain alive as long as possible, no matter the discomfort, no matter the pain, no matter the absence of any prospect of recovery. It is incumbent upon the treatment team to not only explain the risks and benefits of that decision but also to then identify the treatments they will not offer. It is not uncommon when the treatment team disagrees with this approach and the patient is incapable, the team will decide not to offer a feeding tube.

11 *HCCA, supra* note 1, s 2(1) “treatment” means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan, but does not include,

(a) the assessment for the purpose of this Act of a person’s capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the *Substitute Decisions Act, 1992* of a person’s capacity to manage property or a person’s capacity for personal care, or the assessment of a person’s capacity for any other purpose,

(b) the assessment or examination of a person to determine the general nature of the person’s condition,

(c) the taking of a person’s health history,

(d) the communication of an assessment or diagnosis,

(e) the admission of a person to a hospital or other facility,

(f) a personal assistance service,

(g) a treatment that in the circumstances poses little or no risk of harm to the person,

(h) anything prescribed by the regulations as not constituting treatment.

12 *Cuthbertson v. Rasouli* [2013] 3 SCR 341.

13 *Wawrzyniak v. Livingstone*, 2019 ONSC 4900.

- b) **“Allow Me to Die”**: This is the palliative care approach. The patient (or SDM) recognizes that, where there is no prospect of recovery, there will come a point when life no longer has value to the person, or the suffering and pain outweigh the benefits of enduring continued life. There are differences from treatment team to treatment team (and from person to person) in what will or will not be provided to a palliative patient and it is important to understand what the palliative plan of treatment includes and does not include.
- c) **“Cause Me To Die”**: Allowing a person to die is a passive approach. Death is neither hastened nor delayed. Causing death is an active approach, by which a health practitioner administers a treatment with the intent of ending the person’s life. This is illegal in Canada unless done in accordance with the rules for “Medical Assistance in Dying”<sup>14</sup> (**“MAiD”**), as will be explained below.

Although illegal to cause death unless in compliance with MAiD legislation, sometimes the “Doctrine of Double Effect” comes into play. This is when a treatment is useful for the patient’s condition, but it may speed or cause death. A common example is potent pain medication, which can slow heart function to a degree that, in a person already weakened by illness, death may ensue. Since the purpose of the treatment is to alleviate pain rather than cause death, this is an acceptable approach to treatment decisions.

### ***End of Life Decisions for Capable Patients***

As explained above, capable patients will make their own treatment decisions. However, they do not get to choose anything, they make choices from the treatment options “proposed” by their treatment team: one cannot demand a heart transplant, for example.

### ***Medical Assistance in Dying (“MAiD”)***

Medical assistance in dying, known as physician-assisted death in Canada, was illegal in terms of the Criminal Code,<sup>15</sup> which prohibited counselling or assisting a person to commit suicide. This changed in June of 2016, with the Decision from the Supreme Court of Canada in *Carter v Canada Attorney General*, which declared that sections 241(b) and 14 of the *Criminal Code* unjustifiably infringe section 7 of the *Charter*<sup>16</sup> and are of no force or effect to the extent that they prohibit physician-

14 The term Medical Assistance in Dying, describes the administering by a physician or nurse practitioner of a substance to a person, at their request, that causes their death; or the prescribing or providing by a physician or nurse practitioner of a substance to a person at their request, so that they may self-administer the substance and in doing so cause their own death.

15 Criminal Code (R.S.C., 1985, c. C-46) (“Criminal Code”).

16 *Canadian Charter of Rights and Freedoms*, s 7, *Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*. “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.<sup>17</sup>

The first challenge to this provision was unsuccessful in the Courts. That was in *Rodriguez v. British Columbia (Attorney General)*, in which the Court held that constitutional protection for the “sanctity of life” outweighed Ms. Rodriguez’s constitutional right to liberty and security of the person as she wanted those terms interpreted.<sup>18</sup>

The second time the issue came before the Supreme Court, the decision went the other way. The Court recognized that Canadian society had changed, that MAiD was no longer contrary to the values of Canadians. Also, given the reported experiences in jurisdictions around the world with experience in active euthanasia, vulnerable individuals could be protected. To the extent that the Criminal Code prohibited a health practitioner from assisting a person to die, the Court held the Criminal Code provision against counselling or assisting death unconstitutional and gave the government time to amend the Criminal Code.<sup>19</sup>

A person qualifies for MAiD if:

- a) The person is an adult;
- b) The person’s death is “reasonably foreseeable”;
- c) The person is capable when the request is made and capable when the “treatment” is administered;
- d) Except in unusual cases, there is a 10 day wait between the time of the request and the time death is caused; and
- e) The person’s condition is such that continued pain and suffering is intolerable to him or her in the circumstances.<sup>20</sup>

Few people are satisfied with this compromise legislation. People who oppose causing death are obviously unhappy. People who say the legislation is too limiting are also unhappy and some have gone to court to challenge the limits to assisted death.

17 *Carter v. Canada (Attorney General)* [2015] 1 SCR 331 [“Carter”].

18 1993 CanLII 75 (SCC)

19 *Carter*, *supra* note 17.

20 Ontario Government website online on Medical Assistance in dying and end-of-life decisions: <https://www.ontario.ca/page/medical-assistance-dying-and-end-life-decisions> [accessed on 10.11.19]

One challenge has already been successful. A Superior Court judge in Quebec has held the requirement that death be “reasonably foreseeable” is unconstitutional.<sup>21</sup> The *Carter* case involved two patients. Kay Carter’s children took her to Switzerland for an assisted death before the Court heard the case, but her condition, spinal stenosis, though painful was not terminal, so her death would not have been “reasonably foreseeable”.<sup>22</sup>

There have also been challenges by minors since MAiD is limited to adults, by persons suffering major mental conditions since the victims’ deaths are not reasonably foreseeable and by persons who object to having to be capable at the time the treatment is to be administered.

On the other side of the coin, some health practitioners conscientiously object to their involvement in having to cause the death of their patients. The workaround, that their obligation is to make an “effective referral” of the patient to health practitioners prepared to cause death, remains unsatisfactory to many health practitioners.

So, MAiD is legal in Canada but the law governing who may avail of it remains in flux.

### ***End of Life Decisions for Incapable Patients***

In Ontario, the *HCCA* governs who makes health care decisions for persons incapable of making their own decisions and the principles upon which those decisions must be made. Other provinces have similar legislation but the Ontario legislation has a unique dispute resolution provision, discussed below.

After determining that you are incapable to make the requisite treatment decision, your doctor must identify the correct SDM then obtain consent that accords to the principles for substitute consent.

### ***Identifying the SDM***<sup>23</sup>

The *HCCA* has a hierarchy that health practitioners must follow to identify the correct SDM or SDMs.<sup>24</sup> If there is a court-appointed “guardian of the person” and the court authorized the guardian to make the decision, he or she is the SDM. Next in line is an Attorney for Personal Care, if the person was wise enough to complete a Power of Attorney for Personal Care, followed next by a “Representative” appointed by the Consent and Capacity Board.

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21 *Truchon c. Procureur général du Canada*, 2019 QCCS 3792 (CanLII); also see British Columbia Civil Liberties Association (BCCLA) presentation on “Constitutional Issues in Medical Assistance in Dying” by Grace Pastine at the 2019 Isaac Pitblado Lectures, and what the BCCLA is doing in respect of the future of MAiD online: <https://bccla.org/>

22 *Carter*, *supra* note 17.

23 While all provinces have similar legislation, reference is made to Ontario legislation.

24 *HCCA*, *supra* note 1, s 20(1). (List of persons who may give or refuse consent)

Most people do not have guardians, Attorneys or Representatives. Their relatives will make their decisions. A spouse or partner comes first, followed by the patient's parents or children, then siblings, then "any other relative."

Note that an individual can have more than one SDM. The Power of Attorney may have appointed two Attorneys, or both the parents are alive, or the individual has more than one child or more than one sibling. However, no one is left without an SDM because if there is no one fitting any of the categories, the Public Guardian and Trustee (the "**PGT**") becomes the SDM of last resort.

### ***The Principles for Giving or Refusing Consent to Treatment of an Incapable Person***

Ontario's *HCCA* sets out the principles for giving or refusing substitute consent to treatment. SDMs are required to follow those principles although there is no statutory "punishment" for not doing so and the "policing" of the obligation is left to the health care professional seeking the substitute consent to treatment.

The first principle of giving substitute consent is that if the SDM is aware of a wish applicable to the circumstances that the patient expressed while capable and an adult, then treatment decisions must respect that wish wherever possible. If there is no such wish, or if it is impossible to give effect to that wish, decisions must be made that respect the patient's "best interests."

"Best interests" is a defined term. It includes consideration of the incapable person's values and beliefs, medical best interests and any other relevant factors.<sup>25</sup> At end of life, "medical best interests" basically comes down to, "Patient is barely aware of his environment but is aware of the pain, suffering and discomfort that continued interventions cause and patient has no prospect of recovery. We are torturing her with no prospect of benefit in return."

At times the patient's values and beliefs, held when capable, compete with medical best interests for supremacy in the decision-making process. Arguments raised have included, "Granddad is a devout Catholic, he believed suffering is the path to heaven and if God wants him to suffer before he dies, then who are you to interfere with his deeply held religious beliefs?" And, "Grandma is a strictly Orthodox Jew to whom every second of life has infinite value, no matter the suffering, no matter the pain."

What is important in this process for both family and health practitioners is to ensure the substitute treatment decision reflects the values, beliefs and best interests of the patient, not of the treatment team or of the family. The best way to achieve that is to have a Power of Attorney for Personal Care ("**POAPC**") that both identifies the person one most trusts to make end of life decisions, and

<sup>25</sup> *HCCA*, *supra* note 1, s. 21(2) (Best Interests).

express one's wishes, values and beliefs in that document. However, that is not quite enough: one also needs to talk to his/her Attorney(s) to "empower" them to make those difficult decisions, to ensure the attorney understands what their wishes, values and beliefs are and to ensure that the attorney will respect them.

### ***The Role of the Consent and Capacity Board*** <sup>26</sup>

The PGT is also, according to the *HCCA*, the default SDM when there is more than one SDM and they disagree among themselves,<sup>27</sup> although there is a process of applying to the Consent and Capacity Board ("**CCB**") for appointment as Representative. These can be contested, for example when one parent says "pull the plug" and the other says, "keep my child alive." The CCB makes the appointment it concludes is in the incapable person's best interests.

The CCB also has a role when the SDMs, all in agreement with each other, disagree with the treatments proposed by the incapable person's treatment team. The physician can apply to the CCB to determine if the SDM decision accords to the principles for giving or refusing substitute consent. If the CCB agrees with the physician, it directs the SDMs to consent to the proposed treatment or plan of treatment and if the SDMs do not consent they cease to be the decision-makers for that decision.

In practice, the usual decisions challenged are those involving SDM refusal to consent to withdrawal of treatment at end of life. Also in practice, few physicians bother challenging the decision of an SDM in any circumstances.

The CCB normally convenes a Hearing where the patient is, usually at a hospital, and usually within 7 days of receiving an Application. "End of Life" hearings normally take one to 3 days and the CCB must release its Decision within a day following the end of the Hearing. Decisions can be appealed to the Superior Court and then to the Court of Appeal, and both appeals are "as of right," meaning no "leave to appeal" is required. The next and final appeal would be to The Supreme Court of Canada, for which leave to appeal is required.

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26 The Consent and Capacity Board ("CCB") is a tribunal created by the Ontario government pursuant to the *HCCA*. The CCB addresses a range of capacity and health care decisions, conducting hearings under the *Mental Health Act*, R.S.O. 1990, c. M.7, the *HCCA*, the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, the *Personal Health Information Protection Act* 2004, S.O. 2004, c. 3, Sched. A and the *Mandatory Blood Testing Act*, 2006, S.O. 2006, c. 26.

27 *HCCA*, *supra* note 1, s. 20 (6).

## **CONCLUSION**

Everyone wants a “good death,” whatever that means to him or her. Problems arise when he or she has lost the capacity to direct treatment and the substitute decision-maker must make these very difficult decisions.

While most people do not wish for and do not want a prolonged dying process, some substitute decision-makers do not have that information about a loved one and believe the right thing to do is to keep their elderly loved ones alive no matter what. If one wishes to avoid that fate, they need to talk to their loved ones to explain their own end of life wishes, values, and beliefs, to ensure the people who will make those decisions for them understand their personal views and will respect them.



# CHAPTER 16: LEGISLATION RESPONDING TO ELDER ABUSE AND NEGLECT IN THE PROVINCES AND TERRITORIES

## INTRODUCTION

In addition to remedies provided under the Canadian *Criminal Code*,<sup>1</sup> each province and territory has created various laws in response to adult abuse and neglect. Generally, the following different types of provincial legislation may apply to the abuse of older adults:

- Adult protection laws;
- Protection for persons in care legislation;
- Neglect legislation;
- Domestic violence legislation;
- The Quebec Charter of Human Rights and Freedoms; and
- Public Guardian and Trustee Legislation

A small number of jurisdictions have adult protection laws that apply to adults who meet a definition of an “adult in need of protection”. These include British Columbia,<sup>2</sup> Yukon,<sup>3</sup> Prince Edward Island,<sup>4</sup> and New Brunswick.<sup>5</sup> In British Columbia, Yukon and PEI there are agencies designated by regulation to investigate and respond although there is no duty to report.

Nova Scotia is the only jurisdiction in Canada that has a mandatory reporting regime for abuse of adults and this duty applies under limited circumstances under the *Adult Protection Act*.<sup>6</sup> In

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1 RSC 1985, c.C-46  
2 *Adult Guardianship Act*, RSBC 1996, c. 6  
3 *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A.  
4 *Adult Protection Act*, RSPEI 1988, c A-5  
5 *Family Services Act*, SNB 1908, c F-2.2  
6 *Adult Protection Act*, RSNS 1989, c.2

Newfoundland and Labrador, there is a general duty on the part of everyone to report neglect. However, the duty under those acts does not apply to financial abuse per se, as they focus on physical, sexual, or mental abuse or “neglect” in general.

In British Columbia,<sup>7</sup> Alberta,<sup>8</sup> Manitoba,<sup>9</sup> Ontario<sup>10</sup> and Nova Scotia<sup>11</sup> employees or operators of care facilities have a statutory duty to report and investigate abuse.

In some provinces and territories, the public guardian and trustee (the “**PGT**”) has some power to intervene in circumstances of financial abuse or abuse by, an attorney under a power of attorney, guardian, trustee or other substitute decision-maker, but there is no duty to report to a PGT. In Yukon,<sup>12</sup> BC,<sup>13</sup> Alberta,<sup>14</sup> Saskatchewan,<sup>15</sup> Ontario<sup>16</sup> and Quebec<sup>17</sup> the PGT has the power to investigate abuse.

Like the *Criminal Code*, provincial and territorial legislation are essentially age-neutral, there are no laws that apply exclusively to older persons, the laws were made to protect people at risk. Below is a full list of related provincial or territorial legislation.

## **PROVINCIAL/ TERRITORIAL LEGISLATION**

### **Alberta**

- *Adult Guardianship and Trusteeship Act*, SA 2008 c A-4.2 <http://canlii.ca/t/522k5>
- *Protection Against Family Violence Act*, RSA 2000, c P-27 <http://canlii.ca/t/5347k>
- *Protection for Persons in Care Act*, SA 2009 c P-29.1 <http://canlii.ca/t/52dxl>
- *Health Information Act*, RSA 2000, c H-5 <http://canlii.ca/t/81pf>
- *Personal Information Protection Act*, SA 2003, c P-6.5 <http://canlii.ca/t/81qp>
- *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 <http://canlii.ca/t/821t>

7 *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D

8 *Protection for Persons in Care Act*, SA, 2009 C.P-29.1

9 *The Protection for Persons in Care Act*, CCSM, c P144

10 *Long-Term Care Homes Act*, SO 2007, c8

11 *Protection for Persons in Care Act*, SNS 2004 c 33

12 *Public Guardian and Trustee Act*, SY 2003, c 21 Sch C, Part2 s.9(1)

13 *Public Guardian and Trustee Act*, RSBC 1996, c 383 s.17

14 *The Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2 ss75-77

15 *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 s40.7

16 *Substitute Decisions Act*, SO 1992, c 30, s27.

17 *Public Curator Act*, RSQ, c C-81

## **British Columbia**

- *Adult Guardianship Act*, RSBC 1996, c 6 <http://canlii.ca/t/52c92>
- *Adult Guardianship Act, Designated Agencies Regulation*, BC Reg 19/2002, <http://canlii.ca/t/jjwx>
- *Community Care and Assisted Living Act*, SBC 2002, c 75 <http://canlii.ca/t/53fvs>
- *Assisted Living Regulation*, BC Reg 218/2004 <http://canlii.ca/t/852n>
- *Community Care and Assisted Living Regulation*, BC Reg 217/2004 <http://canlii.ca/t/852k>
- *Residential Care Regulation*, BC Reg 96/2009 <http://canlii.ca/t/89ln>
- *Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2000 <http://canlii.ca/t/lck8>
- *Public Guardian and Trustee Act*, RSBC 1996, c 383 <http://canlii.ca/t/53j4w>
- *Health Professions Act*, RSBC 1996, c 183 <http://canlii.ca/t/534hx>
- *Personal Information Protection Act*, RSBC 2003, c 63 <http://canlii.ca/t/52pq9>
- *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, <http://canlii.ca/t/53k1h>

## **Manitoba**

- *Protection for Persons in Care Act*, CCSM, c P144 <http://canlii.ca/t/8gp4>
- *Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90 <http://canlii.ca/t/8gnj>
- *The Domestic Violence and Stalking Act*, CCSM c D 93 <http://canlii.ca/t/8gkx>
- *The Personal Health Information Act*, CCSM c P33.5 <http://canlii.ca/t/8gqs>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **New Brunswick**

- *Family Services Act*, SNB 1980, c F-2.2 <http://canlii.ca/t/88bd>
- *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 <http://canlii.ca/t/8j1c>
- *Public Trustee Act*, SNB 2005 c P-26.5 <http://canlii.ca/t/888p>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Newfoundland and Labrador**

- *Adult Protection Act*, SNL 2001, c A-4.01 <http://canlii.ca/t/8pff>
- *Family Violence Protection Act*, SNL 2005, c.F-31 <http://canlii.ca/t/8b2k>
- *Personal Health Information Act*, SNL 2008 c P-7.01 <http://canlii.ca/t/89st>
- *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 <http://canlii.ca/t/89t5>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Nova Scotia**

- *Adult Protection Act*, RSNS 1989, c 2 <http://canlii.ca/t/87m6>
- *Protection for Persons in Care Act*, SNS 2004 c 33 <http://canlii.ca/t/87gw>
- *Protection for Persons in Care Regulations*, NS Reg 364/2007 <http://canlii.ca/t/86wd>
- *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 <http://canlii.ca/t/87b3>
- *Domestic Violence Intervention Act*, SNS 2001, c 29 <http://canlii.ca/t/87rr>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

## **Ontario**

- *Long-Term Care Homes Act*, SO 2007, c 8 <http://canlii.ca/t/34x>
- *Long-Term Care Homes Act*, General, O Reg 79/10 <http://canlii.ca/t/8mtq>
- *Home Care and Community Services Act*, 1994, SO 1994, c 26 <http://canlii.ca/t/2vs>
- *Substitute Decisions Act*, 1992, SO 1992, c 30 <http://canlii.ca/t/2tq>
- *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sch A <http://canlii.ca/t/32t>
- *Personal Health Information Protection Act*, General, O Reg 329/04 <http://canlii.ca/t/s0b>
- *Regulated Health Professions Act*, 1991, SO 1991, c 18 <http://canlii.ca/t/2sj>
- *Health Care Consent Act*, 1996, SO 1996, c 30 Sch A <http://canlii.ca/t/2wh>
- *Mental Health Act*, 1990, RSO 1990 c M7 <http://canlii.ca/t/2k9>
- *Residential Tenancies Act*, SO 2006 c 17 <http://canlii.ca/t/33p>
- *Consumer Protection Act*, 2002 SO 2002 c 30, Sch A <http://canlii.ca/t/31w>
- *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 <http://canlii.ca/t/2d9>
- *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56 <http://canlii.ca/t/2k1>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Prince Edward Island**

- *Adult Protection Act*, RSPEI 1988, c A-5 <http://canlii.ca/t/8d3b>
- *Victims of Family Violence Act*, RSPEI 1998, c V-3.2 <http://canlii.ca/t/8dcl>
- *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 <http://canlii.ca/t/8d80>
- *Freedom of Information and Protection of Privacy Act*, General Regulations, PEI Reg EC564/02 <http://canlii.ca/t/8dql>
- *Hospitals Act*, RSPEI 1988, c H-10.1 <http://canlii.ca/t/8d2h>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Quebec**

- Charter of Human Rights and Freedoms, CQLR c C-12, art 48 <http://canlii.ca/t/52t34>
- *Public Curator Act*, CQLR c C-81 <http://canlii.ca/t/53k4m>
- *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1 <http://canlii.ca/t/535jc>
- *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 <http://canlii.ca/t/xpm>
- *Act to Combat maltreatment of seniors and other persons of full age in vulnerable situations*, CQLR c L-6.3 <http://canlii.ca/t/53084>
- *Professional Code*, CQLR c C-26 <http://canlii.ca/t/53gh1>
- *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 <http://canlii.ca/t/52pw4>

## **Saskatchewan**

- *Victims of Domestic Violence Act*, SS 1994, c V-6.02 <http://canlii.ca/t/wbh>
- *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 <http://canlii.ca/t/wns>
- *Personal Care Homes Act*, SS 1989-90, c P-6.01 <http://canlii.ca/t/x46>
- *The Health Information Protection Act*, SS 1999, c H-0.021 <http://canlii.ca/t/wmv>
- Health Information Protection Regulations, RRS c H-0.021 Reg 1 <http://canlii.ca/t/w5m>
- *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 <http://canlii.ca/t/x4n>
- Freedom of Information and Protection of Privacy Regulations, The, RRS c F-22.01 Reg 1 <http://canlii.ca/t/vcr>
- *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 <http://canlii.ca/t/wrx>
- Local Authority Freedom of Information and Protection of Privacy Regulations, RRS c L-27.1 Reg 1 <http://canlii.ca/t/vsh>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

## **Yukon**

- *Adult Protection and Decision Making Act*, SY 2003, c 21 Sch A <http://canlii.ca/t/8j7t>
- *Family Violence Prevention Act*, RSY 2002, c 84 <http://canlii.ca/t/8jfp>
- *Public Guardian and Trustee Act*, SY 2003, c 21 Sch. C, Part 2 <http://canlii.ca/t/8lrs>
- *Access to Information and Protection of Privacy Act*, RSY 2002, c 1 <http://canlii.ca/t/8jf9>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]



### **Nunavut**

- *Family Abuse Intervention Act*, SNu 2006, c 18 <http://canlii.ca/t/8l4w>
- *Family Abuse Intervention Regulations*, NWT Reg (Nu) 006-2008 <http://canlii.ca/t/8lvg>
- *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20  
<http://canlii.ca/t/8l74>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5  
<http://canlii.ca/t/7vwj> [ Federal Act]

### **Northwest Territories**

- *Protection Against Family Violence Act*, SNWT 2003, c 2 <http://canlii.ca/t/8hvh>
- *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20  
<http://canlii.ca/t/8hwx>
- *Access to Information and Protection of Privacy Regulations*, NWT Reg 206-96  
<http://canlii.ca/t/8h9n>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5  
<http://canlii.ca/t/7vwj> [ Federal Act]

# **CHAPTER 17: NATIONAL AND PROVINCIAL ORGANIZATIONS RELATED TO ELDER ABUSE PREVENTION**

## ***INTRODUCTION***

This chapter includes a list of national and provincial resources for older adults, family members, friends, caregivers, professionals and communities. The resources listed provide support, information, and services on the following: physical health, mental wellbeing, assisted living, financial matters, and legal services. These resources can be as educational tools that can assist in the prevention of elder abuse.

