OVERVIEW OF DECISIONAL CAPACITY: ESTATES & TRUSTS CONTEXT

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INTRODUCTION

Issues of capacity arise frequently for estates and trusts lawyers. Such issues are complex and are only bound to increase in frequency as our population continues to age rapidly. With longevity naturally comes an increase in the occurrence of medical issues affecting mental capacity, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability.[1] There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependent. Other factors affecting capacity include, normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.

This presentation will outline the concept of capacity in general, the role of the lawyer in assessing decisional capacity, and offer some best practices or guidelines, as well as compare the various determining factors or criteria applied in ascertaining capacity that frequently arise in the context of an estates and trusts practice.[2]

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

[2] For ease of reference, a table appended to this paper outlines the basic determining factors for capacity referred to within.

SOCIETAL CONTEXT

To give you an overview of why the lawyer's role with respect to decisional capacity is important in today's estates and succession planning context, we must put our current demographic in context.

From 2011 to 2016 Canada registered the largest increase in the proportion of seniors since Confederation.[3] 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 proportion of seniors from 2011 to 2016 was the largest observed since 1871. This is a clear sign that Canada's population is aging at a faster pace.[4]

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 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.[5] 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.

[3] Statistics Canada, Census 2016 Results on Age and Gender: http://www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.htm [accessed May 12, 2017]
[4] *Ibid*.
[5] I*bid*.

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.[6] Globally, we are facing the **largest demographic shift** in the history of humankind - the statistics on ageing 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 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.[7]

CAPACITY IN GENERAL

There is no single legal definition of "capacity". For example, the *Powers of Attorney Act*, RSPEI 1988, c P-16 defines "legal incapacity" as "mental infirmity of such a nature as would, but for this act, invalidate or terminate a power of attorney". "Legal capacity" has a corresponding meaning. The *Mental Health Act* RSPEI 1988, c M-6.1 defines "capable" or "incapable" as "mentally capable or incapable of making a decision to give or refuse consent to treatment".

Equally, there is no definitive approach to apply in determining or establishing "capacity", "mental capacity" or "competency". Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

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[6] *Supra* note 3.
[7] Statistics Canada, Health Reports: Alzheimer's Disease and Other Dementias in Canada, May 2016, http://www.statcan.gc.ca/pub/82-003-x/2016005/article/14613-eng.htm [accessed May 5, 2017]

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[8]

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable "test" for capacity.[9] Notably, when referring to "test", it is important to understand that there is no "test" so to speak, as much as there are factors to consider in assessing requisite decisional capacity. Therefore, it is important to know there is no "test" *per se*, but rather a standard to be applied, or factors to be considered in an assessment of requisite mental capacity to make a certain decision at a particular time. Accordingly, all references to "test" should be read with this in mind. It is often the case that reference will be made to a "test" particularly as it simplifies the reference for a lay person.

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

The assessment of capacity is a less-than-perfect science, both from a legal and medical point of view. Capacity determinations are often

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

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

complicated: in addition to professional and expert evidence, lay evidence is often relevant to assessing capacity in certain situations.

Complicating matters further, the standard of any assessment varies and this too, can become an obstacle that is difficult to overcome in determining capacity as well as in resolving disputes concerning the quality and integrity of an assessment and resultant report. And, to add to the complication, 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 of a person, alive or even deceased. The evidentiary weight given to such assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

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

CAPACITY IS DECISION-SPECIFIC

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to execute a Will (testamentary capacity), differed from the capacity to enter into a contract which differs from the capacity required to make a gift, or to marry, separate or divorce. They 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 his/her property, or capable of granting a power of attorney document, but, not capable of making a will. The possibilities are unlimited as each task or decision has its own specific capacity standard or factors to consider in its determination.

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. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. And even in situations where an individual suffers from a non-reversible and/or progressive disorder, that person may not be permanently incapable, and may have requisite decisional capacity 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.[10]

The factor of time-specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment and address decisional capacity as at the time the task was undertaken. 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 have less probative value than the evidence of, for instance, a drafting solicitor who applies the legal standard for capacity commensurate with the time that instructions are received.[11]

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10 *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton,* all *supra* note 3

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

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 example, a person in his/her home may have capacity that he/she may not display 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, or taken, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court decision in *Starson v. Swayze*[12] provides insightful analyses in examining capacity. Although the decision dealt solely with the issue of capacity to consent to treatment under the Ontario *Health Care Consent Act*, *1996,* [13] (a statute not addressed herein) the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, Major J., made several notable points about ascertaining capacity. First, the court stated 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.[14]

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12 *Supra* note 4

13 S.O. 1996, c. 2, Sched. A as am.

14 *Starson v. Swayze, supra* note 4 at para. 77. This case was applied in the Ontario Court of Appeal case of *Gajewski v. Wilkie* 2014 ONCA 897 which deals with statutory guide for capacity to consent to treatment under the *Health Care Consent Act, 1996*, S.O. 199, c.2. Sched.A.

Major J., emphasized the ability to understand and process information is the key to ascertaining capacity. The ability to understand the relevant information requires the "cognitive ability to process, retain and understand the relevant information."[15] Then, a person must "be able to apply the relevant information to his/her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof." [16]

A capable person requires the "ability to appreciate the consequences of a decision", and not necessarily "actual appreciation of those consequences".[17] A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if he/she possesses the ability to comprehend the information and consequences of a decision.

Major J. also pointed out 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.[18] A capable person is entitled to be unwise in his/her decision-making. In the oft-cited decision of *Re. Koch*,[19] Quinn J. wrote:

> It is mental capacity and not wisdom that is the subject of the *Substitute Decisions Act* and the *HCCA.* The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...[20]

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[15] *Ibid.* at para. 78
[16] *Ibid.* at para. 78
[17] *Ibid.* at paras. 80-81 [emphasis in original]
[18] *Starson v. Swayze supra* note 4 at para. 79
[19] 1997 CanLII 12138 (ON S.C.) [*Re. Koch*]
[20] *Ibid.* at para. 89

PROFESSIONAL ADVISOR ROLE WHERE CAPACITY IS AT ISSUE

Capacity is a complicated concept in that each task has its own standard, and often the issues involved where capacity is in question can be less than crystal-clear. There is no clear hierarchy of capacity. Indeed courts are loath to say that the standard to establish decisional capacity is higher or lower than another. Though, this does happen as demonstrated by some of the decisions reviewed herein. Yet, in *Covello v. Sturino,*[21] Justice Boyko was careful to distinguish the varying capacity standards as not necessarily higher or lower, but rather simply as different. My view is this approach makes more sense, but inconsistency of treatment underscores the complexity of understanding.

A drafting solicitor must at all times be mindful of the client's capacity to complete the specific task at hand. This in effect means that a lawyer may be able to assist a client with competing one task, but not another.

The message from our common law precedent suggests that the drafting solicitor should be satisfied that the client has capacity to give instructions for and execute the document in question, notwithstanding the presumption of capacity. This duty is particularly significant if the client is elderly, infirm, dependent or if the instructions vary substantially from previous documents (wills, trusts, powers of attorneys, etc.) or where the instructions are not received from the testator directly. Solicitors are also wise to exercise additional caution in circumstances where the potential beneficiary brings the client to the office, and appears overly involved in the process.

[21] 2007 W.L. 1697372, 2007 CarswellOnt 3726 (ON. S.C.J.)

A case before the Ontario Superior Court of Justice provides some guidance on the proper steps to be taken by drafting solicitors when determining testamentary capacity (discussed in more detail below) and probing for indicators of undue influence. In *Walman v Walman Estate* 2015 ONSC 185, Justice Corbett observed that the drafting solicitor "did several things 'right' in connection with [the] interview" with an older adult client, including interviewing the older adult alone, keeping good notes and asking questions that "facially, comport with the requirement of determining whether the testator understood the extent of his assets."[22] However, Justice Corbett found that in the circumstances of that particular case (the older adult suffered from Parkinson's Disease and Lewy Body Dementia, and he was changing his will so his second wife would receive the majority of his estate and his three sons very little) the solicitor "needed to go further than that". Not only should the solicitor have questioned whether the testator understood what his *own* assets were, but the testator should have understood what *his wife's* assets were as well: "Had these issues been explored, [the solicitor] would have discovered what the case law refers to as 'suspicious circumstances' – recent transfers of substantial wealth from [the husband] to [the wife] that had the effect of significantly denuding [the husband's] financial position to the benefit of [the wife]".[23] The Court found that the husband lacked testamentary capacity and that his will and certain transfers of capital to the wife were products of undue influence by the wife.[24]

[22] *Walman Estate v. Walman* 2015 ONSC 185 at para. 55.
[23] *Walman Estate v Walman* 2015 ONSC 185 at para. 55
[24] *Walman Estate v. Walman* 2015 ONSC 185 at para. 133.

As issues of capacity can cause complications and significant cost consequences many years after legal services have been rendered, a solicitor is well-advised to maintain careful notes when dealing with clients, and to address the issue of capacity so as to ascertain whether the client has the requisite legal capacity to complete the task requested.

It is always the obligation of the drafting solicitor, to interview the client for the purpose of determining the requisite legal capacity for the task undertaken by the client. If the lawyer is confident that the client meets the requisite standard for capacity, they should clearly indicate this in file notes. Solicitor notes should be thorough as well as carefully recorded and preserved.

It is wise for lawyers to take time in asking the client probing questions, to give the client a chance to answer carefully, to provide the client with as much information as possible about the legal proceedings. All questions and answers should be carefully recorded in detail. Lawyers should also consider corroboration of answers provided by the client, for example, relating to the extent of the client's assets by seeking appropriate directions.

If the solicitor has serious concerns about the client's capacity, it is worth discussing with the client the implications, benefits, or otherwise of having a capacity assessment to protect the planning in question.

The approach of professionals ought to be direct, yet sensitive.

Requests for capacity assessments should be clear and should concisely outline the legal criteria to be applied in assessing the specific decisional capacity that is to be met for the particular task sought. A capacity

assessment that is not carefully written and that does not apply the evidence to the appropriate legal standard will be deemed deficient and unhelpful should a legal challenge arise in the future.

