



**Canadian Tax Foundation**

**2011 Ontario Tax Conference**

**Estate Planning Lessons from Recent Case Law**

**October 24 – 25, 2011**

**Kimberly Whaley—Whaley Estate Litigation**



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**A. Introduction**

As most estate planners (and litigators) know, estate planning can be a minefield. Tax practitioners are usually intimately involved with designing the plan and reviewing the documents that are required to implement it. A Plan that is well designed can unravel if it is not properly implemented. This, in turn often leads to adverse tax consequences and estate litigation which will inevitably involve the planners as well as the implementers. Therefore tax practitioners need to understand some of the most important basic implementation issues that can lead to such results.

This paper will focus on two of the cornerstones of any estate plan: execution of wills and powers of attorney. It will also highlight issues surrounding capacity. The following is a review of the law and an update of some of the recent case law. Although a mere snapshot, it is meant to provide tax practitioners and estate planners with some necessary guidance on these three important and basic aspects of estate plan implementation.

## **B. Wills and Powers of Attorney: What it Takes to Ensure Due Execution, and Knowledge and Approval**

### **(i) *Wills and Codicils***

#### **The Formal Requirements**

The validity of a will is dependent upon whether or not it was duly executed. For a will to have been duly executed, it must meet the formal requirements set out in the governing legislation, the *Succession Law Reform Act* (the “SLRA”).<sup>1</sup>

The *formal* requirements for due execution are found in sections 3, 4, and 7 of the SLRA, which provide as follows:

#### **Will to be in writing**

3. A will is valid only when it is in writing.

#### **Execution**

4. (1) Subject to sections 5 and 6, a will is not valid unless,
  - (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
  - (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
  - (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

#### **Position of signature**

7. (1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the

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<sup>1</sup> R.S.O. 1990, c. S.26.

testator intended to give effect by the signature to the writing signed as his or her will.

(2) A will is not rendered invalid by the circumstance that,

- (a) the signature does not follow or is not immediately after the end of the will;
- (b) a blank space intervenes between the concluding words of the will and the signature;
- (c) the signature,
  - i. is placed among the words of a testimonium clause or of a clause of attestation,
  - ii. follows or is after or under a clause of attestation either with or without a blank space intervening, or
  - iii. follows or is after, under or beside the name of a subscribing witness;
- (d) the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or
- (e) there appears to be sufficient space on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written to contain the signature.

(3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4, 5 or 6 or this section does not give effect to,

- (a) a disposition or direction that is underneath the signature or that follows the signature; or
- (b) a disposition or direction inserted after the signature was made.

While it is true that in the last decade or so Ontario courts have been taking a less strict approach to determining whether a will has met the formal requirements needed to

prove due execution,<sup>2</sup> drafters would be wise to ensure that the formal criteria are met. There is no formal recognition in Ontario law for “substantial compliance,” as there is in certain other jurisdictions.<sup>3</sup>

A further requirement for proving due execution is that the testator had knowledge and approval of the contents of the will or codicil. Knowledge and approval of a testamentary document will only be presumed if it can be proven that not only was the will duly executed but the will was read to/read by the testator who appeared to understand its contents and effect.<sup>4</sup>

### Rectification

Courts retain an equitable power to correct errors or omissions when it is found that the error or omission compromises the testator’s true intentions. This judicial process is called rectification.

The case of *Lipson v. Lipson*<sup>5</sup> involved a case where a testator, Mr. Lipson, had attempted to deal with his property on death by way of primary and secondary wills for tax planning purposes. However, the wills were inadvertently sent by Mr. Lipson’s lawyer in draft form to the testator’s accountant who, without reading them, brought them to the testator to sign. The wills contained a number of errors. Among other things, certain articles of the draft version of the secondary will had the effect of revoking the first will in its entirety and also purported to deal with the same assets as those dealt with in the first, thus defeating the purpose of drafting the two wills in the first place. In light of the evidence, the court found that the deceased did not have knowledge and approval of the testamentary documents, stating, at paragraph 53:

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<sup>2</sup> Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* looseleaf (Aurora, ON: Canada Law Book, 2008) at 16-3, citing to: *Sisson v. Park Street Baptist Church* (1998), 24 E.T.R. (2d) 18 ((Ont. Ct. (Gen. Div)).

<sup>3</sup> Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* looseleaf (Aurora, ON: Canada Law Book, 2008) at 16-3.

<sup>4</sup> Jennifer J. Jenkins & H. Mark Scott, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* looseleaf (Aurora, ON: Canada Law Book, 2008) at 16-3.

<sup>5</sup> 2009 CarswellOnt 7474 (Ont. S.C.J.)

In my view and notwithstanding my view that it was primarily [the accountant's] error that caused the wrong will to be executed, the mistake which occurred was, first and foremost a drafting error which arose as a result of a clerical mistake. Mr. Lipson signed an early draft of the Secondary Estate Will instead of the final version. Further, in doing so, I accept Mr. Harper's evidence that *he did not read or have read to him the Secondary Estate Will before he signed it. As a result, Mr. Lipson was unaware of the errors in Article I of the Secondary Estate Will.*

On this basis and the fact that the mistakes in portions of the secondary will did not accurately or completely express the clear and unambiguous intentions of Mr. Lipson as indicated in his will as a whole, the court relied on its jurisdiction to correct the mistakes in certain articles of the secondary will such that the will properly reflected the deceased testator's intentions.<sup>6</sup> In doing so, the Court summarized the factors that must exist before a court will exercise its power to delete or insert words in order to rectify a will:

- (i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
- (ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;
- (iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and
- (iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.<sup>7</sup>

In the result, the Court deleted certain portions of the will to better accord with the deceased's true intentions in executing the primary and secondary wills.

It is important to note that, despite the outcome in *Lipson v. Lipson*, the Ontario courts will proceed cautiously before taking liberties with testamentary documents. Hence, in

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<sup>6</sup> 2009 CarswellOnt 7474 (Ont. S.C.J.) at par. 62.

<sup>7</sup> 2009 CarswellOnt 7474 (Ont. S.C.J.) at par. 42.

the case of *Robinson Estate v. Robinson*,<sup>8</sup> which was upheld by the Ontario Court of Appeal,<sup>9</sup> the Court refused to rectify a will when it was found that the testator did not understand the legal effect of a revocation clause. In reaching its decision, the Court emphasized the limits of the court jurisdiction to interfere by way of rectification:

The position being urged by the applicants would give the court the following power: Even where there is no ambiguity on the face of the will, and no drafting error of any sort, and the will has been reviewed and approved by the testator before it was executed, the court may nonetheless intervene and rectify simply on the basis of third party affidavit evidence that the testator was mistaken and did not mean what she said.