The list of resources in the different provinces has been put together in collaboration with Elder Abuse Ontario (“EAO”), Canadian Centre for Elder Law (“CCEL”) “A Practical Guide to Elder Abuse and Neglect Law in Canada”), July 2011, online: [https://www.bcli.org/sites/default/files/Practical\\_Guide\\_English\\_Rev\\_JULY\\_2011.pdf](https://www.bcli.org/sites/default/files/Practical_Guide_English_Rev_JULY_2011.pdf), as well as online research.

The challenge of including resources in a book is that information related to government and community agencies change fairly frequently. The information provided here was current at the time of publishing.

## ***NATIONAL AND FEDERAL RESOURCES***

### ***Public Health Agency of Canada: Division of Aging and Seniors (PHAC)***

Website: <http://www.phac-aspc.gc.ca/seniors-aines/>

- PHAC has created a number of elder abuse resources.

### ***National Initiative for the Care of the Elderly (NICE) Network***

Phone: 416-978-7037

Website: <http://www.nicenet.ca>

- International network of researchers, practitioners, students and seniors.

***Canadian Centre for Elder Law (CCEL)***

Phone: (604) 822-0142

Website: <http://www.bcli.org/ccel>

- The CCEL conducts legal research, law reform, legal education and public outreach relating to issues affecting older adults. The CCEL does not provide legal advice to individuals.

***Canadian Network for the Prevention of Elder Abuse (CNPEA)***

Website: <http://www.cnpea.ca>

- CNPEA works to raise awareness of key issues around abuse and neglect in later life and to ensure older adults are treated as full citizens of Canadian society.

***Canadian Anti-Fraud Centre***

Toll-Free: 1-888-495-8501

Website: <http://www.antifraudcentre-centreantifraude.ca/>

- The phone line operated by the Royal Canadian Mounted Police and each of the province's police to provide information about frauds and scams and take reports from people who believe they are victims of fraud. The website allows privacy-protected online reporting of frauds through an electronic complaint form.

***Canadian Association on Gerontology***

Toll-Free: 1- 855-24-2240

Website: <https://cagacg.ca/about/contact-us/>

- A multidisciplinary association that provides leadership and information in matters related to the aging population.

***Canadian Association of Retired Persons (CARP)***

Toll-Free: 1-888-363-2279

Website: <https://www.carp.ca/about#contact>

- An advocacy group that provides personal support and assistance.

***Canadian Coalition for Seniors Mental Health (CCSMH)***

Phone: 289-846-5383

Website: <https://ccsmh.ca/>

- Promotes mental health for seniors, provides information and resources.

***The Canadian Caregiver Network***

Website: <https://thecaregivernetwork.ca/>

- Information, support, and resources for caregivers.

***National Seniors Council (NSC)***

Website: <https://www.canada.ca/en/national-seniors-council.html>

- The NSC provides advice to the federal government on issues that matter to seniors.

***ABCs of Fraud Awareness Program***

Website: <http://www.abcfraud.ca/>

- Promoting protection against scams and frauds.

***Ombudsman for Banking Services and Investments (OBSI)***

Toll-Free: 1-888-451-4519

Website: <http://www.obsi.ca>

- OBSI helps resolve disputes between participating banking services and investment firms and their customers if they can't resolve disputes on their own.

***Royal Canadian Mounted Police (RCMP)***

Website: <http://www.rcmp-grc.gc.ca/en>

- A person can contact the local police in their jurisdiction if the situation is not an emergency but suspect an act or an omission might be against the law. A request can be made to speak to someone who has been trained in senior abuse, or domestic/family violence.

***The Financial Consumer Agency of Canada (FCAC)***

For service in English: 1-866-461-FCAC (3222)

For service in French: 1-866-461-ACFC (2232)

Website: <https://www.canada.ca/en/financial-consumer-agency.html>

- FCAC ensures that federally regulated financial entities comply with consumer protection measures, promotes financial education, and raises consumers' awareness of their rights and responsibilities

### ***Competition Bureau of Canada***

Telephone: 819-997-4282

Toll-free: 1-800-348-5358 (Canada)

Website: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home>

- The Competition Bureau is an independent law enforcement agency. One of its responsibilities is the administration and enforcement of the Competition Act. The Bureau has published two editions of **“THE LITTLE BLACK BOOK OF SCAMS - YOUR GUIDE TO PROTECTION AGAINST FRAUD”**. The booklets list the most common scams, aim to increase people’s awareness, and provide a list of “Red-Flags” to look out for in respect of each scam.

### ***Better Business Bureau (BBB)***

Website: <https://www.bbb.org/>

- The BBB is a not-for-profit, independent, self-governing organization established by members of the business community, it collects and reports information to help callers make informed decisions, answers inquiries about business reputations; gives general direction, receives, reconciles and resolves written complaints and reports these to callers; and educates businesses and consumers with news releases. It works with other agencies, associations, police, and all levels of government such as the Canadian Anti-Fraud Centre to assist businesses and consumers to be more informed and satisfied.

### ***Crime Stoppers***

Toll-Free: 1-800-222-TIPS (8477)

Website: [www.canadiancrimestoppers.org](http://www.canadiancrimestoppers.org)

- This is a civilian, non-profit, charitable organization that brings together the police services of a community, the media and the community in the fight against crime.

## ***ALBERTA***

### ***Alberta Elder Abuse Awareness Network***

Phone: 780-485-7863

Website: <http://www.albertaelderabuse.ca>

- The Alberta Elder Abuse Awareness Council is a group of Albertans dedicated to increasing awareness and supporting a community response to elder abuse. The website facilitates the sharing of knowledge, resources, and tools about elder abuse amongst people who work with seniors in Alberta.

***Protection for Persons in Care Reporting Line***

Phone: 1-888-357-9339

Website: <https://www.alberta.ca/protection-for-persons-in-care.aspx>

***Alberta Seniors Information Line***

Phone: 1-800-642-3853

***Seniors Association of Edmonton (SAGE)***

Phone: 780-423-5510. Ext. 323

Website: <https://www.mysage.ca/>

***Calgary Elder Abuse Resource Line***

Phone: 403-705-3250

- Located in the Kerby Centre, make a report or get information.

***Edmonton Senior Abuse Helpline***

Phone: 780-454-8888

- Information referral line (not a crisis line)

***Elder Abuse Intake Line***

Phone: 780-477-2929 (Edmonton)

***Red Deer Helping Elder Abuse Reduction (H.E.A.R.) Resource Information Line***

Phone: 403-346-6076 or 1-877-454-2580

***Strathcona County Elder Abuse Line***

Phone: 780-464-7233

***Edmonton Seniors Protection Partnership***

Phone: 780-477-2929

Website: <https://www.cssalberta.ca/>

- Provided by Catholic Social Services

***Seniors Safe House***

Phone: 780-702-1520 (Edmonton)

***Kerby Elder Abuse Line***

Crisis Line (Calgary): 403-705-3250 (24 hours)

Website: <https://www.kerbycentre.com/general/supportservices/elder-abuse-resource-line/>

***Kerby Centre – Information and Advocacy***

Phone: 403-705-3246

Website: <https://www.kerbycentre.com/general/supportservices/information-resources/>

***Older Women's Long-term Survival (OWLS)***

Phone: 403-253-2912 (Calgary)

Website: <http://www.programsforelderly.com/abuse-older-women-living-safe.php>

***Oak-Net Legal Resource Centre***

Phone: 780-451-8764

Website: <http://www.oaknet.ca>

- Information on the law and community resources available to older adults in Alberta

***Confederation Park 55+ Activity Centre Lawyer Clinic***

Phone: 403-289-4780

Website: <https://yycseniors.com>

***Greater Forest Lawn 55 Plus Society Lawyer Clinic***

Phone: 403-272-4661

Website: <http://www.gfls.org>

***Golden Circle Senior Resource Centre (Red Deer)***

Toll-Free: 1-800-332-109

Phone: 403-343-6074

Website: <http://www.goldencircle.ca/>



***Safeguards for Vulnerable Adults Information and Reporting Line - Protection for Persons in Care (PPC)***

Toll-Free (in Alberta): 1-888-357-9339

Website: <https://www.alberta.ca/about-protection-for-persons-in-care.aspx>

***Office of the Public Guardian and Trustee (PGT)***

Phone: 780-427-0017 (main office- Edmonton)

Website: <https://www.alberta.ca/office-public-guardian-trustee.aspx>

***The Office of the Seniors Advocate***

Toll-Free: 1-844-644-0682

Website: <https://www.seniorsadvocatebc.ca/>

***Alberta Mental Health Patient Advocate***

Phone: 780-422-1812

Website: <https://www.albertahealthadvocates.ca/advocates/Pages/Mental-Health-Patients%27-Avocate-Office.aspx>

***Alberta Family Violence Information Line***

Toll-Free (in Alberta): 310-1818 (24 hours)

Website: <https://www.alberta.ca/family-violence-prevention.aspx>

***Central Alberta Women's Emergency Shelter (CAWES)***

Toll-Free: 1-888-346-5643 (24 hours)

Shelter: 403-346-5643

Website: <https://cawes.com/>

***Alberta Health Services Helpline***

Toll-Free: 1-877-303-2642

Website: <https://www.albertahealthservices.ca/findhealth/service.aspx?Id=1001957&facilityId=1011654>

***Alberta Office of the Seniors Advocate***

Toll-Free: 1-844-392-9025

Website: <https://seniorsadvocateab.ca/>

***Distress Centre Calgary***

Crisis Line: 403-266- 4357 (24 hours)

Senior's Line: 403-264-7700 (24 hours)

***Distress and Suicide Prevention Line of Southwestern Alberta (CMHA)***

Toll-Free Crisis Line: 1-888-787-2880 (24 hours)

Phone: 403-327-7905

Website: <https://lethbridge.cmha.ca/programs-services/distress-line-of-south-western-alberta/>

***Calgary Legal Guidance***

Phone: 403-234-9266

Website: <http://www.clg.ab.ca>

***Lethbridge Elder Abuse Response Network***

Phone: 403-394-0306

Website: <http://lethseniors.com/support-services/learn-lethbridge-elder-abuse-response-network/>

***St. Albert Stop Abuse in Families (SAIF)***

Phone: 780-460-2195

Website: <https://www.stopabuse.ca/>

***Grande Prairie Seniors Outreach***

Phone: 780-539-6255

Website: <https://www.gpcouncilonaging.com/sohome.html>

- Seniors Outreach offers information and referral services to assist seniors, family members, caregivers, neighbors or anyone involved with seniors dealing with issues of abuse. Seniors Outreach is not a crisis center but can give information and definitions of abuse.

***Alberta Seniors and Housing Community***

Toll-free: 310-0000 (in Alberta)

Website: [www.seniors-housing.alberta.ca](http://www.seniors-housing.alberta.ca)

***Kerby Rotary Shelter***

Phone: 403-705-3250 (24-hour crisis line)

Website: <https://www.kerbycentre.com/general/supportservices/kerby-rotary-shelter/>

- Kerby Rotary Shelter is the first purpose-built shelter in North America for abused seniors. The shelter provides crisis intervention, support, advocacy, referral, short-term housing, and the necessities of daily life.

***Calgary Seniors Resource Society***

Phone: 403-266-6200

- Calgary Seniors helps potentially at-risk seniors achieve and maintain their quality of life through social work and outreach, community engagement, education, and volunteer programming, both during crises and in ongoing, long-term support.

***SeniorConnect program (Calgary)***

Phone: 403-266-4357 (24-hour Help Line)

Website: <https://www.calgary.ca/CSPS/Fire/Pages/Safety-tips/Safety-tips-seniors/SeniorConnect-program.aspx>

- The SeniorConnect program provides social work emergency response and assessment for older adults who may be at risk, or in crisis in the community. Referral through Distress Centre 24-hour Help Line.

***Calgary Women's Emergency Shelter, Counselling Program***

Phone: 403-234-7233

Toll-Free: 1-866-606-7233 (24-Hour Family Violence Helpline)

website: <https://www.calgarywomensshelter.com/>

- The Calgary Women's Emergency Shelter Older Adult Liaison Counselling Program provides short and long-term counselling to women who are experiencing family violence and abuse.

***The Way In***

Phone: 403-736-4677

Website: <https://caryacalgary.ca/our-programs/older-adults/twi/>

- Service Coordinators from The Way In teams help seniors connect with services and supports in the community.

### ***Cochrane Victim Services***

Phone: 403-851-8055

- Victim Services include crisis support workers and “first responders” who provide support during the first few critical hours after a crime or tragic event. They also provide an essential link between the Police and victims and can provide information regarding the status of investigations, court cases, and trial dispositions.

### **Legal Guidance and Information**

#### ***Calgary Legal Guidance***

Phone: 403-234-9266

- Calgary Legal Guidance is a non-profit society providing free legal advice, information, and education to Albertans who are not able to afford access to justice. Volunteer lawyers donate their professional time to meet with clients and provide legal advice, information, and education.

#### ***Legal Aid Society***

Phone: 403-297-2260

- The Legal Aid Society assists Albertans facing legal issues by helping them navigate their journey through the justice system and find lasting resolution to their legal challenges.

#### ***Legal Resource Centre – Cochrane***

Phone: 403-851-2250

- Responders part of the Community-Led Elder Abuse Response (CLEAR) network for Cochrane and Area.

#### ***Edmonton Seniors Safe Housing***

Phone: 780-702-1520

- Provides free, safe housing for up to 60 days. Day staff provides information, support, and assistance as needed, including finances, transportation, housing, life skills, etc.

## ***BRITISH COLUMBIA***

### ***Seniors First BC***

Phone: 604-688-1927

Website: <http://seniorsfirstbc.ca/contact-us/>

### ***Public Guardian and Trustee of British Columbia (PGT)***

Toll-Free: 1-800-663-7867

Phone: 604-660-4444

Website: <http://www.trustee.bc.ca>

### ***Community Living BC***

Toll-Free: 1-877-660-2522

Website: <http://www.communitylivingbc.ca/>

### ***Vancouver Coastal Health Authority***

Phone: 604-904-6173

Toll-Free: 1-877-732-2899

Website: <http://vchreact.ca/report.htm>

### ***Fraser Health Authority***

Toll-Free: 1-877-820-7444

Website: <https://www.fraserhealth.ca/>

### ***(Vancouver) Island Health Authority***

Toll-Free: 1-877-370-8699

Website: <https://www.islandhealth.ca/>

### ***Interior Health Authority***

Phone: 250-862-4200

Website: <http://www.interiorhealth.ca/>

### ***Office of the Assisted Living Registrar***

Toll-free: 1-866-714-3378

Phone: 778 974-4887

Website: <http://www.health.gov.bc.ca/assisted/>

***VictimLINK***

Toll-Free: 1-800-563-0808 (24 hours)

TTY: 604-875-0885

Website: <http://www.victimlinkbc.ca/>

***Crisis Intervention and Suicide Prevention Centre of BC***

Toll-Free: 1-800-SUICIDE (784-2433)

Seniors Distress Line: 604-872-1234

Website: <http://www.crisiscentre.bc.ca>

***MOSAIC Multicultural Victim Services Program***

Phone: 604-254-9626

Website: <http://www.mosaicbc.com>

***Burnaby Seniors Outreach Services Society (BSOSS)***

Phone: 604-291-2258

Website: <http://www.bsoss.org>

***QMunity, BC's Queer Resource Centre: Generations Project (Older Adults)***

Phone: 604- 684-5307 ext. 110 (older adults support inquiries)

Office: 604- 684-5307 ext. 100 (general inquiries)

Website: <http://www.qmunity.ca>

***BC CrimeStoppers***

Toll-Free: 1-800-222-8477

Website: <http://www.bccrimestoppers.com>

***Provincial Seniors' Phone Line***

Toll-Free: 1 877 952-3181

Phone: 250-952-3181 (Victoria)

Website: <https://www2.gov.bc.ca/gov/content/family-social-supports/seniors/about-seniorsbc/seniors-action-plan/what-we-ve-done/provincial-seniors-phone-line>

***BC Association of Community Response Networks***

Website: <http://www.bccrns.ca/>

### **Seniors Abuse and Information Line (SAIL)**

Toll-free: 1-877-952-3181

- Province-wide confidential line - a safe place for older adults, and those who care about them to talk to a trained intake worker about abuse or mistreatment receive information and support about issues that impact the health and well being of an older adult.

### **MANITOBA**

#### **Public Guardian and Trustee (Winnipeg Office)**

Phone: (204) 945-2700

Website: <https://www.gov.mb.ca/publictrustee/index.html>

- The Public Guardian and Trustee of Manitoba is a provincial government Special Operating Agency that manages and protects the affairs of Manitobans who are unable to do so themselves and have no one else willing or able to act.

#### **Seniors Abuse Support Line**

Toll-Free: 1-888-896-7183

Website: [https://www.gov.mb.ca/seniors/docs/abuse\\_support\\_line.pdf](https://www.gov.mb.ca/seniors/docs/abuse_support_line.pdf)

#### **Age & Opportunity (Support Services for Older Adults)**

Phone: 204-956-6440

Website: <https://www.aosupportservices.ca/>

- Age & Opportunity's Safe Suite Program: Crisis accommodations are available for men, women and couples 55+ who are in need of a safe place to stay due to abuse or neglect. Assistance in arranging finances, housing, and legal services can also be provided.

#### **Protection for Persons in Care Office**

Toll-Free (in Manitoba): 1-866-440-6366

Phone: 204-788-6366

TTY Winnipeg: 204-774-8618

Website: <https://www.gov.mb.ca/health/protection/index.html>

- This Office responds to reports of abuse of persons receiving care in personal care homes, hospitals or any other designated health facility.