Lawyers have an important role to play where capacity is at issue. Solicitors must turn their minds to issues of capacity, undue influence and other red flags, including abuse, when discussing and preparing trusts, gifts, wills, contracts, powers of attorney, domestic contracts, and other legal documents. Although the area of capacity is complex, the more information a lawyer has about the issues and interaction of applicable factors, and the state of the client's abilities and understanding, the better protected both the lawyer and the client.

These guidelines and best practices are not limited to drafting solicitors. Often, lawyers are asked to enter into limited scope retainers to provide independent legal advice (ILA) with respect to a certain transaction. A lawyer who agrees to provide ILA must not take on the role lightly. The duty of care especially in certain demographics and circumstances requires a high degree of integrity and professionalism. Providing legal advice under a limited scope retainer with respect to only one particular transaction can have its challenges; this is especially so when a lawyer is meeting the client for the first time, knows little about the client, has little background information, and the client is older and possibly vulnerable, dependant, possessing physical and/or cognitive impairments.

For more information on capacity and ILA, see my paper "*Risks Associated with ILA where Undue Influence and Capacity are Complicating Factors*": http://welpartners.com/resources/WEL_TQR_March_2017.pdf

THE CODE OF PROFESSIONAL CONDUCT AND CAPACITY

The *Law Society of Prince Edward Island Code of Professional Conduct*[25] provides some guidance to the lawyer facing clients with potential capacity challenges.

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

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

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

> ***3.2 Quality of Service***
> …
> *3.2-9 Client with Diminished Capacity*
> When a client's ability to make decisions is impaired because of minority, **mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship**.
>
> Commentary
>
> **[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer**

[25] The Law Society of Prince Edward Island *Code of Professional Conduct*, Amendments current to June 25, 2016.

instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. **A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client**.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, **the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client.** Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal

representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[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.

Counsel should be alert to a client's impairment in relation to their ability to give instructions, enter into binding legal relationships, and manage their legal affairs but they must, as far as reasonably possible, maintain a normal lawyer and client relationship. Notably, capacity is fluid – a client's ability to make decisions can change and fluctuate over time.

The rules requiring the maintenance of a normal solicitor-client relationship with a client who may have some capacity challenges would also require that a lawyer be bound by the Rule respecting confidentiality. The Commentary in respect of Rule 3.3 (Confidentiality) provides that the duty

of confidentiality is owed "to every client without exception." Rule 3.3-1 provides as follows:

> ***3.3 Confidentiality***
>
> Confidential Information
> 3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless,
>
> a) expressly or impliedly authorized by the client;
>
> b) required by law or by order of a tribunal of competent jurisdiction to do so;
>
> c) required to provide the information to the Law Society; or
>
> d) otherwise permitted by rules 3.3-2 to 3.3-6.
>
> **Commentary**
>
> [1] A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.
>
> **[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawye**r. **The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.**
>
> **[3] A lawyer owes the duty of confidentiality <u>to every client without exception</u>** and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for

the client, whether or not differences have arisen between them.

…

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

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

3.7 - WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

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

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a

client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

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

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

. . .

Optional Withdrawal

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

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

of withdrawal as a device to force a hasty decision by the client on a difficult question.

…

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings (see Rules 3.7-4 to 3.7-6) and the direction of the tribunal, a lawyer shall withdraw if,

(a) discharged by the client;

(b) the client's instructions require the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle the matter.

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

Section 5.1 – The Lawyer As advocate

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

Commentary

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. **The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent**

> **with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.**
>
> …

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

CAPACITY ASSESSED BY DRAFTING LAWYER

The answer to the question of who is responsible to assess decisional capacity depends on many factors including the type of capacity being assessed or the decision that is being made.

For example, the *Mental Health Act*, RSPEI 1988, c M-6.1 requires a particular individual to assess particular capacity determinations. Or for health treatment, the health practitioner who proposes the treatment is responsible for assessment of capacity of the patient.

Below are a number of situations and decisions where it is likely that the drafting lawyer will be responsible for assessing capacity in the estates and trusts context in particular:

CAPACITY TO INSTRUCT COUNSEL

There exists a rebuttable presumption that an adult client is capable of instructing counsel. To ascertain incapacity to instruct counsel, it will involve a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances.

The lawyer interacting with the potential client should determine capacity to instruct before being retained.

A person's capacity to instruct counsel involves the ability to understand financial and legal issues.[26] 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 then a client who would like a lawyer to assist with his or her rights about living in a long term care home.

The client should be able to: 1) understand the context of the decision: what they have asked the lawyer to do for them and why; 2) know his/her specific choices: be able to understand and process the information, advice and options the lawyer presents to them; and 3) appreciate the consequences of his/her choices: i.e., appreciate the pros, cons and potential results of the various options.[27]

The client should have the ability to understand that the retainer agreement will confer authority on the lawyer that will impose contractual liability on him/her. The client should understand the nature and effect of the

[26] *Calvert (Litigation Guardian of) v. Calvert*, (1997) 32 OR (3d) 281 (Gen. Div.), aff'd (1998), 37 OR 221 (CA), leave to appeal refused [1998] SCCA No. 161, *Wolfman-Stotland v. Stotland* 2011 BCCA 175 at para. 26;

[27] See Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel*",* *www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0* and Clare Burns & Anastasja Sumakova , LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at p.40.

transactions which the lawyer is being authorized to enter on his or her behalf. The client should be able to retain information on an ongoing basis so that he can interact meaningfully with his counsel and retain information as the transaction proceeds.[28]

It is not necessary that a client understand all the details necessary to pursue 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.[29]

Best practices provide that it is important that lawyers first meet with clients and make their own determination of capacity of the client to instruct before seeking some form of assessment. Lawyers should specifically look at the capacity of the client to "make decisions about his or her legal affairs" as described in the *Code of Professional Conduct.* By seeking out a capacity assessment first before making his/her own determination of capacity to instruct, the lawyer assumes that a health professional or some other assessor has more knowledge than him/her about the legal standards or criteria for determining capacity to instruct on the particular matter on which the client wants help. It is unlikely that health professionals know the specific legal criteria for capacity for that particular purpose unless the lawyer details the definition of the decisional capacity for seeking the assessment.[30]

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[28] Clare Burns & Anastasja Sumakova , LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at p.40

[29] Ed Montigny, supra note 22 at p.2.

[30] Judith Wahl, Capacity and Capacity Assessments in Ontario, PracticePro website: http://www.practicepro.ca/practice/PDF/Backup_Capacity.pdf at p.5

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 the requisite capacity to make a will was established in the 1800's by the English case of *Banks v. Goodfellow*.[31] 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.

In order to validly make a 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 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." [32]

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."[33]

There is some school of thought in cases of borderline capacity that a change in a will or a codicil could be undertaken where the testator

[31] (1870) L.R. 5 Q.B. 549.
[32] *Leger et al. v. Poirier*, [1944] S.C.R. 152 at page 153
[33] Robertson, G., *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at p. 214 [*Mental Disability and the Law in Canada*]

understands the change in question and the reasons for the change even where it could not be said that the testator has full testamentary capacity. An example of this could be an instance where a testator with borderline capacity seeks to make a limited change by making a codicil that appoints a new executor, after the executor named in the will has died. The writer takes the respectful view that these are considerations a drafting solicitor would need to carefully and cautiously approach, perhaps with the assistance of a qualified capacity assessor given the clarity of the requirements for testamentary capacity. Either a person has capacity or not to make the decision in question.

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, we know this to be a factor.[34] The rule, in *Parker v. Felgate* [35] 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

[34] *Banton*, 1998, 164 D.L.R. (4th) 176; *Eady v Waring* (1974), 2 O.R. (2d) 627 (Ont.C.A.) : 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. at p. 639 [emphasis added], para 178

[35] (1883), 8 P.D. 171 [*Parker v. Felgate*]

(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.

Notably, regardless of capacity, the requirements for due execution as set out in Section III of the *Probate Act* RSPEI, 1988 c P-21 must be met to have a legal testamentary document.[36]

Courts have cautioned that the rule in *Parker v. Felgate* can only be applied where the instructions for the will 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 that 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.[37]

The threshold capacity required to make a Will is again, often described as higher than the capacity required to grant a power of attorney, for property or for personal care.[38] In fact, it is simply a different criteria applied to a certain decision. The thresholds are inherently different.

Still, a testator need not be capable of managing his/her property in order to have testamentary capacity. A finding that a person is incapable of managing his/her own affairs does not automatically lead to a finding that that person lacks testamentary capacity. The questions of whether the

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[36] *Probate Act, RS PEI* 1988, c P-21 s. 60

[37] *Re Fergusson's Will; Fergusson v. Fergusson* (1981), 43 N.S.R. (2d) 89 (C.A.); Re. Griffin's Estate (1978), 21 Nfld. & P.E.I.R. 39 (P.E.I.C.A.), leave to appeal to S.C.C. refused 24 Nfld. & P.E.I.R. 90n (S.C.C.)

[38] *Penny v. Bolen,* 2008 CanLII 48145 (ON.S.C.) at 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."

testator understood his/her assets and the impact of the will may be distinct from whether the testator actually managed or had the capacity to manage his or her own property.[39]

A solicitor drafting a will is obliged to assess the client's testamentary capacity prior to preparing the will. The drafting lawyer must ask probing questions and be satisfied that the testator not only can communicates clearly, and answers questions in a rational manner, but that the testator has the ability to understand the nature and effect of the will, the extent of his/her property and all potential claims that could be expected with respect to the estate.[40]

In the case of *Laszlo v. Lawton* 2013 BCSC 305, 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.

There was evidence that the deceased was still possessed of her cognitive faculties – 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).

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[39] *Hamilton v. Sutherland*, [1992] 5 W.W.R. 151 (B.C.C.A.)

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 the previous will, cut out family members who would be expected to benefit, and made irrational bequests to two charities that the deceased and her husband had no affiliation with. On the other hand, there was some evidence that the deceased did not suffer from significant cognitive defects when she made her will and there is an apparent rule of law that non-vitiating delusions alone do not invalidate a will.

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 Ballance explained that:

> 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 a progressive degenerative brain disease like Alzheimer's does not run afoul of the rule in Banks or its lineage.