This would be a significant change in the law.

If a long-standing legal principle is to be changed, it should be done by legislation or by a Court of Appeal. I am not about to expand the limits of the rectification power and reverse a century of case law on the basis of the submissions that were made on these applications, however sympathetic my views may be given the facts of this particular case.<sup>10</sup>

Notably, other ways in which a will can be challenged include lack of capacity of the testator to make a will, undue influence and fraud, forgery and the impact of suspicious circumstances must be dispelled if raised. These are discussed in further detail, below.

## **(ii) Powers of Attorney**

### *The Formal Requirements for a Valid Continuing Power of Attorney for Property*

Subsection 9(1) of the *Substitute Decisions Act* (the “*SDA*”)<sup>11</sup> provides that, in order for a continuing power of attorney for property to be valid, the grantor, at the time of executing the document, must be capable of giving it, even if he or she is incapable of managing property. In order for a granter of a continuing power of attorney for property to be capable of giving one, they must meet the following conditions set out in subsection 8(1) of the *SDA*:

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<sup>8</sup> 2010 CarswellOnt 4576 (Ont. S.C.J.).

<sup>9</sup> 2011 CarswellOnt 5819 (Ont. C.A.).

<sup>10</sup> 2010 CarswellOnt 4576 (Ont. S.C.J.) at paras. 45-47.

<sup>11</sup> 1992, S.O. 1992, c. 30.

- (a) They must know what kind of property they have and its approximate value;
- (b) They must be aware of obligations owed to their dependants;
- (c) They must know 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) They must know that the attorney must account for his or her dealings with the person's property;
- (e) They must know that they may, if capable, revoke the continuing power of attorney;
- (f) They must appreciate that unless the attorney manages the property prudently its value may decline; and
- (g) They must appreciate the possibility that the attorney could misuse the authority given to him or her.

The formal requirements governing execution of a continuing power of attorney for property are set out in section 10 of the *SDA*, which provides as follows:

#### **Execution**

10. (1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.

#### **Persons who shall not be witnesses**

10. (2) The following persons shall not be witnesses:

- 1. The attorney or the attorney's spouse or partner.
- 2. The grantor's spouse or partner.
- 3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
- 4. A person whose property is under guardianship or who has a guardian of the person.
- 5. A person who is less than eighteen years old.

Although a continuing power of attorney that does not comply with subsections 10(1) and (2) is not effective, the court may, on any person's application, declare the

continuing power of attorney to be effective provided the court is satisfied that it is in the interests of the grantor or his or her dependants to do so.<sup>12</sup>

### Effective Date

Generally-speaking, a continuing power of attorney for property becomes effective immediately upon execution, unless the document says otherwise. Subsection 7(7) of the *SDA* provides that the grantor may specify a specific date or contingency upon which the attorney comes into effect, such as incapacity. If such a provision is included, however, it may be necessary to also incorporate a method for determining capacity, such as a capacity assessment. If the continuing power of attorney for property provides that it comes into effect when the grantor becomes incapable of managing their property, but it does not provide a method for determining whether that situation has taken place, section 16 of the *SDA* applies and the power of attorney comes into effect when the attorney is notified of the issuing of a Certificate of Incapacity

### The Formal Requirements for a Valid Power of Attorney for Personal Care

A power of attorney for personal care is valid if, at the time the power of attorney is executed, the grantor of the power (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and (b) appreciates that the person may need to have the proposed attorney make decisions for them.<sup>13</sup>

Section 48 of the *SDA* sets out the formal requirements for the execution of a power of attorney for personal care. It provides as follows:

48. (1) A power of attorney for personal care shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.

Persons who shall not be witnesses

(2) The persons referred to in subsection 10 (2) shall not be witnesses.

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<sup>12</sup> 1992, S.O. 1992, c. 30, s. 10(4).

<sup>13</sup> 1992, S.O. 1992, c. 30, s. 47(1) & (2).

According to subsection 48(4), a power of attorney for personal care that does not comply with subsections (1) and (2) is not effective. However, the court may, on any person's application, declare the power of attorney for personal care to be effective if the court is satisfied that it is in the grantor's interests to do so.

### Effective Date

When a power of attorney for personal care takes effect is very different from a continuing power of attorney for property. Unlike a continuing power of attorney for property, a power of attorney for personal care only comes into effect when the grantor of the power becomes incapable of making a particular type of personal care/health care decision.

Subsection 49(1) of the *SDA* provides that a power of attorney for personal care only becomes effective (a) when the decision is one to which the *Health Care Consent Act* (the "*HCCA*")<sup>14</sup> applies to and that Act authorizes the attorney to make the decision, or, (b) if the *HCCA* does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from making the decision unless the fact that the grantor is incapable of personal care has been confirmed.

The *HCCA* governs three aspects of health care: treatment; admission to a care facility; and personal assistance services. Before an attorney for personal care may make a decision to which the *HCCA* applies, it is necessary to ensure that the grantor's rights pursuant to that Act are protected. For instance, the grantor has the right to challenge a finding of incapacity by applying to the Consent and Capacity Board for review. Thus, an attorney is prohibited from making substitute decisions governed by the *HCCA* without the knowledge and agreement of third parties.<sup>15</sup>

If the decision is not one to which the *HCCA* applies then provided the document does not require incapacity to be confirmed, an attorney can make the decision if they have

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<sup>14</sup> 1996, S.O. 1996, c. 2, Sched. A.

<sup>15</sup> M. Jasmine Sweatman, *Guide to Powers of Attorney* (Ontario: Canada Law Book, 2002) at pg. 134.

reasonable grounds to believe that the grantor is incapable of making the particular decision. Although “personal care” is not defined within the *SDA*, it is accepted that the items enumerated in section 45 of the *SDA* constitute “personal care.” Thus, decisions regarding health care, nutrition, shelter, clothing, hygiene or safety are decisions which do not fall within the scope of the *HCCA*. Decisions regarding items such as these can be made only when the attorney has reasonable grounds to believe that the grantor is incapable of making a decision regarding same, unless the power of attorney provides otherwise.