***Office of the Vulnerable Persons' Commissioner***

Toll-Free: 1-800-757-9857 (outside Winnipeg)

Phone: 204-945-5039

Website: <https://www.gov.mb.ca/fs/vpco/index.html>

***Seniors Information Line***

Toll-free: 1-800-665-6565

Phone: 204-945-6565

Website: <http://www.csbsc.mb.ca/seniors.html>

***Province-wide Domestic Violence Crises and Information Line***

Toll-free (Manitoba): 1-877-977-0007

Website: <https://www.gov.mb.ca/msw/fvpp/index.html>

***Legal Aid Manitoba***

Toll-Free: 1-800-261-2960

Phone: 204-985-8500

Website: <https://www.legalaid.mb.ca/>

***Klinik Community Health Centre***

Toll-Free Crisis Line: 1-888-322-3019 (24 hours)

Phone (Winnipeg): 204-784-4090

Sexual Assault Crisis Line – Toll-Free: 1-888-292-7565

Website: <http://klinik.mb.ca/>

***Manitoba Human Rights Commission***

Toll-Free: 1-888-884-8681

TTY: 1-888-897-2811

Website: <http://www.manitoba.ca/hrc>

- The Manitoba Human Rights Commission is an independent agency of the Government of Manitoba and is responsible for administering The Human Rights Code.

***Manitoba Suicide Line***

Toll-Free: 1-877-435-7170 (24 hours)

Website: <http://reasontolive.ca/>

***Prevent Elder Abuse Manitoba (PEAM)***

Phone: 204-669-7531

Website: <http://www.peam.ca/>

***NEW BRUNSWICK***

***Adult Protection Program, Department of Social Development***

Toll Free (by region):

Acadian Peninsula (Tracadie-Sheila):	1-866-441-4149
Chaleur (Bathurst):	1-866-441-4341
Edmundston:	1-866-441-4249
Fredericton:	1-866-444-8838
Miramichi:	1-866-441-4246
Moncton:	1-866-426-5191
Restigouche (Campbellton):	1-866-441-4245
Saint John:	1-866-441-4340
After Hours Emergency Toll Free (in NB):	1-800-442-9799

Website: [https://www2.gnb.ca/content/gnb/en/services/services\\_renderer.9335.Adult\\_Protection.html#serviceLocation](https://www2.gnb.ca/content/gnb/en/services/services_renderer.9335.Adult_Protection.html#serviceLocation)

***New Brunswick Senior Citizens' Federation (NBSCF)***

Toll-Free: 1-800-453-4333

Phone: 506-857-8242

Website: <https://nbscf.ca/>

***Beausejour Family Crisis Resource Centre Inc.***

Phone: 506-533-9100 (24 hours)

Website: <http://healingstartshere.ca/>

***Chimo Helpline Inc.***

Toll Free Crisis Helpline: 1-800-667-5005 (province-wide)

Phone (Fredericton): 450-HELP (4357)

Website: <http://www.chimohelpline.ca/>

***Fredericton Sexual Assault Crisis Centre***

Phone: call 506-454-0437

Website: <http://fsacc.ca/en>

***Department of Social Development (Seniors)***

Toll-Free: 1-866-444-8838

Website: [https://www2.gnb.ca/content/gnb/en/departments/social\\_development/seniors.html](https://www2.gnb.ca/content/gnb/en/departments/social_development/seniors.html)

***Seniors and Healthy Aging Secretariat***

Phone: 506-453-2001

Website: [https://www2.gnb.ca/content/gnb/en/departments/social\\_development/seniors/content/secretariat.html](https://www2.gnb.ca/content/gnb/en/departments/social_development/seniors/content/secretariat.html)

***Fredericton Legal Advice Clinic***

Phone: (506) 455-1301

Website: <http://frederictonlegaladviceclinic.ca/>

Email: [admin@frederictonlegaladviceclinic.ca](mailto:admin@frederictonlegaladviceclinic.ca)

***Crossroads for Women Inc.***

Crisis Line: 506-853-0811 (24 hours)

Phone (Community Outreach Services): 506-381-8808

Phone: 506-857-4184 (Admin)

Website: <https://www.crossroadsforwomen.ca/en/>

***Public Legal Education and Information Service of New Brunswick (PLEIS-NB)***

Toll-Free (Family Law Information Line): 1-888-236-2444

Phone: (506) 453-5369

Website: <http://www.legal-info-legale.nb.ca/>

## **NEWFOUNDLAND & LABRADOR**

### **Seniors NL**

Toll Free: 1-800-563-5599

Phone: 709-737-2333

Website: <http://seniorsnl.ca/seniors/legal/>

### **Office for Aging and Seniors (Department of Children, Seniors and Social Development)**

Toll-Free (NL): 1-888-494-2266

Website: <https://www.cssd.gov.nl.ca/seniors/index.html>

### **Department of Health and Community Services**

General inquiries: 709-729-4984

Website: [https://www.health.gov.nl.ca/health/findhealthservices/in\\_your\\_community.html](https://www.health.gov.nl.ca/health/findhealthservices/in_your_community.html)

### **NL Network for the Prevention of Elder Abuse (NLNPEA)**

Toll-Free: 1-800-563-5599

Phone: 709-737-2333

Website: <http://www.nlnpea.ca/>

### **Public Legal Information Association of Newfoundland and Labrador (PLIAN)**

Toll-Free: 1-888-660-7788

Phone: 709- 722-2643

Website: <https://publiclegalinfo.com/>

### **Mental Health Crisis Line**

Toll-Free Crisis Line: 1-888-737-4668 (24 hours)

Website: <https://www.health.gov.nl.ca/health/findhealthservices/helplines.html>

### **NL Sexual Assault Crisis and Prevention Centre**

Toll-Free Crisis Line: 1-800-726-2743 (24 hours)

Phone: 709-747-7757 (Office)

Phone: 1-888-660-7788 (PLIAN Legal Information Line)

Website: <http://nlsacpc.com/>

***Violence Prevention Initiative (VPI)***

Phone: 709-729-5009

Website: <https://www.gov.nl.ca/vpi/>

***NOVA SCOTIA***

***Adult Protection Services, Protection for Persons in Care***

Toll-Free (NS): 1-800-225-7225

TTY: 1-877-404-0867

Website: <https://novascotia.ca/dhw/ppcact/>

***Legal Info Nova Scotia (Abuse of Older Adults)***

Toll-Free: 1-800-665-9779

Phone: 902-455-3135

Website: <https://www.legalinfo.org/wills-and-estates-law/elder-abuse-adult-protection-act#what-kind-of-services-does-adult-protection-provide>

***Senior Abuse Information and Referral Line***

Toll-Free (NS): 1-877-833-3377

Phone (out of province): 902-424-3163

Website: [https://novascotia.ca/seniors/stopabuse/booklet\\_4.asp#sa\\_information](https://novascotia.ca/seniors/stopabuse/booklet_4.asp#sa_information)

***Nova Scotia Department of Seniors***

Toll Free (Nova Scotia): 1-844-277-0770

Phone (Metro Area): (902) 424-0770

Website: <https://novascotia.ca/seniors/>

***Legal Information Line and Lawyer Referral Service***

Toll-Free (Nova Scotia): 1-800-665-9779

Phone (Halifax): 902-455-3135

Website: <https://www.legalinfo.org/how-lisns-can-help/i-need-a-lawyer>

***Seniors' Safety Program***

Website: [https://novascotia.ca/seniors/senior\\_Safety\\_Programs.asp](https://novascotia.ca/seniors/senior_Safety_Programs.asp)

***Mental Health Mobile Crisis Team (MHMCT)***

Toll-Free Crisis Line: 1-888-429-8167

Phone: 902-429-8167

Website: <http://www.nshealth.ca/servicedetails/Mental%20Health%20Mobile%20Crisis%20Telephone%20Line>

**ONTARIO**

***The Seniors Safety Line***

Toll-Free: 1-866-299-1011 (24 hours)

***Assaulted Women's Helpline***

Toll-Free Crisis Line: 1-866-863-0511 (24 hours)

Toll-Free TTY: 1-866-863-7868

GTA: 416-863-0511

GTA TTY: 416-364-8762

Website: <http://www.awhl.org/contact-us>

***Victim Support Line (VSL)***

Toll Free (in Ontario): 1-888-579-2888 (24hrs)

Phone: 416-314-2447.

Website: <https://www.ontario.ca/data/victim-support-line-information-and-referral-component>

***Fem'Aide (Ligne de soutien pour femmes violentées)***

Toll Free Crisis Line: 1-877-336-2433 (24 hours)

Phone (ATS): 1-866-860-7082

Website: <http://femaide.ca/>

***Long-Term Care ACTION Line***

Toll-Free: 1-866-434-0144

Phone (Toronto): 416-314-5518

Website: [http://www.health.gov.on.ca/en/common/system/services/lhin/ltc\\_actionline.aspx](http://www.health.gov.on.ca/en/common/system/services/lhin/ltc_actionline.aspx)

***Advocacy Centre for the Elderly (ACE)***

Toll-Free: 1-855-598-2656

Phone: 416-598-2656

Website: <http://www.advocacycentreelderly.org/>

***Community Legal Education Ontario (CLEO)***

Toll-Free Legal Referral Hotline: 1-866-667-5366 (24 hours)

Toronto area Crisis Line: 416-947-5255

Website: <https://www.cleo.on.ca/en>

***Ministry of Health and Long-Term Care***

Toll-Free: 1-866-532-3161

TTY: 1-800-387-5559

Phone (Toronto): 416-314-5518

Website: <http://www.health.gov.on.ca/en/>

***Ontario Seniors' Secretariat/Seniors' InfoLine***

Toll Free: 1-888-910-1999

TTY: 1-800-387-5559

Website: <https://www.ontario.ca/page/information-seniors>

***Ministry for Seniors and Accessibility***

Toll-free: 1-888-910-1999

TTY: 1-800-387-5559

Website: <https://www.ontario.ca/feedback/contact-us?id=25516&nid=84333>

***The Office of the Public Guardian and Trustee, Guardianship Investigation***

Phone: 416-314-2800

Toll-Free: 1-800-366-0335

TTY: 416-314-2687

Guardianship Investigations Unit: 416-327-6348

Website: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/overview.php>

***Elder Abuse Ontario (EAO)***

Phone: 416-916-6728

Website: <http://www.elderabuseontario.com/>



***Retirement Homes Regulatory Authority (RHRA)***

Toll-free: 1-855-ASK-RHRA (1-855-275-7472)

Website: [www.rhra.ca](http://www.rhra.ca)

- The RHRA is a not-for-profit organization that oversees retirement homes to make sure the law is being followed. RHRA staff process retirement home licence applications respond to calls about harm to retirement home residents and inspect retirement homes to make sure they meet the law's standards. If you see or suspect harm or risk of harm to a resident resulting from: Improper or incompetent treatment or care, abuse of a resident by anyone or neglect of a resident by staff of the retirement home, unlawful conduct, misuse or misappropriation of a resident's money

***Legal Aid Ontario***

Toll-free: 1-877-785-1555

(Local): 416-593-8314

Website: <http://www.legalaid.on.ca/>

- Legal Aid Ontario provides legal assistance for low-income people.

***Ontario Human Rights Commission***

Tel: (416) 326-9511

Toll-Free: 1-800-387-9080

Website: <http://www.ohrc.on.ca/en/about-commission>

***Office of the Ombudsman of Ontario***

Toll-free (inside Ontario only): 1-800-263-1830

Outside Ontario: 416-586-3300

Website: <https://www.ombudsman.on.ca/>

***Ontario Securities Commission***

Website: <https://www.osc.gov.on.ca/>

- As a regulatory body, the OSC administers and enforces compliance with the provisions of the Securities Act (Ontario) and the Commodity Futures Act (Ontario). Specifically, it works to protect investors, foster fair and efficient markets, and contribute to the stability of the financial system by making and monitoring compliance with rules governing the securities industry in Ontario.

## **PRINCE EDWARD ISLAND**

### **Health PEI – Adult Protection Program**

Phone:

Charlottetown: 902-368-4790

Montague: 902-838-0786

O’Leary: 902-859-8730

Souris: 902-687-7096

Summerside: 902-888-8440

Website: <https://www.princeedwardisland.ca/en/topic/health-pe>

### **Seniors Secretariat**

Toll Free: 1-866-770-0588 (Seniors Information)

Phone: 902-368-4502 (General Inquiries)

Website: <https://www.princeedwardisland.ca/en/information/executive-council-office/seniors-secretariat>

### **Seniors Safe @ Home Program**

Toll-Free: 1-855-374-7366

Phone: 902-368-4889

Website: <https://www.princeedwardisland.ca/en/information/family-and-human-services/seniors-safe-home-program>

- PEI Family Violence Prevention Services

### **Anderson House Shelter (Charlottetown)**

Emergency Toll-Free: 1-800-240-9894

Emergency Phone (local): 902-892-0960

Office: 902-894-3354

Website: <http://www.fvps.ca/>

### **PEI Senior Citizens Federation**

Phone: 902-368-9008

Website: [www.peiscf.com](http://www.peiscf.com)

- The PEI Senior Citizens’ Federation is a provincial-wide nonprofit charitable organization consisting of over 50 seniors groups.

***Prince Edward Island Human Rights Commission***

Phone: 902-368-4180

Toll-Free (in PEI): 1-800-237-5031

Website: [www.gov.pe.ca/humanrights/](http://www.gov.pe.ca/humanrights/)

***Prince Edward Island Rape and Sexual Assault Centre***

Toll-Free (PEI): 1-866-566-1864

Phone: 902-566-1864

Website: <http://www.peirsac.org/>

***Island Helpline***

Toll-Free Crisis Line (PEI): 1-800-218-2885 (24 hours)

Website: <https://www.princeedwardisland.ca/en/information/health-pe/health-pe/call-island-helpline>

***Community Legal Information Association of Prince Edward Island (CLIA-PEI)***

Toll-Free (Atlantic Canada): 1-800-240-9798

Phone: 902-892-0853

Website: <http://www.cliapei.ca/>

***Victim Services***

Queens and Kings County: 902-368-4582

Prince County: 902-888-8217 or 902-888-8218

Website: <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/victim-services>

***Office of Seniors***

Phone: (902) 620-3785

<http://www.gov.pe.ca/seniors/>

The Office of Seniors helps seniors, their families, and people who work with seniors obtain information about programs and services that are available in Prince Edward Island.

## **QUEBEC**

### ***Ligne Aide Abus Aînés/Elder Abuse***

Toll Free: 1-888-489-2287

Phone: 514-489-2287

Website: <https://www.aideabusaines.ca/>

### **Commission des droits de la personne et des droits de la jeunesse**

Phone: 514-873-5146

Toll Free: 1-800-361-6477

TTY: 514-873-2648

Website: <http://www.cdpdj.qc.ca/en/Pages/default.aspx>

### ***Public Guardian and Trustee Office of Québec- Curateur Public Québec***

Toll Free: 1-800-363-9020

Phone: 514-873-4074

Website: <https://www.curateur.gouv.qc.ca/cura/en/index.html>

### ***Ministère de la Santé et des Services sociaux (MSSS)***

Toll-Free: 1-877-644-4545

Phone: 418 644-4545 (Québec), 514 644-4545 (Montréal)

Toll Free: 1-800-361-9596

Website: <http://www.msss.gouv.qc.ca/>

### ***Table de Concertation des aînés de l'île de Montreal***

Phone: 514-382-0310

Website: <http://tcaim.org/>

### ***Commission des Services Juridique***

Toll-Free: 1-800-842-2213

Phone: 514-873-3562

Website: <https://www.csj.qc.ca/commission-des-services-juridiques/>

### ***Association québécoise des retraité(e)s des secteurs public et parapublic***

Toll-Free: 1-800-653-2747

Phone: 418-683-2288

Website: <https://www.aqrp.ca/>

***Crime Victims Assistance Center - Centre d'aide aux victimes d'actes criminels (CAVAC)***

Toll Free (in Quebec): 1-866-532-2822

Phone (Montreal): 514-277-9860

Website: <https://cavac.qc.ca/>

***Centre de prévention du suicide de Québec***

Toll Free Crisis Line: 1-866-APPELLE (277-3553) (24 hours)

Website: <https://www.cpsquebec.ca/en/>

***Human Rights Commission***

Phone: 514 873-5146

Toll-Free: 1 800 361-6477

TTY: 514-873-2648

Website: <http://www.cdpcj.qc.ca/en/pages/default.aspx>

***The Elder Law Clinic***

Phone (Clinique): 514-934-2463

Phone: 5147-289-9198

Website: <https://elderlawcanada.ca/en/>

**SASKATCHEWAN**

***Provincial Association of Transition Houses of Saskatchewan (PATHS)***

Phone: 306-522-3515

Website: <https://pathssk.org/>

***Public Guardian and Trustee***

Toll-Free: 1-877-787-5424

Phone: 306-787-5424

Website: <https://www.saskatchewan.ca/government/government-structure/boards-commissions-and-agencies/office-of-the-public-guardian-and-trustee><http://www.justice.gov.sk.ca/pgt>

***Personal Care Homes Program***

Phone: (306) 787-1715 (Regina) / (306) 933-5843 (Saskatoon)

Phone (Community Care Branch): (306) 787-7239

Website: <https://www.saskatchewan.ca/residents/health/accessing-health-care-services/care-at-home-and-outside-the-hospital/personal-care-homes>

***Seniors Legal Assistance Panel Program, Probono Law Saskatchewan***

Toll-Free: 1-855-833-7257

Phone: 306-569-3098

Website: <http://www.pbilsask.ca>

***HealthLine Saskatchewan***

Toll-Free: 1-877-800-0002 (24 hours).

Website: <https://www.saskatchewan.ca/residents/health/accessing-health-care-services/healthline>

***SSM Seniors Information Line (Saskatchewan Seniors Mechanism)***

Phone: 306-757-0127

Website: <https://skseniorsmechanism.ca/resources-programs/information-line/>

- The Saskatchewan Seniors Mechanism (SSM) is a non-profit, volunteer organization. It acts as an umbrella to bring together Saskatchewan seniors' organizations to contribute to a better quality of life for our province's older adults.

***Mobile Crisis Services***

Crisis Line: 306-933-6200 (24 hours)

Phone: 306-463-6655

Website: <http://www.mobilecrisis.ca/>

***West Central Crisis & Family Support Centre***

Toll-Free Crisis Line: 1-877-310-HELP (4357) (24 hours)

Website: <http://westcentralcrisis.ca/>

### ***Victim Services***

Toll-free: 1-888-286-6664

Phone: 306-787-3500

Website: <https://www.saskatchewan.ca/government/directory?ou=8c21ef67-fb4d-469a-b9c6-ba6c79dd37bb>

### ***211 Saskatchewan***

Website: <https://sk.211.ca/>

- 211 Saskatchewan is a free, confidential, 24/7 service that connects individuals to human services in the province by telephone, text, or web chat, plus a searchable website with over 5,000 listings of social, community, non-clinical health, and government services across the province.

### ***Health Regions***

Each health region offers a full range of services that includes: Acute Care, Home Care, Community and Population Health, Long Term Care, Mental Health, Addictions Services, Support Services, and Emergency Services. Each area of service acts as a complementary component of the holistic care provided in the region.