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[40] *Murphy v. Lamphier*, [1914] O.J. No. 32 at para. C.A.) at para. 58; *Hall v. Bennett Estate*, 2003 CanLII 7157 (ON C.A.) at para. 58

Ultimately the Court found that the testator lacked capacity, but not because she suffered from delusions. 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 notably 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 MMSE results on the law of capacity. The deceased had twice been given a Mini-Mental State Examination (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 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.

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 widely. 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.

In the Prince Edward Island case of ***Praught, Re*** 2002 PESCTD 1 (CanLII), Jenkins J. set aside a will, finding that the elderly testator lacked testamentary capacity:

> Upon considering all the evidence in relation to the attributes of testamentary capacity, I conclude that the testator did not have testamentary capacity when she made her will. This conclusion presents itself to me quite obviously. **The absence of a disposing mind and memory was ubiquitous. The evidence of Dr. Lantz, the caregivers, and the nieces shows a clear picture of an elderly person with senile dementia who had lost the use of her mental faculties requisite to will-making.** Gladys Praught's loss of her ability to comprehend of her own volition even the basics of daily living, let alone the elements of will-making, was pervasive and constant. The evidence of any general basis to find otherwise is very limited, and except for the observations of niece Colleen, is mainly conclusions based on quite limited observations.[emphasis added][41]

There was no evidence that the testator was "generally aware of the nature and extent of her property".[42] The drafting solicitor did not inquire about the value of her property and was unaware whether she had "$100 or $1 million in her bank account". Furthermore, the solicitor did not inquire as to the state of her health, and did not inquire about her senile dementia and her condition of "being forgetful and confused". Her instructions mentioned some siblings, but the solicitors did not canvass all of her close family and

[41] *Praught, Re* 2002 PESCTD 1 (CanLII) at para. 107
[42] *Praught, Re* 2002 PESCTD 1 (CanLII) at para.93

did not inquire beyond the instructions given to him. Justice Jenkins concluded:

> Overall, the evidence of Dr. Lantz [testator's doctor] along with the evidence from the Garden Home [her residence] and of the caregivers demonstrates that there existed a serious issue of testamentary capacity. In the presence of that, the evidence of what took place in the solicitor's office surrounding the making of the will, and the supporting opinion and observations of the solicitor taking the will, does not approach satisfying the test of showing testamentary capacity.[43]

In the case of ***Coughlan Re*****,** 2003 PESCTD 64 (CanLII) the daughter and propounder of her father's Will, sufficiently established through expert evidence and the evidence of the drafting solicitor, that her father had testamentary capacity. Her father was 90 years old at the time he executed his Will and there was some question whether he suffered from Alzheimer's disease or not, along with age appropriate memory losses.

Relying on the evidence of the drafting solicitor and two expert witnesses (both psychiatrists) who all opined that the testator had the requisite capacity to execute a Will, Justice Cheverie concluded that the evidence supported the finding that the testator was sufficiently clear in his understanding and memory to know, on his own, and in a general way the nature and extent of his property. He may have had "some details mixed up, but he generally knew the nature and extent of his property. He knew he had some savings; he knew he had a pension; he knew he had an interest in some real estate."[44] He also knew he had three children and that he had grandchildren.

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[43] *Praught Re*, 2002 PESCTD 1 (CanLII) at para. 97
[44] *Coughlan Re* 2003 PESCTD 64 (CanLII) at para. 129

Furthermore, the drafting solicitor "went to great lengths" to determine whether the testator was sufficiently clear in his understanding and memory to make the testamentary provisions provided for in his Will. Two psychiatrists were engaged to offer their professional opinions as to his ability to make testamentary provisions. Justice Cheverie concluded "certainly the weight of expert opinion in this case supports the conclusion that he had the requisite testamentary capacity, and I so find."[45]

On the role of the drafting solicitor, Justice Cheverie commented:

> I wish to comment on the process and actions engaged by Mr. Mitchell [the drafting solicitor] in his dealings with John James Coughlan [the testator]. **I was impressed by the steps which he took to satisfy himself as to Coughlan's capacity to make a will and the manner in which he approached the topic from a professional and common sense approach.** Some of the inquiries he made of Coughlan appear light and superficial. For example, the baseball references.[46] But in the end, the answers to those questions were very telling. Mitchell made sure Mary Coughlan [the daughter] was not present when he took his instructions, and was careful to determine Coughlan's knowledge of the extent of his estate, his potential beneficiaries, and his reasons for his dispositions. Further, Mitchell, from his experience, had a sense this will would be contested. It is for that reason he engaged the psychiatrists to comment on what he felt was the disposing mind of John James Coughlan. Mitchell indeed made detailed notes of his meetings with Coughlan and his observations from those meetings and they are now part of the record at this trial. Suffice it to say that Mitchell was not going to rely on his memory alone if this matter were contested - he had his notes.[emphasis added] [47]

[45] *Coughlan, Re* 2003 PESCTD 64 (CanLII) at para.130.

[46] The lawyer asked about the testator's interest in baseball and specifically the Mark McGuire home run race. He questioned the testator about how many home runs Mark McGuire had at the time and the testator was correct: 62.

[47] *Coughlan, Re* 2003 PESCTD 64 (CanLII) at para. 132.

CAPACITY TO REVOKE A WILL

A testator who seeks to revoke a will requires testamentary capacity. This is especially clear in case where a testator revokes a will by executing a later will or document.

As for 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.[48] 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 his will.

As revocation requires testamentary capacity, in cases where a testator makes a will and then subsequently and permanently loses testamentary capacity, that testator cannot revoke that will. The only exception to this is, (in most provinces)[49] if the testator marries (and has capacity to marry)[50] at which time the will is effectively revoked. [51]

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[48] 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: *Re. Beattie Estate,* [1944] 3 W.W.R. 727 (Alta. Dist. Ct.) at 729-730, [hereinafter *Beattie Estate*] *Re. Drath* (1982), 38 A.R. 23 (Q.B.) at 537
For more detailed discussion on revocation and destruction of wills, please see *Mental Disability and the Law in Canada, supra* at 224 to 225.

[49] Except British Columbia, Alberta and Quebec.

[50] Please see "CAPACITY TO MARRY", below.

[51] *Re. Beattie Estate, supra* note 43

CAPACITY TO MAKE A CODICIL

Under the *Probate Act,* RSPEI 1988, c P-21:

> (t) "will" means the last will and testament of a deceased person, and includes codicil and testamentary disposition; and also includes an appointment by will, or by writing, in the nature of a will, in the exercise of a power;[52]

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. See also *Praught Re* 2002 PESCTD 1 (CanLII) where capacity to execute a codicil is discussed at paragraphs 102- 115.

CAPACITY TO MAKE A TRUST

In order to create a testamentary trust, a person requires testamentary capacity as it arguably constitutes "a testamentary disposition" as defined under subsection 1 (t) of the *Probate Act.*

Capacity to create an *inter vivos* trust is less clear. While the criteria of assessment for making a contract or gift may be applicable, in that a trust is comparable to a contract or gift, the fact that a trust may be irrevocable, and that another person handles the funds complicates matters, such that a more comprehensive capacity standard might be required.

CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY

[52] *Probate Act,* RSPEI 1988, c P-21Section 1 (t)

While the *Powers of Attorney Act* RSPEI 1988 c P-16, does not contain a presumption of capacity specific to making a power of attorney (POA), capacity to enter into a contract is presumed for persons over 18 and a lawyer who is asked to prepare a POA can rely on this presumption unless having reasonable grounds to believe that the individual is incapable of entering into the contract or of giving or refusing consent.[53]

A POA may survive a donor's incapacity if there is a provision in the POA document expressly stating that it may be exercised during any subsequent legal incapacity of the donor.[54] A POA may be revoked by the donor at any time while he or she has "legal capacity". As noted above, "legal capacity" is defined in the *Powers of Attorney Act* as "mental infirmity of such a nature as would, but for this Act, invalidate or terminate a power of attorney" and "legal incapacity" has "a corresponding meaning".[55]

In the PEI case of ***Coughlan, Re*** (discussed above) capacity to revoke a POA for property was addressed alongside testamentary capacity. While no specific criteria were addressed by Justice Cheverie, the following was observed:

- that the drafting solicitor spent 15-20 minutes questioning the testator and assessing him for capacity to revoke the POA;[56]

- the drafting solicitor concluded he was lucid, focussed and wanted to regain control of his assets. He discussed the existing POA and the fact it stated to be irrevocable;[57]

[53] See "Capacity to Contract" below.
[54] *Powers of Attorney Act*, RSPEI 1988 c P-16, s. 5
[55] *Powers of Attorney Act*, RSPEI 1988, c P-16, s.1
[56] *Coughlan, Re* 2003 PESCTD 64 at para. 88

- the solicitor also made sure he had knowledge of his assets and that he reviewed and understood the revocation when he signed it;[58]

- the solicitor had also arranged the testator to meet with two psychiatrists who were engaged to assess both the testator's ability to revoke a POA and his testamentary capacity;

- one of the psychiatrists who assessed Coughlan testified that "her opinion with respect to the ability of Coughlan to revoke a Power of Attorney is that he has to understand what it is in order to revoke it".[59]

Some lawyers, like in *Coughlan*, recommend their clients who are older adults or who appear to have a mental disability to undergo a capacity assessment for the purposes of planning protection. Ultimately, the final arbiter of capacity will be a judge who will consider any assessments as evidence. Indeed, it is the responsibility of the drafting solicitor to assess the client's capacity to grant or revoke a power of attorney or health care directive appointing a proxy, when asked to prepare such documentation for a client.[60] 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.

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[57] *Coughlan, Re* 2003 PESCTD 64 at para. 88
[58] *Coughlan, Re* 2003 PESCT 64 (CanLII) at para. 90.
[59] *Coughlan Re* 2003 PESCTD (CanLII) at para. 117.
[60] *Egli v. Egli*, 2005 BCCA 627 (CanLII)
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.