Subsection 49(2) of the *SDA* sets out the method for confirming incapacity. It provides as follows:

49. (2) A power of attorney that contains a condition described in clause (1) (b) may specify the method for confirming whether the grantor is incapable of personal care and, if no method is specified, that fact may be confirmed by notice to the attorney in the prescribed form from an assessor stating that the assessor has performed an assessment of the grantor’s capacity and has found that the grantor is incapable of personal care.

If a particular decision is not covered by the *HCCA*, the power of attorney itself may specify the method for confirming whether the grantor is incapable. If, however, the power of attorney for personal care is silent on the method for confirming incapacity, confirmation may be obtained by notice to the attorney in the prescribed form from an approved professional.

*Nguyen-Crawford v. Nguyen (2010)*<sup>16</sup>

In *Nguyen-Crawford v. Nguyen*, a daughter (Ms. Nguyen-Crawford) accompanied her mother to her mother’s lawyer’s office where her mother executed powers of attorney in her daughter’s favour. Before executing the documents, Ms. Nguyen-Crawford translated them to her mother, whose primary language was Vietnamese. Ms. Nguyen-Crawford’s other siblings later sought a declaration that the powers of attorney were

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<sup>16</sup> 2010 CarswellOnt 9492 (Ont. S.C.J.).

invalid on the basis that Ms. Nguyen-Crawford, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her mother and was the only person who translated both the documents and the lawyer's advice concerning them.

The Court found that Ms. Nguyen-Crawford did not meet the "high evidentiary burden" necessary to uphold the documents and demonstrate that her mother knew what she was signing or that the powers of attorney were a clear expression of her mother's wishes at the time she signed the documents, and, consequently, the powers of attorney were of no force and effect.

In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that Ms. Nguyen-Crawford exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was that (a) the mother was dependent upon Ms. Nguyen-Crawford, b) Ms. Nguyen-Crawford provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves (which, in turn, conferred on Ms. Nguyen-Crawford extensive powers to act on her mother's behalf), and, somewhat perplexingly, c) Ms. Nguyen-Crawford and her husband used the mother's funds as if they were their own. This latter point is somewhat peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents, but took place two years later.

Importantly, in *obiter*, there was some discussion of the fact that since the drafting solicitor failed to obtain an independent translator for the grantor/mother before the documents were executed, the solicitor may have failed to discharge her duty of care, and could have been found negligent. Ms. Nguyen-Crawford had attempted to argue that such a finding was a condition precedent, so to speak, to finding the powers of attorney documents invalid.

Although the Court disagreed with Ms. Nguyen-Crawford's argument, in grappling with the issue of possible solicitor negligence, the Court referred to the similar case of

*Barbulov v. Cirone* (2009), 2009 CarswellOnt 1877 (Ont. S.C.J.). However, as noted by the Court, in that case, “[t]here was no comment as to whether the solicitor had breached his duty to the donor/father by failing to have the power of attorney translated to him by an independent translator.”

The Court did not delve further into the issue on the basis that there was no evidence to support any finding on that issue, since it lacked the drafting solicitor’s notes, records and testimony. The Court did, however, opine that the drafting solicitor’s notes, records and testimony would have been useful had it provided positive evidence that the documents and advice were independently translated.

The case of *Nguyen-Crawford v. Nguyen* sends a clear message to drafting solicitors who proceed to draft documents for grantors with little command of the languages spoken by the drafting solicitor. Not only do solicitor’s notes and records have significant probative value in that they can provide positive evidence as to whether documents and advice were independently translated, but, if damning, *Nguyen-Crawford v. Nguyen* also suggests that they can leave open the possibility of a successful claim of solicitor’s negligence.

Thus, this decision suggests that care should be taken to ensure that proper independent translators are obtained by drafting solicitors—and not those who stand to benefit from the document itself. Would-be attorneys ought to be equally vigilant, if they do not wish to have the document they later act pursuant to, to be challenged at a later date on the basis of grantor’s lack of capacity to grant the power.

*Johnson v. Huchkewich* (2010)<sup>17</sup>

The case of *Johnson v. Huchkewich* involved a similar set of facts as that of *Nguyen-Crawford v. Nguyen*, thus underscoring the point that many individuals view power of attorney documents as a way in which to gain access to the assets of a vulnerable individual and care must be taken by drafting solicitors when preparing such documents.

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<sup>17</sup> 2010 CarswellOnt 8157 (Ont. S.C.J.).

In *Johnson v. Huchkewich*, one of the widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as "a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets. During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother, in Polish; and no one else in the room understood Polish. Shortly after that and as stated by the Court "before the ink had dried'?", the daughter used the power of attorney to transfer \$200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant cost associated therewith, and a number of orders were made against the attorney/daughter, including:

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

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

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

## **C. Capacity and Negligence**

### **(I) *Capacity and Negligence***

Issues of capacity arise frequently in an estate planning practice. Such issues are complex and are only bound to increase in frequency as our population continues to age rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders, memory deficits and other conditions involving reduced functioning and capability. There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. Other factors affecting capacity include normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bi-polar disorder, psychotic disorders, mood disorders, disorientation, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction. It is now, however, correct to make an assumption that any such diagnosis renders an individual incapable of making certain decisions.

### **(II) *Capacity in General***

There is no single legal definition of "capacity". The *SDA* which addresses various types of capacity, simply defines "capable" as "mentally capable," and provides that "capacity" has a corresponding meaning.

Nor is there a general test or criteria for establishing "capacity," "mental capacity" or "competency." Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

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.

The *SDA* was drafted with the intention of providing a framework to promote individuals autonomy, while balancing the ability to enhance the protection afforded to individuals of limited capacity.

**(III) Key Interpretations: “Understand” and “Appreciate”**

The *SDA* sets out a two-part definition of mental capacity in that the person must have the ability to (i) understand information relevant for making decisions and (ii) show the ability to appreciate the consequences of a decision or a lack of a decision. To better explain, the following is a summary provided by Guidelines for Conducting Assessments of Capacity, Ministry of the Attorney General, Capacity Assessment Office, May 2005: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>

The crux of the matter for the assessor is to distinguish between decisions that are poorly informed, foolish, risky or socially deviant, as opposed to decisions that are the product of an impaired decision-making process. Only the latter warrant designation of persons as "mentally incapable." In order to be deemed "mentally capable," an individual must satisfy both parts of the definition. In some ways, the "understand" standard is more fundamental to capacity in that erosion of fundamental knowledge or significant information-processing impairments usually interfere with accurate appraisal of risk needed to fully appreciate the consequences. However, many individuals will pass the "understand" standard as it focuses more on factual understanding, but fail the "appreciation" standard due to lack of insight, poor impulse control, delusional beliefs or motivational disorders that distort the reasoning process or the attachment of personal meaning to decisions.