#### ***Cypress Health Region***

Phone: 306-778-5100

Toll-Free: 1-888-461-7443

Website: <https://cypresshealth.ca/>

#### ***Five Hills Health Region***

Phone: 306-694-0296

Toll-Free: 1-888-425-1111

Website: <https://www.fhhr.ca>

#### ***Heartland Health Region***

Phone: 306-882-4111

#### ***Keewatin Yatthé Regional Health Authority***

Phone: 306-235-2220

Website: <https://kyrha.ca/>

#### ***Kelsey Trail Health Region***

Phone: 306-873-6600

Website: <https://www.kelseytrailhealth.ca/Pages/default.aspx>

***Mamawetan Churchill River Health Region***

Phone: 306-425-2422

Website: <http://www.mcrhealth.ca>

***Prairie North Health Region***

Phone: 306-655-1026

Toll-Free: 1-866-655-5066

Website: <https://www.pnrha.ca/Pages/default.aspx>

***Prince Albert Parkland***

Phone: 306-765-6400

Website: <http://paphr.ca/>

***Regina Qu'Appelle Regional Health Authority***

Phone: 306-766-3232

Toll-Free: 1-866-411-7272

Website: <http://www.rqhealth.ca>

***Saskatoon Health Region***

Phone: 306-655-1026

Toll-Free: 1-866-655-5066

Website: <https://www.saskatoonhealthregion.ca/>

***Sun Country Health Region***

Phone: 306-637-3642 (Estevan)

Toll-Free: 1-800-696-1622

Website: <https://www.suncountry.sk.ca/>

***Sunrise Health Region***

Phone: 306-786-0103

Website: <http://www.sunrisehealthregion.sk.ca/>

**YUKON**

***Victim Services Programs & Initiatives***

Toll Free: 1-800-661-0408 (ext. 8500)

Phone: 867-667-8500

Website: [http://www.justice.gov.yk.ca/prog/cor/vs/vs\\_programs.html](http://www.justice.gov.yk.ca/prog/cor/vs/vs_programs.html)



***Seniors' Services / Adult Protection Unit***

Toll Free: 1-800-661-0408 (ext. 3946)

Phone: 867-456-3946

Website: <http://www.hss.gov.yk.ca/seniorservices.php>

***VictimLINK***

Toll-Free Crisis Line: 1-800-563-0808 (24 hours)

Website: [http://www.justice.gov.yk.ca/prog/cor/vs/other\\_services.html](http://www.justice.gov.yk.ca/prog/cor/vs/other_services.html)

***Women's Transition Home***

Phone: 867-668-5733

Website: <https://www.womenstransitionhome.ca/>

***Kaushee's Place / Yukon Women's Transition Home Society***

Crisis Line: 867-668-5733 (24 hours - call collect from communities outside Whitehorse)

Phone: 867-633-7720

***Community Adult Services Unit (emergency assistance)***

***Adult Community Services, Department of Health and Social Services***

Toll-Free: 1-800-661-0408 ext. 5674

Phone: 867-667-5674

Website: <http://www.hss.gov.yk.ca/adultservices.php>

***Office of the Public Guardian and Trustee***

Toll-Free (in Yukon): 1-800-661-0408, local 5366

Phone: 867-667-5366

Website: <http://www.publicguardianandtrustee.gov.yk.ca/>

***Yukon Legal Services Society (YLSS)***

Toll-Free: 1-800-661-0408 ext. 5210

Phone: (867) 667-5210 ext. 1

Website: <https://legalaidservice.yk.ca/>

***Community Law Clinic***

Toll Free: 1-800-661-0408 ext. 8359

Phone: (867) 667-8359

***Yukon Council on Aging***

Toll-free: 1-866-582-9707

Phone: 867-668-3383

Website: <http://www.ycoayukon.com/>

***Yukon Public Legal Education Association (YPLEA)***

Toll-Free: 1.866.667.4305

Phone: 867.668.5297

Website: <https://yplea.com/>

***Yukon Human Rights Commission***

Phone: 867-667-6226

Toll-Free: 1-800-661-0535

Website: <http://www.yukonhumanrights.ca>

***NUNAVUT***

***Elders Support Phone Line***

Toll-free: 1-866-684-5056

Website: <https://www.gov.nu.ca/programs-services/elders-support-line>

- Peer to peer counselling for unilingual (Inuktitut-speaking) Elders.

***Department of Health and Social Services***

Phone: (867) 975-5700

Website: <https://www.gov.nu.ca/health/>

***Baffin Regional Agvvik Society***

Phone: 867-979-4566 (24hrs)

Website: <http://www.victimjusticenetwork.ca/service/719-baffin-regional-agvvik-society-qimaavik-baffin-regional-agvvik-society-nunavut>

***Victim Services***

Phone: 867-975-6170

Website: <https://www.gov.nu.ca/justice/programs-services/victim-services>

**Qimaavik Transition House**

Phone: 867-979-4500

Website: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/women/transition-houses-shelters-abused-women/transition-houses-shelters-abused-women-canada-2008-9.html>

**Elder's Support Phone Line**

Toll-Free: 1-866-684-5056

Website: <https://www.gov.nu.ca/programs-services/elders-support-line>

**NORTHWEST TERRITORIES**

**Seniors Information Line (Northwest Territories Seniors' Society)**

Toll-Free: 1-800-661-0878

Phone (Yellowknife): 867-920-7444

Website: <https://www.nwtseiorsociety.ca/>

**Sutherland House, Fort Smith**

Crisis Line: 867-872-4133 (24hrs)

Toll-Free: 877-872-5925

Website: [www.ywcanwt.ca](http://www.ywcanwt.ca)

**Seniors and Elders Deserve Respect Line**

Toll-free: 1-866-223-7775 (24 hours)

Website: <http://www.nwtnetwork.com/wp-content/uploads/2013/11/Seniors-and-Elders-Deserve-Respect.pdf>

**Alison McAteer House (YWCA)**

Toll-Free Crisis Line: 1-866-223-7775 (24 hours)

Phone: 867-873-8257

Website: [www.ywcanwt.ca](http://www.ywcanwt.ca)

**Inuvik Transition House**

Crisis Line: 867-777-3877

***Regional Health and Social Service Authorities***

Website: <https://www.hss.gov.nt.ca/en>

***Family Support Centre – Hay River***

Crisis line: (867) 874-3311

Toll-free: (833) 372-3311

***NWT Network of Prevention of Abuse of Older Adults***

Toll-Free: 1-800-661-0878

Website: [www.nwtnetwork.com](http://www.nwtnetwork.com)

- Works in partnership and collaboration with older adults and their families, caregivers, service providers, government departments and agencies, aboriginal organizations, Non-Governmental Organizations (NGO's) and others to advance the goals and objectives of the NWT Network to achieve its vision.

## APPENDICIES

1. ATTORNEY CHECKLIST: DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the “SDA”)
2. ATTORNEY CHECKLIST: DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE *SUBSTITUTE DECISIONS ACT*, 1992 (the “SDA”)
3. CAPACITY CHECKLIST
4. ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL EXAMINATION OF CAPACITY LEGISLATION
5. UNDUE INFLUENCE CHECKLIST
6. GUARDIANSHIP CHECKLIST: PERSONAL CARE
7. GUARDIANSHIP CHECKLIST: PROPERTY
8. CHECKLIST: GROUNDS TO ATTACK AN *INTER VIVOS* GIFT
9. CHECKLIST: PRESUMPTION OF RESULTING TRUST
10. ELDER ABUSE CHECKLIST: CIVIL & CRIMINAL REMEDIES
11. CHECKLIST: “RED FLAGS” FOR DECISIONAL INCAPACITY IN THE CONTEXT OF A LEGAL RETAINER

# **APPENDIX “1” - ATTORNEY CHECKLIST: DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO *THE SUBSTITUTE DECISIONS ACT, 1992* (the “SDA”)**

## ***An Attorney MUST...***

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the “SDA”) and the *Health Care Consent Act, 1996*
- Be aware that an individual of 16 years of age is capable of giving or refusing consent of one’s own personal care
- Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor’s behalf
- Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid
- Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor
- Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
  - o Is the power to be exercised solely or jointly?
  - o Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?

- Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
  - o Does the grantor have the ability to understand and appreciate the role of the attorney and in particular the risks associated with the appointment?
  - o Does the grantor have capacity to give instructions for decisions to be made as to personal care?
  - o Is the grantor aware of the Power to revoke the Power of Attorney if capable?
  - o The grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care
- Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
- Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document
  - o The *HCCA* applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
  - o The *HCCA* prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
  - o Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the *SDA*?
  - o What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?
- Be aware that special provisions exist in the *SDA* and the *HCCA* addressing conflicting

APPENDIX “1” - ATTORNEY CHECKLIST: DUTIES OF THE ATTORNEY  
UNDER A POWER OF ATTORNEY FOR PERSONAL CARE

requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor’s care and treatment

- Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the *SDA* and the *HCCA*
- Arrange for a capacity assessment at the request of the grantor, except where there has been an assessment performed in the six months immediately previous
- Be aware the statutory requirements concerning resignation
  - o Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
  - o Notify persons previously being dealt with on the grantor’s behalf
- Be aware that a Power of Attorney for personal care terminates on the death of the grantor
- Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor’s well-being and personal care
- Explain to the grantor the attorney’s powers and duties, and encourage the grantor’s participation in decisions
- Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor
- Keep records of all decisions made on the grantor’s behalf
- Facilitate contact between the grantor, relatives and friends
- Consult with relatives, friends and other attorneys on behalf of the grantor
- Facilitate the grantor’s independence
- Make decisions which are the least restrictive and intrusive to the grantor
- Not use or permit the use of confinement, monitoring devices, physical restraint by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another



- Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the *HCCA*
- Maintain comprehensive records
  - o A list of all decisions made regarding health care, safety and shelter
  - o Keep all medical reports or documents
  - o Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor
- Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required
- Keep a copy of the Power of Attorney for Personal Care and all other court documents relating to the attorney's power or authority
- Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records.

## **APPENDIX “2” - ATTORNEY CHECKLIST: DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE *SUBSTITUTE DECISIONS ACT, 1992* (the “SDA”)**

### ***An Attorney MUST...***

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the “**SDA**”) and the *Health Care Consent Act, 1996* (the “**HCCA**”)
- Be 18 years of age
- Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision
- Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
  - o Is the power a “Continuing” Power of Attorney?
  - o Is the power limited to a particular period of incapacity?
  - o Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
  - o Is the power to be exercised solely or jointly with another?
- Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will

- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:
  - o Is the grantor aware of the scope of property possessed?
  - o Is the grantor aware of the approximate value of property possessed?
  - o Is the grantor aware of obligations owed to dependants?
  - o Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
  - o Is the grantor aware that an attorney has a duty to account for all actions taken?
  - o Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
  - o Is the grantor appreciative of the risks of entrusting property to the attorney?
- Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
- Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- Be aware of the statutory obligations of resignation
  - o Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable
  - o Notify persons previously being dealt with on the grantor's behalf
- Be aware that a Power of Attorney terminates upon the death of the grantor
- Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care
- Explain to the grantor its powers and duties and encourage the grantor's participation in decisions
- Facilitate contact between the grantor and relatives or friends
- Consult with relatives, friends and other attorneys on behalf of the grantor

APPENDIX “2” - ATTORNEY CHECKLIST: DUTIES OF AN ATTORNEY  
UNDER A POWER OF ATTORNEY FOR PROPERTY

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

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

- **Duties**

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

- **Personal comfort and well-being**

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

- **Personal care**

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

- **Exception**

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

- **Explanation**

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

- **Participation**

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

- **Family and friends**

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

- **Consultation**

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

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

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

- **Accounts**

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

- **Standard of care**

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

- **Same**

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

- **P.G.T.**

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

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

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

- **Amendment of plan**

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

- **Application of Trustee Act**

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

- **Liability of guardian**

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

- **Same**

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

- **Exception, corporate directors**

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

- **Breach of duty**

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

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

- An Attorney may not change a beneficial designation of life insurance or a "Plan". Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person's death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario, R. S. O. 1990, C.I.8 as amended) and a "Plan" pursuant to the *Succession Law Reform Act*, (R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty (*Desharnais v. Toronto Dominion Bank* 2001 BCSC 1695 (*CanLII*). [2001] B.C.J. [No. 2547]).
- An Attorney may want to protect an incapable person's assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton v. Banton*, 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.).

APPENDIX “2” - ATTORNEY CHECKLIST: DUTIES OF AN ATTORNEY  
UNDER A POWER OF ATTORNEY FOR PROPERTY

- An Attorney may complete transactions already entered into by an incapable person.
- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher v. Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.*).
- An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.
- An Attorney may settle an “*Alter Ego Trust*” or *inter vivos* trust. Similarly, certain “Estate Freeze” planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor’s Last Will and Testament, or otherwise if the ultimate beneficiary consents. The planning must be in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. Attorneys may settle *inter vivos* trusts as long as the trust does not contravene the intentions of the Grantor and is considered to be in the Grantor’s best interests as defined by the SDA. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. A trust which is contrary to a Grantor’s intentions (for example, where a trust has the effect of adding beneficiaries not named in a Will or avoids a gift established by a Will) then the trust may be successfully challenged. Tax considerations must also be factored into any planning (*Easingwood v. Cockroft, 2013 BCCA 182*).
- An Attorney should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.
- An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.
- An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.



## APPENDIX “3” - CAPACITY CHECKLIST

### **CAPACITY GENERALLY**

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

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

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

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

### **TESTAMENTARY CAPACITY**

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

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

- (a) The nature of the act of making a Will (or testamentary document) and its effects;
- (b) The extent of the property of which he or she is disposing of; and
- (c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).<sup>3</sup>

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

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

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

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

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

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

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

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

## **CAPACITY TO MAKE TESTAMENTARY DISPOSITIONS OTHER THAN WILLS**

The *Succession Law Reform Act*<sup>7</sup> defines a “Will” to include the following:

- (a) a testament,
- (b) a codicil,
- (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
- (d) any other testamentary disposition (“testament”).

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

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

<sup>6</sup> *Laszlo v Lawton*, 2013 BCSC 305, SCBC

<sup>7</sup> R.S.O. 1990 c.s.26 as amended subsection 1(1)

- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; designations respecting RRSPs, RIFs, Insurances, Pensions, and others.<sup>8</sup> Therefore, capacity is determined on the criteria applied to determining testamentary capacity
- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.<sup>9</sup> The criteria to be applied, is that of testamentary capacity.
- The capacity required to create an *inter vivos* trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

### **CAPACITY TO GRANT OR REVOKE A CONTINUING POWER OF ATTORNEY FOR PROPERTY (“CPOAP”)**

Pursuant to section 8 of the *Substitute Decisions Act*,<sup>10</sup> to be capable of granting a Continuing Power of Attorney for Property (“CPOAP”), a grantor requires the following:

- (a) Knowledge of what kind of property he or she has and its approximate value;
- (b) Awareness of obligations owed to his or her dependants;
- (c) Knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- (d) Knowledge that the attorney must account for his or her dealings with the person’s property;
- (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;
- (f) Appreciation that unless the attorney manages the property prudently its value may decline; and
- (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.<sup>11</sup>

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

8 S.51(10) of the *Succession Law Reform Act* (SLRA).

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

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

11 SDA, subsection 8(2)

12 SDA, subsection 9(1)

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

### **WHEN AN ATTORNEY SHOULD ACT UNDER A CPOAP**

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

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor’s capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* <sup>14</sup>

### **CAPACITY TO MANAGE PROPERTY**

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

- (a) The ability to understand the information that is relevant in making a decision in the management of one’s property; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. <sup>15</sup>

*A person may be incapable of managing property, yet still be capable of making a Will.*<sup>16</sup>

### **CAPACITY TO GRANT OR REVOKE A POWER OF ATTORNEY FOR PERSONAL CARE (“POAPC”)**

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

- (a) The ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; and
- (b) The appreciation that the person may need to have the proposed attorney make decisions

<sup>13</sup> SDA, subsection 9(2)

<sup>14</sup> R.S.O. 1990, c. M.7

<sup>15</sup> See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)

<sup>16</sup> *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

for the person.<sup>17</sup>

A person who is capable of granting a POAPC is also capable of revoking a POAPC.<sup>18</sup>

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

### **WHEN AN ATTORNEY SHOULD ACT UNDER A POAPC**

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

### **CAPACITY TO MAKE PERSONAL CARE DECISIONS**

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

- (a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

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

### **CAPACITY UNDER THE HEALTH CARE CONSENT ACT, 1996 <sup>20</sup>**

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

- (a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

17 SDA, subsection 47(1)

18 SDA, subsection 47(3)

19 SDA, subsection 47(2)

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

## CAPACITY TO CONTRACT

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

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.<sup>22</sup>

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

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract’s specific effect in the specific circumstances.<sup>23</sup>

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* (“SDA”).<sup>24</sup> 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.<sup>25</sup> Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are “reasonable grounds to believe that the other person is incapable of entering into the contract.”<sup>26</sup>

## CAPACITY TO GIFT

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

- (a) The ability to understand the nature of the gift; and
- (b) The ability to understand the specific effect of the gift in the circumstances.<sup>27</sup>

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

21 G.H. Treitel, *The Law of Contract*, 11<sup>th</sup> ed. (London: Sweet & Maxwell, 2003).

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

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

24 SDA, *supra* note 2

25 SDA, subsection 2(1)

26 SDA, subsection 2(3)

27 *Royal Trust Company v. Diamant*, *Ibid.* at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

28 *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel* [1956] S.C.R. 477 at 487

## **CAPACITY TO UNDERTAKE REAL ESTATE TRANSACTIONS**

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

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract's specific effect in the specific circumstances.<sup>30</sup>

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

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

## **CAPACITY TO MARRY**

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

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

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.<sup>33</sup>

The capacity to separate and divorce is arguably the same as required for the capacity to marry.<sup>34</sup>

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

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

31 *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)

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

33 *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik

34 *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494

## **CAPACITY TO INSTRUCT COUNSEL**

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

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

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

As stated in *Torok v. Toronto Transit Commission*<sup>36</sup>, at para. 40: “The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision in the litigation includes the ability to consider a reasonable range of possible outcomes, including those that are unfavourable. This ability is essentially the capacity to assess risk, which requires consideration of a variety of results, both positive and negative.”

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: “*Notes on Capacity to Instruct Counsel*” by Ed Montigny.<sup>37</sup> That article was cited in the case of *Costantino v Costantino* 2016 ONSC 7279 where the court concluded that 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.<sup>38</sup>

35 *Lengyel v TD Home and Auto Insurance* (2017) ONSC 2512, 278 ACWS (3d) 830

36 *Torok v. Toronto Transit Commission* 2007 CarswellOnt 2834

37 Staff lawyer at ARCH Disability Law Centre.

38 *Costantino v Costantino* 2016 ONSC 7279 citing Montigny, at page 3. See also *Evans v Evans* 2017 ONSC 5232 and *Sylvester v Britton*, 2018 ONSC 6620.



## **CAPACITY TO SUE (OR WHERE A LITIGATION GUARDIAN IS REQUIRED)**

The factors to be considered in determining whether a party is capable of commencing an action (or is in need of a litigation guardian) are set out in case law:

- (a) A person's ability to know or understand the minimum choices or decisions required to make them;
- (b) An appreciation of the consequences and effects of his or her choices or decisions;
- (c) An appreciation of the nature of the proceeding;
- (d) A person's ability to choose and keep counsel;
- (e) A person's ability to represent himself or herself;
- (f) A person's ability to distinguish between relevant and irrelevant issue; and
- (g) A person's mistaken beliefs regarding the law or court procedures.<sup>39</sup>

On a related note, Section 7 of the *Limitations Act, 2002* SO 2002 c 24 Sch B provides that the basic two year limitation period does not run during any time in which the person with the claim is "incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological conditions".<sup>40</sup>

## **ISSUES RELATED TO CAPACITY**

### **UNDUE INFLUENCE**

Undue influence is a legal concept where the onus of proof is on the person alleging it.<sup>41</sup>

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

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;

39 See *Costantino v Costantino* 2016 ONSC 7279, *Huang v. Braga* 2016 ONSC 6306 at para 19 and repeated in *Hengeveld v. Ontario (Transportation)* 2017 ONSC 6300 at para 21.

40 See *Carmichael v Glaxosmithkline Inc.* 2019 ONSC 2037

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

- The ability to dominate one’s will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;<sup>42</sup>
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion <sup>43</sup>

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

The timing, circumstances, and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.<sup>44</sup>

Actual violence, force, or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.<sup>45</sup>

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences. <sup>46</sup>

Psychological pressures creating fear may be tantamount to undue influence.<sup>47</sup>

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document ... “cannot be said to be that of the deceased.”<sup>48</sup>

Undue influence must be corroborated. <sup>49</sup>

Suspicious circumstances will not discharge the burden of proof required.<sup>50</sup>

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

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

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

45 *Wingrove v. Wingrove* (1885) 11 P.D. 81

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

47 *Tribe v Farrell*, 2006 BCCA 38

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

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

50 *Vout v Hay*, at p. 227

\* See Undue Influence Checklist

## ***SUSPICIOUS CIRCUMSTANCES***

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

- (a) circumstances surrounding the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator; or
- (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.<sup>51</sup>

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.<sup>52</sup>

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

52 *Laszlo v Lawton*, 2013 BCSC 305 (CanLII)

## APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
ALBERTA	<i>Public Trustee Act</i> , SA 2004, c P-44.1, s. 24(2)	The Public Trustee may act: “as personal representative of a deceased person; as trustee of any trust or to hold or administer property in any other fiduciary capacity (including on behalf of incapacitated persons); to protect the property or estate of minors and unborn persons, and; in any capacity in which the Public Trustee is authorized to act (i) by an order of the Court, or (ii) under this or any other Act.”	No definition of “capacity”

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>ALBERTA</b>	<i>Personal Directives Act</i> , RSA 2000, c P-6	Decisions dealing with “personal matters” matter of a nonfinancial nature that relates to an individual’s person and without limitation includes: health care; accommodation; with whom the person may live and associate; participation in social, educational and employment activities; legal matter; any other matter prescribed by the regulations;	Defines “capacity” as:  “the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision.”
<b>ALBERTA</b>	<i>Powers of Attorney Act</i> , RSA 2000, c P-20, s.2(1)-(4),	Decisions to grant or revoke enduring power of attorney.	No definition of “capacity”  However, section 3 states:  “An enduring power of attorney is void if, at the date of its execution, the donor is <b>mentally incapable</b> of <b>understanding the nature and effect</b> of the enduring power of attorney.”