With that said, the principle that capacity assessments should be undertaken carefully due to their negative impact on autonomy applies as well to assessments determining the granting of a power of attorney. In a 2009 ruling in *Abrams v. Abrams*,[61] Justice Low was asked to grant leave to appeal a decision of Justice Strathy in which Justice Strathy had declined to order an assessment of the applicant's mother's capacity to grant a continuing power of attorney for property ("CPOAP") and a power of attorney for personal care ("POAPC"). Justice Low held that Justice Strathy properly exercised his discretion when he denied the applicant's request for further capacity assessments. Justice Low noted that a finding of incapacity has serious implications that infringe upon a person's privacy and autonomy; and that capacity assessments should be ordered only when necessary. Justice Low wrote as follows:

> [56] **An application for a declaration of incapacity under the [*Substitute Decisions Act*] is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.**
>
> [57] That these rights should not be lightly interfered with and that the individual should not be visited with the intrusion into her privacy that an assessment entails simply by virtue of an allegation having been made – even if there is "good reason to believe that there is substance to the allegation" – is reflected in the statutory presumption of capacity and, in respect of the particular issue before the court, in the onus built into s. 79 for the moving party to show that there are reasonable grounds to believe that the person is incapable.[62]

[61] 2009 CanLII 12798 (ON. S.C.D.C.) [*Abrams*]
[62] *Ibid* at paras. 56 and 57 [emphasis added]

The case extract referenced above refers to additional capacity assessments sought by family members, after a CPOAP and POAPC had already been granted.

This view does not take away from a solicitor's obligation to always ensure that the client who seeks to give or revoke a CPOAP/POAPC is capable of doing so. Indeed, a lawyer is obligated to ensure that a person taking such steps possesses the requisite capacity to do so. Solicitors should take careful notes of their assessments of their client's capacity, and should keep those notes with the file and the executed powers of attorney.

CAPACITY TO GRANT AND REVOKE A HEALTH CARE DIRECTIVE

Under the *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2 every person over the age of sixteen years who is "capable" may execute a health care directive. Under a health care directive a maker can appoint a "proxy". A proxy is a person appointed by the maker of the directive to make decisions on his or her behalf.[63]

Every person is presumed to be capable of giving or refusing consent to treatment, and making a health care directive, "until the contrary is demonstrated".[64]

"Capable" is defined in the act as "*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*".[65]

[63] *Consent to Treatment and Health Care Directives Act,* RSPEI 1988 c C-17.2, s.3(1)(b)
[64] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988 c C-17.2, s.1(l).
[65] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, section 1(b).

Section 7 sets out the capacity criteria: if the person is able to understand the information that is relevant to making the decision; understand that the information applies to his or her particular situation; understand that the person has the right to make a decision; and appreciate the reasonably foreseeable consequences of a decision or lack of decision.[66]

A directive and authority of a proxy become effective a) when the maker ceases to be capable of making or communicating decisions or b) upon the occurrence of such other event or condition as may be specified in the directive and continue to be effective for the duration of the maker's incapacity or inability to communicate.[67]

Section 25 provides that so long as the maker has the capacity to make decisions, a directive may be revoked by a) a later directive b) a later writing declaring an intention to revoke the directive by the maker and in accordance with the *Act*; or c) the destruction, with intent to revoke, of all original executed copies of the directive either by the maker or by some other person in the presence and the direction of the maker. Also, unless the directive expressly provides otherwise, the appointment of a spouse as proxy in a directive is revoked if the person ceases to be a spouse after executing the directive.[68]

CAPACITY TO MAKE A GIFT (DEPENDS ON SIZE AND CONTEXT)

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.

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[66] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, section 7.
[67] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, Section 21(4).
[68] *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, section 25(2).

In general, however, the criteria to be applied are the same as that applied to determine capacity to enter into a contract.

Similar to capacity to contract, the capacity to make a gift requires the:

(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 *Royal Trust Co. v Diamant*, referred to above. In that case, the Court held that an *inter vivos* transfer is not valid if the donor had "such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."[69]

This approach was further supported in the case of *Re Bunio (Estate of)*[70]:

> 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...

Citing earlier case law on the capacity to gift, the Court in *Dahlem (Guardian ad litem of) v. Thore*, [1994] B.C.J. No. 809 B.C.S.C. at page 9 [para. 6] 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**

[69] *Royal Trust v. Diamant*, *infra* note 76 at page 6.
[70] 2005 ABQB 137 at para. 4

> **to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.** [71]

In his study, *Gifts: a Study in Comparative Law*,[72] 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 for capacity in various jurisdictions. Referring to American law, Professor Hyland outlines that:

> ...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.[73]

While the approach is similar to that outlined in the cases referenced, it is somewhat more onerous than the simple standard or criteria of understanding the nature of the gift and its effect, in that it requires donors to understand the "extent of their property." This is more aligned to 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. Professor Hyland importantly 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

[71] [emphasis added]
[72] Hyland, R., *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009)
[73] *Ibid.* at page 222

> 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. [74]

Professor Hyland highlights the problem with the proposition, in that a capable person is fully entitled to make a decision, and give a gift that others may perceive as foolish. Still, Professor Hyland states that 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." [75]

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. Still it is true that courts will look at the decisions people make and the reasons they give for them, as well as the intent behind them[76] to assess their capacity to make those decisions, so 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

[74] *Supra* note 68 at page 222
[75] *Supra* note 68 FN 26 at pages 222 to 223
[76] *Pecore v. Pecore*, [2007] 1 S.C.R. 795, and *Madsen Estate v. Saylor,* [2007] 1 S.C.R. 838

applicable capacity criteria applied changes to that required for capacity to make a Will, that is, testamentary capacity.

In the English case of *Re. Beaney,*[77] the judge explained the 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 comprise 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 even earlier case, *Mathieu v. Saint-Michel* [78] the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it be less than the entirety of the estate, then the standard for testamentary capacity applies for the gift to be valid.

CAPACITY TO CONTRACT

[77] [1978] 2 All E.R. 595 (Ch.D.) [*Re. Beaney*]
[78] [1956] S.C.R. 477 at 487

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.*[79] 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.

In undertaking an analysis of the requisite capacity to contract, the determining factor is a person's ability to understand the nature and consequences of the contract at hand. A person capable of entering into a contract has the ability not only to understand the nature of the contract, but the impact on his or her interests.

In *Bank of Nova Scotia v. Kelly,* the Court emphasized that a person entering into a contract must exhibit an ability to understand all *possible* ramifications of the contract. In the ruling, Nicholson J. concluded:

> ..It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests.*[80]

[79] (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) [*Bank of Nova Scotia v. Kelly*]
[80] *Ibid.* at 284 [emphasis in original]

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.

In *Royal Trust Co. v. Diamant*,[81] the Court stated as follows:

> The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.
>
> The degree of mental incapacity which must be established in order to render a transaction inter vivos invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: *Manches v. Trimborn* (1946), 115 L.J.K.B. 305.[82]

All persons who are eighteen years of age or older are presumed to be capable of entering into a contract. 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.

CAPACITY TO ENTER INTO REAL ESTATE TRANSACTIONS

There are no set criteria or standard for capacity to enter into a real estate transaction. To determine requisite capacity to convey title, it is important to consider the nature of the real estate transaction.

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[81] [1953] 3 D.L.R. 102 B.C.S.C. [*Royal Trust v. Diamant*]
[82] *Supra* note 76 at 6

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*. [83] This means that he/she requires the ability to understand the nature of the real estate transaction, and the ability to appreciate the impact of that transaction on his/her interests.

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 in cases where an individual transfers a property for nominal consideration, or places someone on title on their property. In such instances, the transaction is a gift, rather than a contract.

Where the gift is substantial in value, or otherwise affects the individual's testamentary dispositions, then arguably, the standard for testamentary capacity applies. Depending on the size of the gift, it may venture into the territory of 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.

[83] 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)

Where the gift of property is significant in value, the onus is higher on the real estate lawyer. Clear probing enquiry ought to be made and well-documented notes on the issue of capacity are warranted.

CAPACITY TO MARRY

There are also no statutory criteria for determining the requisite capacity to marry, nor to separate nor to divorce.

Under the *Marriage Act*, RS PEI 1988, M-3, no person may issue a marriage certificate or solemnize a marriage of a person under the age of 16 years old.[84] However there are no "capacity" requirements or criteria. The definition of what that capacity comprises is a developing area of common law.

The traditional English view is that the factors to be applied to determine capacity to marry are analogous to the capacity to enter into a contract. As a result, according to this view, in order to be deemed capable of entering into a marriage, a person must have the:

> (a) Ability to understand the nature of the contract of marriage; and
> (b) Ability to understand the effect of the contract of marriage.[85]

In this traditional view, spouses are required to understand only the most basic components of marriage, such as the commitment of the spouses to be exclusive, that the relationship is to be terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation. In general, to be found capable of marrying [according to historical common

[84] *Marriage Act*, RSPEI, 1988 M-3 at section 17.
[85] *Capacity to Marry and the Estate Plan*, *supra* note 1

law], a person need not have the ability to understand the more serious financial implications that accompany marriage, such as revocation of previous wills, support obligations, and potential equalization. [86]

This view that one only need have the ability to understand the basic components of marriage is based on the conclusion in the leading English case of *Durham v. Durham*[87] which finds that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."

In another English case, *In the Estate of Park, Deceased*,[88] Justice Singleton outlined that in order to be deemed capable of marrying, "a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage."

Again starting from the proposition that the contract of marriage is a simple one, Birkett, L.J. contributed as follows:

> The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.[89]

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[86] *Ibid.* at page 50
[87] (1885), 10 P.D. 80 at 82 [*Durham*]
[88] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [*Estate of Park*].
[89] *Ibid.* at 1411

In the same decision, Karminski J. outlined the requirements for a valid marriage as follows:

> i. the parties must understand the nature of the marriage contract;
> ii. the parties must understand the rights and responsibilities which marriage entails;
> iii. each party must be able to take care of his or her person and property;
> iv. it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and
> v. if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid...The question for consideration is whether he sanely comprehended the nature of the marriage contract.[90]

While the Court struggled with developing the appropriate criteria to be applied in determining what defines capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract, and certainly at a lower threshold than testamentary capacity. Karminski J. stated clearly that there is "a lesser degree of capacity ... required to consent to a marriage than in the making of a will."[91]

Historically, therefore, the Courts have viewed marriage as a contract, and a simple one at that.