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the applicable test for capacity. It 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 tests 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, from both legal and medical points of view. Capacity determinations are often complicated. In addition to professional and expert evidence, lay evidence can be relevant to assess capacity in some situations. The standard of assessment varies and this too can become an obstacle that is difficult to overcome in determining capacity. 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 deceased.

#### **(IV) *Capacity is Domain, Decision, Time and Situation Specific***

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” and there is no test to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision.

##### *Capacity is Decision-specific*

Capacity is decision-specific and is determined by legislation. Thus, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one’s property or personal care. Testamentary capacity, the capacity to enter into a contract or to give a gift, or to marry, separate or divorce 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 or 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 test so to speak, or factors to consider in its determination. The differing tests for capacity are provided in chart-format, for ease of reference, below.

### 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 capacity at differing times. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a will can vary over time.

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. 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 test for capacity at the time that instructions are received.

### 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 or her home may have capacity that he or she may not display in a lawyer’s or doctor’s office.

Although each task has its own specific capacity test, 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.

### Starson v. Swayze<sup>18</sup>

The 2003 Supreme Court decision in *Starson v. Swayze* is helpful in elucidating some points about capacity. Although the decision dealt solely with the issue of capacity to

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<sup>18</sup> 2003 CarswellOnt 2079 (S.C.C.).

consent to treatment under the *HCCA*, the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, Major J., made several points about capacity. First, he pointed out 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.

Major J. emphasized that the ability to understand and process information is key to capacity. The ability to understand the relevant information requires the “cognitive ability to process, retain and understand the relevant information.”<sup>19</sup> Then, a person must “be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof.”<sup>20</sup>

A capable person requires the “ability to appreciate the consequences of a decision,”<sup>21</sup> and not necessarily “actual appreciation of those consequences.”<sup>22</sup> Thus, a person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if he or 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. A capable person is entitled to be unwise in his or her decision-making. His Honour referred to the oft-cited decision of Quinn J. in *Re Koch* for the following principle: “The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.”<sup>23</sup>

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<sup>19</sup> 2003 CarswellOnt 2079 (S.C.C.) at par. 78.

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

<sup>21</sup> *Ibid.* at par. 80.

<sup>22</sup> *Ibid.*

<sup>23</sup> (1997), 33 O.R. (3d) 485 (Ont. Gen. Div.), at p. 521.

## Summary

The following is an excerpt from the Guidelines for Conducting Assessments of Capacity/Ministry of the Attorney General, Capacity Assessment Office, May 2005:

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pqt/capacity/2005-06/guide-0505.pdf>

The *SDA* rejects the notion of global incapacity and instead recognizes that capacity may be limited only with respect to certain decisions or classes of decisions. When the assessor receives a request for a capacity assessment, the first question to ask is “capacity for what?”

At the broadest level, the law distinguishes between the ability to make personal care and financial decisions, recognizing that a person may lack capacity in one area but not the other. The *SDA* also subdivides personal care decision-making into six sub-domains: health care, nutrition, clothing, hygiene, shelter, and safety. Here, capacity can be independently assessed in any, several or all of these sub-domains, and the assessor could find the person incapable in one or more or all.

The *SDA*'s ability to examine decision-making in a more circumscribed fashion has two important advantages. First, it ensures that the person's rights will not be removed in areas where he or she is still able to manage. Second, guardianship orders can be tailor-made to confer powers only where it is needed and clear benefits derive. Capacity for decision-making does not need to be formally examined in areas where there are no presenting concerns. For example, a person may have severe dementia that precludes his or her ability to meet essential personal care needs, but if the individual is already in safe housing, he or she may only require a capacity assessment for property.

“Mental capacity” is a socio-legal construct, the meaning of which varies over time and across jurisdictions. As a legal construct in guardianship proceedings, a finding of “mental incapacity” serves as a trigger for the appointment of a legally authorized substitute decision-maker. The assessor of mental capacity under the *SDA* must appreciate that he or she is not performing a clinical assessment where the purpose is to arrive at a diagnosis, make treatment decisions, or mobilize social supports. Rather, the assessor is making a threshold decision (capable or incapable) about the adequacy of the person's ability to make decisions pertaining to his or her personal life and/or financial situation.

There are as many different operational definitions of mental (in)capacity as there are jurisdictions. Thus, an individual can be declared “mentally incapable” for guardianship purposes in one jurisdiction, but not meet the legal criteria in another. The way in which a state or province defines “mental capacity” in its legislation has a direct bearing on the nature of the assessment. First, it defines which legal “test” is to be applied (e.g. a “disabling conditions” test, a cognitive or “decisional impairment” test, a “functional impairment in essential areas” test, a “need-for-court involvement” test, or any combination of the above, etc.). Second, it constrains the assessor in terms of the type of information that is considered to be germane for this purpose.

Specifically, an assessor asks: "Does this person's level of decisional ability match the demands of the specific situation with which they are faced?" An assessor must give full consideration not only to what the individual can accomplish, but to whether the person acknowledges any personal limitations, knows his or her options, and has considered the merits of obtaining appropriate assistance to meet his or her decision-making needs.

### Capacity Summary

The following is a synopsis which attempts to summarize the various criteria for capacity:

| <b><u>TASK</u></b>                  | <b><u>SOURCE</u></b> | <b><u>DEFINITION OF CAPACITY</u></b>  |
|-------------------------------------|----------------------|---|
| <b>Manage property</b>              | <i>SDA, s. 6</i>     | (a) Ability to understand the information that is relevant in making a decision in the management of one’s property; <u>and</u><br><br>(b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.   |
| <b>Make personal care decisions</b> | <i>SDA, s. 45</i>    | (a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; <u>and</u><br><br>(b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision. |
| <b>Grant and revoke a POA for</b>   | <i>SDA, s. 8</i>     | (a) Knowledge of what kind of property he or she has and its approximate value;<br>(b) Awareness of obligations owed to his or her dependants;<br>(c) Knowledge that the attorney will be able to do on the   |