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>ALBERTA</b>	<i>Adult Guardianship and Trusteeship Act</i> , SA 2008, c. A-4.2, s. 46(2) & (5)	<p>Decisions with respect to personal or financial matters.</p> <p>Governs supported decision-making, co-decision making, guardianships and trusteeships.</p> <p>Designated “capacity assessors” under the regulations.</p>	<p>“capacity” means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of (i) a decision, and (ii) a failure to make a decision.</p>
<b>ALBERTA</b>	<i>Mental Health Act</i> , RSA 2000, c M-13	Governs admission and detention in a facility.	<p>No definition of “capacity”.</p> <p>“mental disorder” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs (i) judgment, (ii) behaviour, (iii) capacity to recognize reality, or (iv) ability to meet the ordinary demands of life.</p>

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>ALBERTA</b>	<i>Limitations Act</i> , RSA 2000 c L-12	Governs the limitation periods to commence a lawsuit and when that period will be “tolled” or suspended when a person is “under a disability”.	<p>1(h) A “person under disability” means</p> <p>(i) a represented adult as defined in the <i>Adult Guardianship and Trusteeship Act</i> or a person in respect of whom a certificate of incapacity is in effect under the <i>Public Trustee Act</i>, or</p> <p>(ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim.</p> <p>No definition of “capacity” or “incapable”.</p>
<b>BRITISH COLUMBIA</b>	<i>Power of Attorney Act</i> , RSBC 1996, c 370	Decisions to grant or revoke enduring Power of Attorney for financial decisions.	<p>No definition of “capacity”.</p> <p>Section 12(2) sets out the criteria for determining whether an adult “is incapable of understanding the nature and consequences of a proposed enduring power of attorney”.</p>

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>BRITISH COLUMBIA</b>	<i>Patients Property Act</i> , RSBC 1996, c 349	Appointment of a “committee” if an individual is “mentally incapable” and no personal directives in place.	No definition for “capacity”.  Section 2(1) states:  “The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of (a)mental infirmity arising from disease, age or otherwise, or (b)disorder or disability of mind arising from the use of drugs, incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.”
<b>BRITISH COLUMBIA</b>	<i>Mental Health Act</i> , RSBC 1996, c 288	Governs admission of individuals to mental health care facilities.	No definition of “capacity”.
<b>BRITISH COLUMBIA</b>	<i>Health Care (Consent) and Care Facility (Admission) Act</i> , RSBC 1996, c 181	Governs health care decisions and sets out the capacity criteria required to make an advance directive.	No definition of “capacity”.  S. 3(1) outlines a presumption of capability with respect to health care decisions.



PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>BRITISH COLUMBIA</b>	<i>Adult Guardianship Act</i> , RSBC 1996, c 6	Governs statutory property guardians and the process by which health authorities issue certificates of incapability as a last resort, resulting in the Public Guardian and Trustee becoming an adult’s committee of estate for financial and legal matters. Also outlines BC’s response to adult abuse, neglect and self neglect by designated agencies.  Governs assessment by a “qualified health care provider” according to prescribed procedures.	No definition for “capacity”.  S 3(1): “Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult’s personal care, health care and financial affairs.”
<b>BRITISH COLUMBIA</b>	<i>Public Guardian and Trustee Act</i> , RSBC 1996, c 383	Governs the powers and duties of the Public Guardian and Trustee (including the ability to investigate allegations of possible financial mismanagement including by those acting as an adult’s substitute decision maker (trustee, representative, attorney, committee).	No definition of “capacity”.

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>BRITISH COLUMBIA</b>	<i>Representation Agreement Act</i> , RSBC 1996, c 405	Governs the making of representation agreements by adults that identify one or more representatives to make or assist with personal and health care and/or financial and legal decisions.	<p>No definition of “capacity”.</p> <p>S. 3(1) outlines a presumption of capability.</p> <p>S 8(1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized even though the adult is incapable of:</p> <p>(a)making a contract,</p> <p>(b)managing his or her health care, personal care or legal matters, or</p> <p>(c)the routine management of his or her financial affairs.</p>
<b>BRITISH COLUMBIA</b>	<i>Limitation Act</i> , SBS 2012, c 13	Governs the limitation periods to commence a claim and when those limitation periods will be “tolled” or suspended when a person is “under a disability”.	<p>“person under a disability” means an adult person who is incapable of or substantially impeded in managing his or her affairs.</p> <p>No definition of “incapable”.</p>

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF "CAPACITY/CAPABLE"?
<b>MANITOBA</b>	<i>The Powers of Attorney Act,</i>  <i>CCSM c P97</i>	Governs enduring and springing Powers of Attorney.	No definition of "capacity".  "mental incompetence" means the inability of a person to manage his or her affairs by reason of mental infirmity arising from age or a disease, addiction or other cause.
<b>MANITOBA</b>	<i>Mental Health Act,</i> <i>CCSM c M110</i>	Governs the admission and treatment requirements for patients in psychiatric facilities.  The Act also applies to individuals on leave from a facility as well as individuals under Orders of Committeeship living in the community.	No definition of "capacity"  "incapable person" means a person for whom a committee has been appointed.  S 3: "a person is incapable of personal care if he or she is repeatedly or continuously unable, because of mental incapacity,  (a) to care for himself or herself; and  (b) to make reasonable decisions about matters relating to his or her person or appreciate the reasonably foreseeable consequences of a decision or lack of decision.

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>MANITOBA</b>	<i>Health Care Directives Act</i> , CCSM c H27	Governs the making of health care directives regarding health care and treatment decisions.	“capacity”: “For the purpose of this Act, a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”
<b>MANITOBA</b>	<i>Vulnerable Persons Living with a Mental Disability Act</i> , CCSM c V90	This Act promotes and protects the rights of adults living with a mental disability who need assistance to meet their basic needs. Deals with support and substitute decision making.	“capable” means mentally capable and “capacity” has a corresponding meaning.  s.2: “If the capacity of a vulnerable person or, a person for whom an application for the appointment of a substitute decision maker is made, is in issue under this Act, the person shall be deemed to have capacity to retain and instruct counsel”
<b>MANITOBA</b>	<i>The Limitation of Actions Act</i> , CCSM c L150	Governs the limitation period within which to commence a claim and the “tolling” of the limitation period while the person is under a “disability”.	s.7(1) A person is under a “disability. . . while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition”.  No definition of “incapable”.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF "CAPACITY/CAPABLE"?
<b>NEW BRUNSWICK</b>	<i>Property Act</i> , RSNB 1973, c P-19	Granting and revoking power of attorney for property.	No definition for "capacity".
<b>NEW BRUNSWICK</b>	<i>Infirm Persons Act</i> , RSNB 1973, c I-8	Governs granting and revoking power of attorney for personal care and committeeships.	No definition for "capacity"  "mentally incompetent person" means a person (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or (b) who is suffering from such a disorder of the mind that he requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property.
<b>NEW BRUNSWICK</b>	<i>Limitation of Actions Act</i> , SNB 2009, c L-8.5	Governs the limitation periods to commence a claim and when those periods will be "tolled" or suspended when a person is "incapable".	s. 18(1) The limitation period is suspended when the "claimant is incapable of bringing a claim because of his or her physical, mental or psychological condition"  No definition of "incapable".

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NEW BRUNSWICK</b>	<i>Mental Health Act</i> , RSNB 1973, c M-10	Governs custody and admission to psychiatric facility.	No definition for “capacity”  “serious mental illness” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs a person’s behaviour, judgment, capacity to recognize reality or ability to meet the ordinary demands of life, but does not include an intellectual disability.”
<b>NEWFOUNDLAND AND LABRADOR</b>	<i>Advance Health Care Directives Act</i> , SNL 1995, c A-4.1	Decisions regarding health care and making an advance directive.	“mental competence”: A maker shall be considered competent to make an advance health care directive where he or she is able to understand the information that is relevant to making a health care decision and able to appreciate the reasonably foreseeable consequences of that decision.
<b>NEWFOUNDLAND AND LABRADOR</b>	<i>Mental Health Care and Treatment Act</i> , SNL 2006, c M-9.1	Governs admission, custody, detention, assessment in a mental health care facility.	“mental disorder” means a disorder of thought, mood, perception, orientation or memory that impairs (i) judgment or behaviour, (ii) the capacity to recognize reality, or (iii) the ability to meet the ordinary demands of life, and in respect of which psychiatric treatment is advisable

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NEWFOUNDLAND AND LABRADOR</b>	<i>Enduring Powers of Attorney Act</i> , RSNL 1990, C E-11	Granting and revoking enduring powers of attorney.	“legal incapacity” means mental disability of a nature (i) such that were a person to engage in an action he or she would be unable to understand its nature and effect, and (ii) that would, but for this Act, invalidate or terminate a power of attorney, RDSP or another legal agreement.
<b>NEWFOUNDLAND AND LABRADOR</b>	<i>Adult Protection Act</i> , SNL 2011, c A-4.01	The act protects adults who are at risk of abuse and neglect, and who do not understand or appreciate that risk. The Act and its policies presume that every adult has the capacity to make decisions unless proven otherwise, and if the adult does not harm him/herself or others, than he/she may choose to live as he/she wishes, even if some may consider it unwise or not socially acceptable.	s. 6(2) An adult shall be considered to lack the capacity to make a decision where that adult (a) is unable to understand information relevant to the decision where that decision concerns his or her health care, physical, emotional, psychological, financial, legal, residential or social needs; or (b) is unable to appreciate the reasonably foreseeable consequences of a decision or the lack of a decision.

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NEWFOUNDLAND AND LABRADOR</b>	<i>Limitations Act</i> , SNL 1995 c L-16.1	Governs the limitation periods to commence a claim and “tolling” or postponement of the limitation period where person under a “disability”.	S. 15(5)(b)(c) A person is under a disability when they are “incapable of the management of his or her affairs because of disease or impairment of his or her physical or mental condition; or for the purpose of an action for misconduct of a sexual nature . . . incapable of commencing that action by reason of his or her mental or physical condition resulting from that sexual misconduct”  No definition of “incapable”
<b>NORTHWEST TERRITORIES</b>	<i>Powers of Attorney Act</i> , SNWT 2001, c 15 s 7	Decision to grant or revoke enduring or springing power of attorney for property.	“mental incapacity” means the inability of a person, by himself or herself or with assistance, to  (a) understand information that is relevant to making a decision concerning his or her financial affairs, or  (b) appreciate the reasonably foreseeable consequences of a decision concerning his or her financial affairs or the lack of such a decision



PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF "CAPACITY/CAPABLE"?
<b>NORTHWEST TERRITORIES</b>	<i>Personal Directives Act</i> , SNWT 2005, c 16	Decision to grant/revoke personal directives re personal care decisions including giving, refusal or withdrawal of consent for health care and other personal matters.	"capacity" means the ability to (a) understand the information that is relevant to the making of a personal decision, and (b) appreciate the reasonably foreseeable consequences of that personal decision;
<b>NORTHWEST TERRITORIES</b>	<i>Guardianship and Trusteeship Act</i> , SNWT 1994, c 29	Governs the appointment and duties of guardians and trustees.	No definition of capacity.
<b>NORTHWEST TERRITORIES</b>	<i>Mental Health Act</i> , RSNWT 1988, c M-10	Governs admission, custody, detention, assessment in a mental health care facility.	"mental disorder" means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgement, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life.
<b>NORTHWEST TERRITORIES</b>	<i>Limitation of Actions Act</i> , RSNWT 1988 c L18	Governs the limitation periods for commencing a claim and the "tolling" or suspending of those periods where person is incapable of commencing a claim.	s.2.1(3) The limitation period does not run so long as the "aggrieved person is incapable of commencing the action because of his or her physical, mental or psychological condition".  No definition of "incapable"

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NOVA SCOTIA</b>	<i>Adult Capacity and Decision-Making Act</i> ,  SNS 2017 c 4	Governs appointment of representatives (formerly guardians); capacity assessments	“capacity” means the ability, with or without support, to (i) understand information relevant to making a decision,  (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made
<b>NOVA SCOTIA</b>	<i>Powers of Attorney Act</i> , RSNS 1989 c 352	Decisions to grant / revoke powers of attorney for property.	No definition of capacity.
<b>NOVA SCOTIA</b>	<i>Personal Directives Act</i> , SNS 2008 c 8	Decision to grant / revoke personal care directives for personal care decisions.	“capacity” means the ability to understand information that is relevant to the making of a personal care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NOVA SCOTIA</b>	<i>Involuntary Psychiatric Treatment Act</i> , SNS 205, c 42	Admission and detention in a psychiatric facility.	“mental disorder” means a substantial disorder of behaviour, thought, mood, perception, orientation or memory that severely impairs judgement, behaviour, capacity to recognize reality or the ability to meet the ordinary demands of life, in respect of which psychiatric treatment is advisable
<b>NOVA SCOTIA</b>	<i>Limitation of Actions Act</i> , SNS 2014 c 35	Governs the limitation periods for commencing a lawsuit and when they will be tolled or suspended due to incapacity.	S 19(1) The limitation periods will “not run while a claimant is incapable of bringing a claim because of the claimant’s physical, mental or psychological condition.”  No definition of “incapable”

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
NUNAVUT	<i>Powers of Attorney Act</i> , S. Nu 2005 c 9 s3(1)	Decision to grant or revoke springing or enduring powers of attorney for property	“mental incapacity”, unless otherwise specified in a power of attorney, means the inability of a person, due to infirmity or impaired judgment, whether arising from disease, disability, age, addiction or other cause (a) to understand information that is relevant to making a decision concerning his or her property or financial interests, or (b) to appreciate the reasonably foreseeable consequences of a decision concerning his or her property or financial interests or the lack of such a decision;
NUNAVUT	<i>Mental Health Act</i> , RSNWT (Nu) 1988, c M-10	Governs the admission, detention, custody and assessment in psychiatric facilities.	“mentally competent” means having the ability to understand the subject-matter in respect of which consent is requested and the ability to appreciate the consequences of giving or withholding consent

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>NUNAVUT</b>	<i>Guardianship and Trusteeship Act</i> , SNWT (Nu) 1994, c 29	Governs the appointment and duties of guardians and trustees.	“capable”: A person is “capable” if the person has (a) the ability, by himself or herself or with assistance, to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety; and (b) the ability, by himself or herself or with assistance, to appreciate the reasonably foreseeable consequences of a decision referred to in paragraph (a) or lack of such a decision.
<b>NUNAVUT</b>	<i>Limitation of Actions Act</i> , RSNWT (Nu) 1988, c L-8	Governs limitation periods to commence a claim and when those limitations periods will be “tolled” or extended for individuals who are “incapable”.	S 2.1(3) the limitation period does not commence so long as the individual is “incapable of commencing the action because of his or her physical, mental or psychological condition”.  No definition of “incapable”
<b>ONTARIO</b>	<i>Substitute Decisions Act</i> , 1992, SO 1992 c 30	Decisions to grant or revoke powers of attorney for property or personal care; management of property and personal care decisions; appointment of guardians.	“capable” means mentally capable, and “capacity” has a corresponding meaning

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PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>ONTARIO</b>	<i>Mental Health Act</i> , RSO 1990, c M 7	Governs criteria for voluntary, informal and involuntary admissions to specially designated psychiatric facilities.	s. 1 “Mental disorder” “any disease of the mind”
<b>ONTARIO</b>	<i>Health Care Consent Act</i> , 1996, SO 1996, c 2 Sch A	Consent regarding health care decisions and admission to long-term care facility.	“capable” means mentally capable, and “capacity” has a corresponding meaning
<b>ONTARIO</b>	<i>Limitations Act</i> , 2002 SO 2002, c 24 Sch B	Governs limitation periods for the commencement of a lawsuit.	Section 7 governs a “tolling” of the limitation period to commence a lawsuit when a person with a claim is “incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition” and does not have a litigation guardian.  No definition of “incapable”.
<b>PRINCE EDWARD ISLAND</b>	<i>Powers of Attorney Act</i> , RSPEI 1988, c P-16	Decision to grant or revoke a power of attorney for property.	“legal incapacity” means mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney and “legal capacity” has a corresponding meaning.

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>PRINCE EDWARD ISLAND</b>	<i>Mental Health Act</i> RSPEI 1988, c M-6.1	Governs criteria for admission, detention, custody in psychiatric facility.	“capable” or “incapable” means mentally capable or incapable of making a decision to give or refuse consent to treatment.
<b>PRINCE EDWARD ISLAND</b>	<i>Consent to Treatment and Health Care Directives Act</i> , RSPEI 1988, c C-17.2	Governs consent to health care treatment and making of health care directives.	<p>“capable” means mentally capable, in accordance with section 7, of making a decision, and “capacity” is used as the corresponding noun indicating the state of being capable.</p> <p>S 7: . . .a patient is capable with respect to treatment if the patient is, in the health practitioner’s opinion, able (a) to understand the information that is relevant to making a decision concerning the treatment; (b) to understand that the information applies to his or her particular situation; (c) to understand that the patient has the right to make a decision; and (d) to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.</p>

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>PRINCE EDWARD ISLAND</b>	<i>Statute of Limitations</i> , RSPEI 1988, c S-7	Governs the limitation periods to commence a lawsuit and the “tolling” or suspension of the limitation period if a person is under a “disability”.	s.1 “disability” means disability arising from minority or disability unsoundness of mind.  No definition of “capacity” or “incapable”.
<b>QUEBEC</b>	Civil Code of Quebec, CCQ-1991, art. 2166-2174	Governs the appointment of a protection mandate which can apply to both property and protection of the person. The mandate must be homologated by the court, which must then have evidence that the mandator has become incapable.	No definition of “capacity”  2166: The performance of the mandate is conditional upon the occurrence of the incapacity. . .
<b>QUEBEC</b>	<i>An Act respecting health services and social services</i> , CQLR, c S-4.2	Governs consent in health care context as well as accessibility to health and social services.	No definition of “capacity”
<b>QUEBEC</b>	<i>An Act respecting the protection of persons whose mental state presents a danger to themselves or to others</i> , CQLR, c P-38.001	Governs the admission, retention, custody, assessment in a psychiatric facility.	No definition of “capacity”



PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>SASKATCHEWAN</b>	<i>Powers of Attorney Act</i> , 2002, SS 2002, c P-20.3	Decisions to grant or revoke enduring powers of attorney for property and personal affairs.	“capacity” means, . . . , the ability: (a) to understand information relevant to making decisions with respect to property and financial affairs or personal affairs, as the case may be; and (b) to appreciate the reasonably foreseeable consequences of making or not making a decision referred to in clause (a)
<b>SASKATCHEWAN</b>	<i>Adult Guardianship and Co-Decision-Making Act</i> , SS 2000, c A-5.3	Governs the appointment of guardians and co-decision-makers with respect to property and personal care decisions.	“capacity” means the ability: (i) to understand information relevant to making a decision; and (ii) to appreciate the reasonably foreseeable consequences of making or not making a decision.
<b>SASKATCHEWAN</b>	<i>The Health Care Directives and Substitute Health Care Decision Makers Act</i> , SS 2015 c H-0.002	Governs the making of health care directives and hierarchy of substitute decision-makers if no directive in place.	“capacity” means the ability: (a) to understand information relevant to a health care decision respecting a proposed treatment; (b) to appreciate the reasonably foreseeable consequences of making or not making a health care decision respecting a proposed treatment; and (c) to communicate a health care decision with respect to a proposed treatment.

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>SASKATCHEWAN</b>	<i>Mental Health Services Act</i> , SS 1984-85-86, c M-13.	Governs the admission, custody, detention, assessment, in psychiatric facilities.	“capacity” means capacity as defined in <i>The Health Care Directives and Substitute Health Care Decision Makers Act</i>
<b>SASKATCHEWAN</b>	<i>The Limitations Act</i> , SS 2004 c L-16.1	Governs the limitation periods to commence a claim and suspends the limitation period for persons with a “mental disability”.	<p>S 8(1) provides that the limitation period is suspended for a “person who, by reason of mental disability, is not competent to manage his or her affairs or estate and is not represented by a personal guardian or property guardian pursuant . . . or a decision-maker pursuant to who: (i) is aware of the claim; and (ii) has the legal capacity to commence the proceeding on behalf of that person or the person’s estate.”</p> <p>“Mental disability” means: (i) an intellectual disability or impairment; or (ii) a mental disorder</p> <p>No definition of “capacity” or “incapable”.</p>

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>YUKON</b>	<i>Enduring Power of Attorney Act</i> , RSY 2002, c 73	Decision on granting and revoking powers of attorney for property.	No definition of “capacity”.
<b>YUKON</b>	<i>Care Consent Act</i> , SY 2003, c 21	Governs consent and substitute consent to health care and admission to care facilities, and advance directives.	<p>6 (2) When deciding whether a person is incapable of giving or refusing consent to care, a care provider must base the decision on whether or not the person demonstrates that they understand (a) the information provided under paragraph 5(e). . . .</p> <p>5(e) the person is given the information a reasonable person would require to understand the proposed care and to make a decision, including information about (i) the reason or reasons why the care is proposed, (ii) the nature of the proposed care, (iii) the risks and benefits of receiving and not receiving the proposed care that a reasonable person would expect to be told about, and (iv) alternative courses of care.</p>

APPENDIX “4” : ASSESSING CAPACITY IN CANADA: CROSS-PROVINCIAL  
EXAMINATION OF CAPACITY LEGISLATION

PROVINCE	LEGISLATION	TYPE OF DECISIONAL CAPACITY	DEFINITION OF “CAPACITY/CAPABLE”?
<b>YUKON</b>	<i>Mental Health Act</i> , RSY 2002, c 150	Governs the admission, detention, custody, assessment in psychiatric facilities.	No definition of “capacity”  “mental disorder” means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behaviour, capacity to recognize reality, or ability to meet the ordinary demands of life;
<b>YUKON</b>	<i>Adult Protection and Decision-Making Act</i> , RSY 2002, c 150	Governs court appointed guardianships, representation agreements and supported-decision making agreements.	No definition of “capacity”  s.82: Subsections 6(2) to (4) of the <i>Care Consent Act</i> apply with the necessary changes to determining the <b>incapability of an adult</b> (a) to give or refuse consent under paragraph 78(1)(c); or (b) to make a decision under subsection 81(1)
<b>YUKON</b>	<i>Limitation of Actions Act</i> , RSY 2002, c 139	Governs limitation periods to commence a claim and when those limitations periods will be “tolled” or extended for individuals under “disability”.	Disability “means disability arising from infancy or a mental disorder”  No definition of “mental disorder”

# APPENDIX “5” - UNDUE INFLUENCE

## CHECKLIST

### UNDUE INFLUENCE: SUMMARY

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

### TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires **coercion**. It is only where the person becomes coerced into doing that which he or she does not desire to do, that it is undue influence.<sup>2</sup> Common law has continued to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”. Persuasion is allowed, but where one person has the ability to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power, undue influence will be found.<sup>3</sup>
- **Burden of Proof:** While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence.<sup>4</sup>
- **Standard of Proof:** *C(R) v McDougall*<sup>5</sup> held that there is a single standard of proof in civil cases— **the balance of probabilities**—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations. One must look at all of the

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

2 *Wingrove v Wingrove* (1885) 11 PD 81 at 82

3 *Dmyterko Estate v. Kulikovsky* (1992) CarswellOnt 543

4 Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.