There is an alternative view of the requirements to determine capacity to marry, and it is one that was alluded to in the cases of *Browning v. Reane*[92] and *Spier v. Spier*[93] . The Court in *Browning v. Reane* stated that for a

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[90] *Supra* note 84. at 1417

[91] *Ibid.* at 1425

[92] (1812),161 E.R. 1080 (Eng. Ecc.) [*Browning v. Reane*].

[93] *Spier v. Benyen (*sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier* v. *Spier* [1947] The Weekly Notes. [*Spier*]

person to be capable of marriage, he or she must be capable of managing his or her person and property. Similarly, in *Spier,* the Court stated that one must be capable of managing his or her property, in order to be capable of marrying.[94]

In recent cases before the Ontario Superior Court of Justice, the tension between the traditional historical view of marriage as an easy-to-understand contract, and the reality that marriage brings with it very serious implications for property and the estate, not the least of which is the revocation of all previous wills is increasingly apparent.

In the case of *Banton v. Banton*[95] Cullity J. was asked to assess whether the deceased, a then-88-year old man had had the requisite capacity to marry a then-31-year old woman.[96]

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards for testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care, capacity to marry, and the provisions of the Ontario *Substitute Decisions Act*.[97]

In Justice Cullity's view, Mr. Banton had been a "willing victim" who had "consented to the marriage." [98]

Justice Cullity took pains to distinguish between "consent" and "capacity", and then embarked upon an analysis of the appropriate criteria to be

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[94] *Ibid.* at para. 46 per Willmer J.

[95] 1998, 164 D.L.R. (4th) 176 at 244 [*Banton*]

[96] The woman the deceased married had worked as a waitress in the retirement home in which the deceased resided. Two days after the marriage, the couple attended at a solicitor's office and instructed the lawyer to prepare a Power of Attorney in favour of the wife, and a will, leaving all of the deceased's property to the wife.

[97] *Banton, supra* note 90 at para. 33

applied in determining capacity to marry and whether Mr. Banton met the criteria. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[99] In the Court's view, the factors to be considered or standard to be applied, is not one that is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before the marriage in question 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." [100]

Justice Cullity then turned his attention to whether or not, in Ontario law, there was or arguably could be an "additional requirement" for 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

[98] *Ibid.* at para. 136
[99] *Ibid.* at para. 142
[100] *Banton, supra* note 90 at para. 144

> matrimonial contract, any more than by any other contract. at pp. 70-1

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

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

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

> Whether a person of unsound mind was capable of contracting a valid marriage depended, according to 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.

After review of these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. Sir John Nicholl's statement in *Browning v. Reane,* appeared to require both incapacity to manage one's person as well as one's property; Whereas Willmer J.'s statement in *Re Spier* could be interpreted as treating incapacity to manage property, by

itself, as sufficient to give rise to incapacity to marry. Notably, Halsbury's statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It is only with the enactment of the *Substitute Decisions Act* (and corresponding legislation throughout Canada) that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."[101]

Despite articulating what would, at the very least, be a dual standard, for capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid.

Somewhat surprisingly at first blush, Justice Cullity made this determination in spite of the fact that he found that, at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "judgment was severely impaired and his contact with reality tenuous." Moreover, Justice Cullity made his decision

expressly “on the basis of *Browning v. Reane*.” However, you will note that, earlier in his reasons, he stated that the case of *Browning v. Reane* is the source to which the “additional requirement” is attributed, which requirement goes beyond a capacity to understand “the nature of the relationship and the obligations and responsibilities it involves” and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one’s own person *and property*.

In 2003, five years after *Banton,* Justice Greer arguably extended the criteria and factors in the determination of the capacity to marry in another Ontario decision: *Feng v*. *Sung Estate*.[102]

Greer J. adopted the criteria for determining the capacity to marry articulated by one of the medical experts, Dr. Malloy, in the Alberta decision of *Barrett Estate v. Dexter.*[103] Dr. Malloy was qualified as an expert in geriatric medicine in that trial and detailed the requirements for capacity. In particular, Dr. Malloy stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.[104]

Applying the facts of the case to the requirements set out in *Barrett Estate*, *supra* Justice Greer found that Mr. Sung lacked capacity to marry as he

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[101] *Banton, supra* note 90 at para. 157

[102] 2003 CanLII 2420 (ON S.C.). [*Fung v. Sung Estate*] The deceased secretly married his caregiver just over a year after his first wife had died, and he died a mere six weeks after the marriage. Following the deceased’s death, the caregiver made a claim for support and preferential share against the estate.

[103] 2000 ABQB 530 (CanLII). [*Barrett Estate*]

[104] *Ibid.* at para. 72, also referred to in *Feng v. Sung Estate, supra* note 90 at para. 62

had not understood the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.[105]

The law on capacity to marry is evolving. Apart from the many historical cases including the case of *Park Estate* which emphasizes the simplicity of marriage and the marriage contract, the cases of *Browning v. Reane* and *Re Spier* suggest that capacity to manage one's person *and* one's property are a component of the standard for capacity to marry. In the more recent Ontario decisions of *Banton* and *Re. Sung Estate* courts appear to be moving in the direction of developing an approach that reflects the financial implications of death or marital breakdown on a marriage. And since marriage carries with it serious financial consequences, it stands to reason that the requisite capacity to marry should be more involved and require the higher standard attributed to the capacity to manage property, which is itself a very high standard of capacity. The development of property rights over time reinforces the need for common law to keep pace in its development with the legislation, particularly when pursuant to statute, marriage revokes a Will.

Predatory Marriages: New York Cases and Possible Equitable Remedies

Predatory marriages are a form of exploitation and abuse. Unscrupulous opportunists often get away with preying upon older adults with diminished reasoning ability purely for financial profit. "Predatory Marriages" is a term that captures the situation where one person marries another of limited capacity solely for financial gain. The overriding problem with such

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

marriages today, is that they are not easily challenged, as the criteria required to find the requisite capacity to marry are anything but rigorous. This means that capacity is likely found by a court, even in the most obvious cases of exploitation.[106]

Two New York cases that I examined more recently, suggest however, that invoking an equitable approach or one founded in public policy, may be a successful alternative in challenging a predatory marriage on grounds other than capacity.

The cases, *In the Matter of Berk,* 71 A.D. 3d 710 (2010) and *Campbell v. Thomas,* 897 NYS2d 460 (2010) are quite similar. In both, a caretaker used her position of power/trust to secretly marry a significantly older adult where capacity was at issue. After death the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to 1/3 of the estate or $50,000, whichever is more). Children of the deceased argued that the marriage was "null and void" as their father lacked capacity to marry. However, the court at first instance held that even if the deceased was incapable, legislatively the marriage was only void from the date of the court declaration and as such, not void *ab initio.*

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 one's own fraud, or take advantage of one's

[106] This paper only briefly addresses predatory marriages, those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*, Canada Law Book,** co-authored by Kimberly Whaley et al., http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html, supra note 1; Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 E.T.P.J. 24, and Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 E.T.P.J. 269 .

own wrong, or to found any claim upon one's own iniquity, or to acquire property by his own crime." This principle, called the "Slayer's Rule" was first applied in *Riggs v. Palmer*, 115 N.Y. 505,511 [1889] to stop a murderer from recovering under the Will of the murdered person. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that would flow from the wrongdoing. The rule was similarly applied to deny a murderer the right to succeed in any survivorship interest in a victim's estate.

The court recognized that while the actions of predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits pursued was even more direct. A murdering beneficiary exists in a position to benefit from his victim's estate when he commits the wrongdoing, which is distinguished as against the predatory marriage which itself constitutes the wrongdoing that put the spouse in a position to profit. The court held that the spouse should not be permitted to benefit from wrongful conduct any more than should a person who through coercion becomes a beneficiary in a Will.

Canadian courts have frequently engaged similar doctrines in the estates/trusts context. It is well founded that no murderer can take under the Will or life insurance of his victim [*Lundy v. Lundy* 1895 24 SCR 650]. It is established that a beneficiary will not inherit where the beneficiary perpetrated a fraud on the testator to obtain a legacy by virtue of that fraud [*Kenell v. Abbott* 31 E.R. 416]; or, where a testator was coerced by the beneficiary into a bequest [*Hall v. Hall* (1868) L.R. 1 P.& D. 48].

These "rules" are equitable, and legal, founded in public policy, and by virtue of the legal maxim, *ex turpi causa non oritur actio* (no right of action

arises from a base cause). The maxim, a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social" [*Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742]; or, "illegal, wrongful or of culpable immorality" [*Hall v. Hebert* 1993 2 S.C.R. 159] both in contract and tort. Simply put, a court will not assist a wrongdoer to profit from a wrongdoing.

Arguably, such an approach should be viable in Canada to defend or attack against these predatory entitlements. The duplicitous, should not be entitled to financial gain arising from "anti-social" or "immoral" predatory/scheming acts. A predatory spouse alters property rights during life and the testamentary plan by securing entitlements in the same manner as if one coerced a testator to add one's name to a Will.

These New York cases suggest there is significant merit to the exploration of other defences outside of the common law capacity approach including the doctrine of unconscionability, where one party takes unfair advantage, or where an inequality of bargaining power/relationship exists [*Juzumas v. Baron* 2012 ONSC 7220] as well as in equity, any/all of which may well tip the balance in favour of denying the iniquitous predator the profits sought.

Principles for Setting Aside a Contract

Possible considerations include application of the various principles or rules that are commonly used in contract law to set aside contracts. Such principles include the doctrine of unconscionability, lack of independent legal advice, and inequality in bargaining power.

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on the grounds there is an

inequality of bargaining power and power and accordingly it would be an improvident bargain that the predator would be entitled to all of the spousal property and financial benefits that come with marriage.[107] The older adult in such circumstances 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",[108] as such, 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 largely unclear whether such arguments extend to parties other than those to the marriage. If the victim so to speak dies, arguments may be difficult to pursue. However, parties such as 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 then declared to be void ab initio, since these unions can be challenged by other interested parties.