| <u>TASK</u>                                     | <u>SOURCE</u> | <u>DEFINITION OF CAPACITY</u>   |
|---|---------------|---|
| <b>Property</b>                                 |               | <p>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;</p> <p>(d) Knowledge that the attorney must account for his or her dealings with the person's property;</p> <p>(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;</p> <p>(f) Appreciation that unless the attorney manages the property prudently its value may decline; <u>and</u></p> <p>(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.</p>   |
| <b>Grant and revoke a POA for Personal Care</b> | SDA, s. 47    | <p>(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; <u>and</u></p> <p>(b) Appreciation that the person may need to have the proposed attorney make decisions for the person.</p>   |
| <b>Contract</b>                                 | Common law    | <p>(a) Ability to understand the nature of the contract; <u>and</u></p> <p>(b) Ability to understand the contract's specific effect in the specific circumstances.</p>  |
| <b>Gift</b>                                     | Common law    | <p>(a) Ability to understand the nature of the gift; <u>and</u></p> <p>(b) Ability to understand the specific effect of the gift in the circumstances.</p> <p><i>In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.</i></p>  |
| <b>Make a will</b>                              | Common law    | <p>(a) Ability to understand the nature and effect of making a will;</p> <p>(b) Ability to understand the extent of the property in question; <u>and</u></p> <p>(c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.</p> <p>Further elements of the test for testamentary capacity are:</p> <ul style="list-style-type: none"> <li>• A "disposing mind and memory" to comprehend the essential elements of making a Will;</li> <li>• A sufficiently clear understanding and memory of the nature and extent of his or her property;</li> <li>• A sufficiently clear understanding and memory to know the</li> </ul> |

| <u>TASK</u>                            | <u>SOURCE</u> | <u>DEFINITION OF CAPACITY</u>  |
|--|---------------|--|
|  |               | <p>person(s) who are the natural objects of his or her Estate;</p> <ul style="list-style-type: none"> <li>• A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and</li> <li>• 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.</li> </ul>   |
| <b>Revoke a will</b>                   | Common law    | (Same as above – to Make a will)   |
| <b>Make a codicil</b>                  | Common law    | (Same as above – to Make a will)   |
| <b>Make a testamentary designation</b> | Common law    | (Same as above – to Make a will)   |
| <b>Create a trust</b>                  | Common law    | <p>(a) Ability to understand the nature of the trust; <u>and</u><br/> (b) Ability to understand the trust`s specific effect in the specific circumstances.</p> <p><i>In cases of a testamentary trust, the test for testamentary capacity applies.</i></p>   |
| <b>Capacity to marry</b>               | Common law    | <p>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.</p> <p>Also possibly required: capacity to manage property and the person</p> <p>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.</p> |
| <b>Capacity to separate</b>            | Common law    | Ability to appreciate the nature and consequences of abandoning the marital relationship.  |
| <b>Capacity to divorce</b>             | Common law    | Ability to appreciate the nature and consequences of a divorce.  |

**(V) Issues Relating to Capacity**

## Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.<sup>24</sup>

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

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one’s will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;<sup>25</sup>
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion.<sup>26</sup>

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances.

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document ... “cannot be said to be that of the deceased”<sup>27</sup>.

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<sup>24</sup> *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4<sup>th</sup>) 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. (4<sup>th</sup>) 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. (4<sup>th</sup>) 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.

<sup>25</sup> *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162  
<sup>26</sup> *Wingrove v. Wingrove* (1885) 11 P.D. 81

<sup>27</sup> *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58

Undue influence must be corroborated.<sup>28</sup>

### Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by:

- (a) circumstances surrounding the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator; or
- (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.<sup>29</sup>

### **(VI) Solicitors' Role in Capacity Matters**

Capacity is a complicated matter in that each task has its own test, and often the issue of capacity can be less than crystal-clear. There is no clear hierarchy of capacity. Indeed courts are loath to say that one test is higher or lower than another. In *Covello v. Sturino*,<sup>30</sup> for instance Justice Boyko was careful to distinguish the varying capacity standards as not necessarily higher or lower, but rather simply as different.

The fact that there is no all-encompassing capacity test means that a drafting solicitor must at all times turn their mind to 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 one task, but not another.

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<sup>28</sup> 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.

<sup>29</sup> *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

<sup>30</sup> 2007 CarswellOnt 3726 (Ont. S.C.J.).

The case law requires the drafting solicitor to satisfy him or herself that the client has capacity to execute the document in question. This duty is particularly significant if the client is elderly, infirm, dependant 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.

As issues of capacity which involve estate planning 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 turn his or her mind to the issue of capacity and assure him or herself that the client has the requisite legal capacity required 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 sought by the client. If the lawyer is confident that the client meets the test for capacity, he or she should clearly indicate this in his notes. Those notes should be thorough and carefully recorded and preserved.

It is wise for lawyers to take their time in asking the client 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 seeking to corroborate the answers provided by the client, for example, relating to the extent of the client's assets.

Of assistance and guidance would be an understanding of the guidelines for conducting assessments of capacity prepared for Assessors, which can be found at the following link:

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>

If the solicitor has serious concerns about the client's capacity, he or she can recommend or suggest with advice that the client have a capacity assessment.

Requests for capacity assessments should be clear and should concisely outline the legal test 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 test will be deemed deficient and unhelpful should a legal challenge arise in the future.

Lawyers have an important role to play when it comes to capacity. It is their responsibility to turn their mind to issues of capacity when preparing trusts, gifts, wills, contacts, powers of attorney and other legal documents. Although the area of capacity is often complicated, the more information a lawyer has about the applicable test, and the state of the client's abilities and understanding, the better protected both the lawyer and the client are.

### **(VII) *Capacity and Negligence: Tips and Traps***

From an estate planning perspective, a lawyer who makes a will, who cannot substantiate the testator or client's capacity to have made the will due to negligence and/or breach of duty of care, which sees a will invalidated on a will challenge, may find liability in respect of claims made by disappointed beneficiaries. If the lawyer's breach of duty caused the will to be declared invalid, particularly when the lawyer's neglect deprives the beneficiaries under the will of the evidence which may substantiate capacity, the onus will be on the lawyer to show that neglect was not the cause of the beneficiaries' loss.

Many cases have been decided on the question of testamentary capacity. The test often applied is whether the testator had a "sound and disposing mind" to have made a will.<sup>31</sup>

The criteria to be met to ascertain testamentary capacity is onerous and it falls on the propounder of the Will. In this instance, it is not sufficient to show that a testator had the ability to communicate testamentary wishes, rather these wishes must be shown to be the product of a sound and disposing mind as set out in *Banks and Goodfellow*.