5 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

surrounding circumstances. Mere influence by itself is insufficient.<sup>6</sup>

- **Indirect Evidence:** In the U.K. case of *Schrader v Schrader*<sup>7</sup>, 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 dependency on 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.
- **Relationship:** Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develop health issues it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.<sup>8</sup>
- **Multiple Planning Documents:** In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her 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.<sup>9</sup>
- **Language:** In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.<sup>10</sup> 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.<sup>11</sup>
- **Indicators of Testamentary Undue Influence:** The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*<sup>12</sup> provided a (non-exhaustive) list of indicators of undue influence:

6 *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38

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

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

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

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

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

12 *Gironda v Gironda*, 2013 CarswellOnt 8612.

- o The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- o The testator is socially isolated;
- o The testator has experienced recent family conflict;
- o The testator has experienced recent bereavement;
- o The testator has made a new Will that is inconsistent with his or her prior Wills; and
- o The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.<sup>13</sup>

In *Tate v. Gueguegirre*<sup>14</sup> the Divisional Court noted that the following constituted “significant evidence suggesting that [a] Will was a product of undue influence”:

- o Increasing isolation of the testator, including a move from his home to a new city;
- o The testator’s dependence on a beneficiary;
- o Substantial pre-death transfers of wealth from the testator to the beneficiary;
- o 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;
- o The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- o The beneficiary conveyed the instructions to the lawyer;
- o 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;
- o There were documented statements that the testator was afraid of the respondent.<sup>15</sup>

### **INTERPLAY WITH CAPACITY AND SUSPICIOUS CIRCUMSTANCES**

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

<sup>13</sup> *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

<sup>14</sup> 2015 ONSC 844 (Div. Ct.)

<sup>15</sup> *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.

between capacity, undue influence and suspicious circumstances.<sup>16</sup> Evidence of undue influence may even rebut the presumption of capacity that would usually apply.<sup>17</sup>

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

Examples of suspicious circumstances include:

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

## **INTER VIVOS GIFTS: UNDUE INFLUENCE**

- **Distinct from Testamentary Undue Influence:** Testamentary undue influence arose from

16 See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman’s will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence. In *Leger v Poirier*, [1944] SCR 152 the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a “disposing mind and memory” without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

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

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

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



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

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

- **Actual Undue Influence:** Has been described as “cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . .”<sup>20</sup> Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.
- **Presumed Undue Influence:** This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or “special” relationships from being abused.<sup>21</sup> These relationships are determined by a “smell test”: does the potential for domination inhere in the relationship itself?

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

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

The presumption of undue influence can be rebutted by:

- o No actual influence was used in the particular transaction or the lack of opportunity to influence the donor;
- o The donor had independent legal advice or the opportunity to obtain independent legal advice;
- o The donor had the ability to resist any such influence;

<sup>20</sup> *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181

<sup>21</sup> *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

- o The donor knew and appreciated what she was doing; or
- o There was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

## ***LAWYERS’ CHECKLIST***

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

### ***Checklist***

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client’s family?
- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- If the client is isolated, does he/she live with one particular individual?
- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was

the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.
- Have numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependent on another? Is the client vulnerable?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

### ***Involvement of Professionals***

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

- Are there professionals involved in the client’s life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

### ***Substantive Inquiries***

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

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

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

- Interview the client alone;
- Obtain comprehensive information from the client, which may include information such as:
  - i. Intent regarding testamentary disposition/reason for appointing a particular attorney/ to write or re-write any planning documents;
  - ii. Any previous planning documents and their contents, copies of them.
- Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability. Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- Address recent health changes and determine whether the client have any physical impairment (hearing, sight, mobility, limitations)?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

***Practical Tips for Drafting Lawyers - Checklist***

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

- Where a person appears to be overly involved in the testator’s rapport with the law office, it may be worth asking a few questions and making inquiries as to that person’s relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;<sup>22</sup> and
- Be mindful of the *Rules of Professional Conduct*<sup>23</sup> which are applicable in the lawyer’s jurisdiction.

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

\* For other related resources, see WEL “Publications, Website”: [www.whaleystatelitigation.com](http://www.whaleystatelitigation.com)  
23 *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>

# APPENDIX “6” - GUARDIANSHIP CHECKLIST:

## PERSONAL CARE

### ***THE DUTIES AND POWERS OF A GUARDIAN OF THE PERSON/ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE (“POAPC”)***

The powers and duties of a guardian/attorney of the person are fully set out in the *Substitute Decisions Act*, 1992 <sup>1</sup>(the “**SDA**”) and the *Health Care Consent Act*, 1996 <sup>2</sup> (the “**HCCA**”).

The essential role of an attorney/guardian for the person (personal care) is to act as a substitute decision maker. The attorney/guardian makes decisions in respect of an incapable person and makes personal care decisions when necessary.

Personal care decisions pursuant to the applicable statutes and legislation may include decisions about where to live, what to eat, safety, security, clothing, personal hygiene, healthcare, and treatment decisions.

Not every incapable person has, or needs, a guardian/attorney of the person.

The person under disability may have already appointed an attorney for personal care or may be content to have the provisions of the *HCCA* govern if necessary.

A guardian of the person can only be appointed by the court. The court will not appoint a guardian if there is an alternative that is less restrictive of the person’s decision making rights and does not require the court to declare the person incapable, or if there is a valid Power of Attorney for Personal Care appointing an Attorney. Therefore, it is only in exceptional circumstances that an incapable person needs or will get a guardian.

A guardian of the person/attorney under POAPC may obtain the following powers as a result of an appointment or resulting from an application for guardianship or otherwise from a court order or judgment:

- The right to exercise custodial power over the incapable person, determine his or her living

<sup>1</sup> *The Substitute Decisions Act*, 1992 - <http://canlii.ca/t/2tq>

<sup>2</sup> *The Health Care Consent Act*, 1996 - <http://canlii.ca/t/2wh>

arrangements and provide for his or her shelter and safety;

- The right to instruct a lawyer, settle claims and commence and settle proceedings on the incapable person’s behalf, in certain circumstances;
- The right to have the same access to personal information, including health information and records, that the incapable person could have access to if capable, and the right to consent to the release of that information to another person, with some exceptions;
- The right to make decisions about the incapable person’s healthcare, nutrition and hygiene;
- The right to make decisions about the incapable person’s employment, education, training, clothing and recreation and any social services provided to the person;
- The right to apprehend the person, with the assistance of a police officer, by entering specified premises at specified times.

### **LEGAL RESPONSIBILITIES OF A GUARDIAN OF THE PERSON/ATTORNEY UNDER POAPC**

A guardian of the person/Attorney must exercise his or her duties and powers diligently, and in good faith. Where a decision is made on behalf of an incapable person, that decision must be made solely for the benefit of the incapable person.

#### **A Guardian/Attorney under a POAPC MUST...**

- Be aware that an individual of 16 years of age is capable of giving or refusing consent to his/her own personal care
- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the “SDA”) and the *Health Care Consent Act, 1996*, (the “HCCA”)
- Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions to be made on the grantor’s behalf
- Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid
- Be aware that an attorney cannot be appointed as an attorney for personal care if, the



- attorney is providing health care, residential, social, training or support services to the grantor, for compensation, unless the attorney is a spouse, partner or relative of the grantor
- Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
    - o Is the power to be exercised solely or jointly?
    - o Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?
  - Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
    - o Does the grantor have the ability to understand and appreciate the role of the attorney and, in particular, the risks associated with the appointment?
    - o Does the grantor have capacity to give instructions for decisions to be made as to personal care?
    - o Is the grantor aware of his/her power to revoke the Power of Attorney?
    - o Notably, the grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care.
  - Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
  - Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
  - Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
  - Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document
    - o The *HCCA* applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions

- o The *HCCA* prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
  - o What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?
- Be aware that special provisions that exist in the *SDA* and the *HCCA* addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor’s care and treatment
- Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the *SDA* and the *HCCA*
- Arrange for a capacity assessment at the request of the grantor, except where there has been an assessment performed in the six months immediately previous
- Be aware of the statutory requirements concerning resignation
  - o Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
  - o Notify persons previously being dealt with on the grantor’s behalf
- Be aware that a Power of Attorney for personal care terminates on the death of the grantor
- Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor’s well-being and personal care
- Explain to the grantor the attorney’s powers and duties, and encourage the grantor’s participation in decisions
- Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor
- Keep records of all decisions made on the grantor’s behalf
- Facilitate contact between the grantor, relatives and friends

- Consult with relatives, friends and other attorneys on behalf of the grantor
- Facilitate the grantor's independence
- Make decisions which are the least restrictive and intrusive to the grantor
- Refrain from using or permitting the use of confinement, monitoring devices, physical restraint by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another
- Refrain from using or permitting the use of electric shock treatment unless consent is obtained in accordance with the *HCCA*
- Maintain comprehensive records
  - o A list of all decisions made regarding health care, safety and shelter
  - o Keep all medical reports or documents
  - o Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor
- Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required
- Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority
- Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records

## **GUIDING PRINCIPLES**

In making a decision for an incapable person, an attorney/guardian of the person must follow these principles:

If the person/attorney under a POAPC knows of a wish the person expressed when capable, and the wish applies to the circumstances, the guardian must make the decision in accordance with the wish.

The wish can be in writing, such as in a “living will”, but it does not have to be.

If the guardian of the person/attorney under a POAPC does not know of any wish, or if it is impossible to comply with the wish, the guardian must act in the incapable person’s best interests. In doing so, the guardian must consider:

- The values and beliefs the guardian knows the person held when capable and believes the person would still act on if capable
- The person’s current wishes (if they can be ascertained)
- Whether the decision is likely to improve the person’s situation, prevent the person’s situation from deteriorating or reduce the extent to which, or the rate at which, the person’s situation is deteriorating. The person’s situation could include his or her condition and well-being (where a treatment decision is being made) or his or her quality of life (where a placement decision or other personal care decision is being made)
- Whether the incapable person’s situation is likely to improve, remain the same or deteriorate if the guardian does not choose the course of action under consideration
- Whether the benefit to the incapable person from the proposed course of action outweighs the risk of harm to him or her
- Whether there is a more desirable alternative to the course of action under consideration (for example, a less restrictive or intrusive course of treatment, or a less restrictive option than admission to a long-term care facility)

A guardian of the person/attorney under a POAPC is entitled to receive the information relating to the incapable person that is necessary for the guardian to make a decision regarding treatment or admission to a nursing home. This may include medical reports, hospital records and reports and records from a Community Care Access Center.

### ***ASSISTANCE FROM THE CONSENT AND CAPACITY BOARD (THE “CCB”)***

Sometimes an attorney/guardian may find it difficult to interpret a wish, or may believe that if the incapable person were capable at the present time, and asked to make the decision, he or she would now make a decision contrary to the wish.

If the decision is about treatment or admission to a nursing home, the guardian may ask the Consent and Capacity Board to assist him or her in interpreting the wish or deciding whether the attorney/guardian may depart from the wish.

A guardian of the person/attorney under a POAPC who wants to ask the Consent and Capacity Board for assistance may wish to consult with a lawyer before doing so.

### ***ASSISTANCE FROM THE COURT – APPLICATION FOR ADVICE AND DIRECTIONS***

A guardian of the person/attorney under a POAPC can also ask the court for directions on any question arising in an attorneyship/guardianship. This involves a formal court procedure, and the attorney/guardian may want to consult with a lawyer for assistance in doing so.

### ***RECORDS TO BE KEPT BY AN ATTORNEY/GUARDIAN OF THE PERSON***

A guardian of the person/attorney under a POAPC should always keep a notarized copy of the court order or the Power of Attorney document or the court order appointing him or her.

The records that a guardian of the person/attorney under a POAPC must keep include:

- A list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date
- A copy of medical reports or other documents, if any, relating to each decision
- The names of any persons consulted, including the incapable person, in respect of each decision and the date
- A description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed
- A description of the incapable person's current wishes, if these can be ascertained, and if they are relevant to the decision
- For each decision taken, the guardian's opinion on each of the guiding principles listed above

### ***MAINTAINING CONFIDENTIALITY***

A guardian of the person/attorney under a POAPC is not allowed to disclose any information contained in his or her records unless required to do so in order to make decisions on the incapable person's behalf or otherwise fulfill the attorney's/guardian's duties, or if ordered to do so by a court.

A guardian of the person/attorney under a POAPC must produce copies of his or her records upon request to:

- The incapable person
- The incapable person’s guardian under a continuing power of attorney for property or guardian of property
- The Public Guardian and Trustee

## **CONCLUDING COMMENTS**

A guardian of the person/attorney under a POAPC is entrusted by the court with the important responsibility of making decisions for an incapable person about shelter, diet, clothing, safety, hygiene and health care, including treatment. This responsibility, and the powers that come with it, are always subject to limits placed on them by the court.

## **COMPENSATION FOR THE GUARDIAN OF THE PERSON/ATTORNEY UNDER A POAPC**

The *SDA* does not regulate or prescribe compensation for a guardian(s) of the person, though the court has been known to make such awards on application. The guardianship of the person involves ethical implications concerning the payment of a person on carrying out life and death decisions being made on behalf of an individual with a disability, and therefore compensation claimed remains in the jurisdiction and discretion of the court. The case of *Re Brown* was a case where a trust company was appointed as the guardian of property, and of the person. In the course of passing its accounts, an objection was raised by the Public Guardian and Trustee to a claim for personal care services compensation. The court made an award based on the following observations:

- a) there is no statutory prohibition against such compensation;
- b) the fact that the legislature has not passed a statute, or regulation providing for the payment of compensation to a guardian of the person, or fixed in the manner in which it is to be calculated, does not prevent the court from awarding it and fixing it;
- c) Section 32(12) of the *SDA* does not oust the application of Section 61(1) of the *Trustee Act*, as the basis for awarding compensation to a guardian. However, the use of the word “estate” in the latter section, implies a guardian of a property rather than a guardian of the person;
- d) The court does have jurisdiction to award compensation for legitimate services rendered by a committee of a person to an incapable person so found, provided there is sufficient evidence of the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation;

- e) The court routinely deals with claims for compensation for work done or services rendered in a variety of situations, and there is no reason, in the absence of any statutory prohibition, for rejecting such a claim, simply because it is made by a committee of the person;
- f) Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property; in the latter case, traditionally, the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;
- g) The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;
- h) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided; the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question; and
- i) There must be some evidentiary foundation to support the claim for compensation.

In the more recent decision of *Childs v Childs* the superior court considered a daughter's claim for compensation as a result of the personal care she provided for her incapable mother in the attorney and guardianship context. While the Court held that a child should not be paid to care for an ailing mother, the Court drew a distinction between care that is provided when a child acts as a primary care attendant and the services a child provides in managing an incapable person's personal care. The Court awarded compensation to the guardian for personal care on the basis that the guardian would have to manage the services her mother received and the care givers provided to her mother.<sup>3</sup>

The Court in *Childs* supported the principle that compensation may be awarded for personal care where the services performed were a benefit to the incapable person and the amounts claimed are demonstrably reasonable. The reasonableness of the amount of compensation awarded to a Guardian of the person must be assessed in the context of the specific financial circumstances of the incapable person. The amount awarded must not only be reasonable in relation to the services performed, it must be proportional to the means of the incapable person. Its payment should not pose a risk to the overall financial affairs of the incapable person.<sup>4</sup>

<sup>3</sup> *Childs v Childs*, 2015 ONSC 4036 at paras. 33, 45, 46. ["Childs"]

<sup>4</sup> *Childs* at paras. 31.

# APPENDIX “7” - GUARDIANSHIP CHECKLIST:

## PROPERTY

*The Substitute Decisions Act*<sup>1</sup> (the “SDA”) is the statute/legislation governing the role, powers, duties and obligations of a guardian of property whether by court appointment or by statutory appointment. While an attorney for property under a continuing power of attorney for property has similar duties and obligations, this checklist focuses solely on guardians.

### **PROPERTY**

- Property as it is used in the substitute decision-making context has a broad definition. It includes all of the real property, monies, investments, income, proceeds of costs awards/ other pecuniary entitlements, GICs, RRSPs, RRIFs, vehicles, personal effects and property of the grantor, including valuables such as, paintings, vehicles, boats, jewellery, and personal and household effects.

### **POWERS**

- A guardian for property can do anything on the incapable person’s behalf, except make a Will, or other testamentary disposition. In other words, the guardian may make financial arrangements, pay bills, cash cheques, direct payments, sell property and make a multitude of other financial decisions for the incapable person.
- The guardian’s powers are also subject to the SDA and to any conditions imposed by a court.

### **MANAGEMENT PLAN**

- A guardian must act in accordance with the management plan established for the property of the incapable person. A management plan includes information about the assets and liabilities of the incapable person, including any land, general household items and vehicles, valuables, savings and bank accounts, securities and investments, the incapable person’s expenses, any legal proceedings that the incapable person is involved in, etc.

<sup>1</sup> 1992 S.O. 1992, c.30. (“SDA”)



- The management plan also requires the guardian of property to outline his or her proposed plans to deal with the assets (keep in current form, sell, convert, close accounts, purchase, pay off debt, etc.) and the reasons for those plans.

## **DUTIES AND OBLIGATIONS**

- A guardian of property must act in accordance with the management plan.
- A guardian of property must explain to the incapable person what the guardian's powers and duties are.
- The guardian is **always** responsible for keeping detailed records and accounts.
- A guardian must encourage the incapable person to participate to the best of his or her abilities in the property decisions.
- The guardian must seek to foster regular contact between the incapable person and supportive family members and friends of the incapable person and must consult from time to time with those supportive family members and friends as well as people who provide personal care to the incapable person.
- The guardian should be careful to make arrangements which are in the best interests of the incapable person. The guardian must take care of the incapable person, in all respects, concerning the property and financial management and investment of his or her affairs. The guardian must take steps to protect, manage and invest the incapable person's property prudently, maximizing the benefit to the incapable person.
- A guardian is a fiduciary, placed in a position of trust, and held accountable to a high standard of ethics and conduct. A guardian's powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith for the incapable person's benefit.
- A guardian must manage property maintaining ownership with the incapable person. Though the guardian may have signing authority over the incapable person's bank account, financial instruments and other financial affairs, the property should not be put into an account in joint names, or under the guardian's name alone.
- The guardian must also ensure that all relevant persons having financial dealings with the incapable person know that the guardian is managing his/her property.
- In addition, the guardian must consider the personal comfort, best interests, well-being of

the incapable person in determining whether any financial decision or transaction is for the incapable person’s benefit. The view should always be to maximize the quality of life of the incapable person, and in that regard, liaise with the attorneys for personal care where appropriate and proper to do so. The guardian of property therefore must manage the property of the grantor, commensurate with decisions made about the incapable person’s personal care.

- A guardian who does not receive compensation must exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs
- A guardian who does receive compensation must exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.
- It is intended that the guardian act honestly, reasonably, and diligently, in all circumstances which is the guardian’s protection from any possible liability which may ensue.