Civil Fraud/Tort of Deceit

An approach based in 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

[107] See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v. Coast Finance Ltd*., 1965 CarswellBC 140 (SCJ)
[108] 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.).

marry by perpetrating a false representation that the marriage will be a "real" marriage (which the predator spouse knows is false, is a trick, is a misrepresentation) and the older adult relies on the representation and marries the predator spouse suffering damage as a result (either through money gifted to the predator spouse, or through the various rights that spouse takes under legislation, which deprives the older adult of significant property rights. A case could be fashioned such that the predator's behavior 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.[109]

Canadian Courts are rich with decisions analyzing civil fraud in the context of marriage in "immigration fraud" cases where one spouse falsely represents he/she is entering into a "true" marriage when in fact the marriage was entered into simply to attain Canadian residency.[110] The Courts have been reluctant to set aside this type of marriage as a fraud.

[109] *Bruno v. Hyrniak* 201 SCC 8 at para.21.
[110] 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 *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).

In *Ianstis v. Papatheodorou*,[111] 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.[112] This case has been cited with approval many times and continues to be considered as the leading case.[113] The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.[114] Alleging fraud where one party to the marriage has character flaws not anticipated by the other is not something the court wishes to advance as is evinced by the following select comments of the Court:

> [23] "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.
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> [24] 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]"[115]

The Court's message, effectively, "caveat emptor" – the spouses ought to have conducted their due diligence before marriage.[116] Predatory

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[111] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).
[112] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[113] See *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; Grewal v. Kaur 2011 ONSC 1812; Raju v. Kumar 2006 BCSC 439; and Ianstis v. Papatheodorou [1971] 1 O.R. 245 (C.A.).
[114] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[115] *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24.
[116] *A.A.S. v. R.S.S.,* 1986 CanLII 822 (BC CA) at para. 25.

marriages are easily distinguishable from immigration fraud cases if for no other reason than, a person under disability may 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 (also known as the tort of deceit), he/she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar*[117], involved a wife who was awarded damages for civil fraud in an immigration fraud case where the court notably stated:

> [69] "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. [. . .]
>
> [70] 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.
>
> [71] The defendant's misrepresentations entitle the plaintiff to damages resulting from her reliance on them."

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting his immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre and post marriage long distance calls.[118]

An International Perspective

Professor Albert Oosterhoff's article, "Predatory Marriages", provides an excellent review of international efforts to address the harms done by predatory marriages. He found that in the U.S.A., very few states have

[117] *Raju v. Kumar* 2006 BCSC 439.

retained the revocation-upon-marriage provisions in their probate legislation.[119] Professor Oosterhoff also found that some states permit a relative to contest the validity of a marriage by an incapacitated elderly family member before the death of that family member, and in Texas, their legislation permits post-death consequences.[120]

Australia's Approach: the Marriage Act, and Oliver (Deceased) & Oliver

Like Canada, Australia has also struggled to balance the autonomy of vulnerable adults with the necessity of protecting them from predatory marriages. Unlike Canada, Australia has met this challenge with legislation that sets out the standard or factors required for capacity to marry. However, Australia's statute is somewhat limited in that it requires the marrying parties to have the mental capacity to understand the effect of the ceremony, not an understanding of the nature of marriage as an institution with all its consequences.[121] Some scholars have suggested that this would be more effective if it required the understanding of the property consequences of marriage, yet judicial comment in Australia suggests that few people, if any, truly understand all the consequences of marriage.[122]

In a recent decision out of New South Wales, *Oliver v. Oliver*, Australia's Family Court declared that the April 2011 marriage between the 78 year-old Mr. Oliver (deceased), and the 49 year-old Mrs. Oliver was invalid.[123] In doing so, the court reviewed the common law criteria for capacity to marry

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[118] *Raju v. Kumar* 2006 BCSC 439 at para. 72.
[119] Albert Oosterhoff, "*Predatory Marriages*" (2013) 33 Estates, Trusts & Pensions Journal 24 at p. 54.
[120] *Supra* note 114 at p. 57.
[121] *Marriage Act 1961* (Cth) subsection 23B(1)(d); see also Jill Cowley, "Does Anyone Understand the Effect of 'The Marriage Ceremony'?The Nature and Consequences of Marriage in Australia" [2007] SCULawRw 6; (2007) 11 Southern Cross University Law Review 125
[122] *Cowley,* supra note 132 at p. 170 – 171
[123] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AstLII)

as it developed in England and the subsequent enactment of a statutory standard or factors in Australia. While the relevant legal standards and factors differ from those applied in Canada, the facts, described below, are instantly recognizable as those of a predatory marriage.

Mr. Oliver had suffered alcohol-related capacity issues dating back to 2001. His first wife, Mrs. E, had also suffered under alcohol-related dementia, and in 2004, when the New South Wales Guardianship Tribunal considered the issue of Mrs. E's guardianship and it held that Mr. Oliver lacked the capacity to manage Mrs. E's affairs.

Mrs. E died in August of 2010. The Respondent attended the funeral as the daughter of a friend of Mr. Oliver, and she referred to Mr. Oliver as "Uncle." Although Mr. Oliver's daughter had made arrangements for Mr. Oliver to receive in-home care from a community organization, the Respondent later cancelled that service. Mr. Oliver had previously granted power of attorney to his son-in-law, but the Respondent made arrangements to assist the Mr. Oliver with his financial affairs. Mr. H had not begun to exercise his authority as an attorney for property, but in January and February of 2011, Mr. Oliver became increasingly suspicious of Mr. H and accused Mr. H of wanting to take all his money and control his life.[124]

From February 2011 to April 2011, the Applicant (Mr. H's daughter and Mr. Oliver's granddaughter), tried on numerous occasions to speak with Mr. Oliver, but the Respondent always answered the phone. The Applicant was rarely able to speak with him. However, in late February or early March of 2011, Mr. Oliver did come to the phone and told the Applicant he was getting married. The Applicant said, "How are you getting married? I didn't

even realize you had a girlfriend." Mr. Oliver said, "Neither did I."[125] The Respondent then took the phone and advised that they would be married in June of 2011.[126]

In February of 2011, the Respondent took Mr. Oliver to see his general practitioner, Dr. G, who certified that the deceased was of sound mind and capable of making rational decisions about his affairs.[127] A few days later, the respondent and Mr. Oliver attended the office of a solicitor and executed a Will in contemplation of marriage (but not conditional on the marriage taking place) that named the solicitor his Executor and left his entire estate to the Respondent.[128] The Respondent moved in with Mr. Oliver the next day.

The Respondent and Mr. Oliver were married in April of 2011, not June, as the Respondent previously asserted to Mr. Oliver's relatives. None of Mr. Oliver's family were invited or notified; only the Respondent's sister and parents attended. In her testimony, the Respondent had no explanation as to why Mr. Oliver's relatives were not invited. The ceremony celebrant, Mrs. Q, gave evidence that Mr. Oliver stated he was pleased to be getting married.

In May of 2011, three weeks after the wedding, Mr. Oliver fell in his home, fractured his hip, and was hospitalized. The social worker, Mrs. U assessed Mr. Oliver and noted his dementia and vulnerability. Mrs. U spoke with the Respondent twice. The Respondent initially informed Ms. U that Mr. Oliver had no relatives other than a niece living out of state, and had no attorney

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[124] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AstLII) at paras 39 and 40.
[125] *Ibid.* at para 25.
[126] *Ibid.*
[127] *Ibid* at para 73.
[128] *Ibid*. at para 74.

for property. Mrs. U recommended that the New South Wales Public Trustee and Guardian be appointed as Mr. Oliver's guardian of property. The New South Wales Trustee and Guardian as so appointed in August of 2011.

The Applicant commenced her application under section 113 of the *Family Law Act* just prior to Mr. Oliver's death for a declaration as to the validity of the marriage. She argued that Mr. Oliver was mentally incapable of understanding the nature and effect of the marriage ceremony as provided for in section 23B(1)(d)(iii) of the Act. The Act further provides standing to the Applicant to make the within Application - such standing is unavailable under Canadian legislation.[129] Mr. Oliver died in September of 2011. The Respondent did not inform Mr. Oliver's family.

The Court had the benefit of an expert's report reviewed Mr. Oliver's voluminous health records and provided an opinion, summarized by the Court, as follows:

> As to whether the deceased was capable of understanding the nature of the contract (marriage) that he was entering into, free from the influence of morbid delusions, upon the subject Dr Z says that is a difficult question to answer. There was clear evidence of long-standing cognitive impairment prior to April 2011, which may have influenced the deceased's capacity in this regard. Dr Z notes:
>
> > ... in relation to the specific issue of "morbid delusions", information provided by his family suggests he was experienced delusions and paranoia through December 2010 into the NewYear, including his belief sometimes that his first wife, [Ms E], was still alive and also his belief that Mr [H] was being too controlling of his money. Moreover, there is a long history documented in hospital notes of paranoid delusions and

[129] *Ibid.* at paras 5 and 6; see also Albert Oosterhoff, "Predatory Marriages" (2013) 33 Estates, Trusts & Pensions Journal 24.

> treatment for these, dating back to 2001, especially during times of delirium. As such, it is possible (but I cannot be certain) that [the deceased] was experiencing some degree of delusions around this time and that this might have influenced his thinking, especially if he had certain inaccurate beliefs about some family members and if he was being unduly influenced by them.[130]

The Court observed that the English common law determination of capacity to marry had been supplanted by the statutory determination in the *Marriage Act 1961* (Cth), as amended, and noted the following:

> On the face of it the English common law test and the Australian statutory test are different, particularly because of the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony. …
>
> In the 32 years since the legislative test has applied, there has not been a plethora of decisions of the Australian courts as to its interpretation. There are only 2 reported decisions that I was referred to and I located no others. … The current test of "mentally incapable of understanding the nature and effect of the marriage ceremony" was applied in both cases. …
>
> It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.…[131]

The Court reviewed judicial commentary on Australia's capacity to marry determination, and in particular, Justice Mullane's application of authorities in *Babich & Sokur and Anor*, as follows:

> … it is in my view significant that the legislation not only requires a capacity to understand "the effect" but also refers to "the marriage" rather than "a marriage". In my view taken together those matters

[130] *Oliver* at para. 185
[131] *Oliver* at paras 244, 245, 246.