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<sup>31</sup> *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

For a detailed review of testamentary capacity in the solicitor's negligence context, please access the following Whaley Estate Litigation blogs:

**Solicitor's Negligence in Will Preparation: What are the Courts saying in 2007?**

<http://whaleyestatelitigation.com/blog/2007/04/solicitors-negligence-in-will-preparation/>

**Solicitor's Negligence in the 21<sup>st</sup> Century: A Trust and Estates Perspective (2002):**

<http://whaleyestatelitigation.com/blog/2002/07/solicitors-negligence-in-the-21st-century/>

**Whaley Estate Litigation Newsletter No. 5 August 2011:**

<http://archive.constantcontact.com/fs060/1105045552020/archive/1106922623261.html>

An estate planner/solicitor can be liable for all sorts of potentially negligent actions of the will drafting solicitor including for delay, failure to obtain clear instructions, failure to ascertain capacity, failure to give or obtain expert advice, such as tax advice<sup>32</sup> and for any number of related duties in an estate plan, including the involvement of real estate transactions, corporate entities, fraudulent conveyances, improvident transactions, joint transfers, transfers in general.

I have not addressed by category the nature of the duty of care owed with respect to ascertaining specific liability, for example, other than capacity to make a will, or indeed specific construction cases, improper witnessing of a will, completing the will in a timely manner, in other words delay in execution, or drafting errors in detail since the present emphasis is on capacity and negligence. There are, of course, a number of case examples under these heads alone which are better reviewed in the papers referenced together with blog link herein.

Some of the common pitfalls to consider avoiding in will preparation that can be gleaned from the case law and are not specific to capacity however are as follows:

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<sup>32</sup> *Crowe v. Bollong*, 1998, CanLII 5607, BC SC.

1. Missed time limits, or inordinate delay in carrying out client instructions;
2. Failure to meet client expectations;
3. Miscommunication with clients, solicitor, third party beneficiaries;
4. Improper delegation;
5. Improper supervision;
6. Poor organization, or self-management;
7. Poorly defined retainer;
8. Not knowing your client issues;
9. Mistakes, omissions, drafting errors;
10. Lack of knowledge of the particular practice area and applicable law;
11. Dabbling;
12. Failure to understand who your client is, and your client needs;
13. Failure to understand that a conflict of interest might arise or be present;
14. Failure to assess urgency from the client who may be severely ill;
15. Failure to ascertain testamentary capacity, existing dementia, Alzheimer's, cognitive dysfunction, delusions, mental illnesses and addictions;
16. The pitfalls of varying one will where mutual wills are involved;
17. When preparing a new will or codicil, not examining the terms of the prior will and codicil;
18. Failure to keep written notes of instructions and dockets; and
19. In executing the will, failure to make a checklist of all necessary items attendant on validity, signatures, dates, witnesses and their contact information.

Given the foregoing, the estate planner is cautioned to take very careful steps in approaching estate planning with our clients and to fully document their file for the purposes of avoiding negligence claims.

*Thorpe v. Fellowes Solicitors LLP: A Cautionary Tale*

A recent case of the Queen's Bench Division of the Court in the United Kingdom, *Thorpe v. Fellowes Solicitors LLP*<sup>33</sup> is of some use on the issue of capacity.

The facts of *Thorpe v Fellowes Solicitors LLP* are as follows. Ms. Alexander contacted Fellowes Solicitors on behalf of her 77 year old mother, Mrs. Hill. Mrs. Hill gave instructions for the sale of her property. Ms. Alexander lived with Mrs. Hill in the property which was to be sold. The sale price was negotiated with instructions to Fellowes Solicitors LLP that the balance received on closing, after repaying the mortgage, would be made available to Mrs. Hill's daughter, such that she could purchase a property in her own name with the assistance of her own solicitors. After the sale had been completed, Mrs. Hill moved to full-time residential care. The action was commenced by Mrs. Hill's son in his capacity as her Litigation Friend, seeking damages for professional negligence. The claims made were as follows:

1. That Fellowes Solicitors LLP failed to appreciate that Mrs. Hill was a vulnerable person and to make enquiries as to her capacity to understand the sale transaction which represented the disposal of her only asset;
2. That Fellowes Solicitors LLP failed to appreciate that Ms. Alexander had considerable influence over Mrs. Hill, and only met with Mrs. Hill briefly in Ms. Alexander's presence;
3. That Fellowes Solicitors LLP did not properly investigate the sale of the property, its market value, the implications of selling her property;

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<sup>33</sup> [2011] EWHC 61.

4. That Fellowes Solicitors LLP failed to respond to the allegedly “highly suspicious” nature of the remission of the sale proceeds to Ms. Alexander as opposed to Ms. Hill; and
5. That Fellowes Solicitors LLP did not appreciate that the remission of the sale proceeds to Ms. Alexander was peculiar.

Notably, it is unclear from the judgment whether and what capacity was assessed. The judgment refers to unequivocal instructions to the solicitor without detail. It is known from the judgment that at the relevant time of the transaction, Mrs. Hill was suffering from senile dementia. The expert evidence seems to suggest that Mrs. Hill did have capacity and did have ability to make a perfectly valued opinion, and that dementia is not an all or nothing condition when it comes to capacity.

In reaching its conclusion, the Court found that there was no negligence and restricted its analysis to the conveyancing transaction alone. It does not appear that the nature of the transaction was investigated in full or established, nor had it been pleaded in negligence. In other words, it is not clear whether or not the proceeds which were ultimately remitted to Ms. Alexander, constituted a gift, or whether it was understood that the proceeds advanced were to be held by way of resulting trust to Mrs. Hill’s Estate.

The judgment speaks to the fact that in Mrs. Hill’s Estate, the gift, if a gift, would constitute a significant portion of her Estate. The judgment speaks to the solicitor’s attendance, no records, and there is some indication that the property to be purchased by Ms. Alexander would be the property in which Mrs. Hill would also reside. This did not turn out to be the case in the end.

This judgment does not seem to be of much value to solicitors in determining any further duty of care owed by a solicitor in circumstances where an elderly client provides instructions, and certainly does not place any further obligation on a solicitor with respect to the assessment of capacity, in circumstances of alleged or potential undue

influence. Solicitors are entitled to rely on the presumption of capacity. Thus, the decision in *Thorpe v Fellowes Solicitors LLP* did not extend the duty of care imposed on a solicitor. The court opined that there is “plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary.”<sup>34</sup>

That said, in a decision analyzed in a paper done by me some time ago now, that of *Re Beaney*,<sup>35</sup> the Court opined:

The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, 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 his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.<sup>36</sup>

## **D. What Circumstances Trigger the Need to Update an Estate Plan**

### **(i) Marriage**

Most members of the public are not aware of the fact that, subject to certain exceptions, marriage revokes a will in Ontario. This is critical information for drafters to impart to clients looking to do a will or a new will, particularly if that client intends to marry in the near future.