### **REQUIRED EXPENDITURES AND GUIDING PRINCIPLES**

A guardian of property *shall* make the following expenditures from the incapable person’s property:

- Expenditures that are reasonably necessary for the person’s support, education and care;
- Expenditures that are reasonably necessary for the support, education and care of the person’s dependants;
- Expenditures that are necessary to satisfy the person’s other legal obligations.<sup>2</sup>

In making a decision for an incapable person, a guardian of property must follow these guiding principles:

- The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations shall be taken into account;
- Expenditures on the support, education and care of the person’s dependants may be made only if the property is and will remain sufficient to provide for the incapable person’s own support, education and care; and
- Expenditures that are necessary to satisfy the person’s other legal obligations may only be

<sup>2</sup> SDA, *supra* note 1, s. 37.

made if the property will remain sufficient to provide for the incapable person's (and their dependants') support, education and care.<sup>3</sup>

- In respect of gifts and loans, and the testamentary intentions of the incapable person, the guardian is meant to make decisions commensurate with the capable wishes of the incapable person.
- In respect of professional assistance, the guardian can seek assistance from professionals including from tax and accounting advisors, as well as advice from a lawyer. It is essential to seek professional assistance when appropriate to do so, because the guardian for property is liable for damages resulting from a breach of the guardian's duty. The guardian should seek legal advice if any of their duties or obligations are unclear or not fully understood.

## **ACCOUNTS AND RECORDS**

The legal responsibilities of a guardian of property with respect to the form of accounts and records are set out in Regulation 100/96 of the SDA. A guardian of property must:

- Make a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;
- Keep an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;
- Keep an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;
- Keep an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;
- Keep an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;
- Keep a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;

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3 SDA, *supra* note 1, s. 37.

- Keep an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;
- Keep an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation; and
- Keep a list of the assets, and value of each, used to calculate the attorney’s or guardian’s care and management fee, if any.
- In addition to proper accounts, a guardian of property must also keep a copy of the certificate of statutory guardianship or court order constituting the authority of the guardian, a copy of the management plan, if any, and a copy of any court orders relating to the guardian’s authority or to the management of the incapable person’s property.

**The guardian of property must retain the accounts and records until he or she ceases to have authority and one of the following occurs:**

- The guardian of property obtains a release of liability from a person who has the authority to give the release. This applies with necessary modifications, to former guardians.
- Another person has acquired the authority to manage the incapable person’s property and the guardian delivers the accounts or records to that person.
- The incapable person has died and the guardian delivers the accounts or records to the incapable person’s personal representative.
- A guardian of property is discharged by the court on a passing of accounts under section 42 of the SDA and either the time for appealing the decision relating to the discharge has expired with no appeal being taken or an appeal from the decision relating to the discharge is finally disposed of and the guardian is discharged on the appeal.
- A court order is obtained directing the guardian to destroy or otherwise dispose of the accounts or records.

### **CONFIDENTIALITY & DISCLOSURE OF ACCOUNTS**

A guardian of property is not permitted to disclose any information contained in the accounts and records of the incapable person, unless directed or required to do so, in order to make transactions on the incapable person’s or grantor’s behalf, or otherwise fulfill his/her duties, or ordered to do so by the court. However, a guardian of property must produce copies of the accounts and records upon request to the following people:

- The incapable person;
- The incapable person's attorney for personal care or guardian of the person;
- If the Public Guardian and Trustee is the guardian of property, the incapable person's spouse, except a spouse from whom the incapable person is living separate and apart within the meaning of the *Divorce Act* (Canada), or the incapable person's partner, child, parent, brother or sister; and
- The Public Guardian and Trustee, if he or she is not the incapable person's guardian of property or guardian of the person.

## **COMPENSATION**

Guardian of property compensation is provided for under the SDA and is subject to court scrutiny:

- A guardian of property may take annual compensation from the property in accordance with the prescribed fee scale.
- The compensation may be taken monthly, quarterly or annually.
- The prescribed fee consists of:
  - (a) 3 per cent on capital and income receipts;
  - (b) 3 per cent on capital and income disbursements; and
  - (c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.
- The prescribed amount per page to be paid for photocopies is 50 cents.
- The guardian may take an amount of compensation greater than the prescribed fee scale allows,
  - (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or
  - (b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.<sup>4</sup>

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<sup>4</sup> SDA, *supra* note 1, ss. 40 (1), 40(2), 40(3)

## **APPLICATION FOR ADVICE, OPINION, AND DIRECTION OF THE COURT**

A guardian of property may from time to time have questions about the management of the property that he/she deems appropriate for resolution and direction by a court. A guardian may apply to the court for the opinion, direction, and advice of the court, and may consult a lawyer for assistance in doing so.

## **PASSING OF ACCOUNTS**

A guardian of property may be required, during the course of their guardianship, to pass the records and accounts for court review, which application is governed by the *Rules of Civil Procedure* (Rules 74.17-74.18). Please note that the following Rules reflect the amendments as of January 1, 2016:

### **FORM OF ACCOUNTS**

- Rule 74.17(1) states that guardians shall keep accurate records of the assets and transactions, and accounts filed with the court *shall* include,
  - (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
  - (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
  - (c) an account of all money received, but excluding investment transactions recorded under clause (e);
  - (d) an account of all money disbursed, including payments for the guardian’s compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
  - (e) where the guardian has made investments, an account setting out,
    - (i) all money paid out to purchase investments,
    - (ii) all money received by way of repayments or realization on the investments in whole or in part, and
    - (iii) the balance of all the investments in the estate at the closing date of the accounts;

- (f) a statement of all the assets of the incapable person that are unrealized at the closing date of the accounts;
- (g) a statement of all money and investments of the incapable person at the closing date of the accounts;
- (h) a statement of all the liabilities of the incapable person, contingent or otherwise, at the closing date of the accounts;
- (i) a statement of the compensation claimed by the guardian and, where the statement of compensation includes a management fee based on the value of the assets of the incapable person, a statement setting out the method of determining the value of the assets; and
- (j) such other statements and information as the court requires.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

#### **MATERIAL TO BE FILED**

- Rule 74.18 (1) deals with the material to be filed on an application to pass accounts. The guardian must file:
  - (a) The accounts for the relevant period verified by affidavit of the guardian. This is **Form 74.43**;
  - (b) A copy of the order appointing the guardian;
  - (c) A copy of the latest judgment, if any, of the court relating to the passing of accounts.

#### **NOTICE OF APPLICATION**

- Rule 74.18(2) states that on receiving the material referred to above, the court must issue a notice of the application to pass accounts which is **Form 74.44**.

**SERVICE**

- Rule 74.18 (3) states that the person seeking to application to pass the accounts (the applicant) must serve the notice of application and a copy of a draft of the judgment sought on every person who has a contingent or vested interest in the estate (or presumably the accounts of the incapable person in a guardianship passing) by regular letter mail.
- Rule 74.18 (3.1) states that where the Public Guardian and Trustee or the Children’s Lawyer represents a person who has a contingent or vested interest in the estate (or accounts of the incapable person), the Public Guardian and Trustee or the Children’s Lawyer must also be served with the documents referred to in subrules (1) and (3).
- Rule 74.18 (3.2) states that where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate [or presumably the accounts of an incapable person], the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).
- Rule 74.18(4) states that where the person is served in Ontario, the documents shall be served at least **60 days** before the hearing date specified in the notice of application.
- Rule 74.18 (5) states that where the person is served outside Ontario, the documents shall be served at least **75 days** before the hearing date specified in the notice of application.

**PERSON UNDER DISABILITY OR UNKNOWN**

- While likely more relevant to a passing of accounts application by an estate trustee (rather than a guardian) rule 74.18 (6) states if a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,
  - (a) neither the Public Guardian and Trustee nor the Children’s Lawyer is authorized under any Act to represent the person; and
  - (b) there is no litigation guardian to act for the person on the passing of the accounts.

**NOTICE OF OBJECTION TO ACCOUNTS**

- Rule 74.18 (7) states that a person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of



service, a notice of objection to accounts, which is Form 74.45.

### **REQUEST FOR FURTHER NOTICE**

- Rule 74.18 (8) states that a person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts which is **Form 74.45.1**.
- Rule 74.18 (8.1) states that unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,
  - (a) receive notice of any further step in the application;
  - (b) receive any further document in the application;
  - (c) file material relating to costs under subrule (8.6), (11) or (11.2); and
  - (d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11)

### **NO RESPONSE**

- Rule 74.18(8.2) states that unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,
  - (a) receive notice of any further step in the application;
  - (b) receive any further document in the application;
  - (c) file material on the application; or
  - (d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

### **RESPONSE TO APPLICATION – PGT OR CHILDREN’S LAWYER**

- Rule 74.18 (8.3) states that if the Public Guardian and Trustee or the Children’s Lawyer

is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children’s Lawyer, shall, at least 30 days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

- (a) a notice of objection to accounts (Form 74.45);
- (b) a request for further notice in passing of accounts (Form 74.45.1);
- (c) a notice of no objection to accounts (Form 74.46); or
- (d) a notice of non-participation in passing of accounts (Form 74.46.1).

#### **WITHDRAWAL OF OBJECTION**

- Rule 74.18 (8.4) states that a person who wishes to withdraw a notice of objection to accounts shall, at least **15 days** before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48).

#### **WHEN HEARING NOT REQUIRED**

- Rule 74.18 (8.5) states that an applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,
  - (a) no notices of objection to accounts are filed; or
  - (b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule.

#### **REQUEST FOR COSTS**

- Rule 74.18 (8.6) states that subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least 10 days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49 or 74.49.1) and file the request with proof of service.

#### **JUDGEMENT ON PASSING GRANTED WITHOUT A HEARING**

- Rule 74.18 (9) states that the court may grant a judgment on passing accounts without a hearing if, at least five days before the hearing date of the application, the applicant files with the court,
  - (a) record containing,

- (i) an affidavit of service of documents served under subrule (3), (3.1) or (3.2),
  - (ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,
  - (iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,
  - (iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,
    - (iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and
  - (v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record;
- (b) a draft of the judgment sought, in duplicate; and
- (c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be.

## **COSTS**

- Rule 78.14 (10) states that where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4).

## **REQUEST FOR INCREASED COSTS**

- Rule 74.18 (11) states that where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),
  - (a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

(b) a costs outline (Form 57B).

- Rule 74.18 (11.1) states that unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least 15 days before the hearing date of the application:
  1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.
  2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).
  3. The Public Guardian and Trustee or Children’s Lawyer, as the case may be, if the Public Guardian and Trustee or the Children’s Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.
- Rule 74.18 (11.2) states that any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 10 days before the hearing date of the application.
- Rule 74.18 (11.3) states that where a request for increased costs is served under subrule (11), the person making the request shall, at least five days before the hearing date of the application, file with the court a supplementary record containing,
  - (a) the documents served under that subrule, together with an affidavit of service of those documents; and
  - (b) an affidavit containing,
    - i. a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and
    - ii. the factors that contributed to the increased costs.

**JUDGEMENT ON INCREASED COSTS GRANTED WITHOUT HEARING**

- Rule 74.18 (11.4) states that the court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies.

**CONTESTED PASSING OF ACCOUNTS (HEARING)**

- Rule 74.18 (11.5) states that if one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least 10 days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,
  - (a) a consolidation of all the remaining notices of objection to accounts; and
  - (b) a reply to notice of objection to accounts (Form 74.49.4).
- Rule 74.18 (11.6) states that the documents referred to in subrule (11.5) shall be served on,
  - (a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;
  - (b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and
  - (c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.
- Rule 74.18 (11.7) states that if the application to pass accounts proceeds to a hearing, the applicant shall, at least five days before the hearing date, file with the court a record containing,
  - (a) the application to pass accounts;
  - (b) the documents referred to in subrule (11.5);
  - (c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;
  - (d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);
  - (e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;
  - (f) any requests for further notice in passing of accounts (Form 74.45.1);

- (g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);
  - (h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and
  - (i) a draft order for directions or of the judgment sought, as the case may be.
- Rule 74.18 (11.8) states that if the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order.
  - Rule 74.18 (11.9) states that if the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,
    - (a) the applicant shall indicate that it is the applicant’s draft order; and
    - (b) any person referred to in clause (11.6) (a) may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing.
  - Rule 74.18 (12) states that no objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise.
  - Rule 74.18 (13) states that at the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts.

***TRIAL MAY BE DIRECTED***

- Rule 74.18(13.1) states that on the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,
  - (a) respecting the issues to be tried and each party’s position on each issue;
  - (b) respecting the timing and scope of any applicable disclosure;
  - (c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness’ testimony; and
  - (d) respecting the procedure to be followed at the trial, including methods of adducing evidence.

***DIRECTIONS REGARDING MEDIATION***

- Rule 74.18 (13.2) states that in making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,
  - (a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or
  - (b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4).

***FORM OF JUDGMENT***

- Rule 74.18 (14) states that the judgment on a passing of accounts shall be in Form 74.50 or 74.51.

## APPENDIX “8” - CHECKLIST: GROUNDS TO ATTACK AN INTER VIVOS GIFT

GROUND	CRITERIA
Decisional Capacity	<p>In order to be found to have the requisite decisional capacity to make a gift, a donor requires the following:</p> <ol style="list-style-type: none"> <li>1. The ability to understand the nature of the gift; and</li> <li>2. The ability to understand the specific effect of the gift in the circumstances.</li> </ol> <p>The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the factors for determining requisite testamentary capacity arguably apply.</p>
Undue Influence	<p><b>Direct or Actual undue influence:</b></p> <ul style="list-style-type: none"> <li>• Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . .”<sup>1</sup></li> <li>• Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.<sup>2</sup></li> </ul>

<sup>1</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.) at p. 181.

<sup>2</sup> *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.Div.); *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.



GROUND	CRITERIA
Undue Influence (cont.)	<p><b>Presumed undue influence</b> or undue influence by relationship:</p> <ul style="list-style-type: none"> <li>• Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.<sup>3</sup></li> <li>• Does the “potential for domination inhere in the relationship itself”?<sup>4</sup></li> <li>• Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization.”<sup>5</sup></li> <li>• A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.<sup>6</sup></li> </ul>
Resulting Trust	<ul style="list-style-type: none"> <li>• Where there is a gratuitous transfer between a parent and an independent adult child there is a presumption of resulting trust.<sup>7</sup></li> <li>• The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient.</li> <li>• The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.<sup>8</sup></li> </ul>

3 *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14.

4 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

5 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42.

6 *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102

7 *Pecore v. Pecore* 2007 SCC 17.

8 *Bakken Estate v. Bakken* 2014 BCSC 1540 at para. 63.

GROUND	CRITERIA
<i>Non Est Factum</i>	<ul style="list-style-type: none"> <li>• <i>Non est factum</i> is the plea that a deed or other formal document is declared void for want of intention:  [W]here a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of non est factum on the basis that his mind at the time of the execution of the document did not follow his hand.<sup>9</sup></li> <li>• <i>Non est factum</i> places the legal onus on the person attacking the transfer or gift to prove “no intention”.</li> </ul>
Unconscionable Bargain	<p>A gift or other voluntary wealth transfer is prima facie unconscionable where:</p> <ol style="list-style-type: none"> <li>1. The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker’s own interests; and</li> <li>2. The transaction affects a substantial unfairness or disadvantage on the maker.<sup>10</sup></li> </ol>
Unconscionable Procurement	<ol style="list-style-type: none"> <li>1. A significant benefit obtained by one person from another; and</li> <li>2. An active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.<sup>11</sup></li> </ol>

9 *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577.

10 *Morrison v. Coast Finance Ltd.* 1965 CarswellBC 140 (C.A.).

11 John Poyser, *Capacity and Undue Influence*, 2<sup>nd</sup> ed (Toronto: Thomson Reuters Canada, 2019) at p.628.

## APPENDIX “9” - PRESUMPTION OF RESULTING TRUST CHECKLIST

- A **resulting trust** arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he/she can establish it was given as a gift.
- In the case of a gratuitous transfer, a **rebuttable presumption of resulting trust** applies when the transfer is challenged. A Court must commence the inquiry with the presumption, weigh all of the evidence and attempt to ascertain the actual intention of the transferor. The presumption of resulting trust determines the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities.<sup>1</sup>
- The presumption of resulting trust applies to gratuitous transfers between parents and adult children. The **presumption of advancement** is still applicable between parents and minor children.
- A gift is a gratuitous transfer made without consideration. The donor must have *intended* to make a gift, the subject matter of the gift must be delivered to the donee, and the donee must accept the gift.<sup>2</sup> Once a gift is given it cannot be retracted. The standard for proving a gift is the usual civil standard of a balance of probabilities. The **intention of the donor** at the time of the transfer is the governing consideration.

### JOINT TENANCY/JOINT ACCOUNTS & RIGHT OF SURVIVORSHIP

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

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

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

3 *Pecore v. Pecore* 2007 SCC 17 at para. 4

- **Right of Survivorship:** When a joint tenant dies, his/her interest in property is extinguished. The last surviving joint tenant takes full ownership of the property.
- **Gift of the Right of Survivorship:** So long as the requirements of a binding gift are met, the owner of property may, during his/her lifetime, make an immediate gift of a joint tenancy including the right of survivorship. The donee of the gift may be holding it for the benefit of the donor while he/she is alive. When gifted *inter vivos*, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies. Donor may gift the right of survivorship but continue to deal freely with property throughout his/her lifetime. When legal title to property is transferred gratuitously and a resulting trust arises, the right of survivorship is held on trust by the transferee unless otherwise established.

## **EVIDENCE OF INTENTION**

- The intention of a person who transfers property gratuitously to another is sometimes difficult to determine, particularly when the transferor is deceased. In *Pecore*, Justice Rothstein set out a non-exhaustive list of factors for a Court to examine:
  - o **Evidence of the deceased’s intention at the time of the transfer:** including, where admissible, evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);
  - o **Bank documents:** The clearer the wording in the bank documents as to the deceased’s intention, the more weight that evidence might attract;
  - o **Control and use of the funds in the account:** The circumstances must be carefully reviewed and considered to determine the weight to be given to this factor since control can be consistent with an intention to retain ownership, yet it is also not inconsistent with an intention to gift the assets in certain circumstances;
  - o **Granting a Power of Attorney:** The court should consider whether a power of attorney is evidence, one way or another, of the deceased’s intention;
  - o **Tax treatment of joint accounts:** This is another circumstance which might shed light on the deceased’s intention as, for example, a transferor may have continued to pay taxes on the income earned in the joint account since they intended the assets to form part of their estate. However, once again the weight to be placed on tax-related evidence in determining a transferor’s intent should be left to the discretion of the trial judge.<sup>4</sup>

<sup>4</sup> *Pecore* at paras. 55-70

- Several cases have also turned on the **testimony of drafting lawyers**,<sup>5</sup> **notary public**,<sup>6</sup> **financial and investment advisors**<sup>7</sup> and **bank tellers**<sup>8</sup> with respect to the deceased's intention at the time a transfer is made or the joint bank account is opened.

## APPLICABILITY

- **Gratuitous Transfer of Assets or Title into Joint Property:** In *Pecore*, the Supreme Court of Canada confirmed that the presumption of resulting trust applies to gratuitous transfers of assets or joint property between parents and adult children. The presumption of advancement still exists, but *Pecore* eliminated it as between parents and adult children.
- **Testamentary Dispositions:** The presumption of resulting trust does not arise with respect to testamentary dispositions since there is clear evidence of intention in the Will or other testamentary document.
- **Beneficiary Designations:** There is conflicting law on whether the presumption of resulting trust applies to beneficiary designations under RRSPs, RRIF or insurance policies for example. Courts in England,<sup>9</sup> Manitoba,<sup>10</sup> British Columbia,<sup>11</sup> Ontario,<sup>12</sup> and Alberta<sup>13</sup> apply the presumption of resulting trust to beneficiary designations. Only one province, Saskatchewan takes the position that the presumption of resulting trust does not apply to beneficiary designations.<sup>14</sup>
- **Transfers of Land:** Some cases have questioned whether the presumption of resulting trust applies to gratuitous transfers of land,<sup>15</sup> although there are several cases and authority that support the view that it does.<sup>16</sup>

5 *Laski v. Laski* 2016 ONCA 337; *Van De Keere Estate Re* 2012 MBCA 109; *Lorintt v Boda* 2014 BCCA 354; *McKendry v. McKendry* 2017 BCCA 48

6 *Fuller v. Harper* 2010 BCCA 421

7 *Foley (Re)* 2015 ONCA 382; *Laski v. Laski* 2016 ONCA 337

8 *Comeau v. Gregoire*, 2007 NSCA 73; *Doucette v. McInnes* 2009 BCCA 393

9 *In Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, (1901), [1902] 1 Ch 282

10 *Dreger (Litigation Guardian of) v. Dreger* [1994] 10 WWR 293

11 *Neufeld v. Neufeld Estate*, 2004 BCSC 25

12 *McConomy-Wood v. McConomy* (2009), 46 ETR (3d) 259

13 *Morrison Re.* 2015 ABQB 769

14 *Nelson et al. v. Little Estate* 2005 SKCA 120

15 *Thorsteinson Estate v. Olson* 2016 SKCA 134 at para. 17, citing *Thorsteinson Estate v. Olson* 2014 SKQB 237 at para. 103

16 *Fuller v. Harper* 2010 BCCA 421

# **APPENDIX “10” - ELDER ABUSE CHECKLIST: CIVIL & CRIMINAL REMEDIES**

## ***TYPES OF FINANCIAL ABUSE***

- misusing or abusing a Power of Attorney document;
- stealing an older adult’s money, pension cheques, or possessions;
- committing fraud, forgery or extortion;
- sharing an older adult’s home without paying a fair share of the expenses;
- unduly pressuring a senior to:
  - o Sell personal property
  - o Invest or take out money
  - o Buy alcohol or drugs
  - o Make or change a will
  - o sign legal documents they do not understand including documents that transfer assets into joint names;
  - o Give money to relatives, caregivers or friends
  - o Engage in paid work to bring in extra money.<sup>1</sup>

## ***INDICATORS OF FINANCIAL ABUSE***

- changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without senior’s permission;
- unexplained or sudden inability to pay bills;

<sup>1</sup> NICE – Tools for Preventing and Intervening in Situations of Financial Abuse, <http://www.nicenet.ca/tools-preventing-and-intervening-in-situations-of-financial-abuse-ontario> [Accessed September 12, 2019]

- unexplained or sudden withdrawal of money from accounts;
- poor living conditions in comparison with the older adult's assets;
- changes in banking patterns due to pressure;
- changes in the older adult's appearance;
- controlling an older adult's spending;
- confusion or lack of knowledge about financial situation and signing of legal documents;
- being forced to sign multiple documents at once;
- being coerced into a situation where a senior is being overworked and underpaid;
- unexplained disappearance of possessions (lost jewellery or silverware);
- changes in a senior's power of attorney;
- necessities of life denied or not provided by an older adult's attorney under a POA (shelter, food, medication, assistive devices)
- being overcharged for services or products by sales people or providers; or
- denying an older adult his/her right to make independent financial decisions.