> require more than a general understanding of what marriage involves [emphasis added]. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.[132]

In *Babich*, Justice Mullane held that the vulnerable adult in question had a general understanding of "a" marriage, but she was incapable of understanding the effect her marriage would have on her.[133]

In *Oliver*, Justice Foster found that Mr. Oliver may have been aware that he was participating in a marriage ceremony to the Respondent, or at least some sort of ceremony with the respondent, but no further.[134]

CAPACITY TO SEPARATE AND DIVORCE

The question of the requisite capacity to separate was addressed in the British Columbia Court of Appeal case of *A.B. v. C.D*.[135] In that decision, the Court agreed with the characterization of the different standards of capacity and the standard of capacity to form the intention to leave a marriage, set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*. [136] Professor Robertson's standard focuses on the spouse's overall capacity to manage his or her own affairs. This standard, which had also been relied upon by the lower court, is found at paragraph 21 of the Court of Appeal`s decision as follows:

> Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart,

[132] Ibid., at para 202, citing para 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII).
[133] *Babich*, supra, at para 256
[134] *Oliver*, supra, at para 210.
[135] *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 [hereinafter *A.B. v. C.D.*]
[136] *Supra* note 59 at page 272

> the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.

The Court noted that this standard differs and is less onerous than that adopted in the English decisions of *Perry v. Perry*[137] and *Brannan v. Brannan*[138] which conclude that when a spouse suffers from delusions that leads to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notes that it prefers Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her life.[139]

In cases where capacity fluctuates or disappears altogether, courts have held that as long as a person had capacity at the time that he or she separated from his or her spouse, and maintained the intention to remain separate and apart from his or her spouse while capable, then the entirety of the separation period could be counted for the purposes of a divorce, even if the person lost capacity during the period of separation.[140]

In *Calvert (Litigation Guardian of) v. Calvert*[141] Justice Benotto compared the different standards of capacity – to marry, separate and divorce:

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[137] [1963] 3 All E.R. 766 (Eng. P.D.A.)
[138](1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.)
[139]*A.B. v. C.D.*, *supra* at para.30.
[140] *O. (M.K.) (Litigation Guardian of) v. C. (M.E.)* 2005 CarswellBC 1690 (B.C.S.C.) at para. 40
[141] 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169., leave to appeal to S.C.C. refused May 7, 1998.

> [57] Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to *remain* separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.
>
> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. **The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins,* 136 A.3d 45 (Ill., 1985).**

It appears that the Court arguably places the threshold for capacity to divorce as arguably somewhat higher than that for capacity to separate. It equates the threshold for capacity to divorce with the threshold for capacity to marry. Justice Benotto continues, and points to "simple" factors or criteria for capacity to marry, consistent with the reasoning in *Durham*[142], and in *Park*:[143]

> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins,* 136 A.3d 45 (Ill., 1985).

As for the specifics of the factors to be applied in assessing capacity, Justice Benotto favourably refers to the evidence of an expert physician, Dr. Molloy who outlined a case for the requisite factors for determining capacity:

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[142] *Supra* note 82
[143] *Supra* note 83

> [73] I found the evidence of Dr. Molloy very helpful. Although he, like Drs. Silberfeld and Freedman, did not see Mrs. Calvert, he provided a useful analysis of the evidence and methodology for determining capacity. To be competent to make a decision, a person must:
>
> 1. understand the context of the decision;
> 2. know his or her specific choices; and
> 3. appreciate the consequences of these choices.

In English case law, the issue of capacity to consent to a decree of divorce is treated in the same manner as all other legally binding decisions. In the England and Wales Court of Appeal decision of *Masterman-Lister v Brutton & Co*., [144] the Court wrote that "a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself" and citing the decision of *Mason v. Mason*[145] pointed out that this includes consenting to a decree of divorce.

In a very recent decision,[146] the Missouri Court of Appeal upheld a lower court finding that the wife was capable to commence proceedings for the dissolution of her marriage as she was able to explain the reasons why she wanted the divorce (in spite of having difficulties with dates and events), and because her testimony was consistent with evidence in other legal proceedings. As a result, over the objections of her husband, the Court granted the wife's request for a divorce.

Put simply, the requisite factors for establishing the capacity to divorce, like the requisite criteria for the capacity to marry, and the requisite criteria for the capacity to separate, at common law and rightly, or wrongly, appears to be based on whether the person in question has an ability to appreciate the

[144] [2002] EWCA Civ 1889 (19 December 2002) at para. 57
[145] [1972] Fam 302

nature and consequences of the act, and in particular the fact that the act taken is legally binding. However, as the law on capacity to marry is evolving, so must the law on the capacity to divorce. This is an area warranted of tracking as the law continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights and attendant legislative changes.

Wolfman-Stotland v Stotland – Divorce

In *Wolfman-Stotland v. Stotland*[147] the British Columbia Court of Appeal was asked to consider the requisite capacity necessary to form the intention to live separate and apart. The appellant, Lillian Wolfman-Stotland at 93 years of age had sought a declaration from the British Columbia Supreme Court that there was no reasonable prospect of reconciliation with her 92-year old husband. Mr. Stotland had applied for a medical examination of Mrs. Stotland and Justice Smith of the Supreme Court had ordered that Mrs. Stotland be examined by a physician with respect to her capacity to instruct counsel, to manage her affairs, her capacity to form the intention to live separate and apart from her husband, and her capacity to "appreciate the nature and consequences of abandoning the marital relationship."[148]

Somewhat confusingly, the assessing physician found that Mrs. Stotland "likely" had the capacity to instruct counsel in respect of the divorce; but did not have the capacity to manage her property; nor did she have the capacity "to form the intention to live separate and apart from her husband;"

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[146] *Szramkowski v. Szramkowski*, S.W.3d, 2010 WL 2284222 Mo.App. E.D.,2010. (June 08, 2010)
[147] 2011 CarswellBC 803, 2011 BCCA 175, [2011] B.C.W.L.D. 3528, [2011] W.D.F.L. 2593, 16 B.C.L.R. (5th) 290, 333 D.L.R. (4th) 106, 97 R.F.L. (6th) 124, 303 B.C.A.C. 201, 512 W.A.C. 201 [hereinafter *Stotland*]

however, he did find that she had the capacity "to appreciate the financial nature and consequences of abandoning her marital relationship."[149]

The Chambers judge found, even more confusingly, in spite of the conclusion that Mrs. Stotland had capacity to instruct counsel, that she lacked the necessary capacity required to obtain the declaration she sought.

The Court of Appeal overturned the Chambers judge's finding, and concluded that the judge "erred in law in the formulation and application of the proper test of the capacity necessary to form the intention to live separate and apart."[150]

The Court of Appeal referred to the decisions in *AB v. CD*, and *Calvert*, above, and referred favourably to Professor Robertson's *Mental Disability and the Law in Canada* and in particular cited the following passage from pages 253 to 254 of the book, which points to a low threshold for capacity to marry:

> In order to enter into a valid marriage, each party must be capable, at the date of the marriage, or understanding the nature of the contract of marriage and the duties and responsibilities which it creates…The test does not, or course, require the parties to be capable of understanding all the consequences of marriage; as one English judge aptly noted, few (if any) could satisfy such a test…the common law test is probably only concerned with the legal consequences and responsibilities which form an essential part of the concept of marriage. Thus, if the parties are capable of understanding that the relationship is legally monogamous, indeterminable except by death or divorce,

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[148] *Ibid.* at para. 12
[149] *Ibid*. at para. 14
[150] *Ibid.* at para. 21

> and involved mutual support and cohabitation, capacity is present. The reported cases indicate that the test is not a particularly demanding one…

The Court of Appeal concluded, based on the authorities that capacity to separate is the same as the standard for the requisite capacity to marry, and that the "requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one's affairs."[151]

It is notable in this case, however, that there was a finding that the appellant was capable of instructing counsel, and of appreciating the financial consequences of a divorce. In fact, therefore there was evidence that she understood and appreciated the ramifications of a separation and divorce, such that her capacity was *not* so low.

Babiuk v. Babiuk – Separation

The Saskatchewan Court of Queen's Bench[152] reviewed capacity to separate, among other issues, in the case of *Babiuk v. Babiuk*. In this case, an older adult (after being admitted to the hospital for injuries to her body) was certified incompetent to manage her estate pursuant to *The Mentally Disordered Person's Act*, RSS 1978, c M-14 (since repealed by SS 2014, c 24). The PGT became her statutory guardian for property. After being discharged from the hospital the older adult resided in a care home and refused any contact from her husband. During a review hearing for her Certificate of Incompetence the wife stated that she had been physically assaulted and intimidated by her husband during her life and that she was afraid of him. She wanted to remain in her care home, separate and apart

[151] *Ibid.* at para. 27
[152] 2014 SKQB 320

from her husband. She said she was happy and safe, although she could not name the care home or its address. She also could not file a tax return on her own and, while she had some knowledge of her financial situation, it was limited. The PGT brought a petition seeking a division of family property pursuant to *The Family Property Act* and maintenance pursuant to *The Family Maintenance Act*. The husband brought a motion seeking an Order prohibiting the PGT from pursuing a property claim on behalf of his wife. The husband argued that his wife would not want the family property to be divided. The wife however testified in an affidavit that while she forgets most things, she does not forget her life with her husband. She also stated that she would like to have half of her family property and have it managed by the PGT.

The Court noted that the wife may not be capable to manage her financial affairs but that does not mean she was not capable of making personal decisions. The Court cited *Calvert (Litigation Guardian of) v. Calvert (1997)*, 32 O.R. (3d) 281 (Div. Ct), at 294, aff'd (1998), 37 O.R. (3d) 221 (CA), leave to appeal [1998] SCCA No. 161: "Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he/she does, or does not want to live." The Court concluded that "In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life. . . There is evidence that [the wife] wants to live in the care home and not with [her husband], and that she wants her half of the family property. . ." The Court dismissed the husband's motion.

SMBC v. WMP and others

Finally, in *SMBC v. WMP and others*[153] the fairly new, Court of Protection of the High Court of England and Wales was asked to give directions in proceedings respecting the capacity to marry and capacity to manage property of a person referred to as "A". The case was prompted by police seeking forced marriage protection orders for A and his two brothers based on concerns about A's capacity to marry and family pressure for A to undergo an arranged marriage abroad.

A argued that the Court of Protection was not the proper forum for him since he had not been properly found incapable. A relied on the fact that there was no conclusive finding that he was incapable, such that he could rely on the presumption of capacity.