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<sup>34</sup> *Thorpe v Fellowes Solicitors LLP*, [2011] EWHC 61 (QB), at par. 77 (per Sharp J.).

<sup>35</sup> *Beaney v. Beaney*, [1978] 2 All E.R. 595 (Ch.).

<sup>36</sup> *Beaney v. Beaney*, [1978] 2 All E.R. 595 (Ch.), at p. 601

The general rule is set out in section 15(a) of the *SLRA*.<sup>37</sup> However, there are certain exceptions, as found in section 16 of that Act, which states:

16. A will is revoked by the marriage of the testator except where,
- (a) there is a declaration in the will that it is made in contemplation of the marriage;
  - (b) the spouse of the testator elects to take under the will, by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario; or
  - (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.

There appears to be some judicial debate regarding whether the word "declaration" in section 15(a) of the Act requires a "formal" declaration that the will was made specifically "in contemplation of the marriage," or whether certain words of the will can be construed in light of the surrounding circumstances (such as the fact that at the time the will was drafted there was an impending marriage) so as to amount to such an expression.

### *Coleman v. Coleman*

Unfortunately, Ontarians still await adjudication on this matter by an appellate level court. Historically, reliance was had on the case of *Coleman v. Coleman* (1976)<sup>38</sup> where the Chancery Division held that for a will to be made in contemplation of marriage, such contemplation had to be sufficiently expressed in the will itself. Hence, in that case, although the testator had made bequests to his "fiancée" in his will and the two were married a year later, this alone was not enough for the court to construe the will as having been made in contemplation of marriage. According to the Court, in a situation where the will does not state that it was made in contemplation of marriage, a will which contains substantial beneficial dispositions which lacked any expression of such

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<sup>37</sup> R.S.O. 1990, c. S.26.

<sup>38</sup> [1975] 1 All E.R. 675.

contemplation, could not be described as a will made in contemplation of a marriage. Thus, because the will in this case contained substantial gifts to family members (not the surviving spouse) that did not indicate that they were made in contemplation of marriage, the will was revoked.

### Owers v. Hayes

This is a much stricter approach than that applied in the oft-cited Ontario case of *Owers v. Hayes* (1983).<sup>39</sup> Here, the testatrix had executed a will dated May 27, 1963, appointing her daughter her executrix and sole beneficiary. The testatrix then purported to amend the will by leaving a handwritten note for her daughter that stated, “[...] Barb: *Just in case I do marry Norm & anything ever happens to me — I would like him to live rent free, until he desires to move back to Brockville or passes on He must pay all taxes — lights gas etc Also he may not bring another woman to live in this house — as that is when trouble will start. She may think she owns it. Love you Mom.*” The testatrix did later marry the man referred to in the note. The Court was satisfied that, both on its own terms and extrinsic evidence, the note was intended as a valid testamentary disposition, that it was a valid holograph codicil, that it revived the earlier testatrix’s earlier will and that both documents survived the testatrix’s marriage.

### MacLean Estate v. Christiansen

The recent British Columbia Court of Appeal case of *MacLean Estate v. Christiansen* (2010),<sup>40</sup> involved a situation where the testator, a divorcée, drafted a will six months before his marriage to the woman he was, at the time, cohabitating with. Only three months after his marriage, the testator passed away. Although the will did not contain an express declaration that it was made “in contemplation of marriage,” significant provision was made for the testator’s new wife who was referred to twice in the will as his “spouse.” The trial judge found that the will was revoked since the testator’s will did not contain the express wording. However, this decision was overturned by the British Court of Appeal which held that the extrinsic evidence overwhelmingly supported the

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<sup>39</sup> 1983 CarswellOnt 621.

<sup>40</sup> 2010 CarswellBC 2128.

construction of the term "spouse" as used in the will to mean the testator's legal spouse, to whom he was contemplating marrying. As such, the Court was of the view that when the will was necessarily read in its entirety, it was clear that it could be construed to have been made in contemplation of the testator's marriage.

### Conclusion

Although it is likely that if ever such a case made its way to an appellate court in Ontario, a similar liberal approach would be taken as that in *Owers v. Hayes* and *MacLean Estate v. Christiansen*, in a culture like ours where more and more people are remarrying sometimes two, three or even more times, one cannot underestimate the importance of ensuring that one's testamentary documents are carefully drafted so as to ensure that one's testamentary wishes can be carried out after death. Thus, if one has a specific estate plan that they would like enforced after their demise, noting the limits that will necessarily be placed thereon due to the relevant matrimonial laws (in Ontario, this is set out in the *Family Law Act*<sup>41</sup>), out of an abundance of caution, a will should specifically state that it has "been made in contemplation of marriage." The other option, and a less viable one, would be attempting to challenge the validity of the marriage itself.

Although a marriage can be "void" or "voidable," a voidable marriage is only challengeable by one of the spouses while they are both living. Hence, in the practice of estates, disgruntled beneficiaries, in many cases children of previous marriages although it can be anyone with a financial interest in the marriage, will seek a court order that the marriage is void on the basis that one of the spouses lacked capacity to marry. Another, less common ground is that one spouse was mistaken about the identity of the other.

Although a marriage can be challenged on the basis of lack of capacity, as it currently stands in Canadian law, a spouse need only have a minimal understanding of the nature of the contract of marriage in order to be found capable of marrying. In fact,

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<sup>41</sup> R.S.O. 1990, c. F.3.

neither spouse is required to understand all of the financial or other consequences that flow from marriage, despite the ways in which our matrimonial property laws have evolved and the benefits that accrue on a surviving spouse as a result of those laws. The reason for this is that cases dealing with claims to void a marriage on the basis of incapacity often cite classic English cases which espouse the principle that “the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.”<sup>42</sup> See for instance the Ontario case of *Banton v Banton*<sup>43</sup> and discussion of it in our many papers and presentations as found on our website.

Given the fact that marriage revokes a will, the low threshold for capacity to marry is having a detrimental impact on the estate plans of older adults, particularly those who are vulnerable due to cognition issues, dementia, or other illnesses, and, consequently, fall victim to predator suitors who marry solely in the pursuit of profit. This again underscores the importance for both lawyers and those interested in drafting a will to ensure that their wills contain the wording necessary to truly protect the interests of those the testator wishes to benefit after his or her demise.