### ***REASONS WHY AN OLDER ADULT MAY NOT REPORT FINANCIAL ABUSE***

- The older adult feels shame or embarrassment that they have been victimized;
- They are fearful of the perpetrator or have a fear of the police or other authorities;
- They are dependent upon the perpetrator for their physical well-being;
- They want to protect the abuser, especially if they are a family member;
- The older adult may feel that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is their only family member or friend;
- They feel guilty for becoming a victim or they blame themselves;
- A coping mechanism may be to minimize or rationalize away the abuse or they may deny the abuse altogether;

- Some may not even recognize it as abuse; or
- Others may not be able to report even if they have the desire to: they may not have the physical capabilities to report or may be suffering from dementia or lack mental capacity.

## **CIVIL REMEDIES**

In a civil court case the plaintiff (the older adult or victim) must use evidence to prove on a “**balance of probabilities**” that the perpetrator caused the harm (i.e. more likely than not) rather than the higher criminal standard of proving “beyond a reasonable doubt”.

Once it is proven that the perpetrator committed the wrong, the civil court may order one or several remedies, including the following:

- Removing an attorney under a Continuing Power of Attorney for Property;
- Requiring an attorney to “account” for their dealings with property;
- Ordering the repayment of money stolen or taken from the older adult by an attorney or other person;
- Declaring that certain property or assets belong to the older adult or that the perpetrator was only holding the property “in trust” for the older adult;
- Ordering that a transfer of certain property be “set aside” or that is no longer valid;
- Custodial sentence (in some circumstance i.e. breach of trust);
- Ordering that the perpetrator vacate the property if he or she is living with the older adult without their permission or order that the perpetrator pay rent;
- Ordering that the perpetrator pay legal costs and interest.

## **QUASI- CRIMINAL REMEDIES - HABEAS CORPUS APPLICATIONS**

- There have been an increasing number of cases involving the removal of elderly individuals with cognitive disabilities (the “Abductee”) from his or her home by one or more family members (the “Abductors”), who place the Abductee in a location they do not disclose to other members of the family. When family members have insufficient evidence about the Abductee’s incapacity, are not POAs or guardians, do not know where the Abductee is located and if there is a concern for the Abductee’s safety, it may be necessary to make recourse to a extraordinary remedy, namely that of Habeas Corpus under the *Habeas*



*Corpus Act* (“**HCA**”).<sup>2</sup>

- The writ of *habeas corpus ad subjiciendum* (the “Writ”) originates in the common law and is a means of determining the validity of a person’s detention. The writ traditionally applied and is still most prevalent in the criminal law context. Although, it is now used to retrieve individuals from detainment.
- In bringing an application for a Writ, the applicant must provide notice of the Application to the Attorney General 48 hours before making the application.<sup>3</sup>
- Section 1(1) of the HCA sets out when a court may award the Writ.
- In the case of Manon Arun, an incapable elderly man, was picked up by his two daughters who were his Power of Attorney for Personal Care and Property. They informed his wife Juliette (second wife) that they would return him to his home later that evening. However, they failed to do so. Although Juliette contacted the daughters to find out his whereabouts, the daughters refused to provide her with the information and the police offered little assistance because Manon was with his daughters who were his appointed POAs.
- Given that Juliette had not been granted a POA by Manon despite his intention to revoke the POAs and create new POAs in favour of his wife, and no formal assessment of Manon’s capacity had been conducted prior to his abduction, Juliette had very little power under the *Substitute Decisions Act*<sup>4</sup> to have her husband returned on a timely manner.
- Juliette brought an application for the return of her husband under the SDA and the HCA.
- Juliette had evidence that her husband was confined or restrained of his liberty, as she received a phone call from him in which he anxiously expressed that he wanted to come, but was unable to identify his location.
- Furthermore, the following factors added to the justification of bringing an urgent application seeking this extra ordinary remedy:
  - o Juliette had proof that the daughters were preventing the father from accessing his finances for the purpose of meeting his own personal needs,
  - o The daughters had a history of cancelling the father’s doctor appointments,
  - o Manon was suffering from Alzheimer’s and cancer was a legitimate concern that Manon’s health needs were not being properly met,

<sup>2</sup> The *Habeas Corpus Act*, RSO 1990, c H 1 (“HCA”)

<sup>3</sup> HCA, *supra* note 1, s. 1(2)

<sup>4</sup> The *Substitute Decisions Act*, 1992, SO, c 30 (“SDA”).

- o The Police’s unwillingness to get involved in the family dispute.
- The potential success of this remedy was not tested in court, as the daughters returned their father before the return of the application.
- The seriousness of the Habeas Corpus Application and severe consequences for disobeying a Writ may have provided sufficient incentive for the unresponsive Abductors to return the Abductee without a court order.

## **CRIMINAL REMEDIES**

While the *Criminal Code* does not provide for the specific offence of “elder abuse”, or “financial abuse” there are however, in-or-about ten separate offences under which such a perpetrator could be charged. All elements of the charge must be proven “**beyond a reasonable doubt**”:

- Section 331: Theft by a Person Holding a Power of Attorney;
- Section 322: Theft;
- Section 336: Criminal Breach of Trust (Conversion by Trustee);
- Section 366: Forgery;
- Section 346: Extortion;
- Section 386-388: Fraud;
- Section 215: Failure to Provide the Necessaries of Life;
- Section 219: Criminal Negligence.

### Sentencing Considerations:

- Section 718 of the *Criminal Code* references a wide range of aggravating factors considered by the Court in determining appropriate sentencing principles.
- Longer sentences are warranted if the crime was motivated **by age or disability**, and evidence exists that the offender abused a position of trust or authority in relation to the victim

## **QUESTIONS TO ASK WHEN INVESTIGATING FINANCIAL ABUSE <sup>5</sup>**

- Is there evidence of money or property missing or unaccounted for? Does the alleged offender hold a power of attorney for property?
- If the victim is capable, visit the victim and obtain financial particulars (the name of the attorney, name of their bank, contact information at the bank branch, account numbers, Old Age Security and Canada Pension Plan information etc.). Once authorized by the victim, look for alternative sources of information (e.g. family members, friends, lawyer who represented the victim when POA was signed).
- Obtain from the victim a completed consent form for the release of their financial records / bank information. Also obtain a copy of the POA for Property.
- Let the victim know they have a right to revoke the POA (if capable to do so<sup>6</sup>). Suggest that the victim get legal advice about how to do so as soon as possible.
- Contact the financial institutions immediately. Speak to a senior employee of the financial institution (a branch manager, customer service manager etc.) and advise them that you are conducting an investigation into the accounts of the victim. Confirm with them that the information that the victim gave you is accurate.
- Take a formal statement from the victim. Obtain a video statement, audio statement or written statement (be mobile – take a camera to the victim when resources allow. In some cases, a dying declaration may be required. Consult your local Crown Attorney for guidance).
- Take the victim's consent form to their financial institution(s), government offices (OAS, CPP) and as when you will be provided with the pertinent financial records/evidence.
- Continue to investigate as required. Identify other means of obtaining evidence (e.g. production order, search warrant, other judicial orders of suspect's account(s), records from retirement home or long-term care facility, etc.)
- If there is adequate evidence, recommend or lay the appropriate theft charge, (e.g. theft over \$5,000 or theft under \$5,000) citing s.331 and/or other relevant sections of the *Criminal Code* noted above.
- Conduct your investigation and document evidence in a way that enables the Crown to

5 Summarized from the National Initiative for the Care of the Elderly's Officer Investigation Guide: <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

6 See Capacity Checklist [http://www.welpartners.com/resources/WEL\\_SummaryofCapacityCriteria.pdf](http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf)

recommend an increased penalty under appropriate sentencing provisions due to age related vulnerability of the victim.

- If a criminal charge is recommended or laid, consider having the accused resign as the attorney. Their resignation could also be a condition of release.<sup>7</sup>

If the victim has been found mentally incapable of making property decisions or incapable of giving consent to release financial documents:

- Consider enlisting the aid of other agencies (ex. Public Guardian and Trustee) to provide support to the victim.
- Contact the financial institution immediately and request disclosure of required financial information as per the relevant privacy legislation and the decision of *R v. Lillico*.<sup>8</sup> Financial institution staff can release general information without a warrant under certain circumstances. Request that the financial institution exercise ‘due diligence’ in relation to the victim’s accounts from this point forward.
- Still take a formal statement from the victim.
- Obtain consent from any person named as attorney in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (production order, search warrant, other judicial orders). Attend financial institutions to gather pertinent financial records / evidence.<sup>9</sup>

## **OTHER RELEVANT PROVINCIAL/ TERRITORIAL LEGISLATION**

### **Alberta**

- *Adult Guardianship and Trusteeship Act*, SA 2008 c A-4.2 <http://canlii.ca/t/522k5>
- *Protection Against Family Violence Act*, RSA 2000, c P-27 <http://canlii.ca/t/5347k>
- *Protection for Persons in Care Act*, SA 2009 c P-29.1 <http://canlii.ca/t/52dxl>
- *Health Information Act*, RSA 2000, c H-5 <http://canlii.ca/t/81pf>
- *Personal Information Protection Act*, SA 2003, c P-6.5 <http://canlii.ca/t/81qp>
- *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 <http://canlii.ca/t/821t>

7 Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

8 1994 CanLII 7548 (ON SC), upheld on appeal 1999 CanLII 2836 (ON CA)

9 Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

**British Columbia**

- *Adult Guardianship Act*, RSBC 1996, c 6 <http://canlii.ca/t/52c92>
- *Adult Guardianship Act, Designated Agencies Regulation*, BC Reg 19/2002, <http://canlii.ca/t/jjwx>
- *Community Care and Assisted Living Act*, SBC 2002, c 75 <http://canlii.ca/t/53fvs>
- *Assisted Living Regulation*, BC Reg 218/2004 <http://canlii.ca/t/852n>
- *Community Care and Assisted Living Regulation*, BC Reg 217/2004 <http://canlii.ca/t/852k>
- *Residential Care Regulation*, BC Reg 96/2009 <http://canlii.ca/t/89ln>
- *Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2000 <http://canlii.ca/t/lck8>
- *Public Guardian and Trustee Act*, RSBC 1996, c 383 <http://canlii.ca/t/53j4w>
- *Health Professions Act*, RSBC 1996, c 183 <http://canlii.ca/t/534hx>
- *Personal Information Protection Act*, RSBC 2003, c 63 <http://canlii.ca/t/52pq9>
- *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, <http://canlii.ca/t/53k1h>

**Manitoba**

- *Protection for Persons in Care Act*, CCSM, c P144 <http://canlii.ca/t/8gp4>
- *Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90 <http://canlii.ca/t/8gnj>
- *The Domestic Violence and Stalking Act*, CCSM c D 93 <http://canlii.ca/t/8gkx>
- *The Personal Health Information Act*, CCSM c P33.5 <http://canlii.ca/t/8gqs>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

**New Brunswick**

- *Family Services Act*, SNB 1980, c F-2.2 <http://canlii.ca/t/88bd>

- *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 <http://canlii.ca/t/8j1c>
- *Public Trustee Act*, SNB 2005 c P-26.5 <http://canlii.ca/t/888p>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Newfoundland and Labrador**

- *Adult Protection Act*, SNL 2001, c A-4.01 <http://canlii.ca/t/8pff>
- *Family Violence Protection Act*, SNL 2005, c.F-31 <http://canlii.ca/t/8b2k>
- *Personal Health Information Act*, SNL 2008 c P-7.01 <http://canlii.ca/t/89st>
- *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 <http://canlii.ca/t/89t5>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Nova Scotia**

- *Adult Protection Act*, RSNS 1989, c 2 <http://canlii.ca/t/87m6>
- *Protection for Persons in Care Act*, SNS 2004 c 33 <http://canlii.ca/t/87gw>
- *Protection for Persons in Care Regulations*, NS Reg 364/2007 <http://canlii.ca/t/86wd>
- *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 <http://canlii.ca/t/87b3>
- *Domestic Violence Intervention Act*, SNS 2001, c 29 <http://canlii.ca/t/87rr>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Ontario**

- *Long-Term Care Homes Act*, SO 2007, c 8 <http://canlii.ca/t/34x>
- *Long-Term Care Homes Act General*, O Reg 79/10 <http://canlii.ca/t/8mtq>

- Home Care and Community Services Act, 1994, SO 1994, c 26 <http://canlii.ca/t/2vs>
- *Substitute Decisions Act*, 1992, SO 1992, c 30 <http://canlii.ca/t/2tq>
- Personal Health Information Protection Act, 2004, SO 2004, c 3, Sch A <http://canlii.ca/t/32t>
- Personal Health Information Protection Act, General, O Reg 329/04 <http://canlii.ca/t/sOb>
- Regulated Health Professions Act, 1991, SO 1991, c 18 <http://canlii.ca/t/2sj>
- *Health Care Consent Act*, 1996, SO 1996, c 30 Sch A <http://canlii.ca/t/2wh>
- *Mental Health Act*, 1990, RSO 1990 c M7 <http://canlii.ca/t/2k9>
- *Residential Tenancies Act*, SO 2006 c 17 <http://canlii.ca/t/33p>
- *Consumer Protection Act*, 2002 SO 2002 c 30, Sch A <http://canlii.ca/t/31w>
- *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 <http://canlii.ca/t/2d9>
- Municipal Freedom of Information and Protection of Privacy Act, RSO 1990, c M.56 <http://canlii.ca/t/2k1>
- Personal Information Protection and Electronic Documents Act, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

### **Prince Edward Island**

- *Adult Protection Act*, RSPEI 1988, c A-5 <http://canlii.ca/t/8d3b>
- *Victims of Family Violence Act*, RSPEI 1998, c V-3.2 <http://canlii.ca/t/8dcl>
- Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01 <http://canlii.ca/t/8d80>
- Freedom of Information and Protection of Privacy Act General Regulations, PEI Reg EC564/02 <http://canlii.ca/t/8dql>
- Hospitals Act, RSPEI 1988, c H-10.1 <http://canlii.ca/t/8d2h>
- Personal Information Protection and Electronic Documents Act, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

## Quebec

- Charter of Human Rights and Freedoms, CQLR c C-12, art 48 <http://canlii.ca/t/52t34>
- *Public Curator Act*, CQLR c C-81 <http://canlii.ca/t/53k4m>
- *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1 <http://canlii.ca/t/535jc>
- *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 <http://canlii.ca/t/xpm>
- *Act to Combat maltreatment of seniors and other persons of full age in vulnerable situations*, CQLR c L-6.3 <http://canlii.ca/t/53084>
- *Professional Code*, CQLR c C-26 <http://canlii.ca/t/53gh1>
- *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 <http://canlii.ca/t/52pw4>

## Saskatchewan

- *Victims of Domestic Violence Act*, SS 1994, c V-6.02 <http://canlii.ca/t/wbh>
- *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 <http://canlii.ca/t/wts>
- *Personal Care Homes Act*, SS 1989-90, c P-6.01 <http://canlii.ca/t/x46>
- *The Health Information Protection Act*, SS 1999, c H-0.021 <http://canlii.ca/t/wmv>
- *Health Information Protection Regulations*, RRS c H-0.021 Reg 1 <http://canlii.ca/t/w5m>
- *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 <http://canlii.ca/t/x4n>
- *Freedom of Information and Protection of Privacy Regulations*, The, RRS c F-22.01 Reg 1 <http://canlii.ca/t/vcr>
- *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 <http://canlii.ca/t/wrx>
- *Local Authority Freedom of Information and Protection of Privacy Regulations*, RRS c L-27.1 Reg 1 <http://canlii.ca/t/vsh>
- *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]



**Yukon**

- *Adult Protection and Decision Making Act*, SY 2003, c 21 Sch A <http://canlii.ca/t/8j7t>
- *Family Violence Prevention Act*, RSY 2002, c 84 <http://canlii.ca/t/8jfp>
- *Public Guardian and Trustee Act*, SY 2003, c 21 Sch. C, Part 2 <http://canlii.ca/t/8lrs>
- Access to Information and Protection of Privacy Act, RSY 2002, c 1 <http://canlii.ca/t/8jf9>
- Personal Information Protection and Electronic Documents Act, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

**Nunavut**

- *Family Abuse Intervention Act*, SNu 2006, c 18 <http://canlii.ca/t/8l4w>
- Family Abuse Intervention Regulations, NWT Reg (Nu) 006-2008 <http://canlii.ca/t/8lvq>
- Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20 <http://canlii.ca/t/8l74>
- Personal Information Protection and Electronic Documents Act, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

**Northwest Territories**

- *Protection Against Family Violence Act*, SNWT 2003, c 2 <http://canlii.ca/t/8hvh>
- Access to Information and Protection of Privacy Act, SNWT 1994, c 20 <http://canlii.ca/t/8hxx>
- Access to Information and Protection of Privacy Regulations, NWT Reg 206-96 <http://canlii.ca/t/8h9n>
- Personal Information Protection and Electronic Documents Act, SC 2000, c 5 <http://canlii.ca/t/7vwj> [ Federal Act]

## **APPENDIX “11” - CHECKLIST: “RED FLAGS” FOR DECISIONAL INCAPACITY IN THE CONTEXT OF A LEGAL RETAINER**

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

### ***RED FLAGS FOR INCAPACITY***

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place
- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension
- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)
- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns
- Comprehension problems: difficulty repeating simple concepts and repeated questions
- Calculation or financial management problems, i.e. difficulty paying bills

- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.
- Intellectual impairment
- Cannot readily identify assets or family members
- Experienced recent family conflict
- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.
- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependent and vulnerable
- Poor living conditions in comparison with the client’s assets
- Changes in the client’s appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client’s instructions seem rational? For example, does the client’s choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation

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- Keep in mind issues related to capacity including, **undue Influence**. See WEL’s Undue Influence Checklist
- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag<sup>1</sup>
- Family members who report concerns about their loved one’s functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives<sup>2</sup>
- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia<sup>3</sup>
- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia<sup>4</sup>
- A deathbed will where there is a strong likelihood that the testator may be delirious<sup>5</sup>
- Complexity or conflict in the milieu of a vulnerable individual<sup>6</sup>

### **BEST PRACTICES**

- Be alert to the signs of incapacity and always ask probing questions not leading questions
- Interview the client alone and take comprehensive, detailed notes
- Use open-ended questions to confirm or elicit understanding and appreciation
- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client

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

2 *Ibid*

3 *Ibid*

4 *Ibid*

5 *Ibid*

6 *Ibid*

- Have clients re-state information in their own words and revert back to earlier discussions
- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken
- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also, it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege
- Be mindful of the Law Society of Ontario, *Rules of Professional Conduct*, <http://www.lsuc.on.ca/lawyer-conduct-rules/>, particularly the Rules related to capacity

# DISCLAIMER

These materials are intended for the purposes of providing information and guidance only. These materials are not intended to be relied upon as the giving of legal advice and do not purport to be exhaustive.

This work is a collective effort by the WEL Partners team.

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