Indeed, the Court found that the capacity assessment (termed a "COP3") was incomplete and flawed, but noted that it did raise concerns of incapacity such that it warranted the attention of the Court of Protection. A further report was ordered, however, the second assessing psychiatrist was unable to provide a fulsome assessment as he required background information and additional tests which A refused to participate in. There were further complications: a social worker had met with and interviewed A without involving his lawyer, which was in breach of the legal requirements. The Court still allowed the social worker's evidence but gave it less weight.

One of the issues in question was whether as part of capacity proceedings, an individual's medical records can be obtained.

The Court appeared to have prima facie evidence that "A" lacked an understanding of marriage and divorce, as well as the proceedings in

[153] [2011] EWHC B13 (CoP)

general. In light of the evidence of possible incapacity, the Court allowed the release of A's information as sought by the expert.

The Court used these proceedings as an opportunity to set out guidelines for capacity proceedings as follows:

(1) including requirements that experts should seek information and set out questions before completing their reports;

(2) that social workers investigating capacity inform the party's lawyer of the intent to interview the party;

(3) medical assessors must provide clear reports;

(4) it is not a violation of human or common law rights for a medical expert to be provided with a party's medical records; and

(5) that psychometric testing is appropriate even if the person who may indeed be capable so objects.

While these proceedings are different from those in the cases noted above, in that they were prompted by protective legislation that allows the state to prevent marriage on the basis of incapacity, the principles are interesting in that they emphasize the importance of clear assessments and the need for access to information. While the decision underscores the importance of respecting an individual's rights, and the presumption of capacity, it also emphasizes the need for experts to have access to full information in order to make proper, informed assessments.

The (Canadian) cases cited above also highlight the need for clear information, so that full and proper assessments can be obtained. Many of

the difficulties in the above-cited cases are caused by the inability to properly determine whether the party in question had capacity to marry or divorce at the requisite time. For capacity assessments to be meaningful, they must not only address the legal issues in full, they must also be informed by proper and complete background information on the person in question.

BEST PRACTICES & GUIDELINES FOR DRAFTING SOLICITORS

Below are some red flags and recommended guidelines to assist in managing and minimizing the risk of capacity concerns, and the potential for interplay of undue influence and suspicious circumstances:

Red Flags:

- Intellectual impairment;
- memory problems;
- disorientation;
- poor attention;
- unaware of risks to self and others;
- irrational behaviour, reality distortion: delusions;
- unresponsive and inability to make a decision;
- cannot easily identify assets or family members;

Guidelines and Best Practices:

- Interview the client alone
- Take comprehensive and contemporaneous notes - record the questions asked and the answers given. Include observations about your client's condition and notes on any discussions you had with caregivers or family members regarding the clients medical condition.
- Ask probative, open-ended questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document
- Determine intentions – consider evidence of intention and indirect evidence of intention
- Obtain comprehensive information from the client, which may include information such as:
    - Intent regarding testamentary disposition / reason for appointing a particular attorney or to write or re-write any planning documents.
    - Any previous planning documents and their contents, and copies of them
- Determine relationships between the 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

- 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? Joint bank accounts? Debts? Loans? Mortgages? Etc.

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

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

- Does the client have a physical impairment of sight, hearing, mobility or other?

- Have there been any recent changes in the planning documents 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?

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

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

- 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?

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

- 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?

- 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;

Undue Influence:

Take note of any indicators of undue influence, although be mindful of the distinction that exists between capacity and undue influence:

- Is the client physically dependant on another or is the client vulnerable?
- Is there an individual who tends to come with your client to his or her appointments or is in some way significantly involved in his or her legal matter? If so, what is the nature of the relationship between this individual and your client?
- Is your client well supported? Supported by only one family member or more? Is there a relationship of dependency between the client and a family member?
- Is there conflict within your client's family?
- Is your client isolated from familial support? Does s/he benefit from some other support network?
- Is the client independent with respect to personal care and finances, or does s/he rely on one particular individual, or a number of individuals? 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 or her character traits?

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

- 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 sough; whether the client was alone with his or her lawyer while providing instructions; who were the witnesses to the document and why those particular witnesses were chosen.

- 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?

- 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.

- 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; and

- 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.

OTHER RELATED TOOLS/RESOURCES/CHECKLISTS

The following checklists can be found with this paper:

Appendix "A": Capacity Checklist: The Estate Planning Context
http://www.welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

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

Appendix “C”: Checklist: Red Flags For Decisional Incapacity in the Context of a Legal Retainer:
http://www.welpartners.com/resources/WEL_ILA%20checklist.pdf

See also WEL partners website for the following resources:

My paper: “*Independent Legal Advice: Risks Associated with ILA where Undue Influence and Capacity are Complicating Factors*”:
http://welpartners.com/resources/WEL_TQR_March_2017.pdf

Undue Influence Checklist:
http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf

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:
http://welpartners.com/blog/?s=section+3+counsel

“*Capacity and the Estate Lawyer: Comparing the various Standards of Decisional Capacity”* (2013) E.T.& P.J. 215-250:
http://welpartners.com/blog/?s=ETPJ

Predatory Marriages: Legal Capacity to Marry and the Estate Plan:
http://welpartners.com/blog/2014/06/paper-predatory-marriages-legal-capacity-to-marry-and-the-estate-plan/

Poyser, John. *Capacity and Undue Influence*. Toronto: Carswell, 2014. This is an excellent resource and I recommend it highly as a comprehensive and insightful resource.

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

Kimberly A. Whaley, WEL Partners June 2017

APPENDIX "A" CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

Capacity Generally

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

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

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

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

Testamentary Capacity

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

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

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

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[1] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 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

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

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

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

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

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

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

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

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[3] *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)
[4] The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz,* 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne* Estate (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (BailII)
[5] *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227*

Capacity to Make Testamentary Dispositions other than Wills

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

> (a) a testament,
>
> (b) a codicil,
>
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) any other testamentary disposition. ("testament")

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

- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.[9] The criteria to be applied, is that of testamentary capacity.

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

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

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

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

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[6] *Laszlo v Lawton*, 2013 BCSC 305,SCBC
[7] R.S.O. 1990 c.s.26 as amended subsection 1(1)
[8] S.51(10 of the Succession Law Reform Act
[9] S 1(1)(a) of the SLRA
[10] R. S.O. 1992, c 30, as am.

(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.[11]

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

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

When an Attorney should act under a CPOAP

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

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

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

Capacity to Manage Property

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

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

[11] *SDA,* subsection 8(2)
[12] *SDA*, subsection 9(1)
[13] *SDA,* subsection 9(2)
[14] R.S.O. 1990, c. M.7

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

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

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

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

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

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

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

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

When an Attorney should act under a POAPC

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

Capacity to Make Personal Care Decisions

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

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

[15] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[16] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291
[17] *SDA*, subsection 47(1)
[18] *SDA*, subsection 47(3)
[19] *SDA*, subsection 47(2)

(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[20]

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

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

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

Capacity to Contract

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

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

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

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

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[24] Subsection 2(1) of the *SDA* provides that all persons who are

[20] S.O. 1996, C.2 Schedule A
[21] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).

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

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

eighteen years of age or older are presumed to be capable of entering into a contract.[25] Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[26]

Capacity to Gift

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

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

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

Capacity to Undertake Real Estate Transactions

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

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

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

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

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

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[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
[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

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

(f) 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.[31]

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

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

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

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

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.[35] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

(a) Understand what they have asked the lawyer to do for them and why,

[31] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[32] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[33] *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik
[34] *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494
[35] Staff lawyer at ARCH Disability Law Centre.

(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.[36]

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[37]

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

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;[38]
- 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 [39]

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

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[40]

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[36] At page 3
[37] *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.
[38] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162
[39] *Wingrove v. Wingrove* (1885) 11 P.D. 81

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

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.[41]

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. [42]

Psychological pressures creating fear may be tantamount to undue influence.[43]

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."[44]

Undue influence must be corroborated. [45]

Suspicious circumstances will not discharge the burden of proof required.[46]

* 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.[47]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[48]

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[41] *Wingrove v. Wingrove* (1885) 11 P.D. 81
[42] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)
[43] *Tribe v Farrell,* 2006 BCCA 38
[44] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[45] 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
[46] *Vout v Hay*, at p. 227
[47] *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.)*

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

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Kimberly A. Whaley, WEL PARTNERS 2017

APPENDIX "B" SUMMARY OF CAPACITY CRITERIA

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Manage property	*Substitute Decisions Act, 1992*[1] *("SDA"),* s. 6	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	*SDA,* s. 45	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	*SDA,* s. 8	(a) Knowledge of what kind of property he or she has and its approximate value; (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

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

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; and (b) Ability to understand the trust`s specific effect in the specific circumstances. *In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to Undertake Real Estate Transactions	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances. *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children. Also possibly required: capacity to manage property and the person Dr. Malloy[2] stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
		previous marriages, as well as his or her children and how they may be affected.
Capacity to separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry)[3].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[4].
Capacity to instruct counsel	Common law	(a) Understanding of what the lawyer has been asked to do and why; (b) Ability to understand and process the information, advice and options the lawyer presents to them; and (c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[5]
Capacity to give evidence	*Evidence Act*,[6] ss. 18(1), 18(2), 18(3)	***18.*** *(1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).* ***Challenge, examination*** *(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).* ***Exception*** *(3) However, if the judge, justice or other presiding officer is of the opinion that the*

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

4 *Calvert*

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

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

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
	Canada Evidence Act,[7] s. 16(1)	*person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).* ***Witness whose capacity is in question*** *16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine* *(a) whether the person understands the nature of an oath or a solemn affirmation; and* *(b) whether the person is able to communicate the evidence*

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

Kimberly A. Whaley, WEL PARTNERS 2017

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

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

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

RED FLAGS FOR INCAPACITY

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

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

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

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

- Comprehension problems: difficulty repeating simple concepts and repeated questions

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

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

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

- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag[1]

- 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[2]

- 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[3]

- 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[4]

- A deathbed will where there is a strong likelihood that the testator may be delirious[5]

- Complexity or conflict in the milieu of a vulnerable individual[6]

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

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[1] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[2] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[3] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[4] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[5] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[6] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

- 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

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

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

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

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

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