For those interested in learning more about the critical issues arising from what we refer to as the “predatory marriage,” you may wish to refer to *Capacity to Marry and the Estate Plan*, a Canada Law Book publication, co-authored by Kimberly Whaley, Dr. Michel Silberfeld, Heather McGee and Helena Likwornik.

## **(ii) Separation or Divorce**

Not only does marriage impact a carefully crafted estate plan, but so too can separation or divorce, albeit in different ways. This is evident in the recent case of *Makarchuk v. Makarchuk*.<sup>44</sup>

Michael and Joan Makarchuk married in May 1961. They had two children. In November of 2003, Michael and Joan separated and Michael purchased a new home. On December 19, 2003, Michael and Joan Makarchuk signed a separation agreement.

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<sup>42</sup> *Durham v. Durham* (1885), 10 P.D. 80 at 82.

<sup>43</sup> 1998, 164 D.L.R. (4th) 176 at 244.

<sup>44</sup> 2011 CarswellOnt 8451.

Joan had independent legal advice. Michael Makarchuk was a retired lawyer. The couple did not divorce. Paragraph 8 of the separation agreement read as follows:

Except as provided in this agreement, and subject to any additional gifts from one of the parties to the other in *any will validly made after the date of this agreement*, the husband and wife each release all rights which he or she has or may acquire under the laws of any jurisdiction in the estate of the other and in particular:....[emphasis added]<sup>45</sup>

Five months prior to executing the separation agreement, Michael made a new will. The will named Joan as the Executor of his will and the sole beneficiary of his estate. On November 29, 2008, Michael passed away.

After his father's death, Michael and Joan's son, Darwin Makarchuk, brought an application seeking directions with respect to the impact of his parents' separation agreement on his father's will. Darwin took the position that paragraph 8 of the separation agreement constituted a waiver by his mother of her rights to claim under Michael's will. He argued that the reference to "any will validly made after the date of this agreement" demonstrated that the parties were releasing each other from their existing wills (and any bequests therein) which must have been in their minds at the time. It was found, however, that Michael never did draft a new will. In essence, Darwin took the position that the release was sufficiently specific and cogent enough to trump the will.

Counsel for Joan took the position there are only three ways that the provisions in the will naming her as the executor and beneficiary of Michael's estate can fail. Those being: through revocation pursuant to section 15 of the *SLRA*, marriage or another will in writing. In addition, he submitted that the release in paragraph 8 of the separation agreement is not a release of any rights under the will.<sup>46</sup> In making this argument, counsel relied on *Robinson v Morrell Estate*<sup>47</sup> and, in particular, paragraph 23 where the

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<sup>45</sup> 2011 CarswellOnt 8451, at par. 6.

<sup>46</sup> 2011 CarswellOnt 8451, at par. 10. Note that in this paragraph Justice P.C. Hennessy states that such was the argument of "Counsel for Darwin Frederick Makarchuk. However, this would appear to be an error and it would appear that such was the argument made by counsel to Joan Makarchuk.

<sup>47</sup> [2009] N.S.J. No 597 (NSCA).

court quotes from *Eccleston Estate v Eccleston*,<sup>48</sup> which considered similar language in a release.

As noted by the Court, in *Eccleston Estate v Eccleston*, the parties executed a domestic contract prior to their divorce that provided that each released and discharged 'rights that he or she has or may hereafter acquire under the laws of any jurisdiction in the estate of the other.' In the result, the New Brunswick Court of Queen's Bench found that the language expressly limited the releases to any 'statutory rights,' but that it was not broad enough to include rights that might be acquired by will or contract.

P.C. Hennessy J. agreed with this logic, finding that the language of the release in *Eccleston Estate v Eccleston* was "so similar to the language in paragraph 8 of this separation agreement that the same principle applies,"<sup>49</sup> such that the language is not broad enough to include rights acquired under the will. Her Honour concluded as follows:

Mr. Makarchuk had a number of means available to him to effectively revoke the gift he had made to Mrs. Makarchuk prior to their separation. The language of the release in the separation agreement does not specifically address the will made only five months prior. The language of the release speaks to 'rights acquired under law'. This is not a reference to rights acquired by the will. I find that the release does not trump the will.<sup>50</sup>

In the result, her Honour dismissed Darwin's application and submissions on costs were invited.

## **E. Conclusion and Checklist**

As can be seen, drafters must take care when assisting testators of wills/grantors of powers of attorney to ensure not only that all of the formal requirements for execution are met, such that they are not easily challenged and set aside after death, but, also, in the case of wills, that testators are made aware of the impact that certain life changes may have on their carefully crafted estate plans.

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<sup>48</sup> 221 N.B.R. (2d) 295.

<sup>49</sup> 2011 CarswellOnt 8451, at par. 13.

<sup>50</sup> 2011 CarswellOnt 8451, at par. 13.

In summary, the following is a brief checklist of things that drafters should take into consideration when drafting wills/power of attorney documents and/or updating existing estate plans:

1. Does the testator/grantor have the requisite capacity to make the will/codicil/grant the power?;
2. Did the testator/grantor decide to draft this will independently of the pressure and influence of others? Ensure that they are met with independently, without potential predators, and that proper independent translators are obtained, if needed;
3. Obtain corroborative information about assets and liabilities;
4. Determine obligations to dependants;
5. Ensure the client understands and appreciates planning and financial choices being made;
6. Consider obtaining medical background;
7. Be alert to dependant relationships;
8. Be wary of propensity to be unduly influenced;
9. Address urgency where a client is severely ill;
10. Ascertain known physical incapacities and known mental incapacities;
11. Determine whether or not there are any hearing problems;
12. Determine whether or not the testator can read the will;
13. Determine whether or not the testator has any problems with the English language, either reading, writing or understanding and whether or not a translator or interpreter is required;
14. Determine whether or not the deceased understands the will;
15. Have the formal requirements for validity been met?

- a. In the case of testamentary documents, refer to the *SLRA* and, in particular: sections 3, 4, and 7, and was the document read to the testator and did he or she understand and approve of its contents?
  - b. In the case of powers of attorney documents, refer to the *SDA* (and the *HCCA*), and, in particular, sections: 7, 8, 9, 10, 47, 48, and 49;
16. In the case of estate planning, is the testator contemplating any significant changes in their life, such as marriage, children, adoption, separation or divorce? If so, their testamentary documents may need updating to reflect such changes.