TRANSFERS FOR NO CONSIDERATION:

Real Estate Transfers and Powers of Attorney

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1. INTRODUCTION

Transfers for no consideration are now occurring with increased frequency and during a period of unprecedented estate claims. Every year in Canada, a significant increase in the number of estate claims are reported by practitioners, courts, and other stakeholders. In 2018, the Lawyers Professional Indemnity Company (LawPRO), reported "real growth" in the proportion of wills and estates claims. In that year approximately 11.5 percent of all claims were wills and estates.[1] Two years later in 2020, LawPRO reported that the wills and estate claims had risen to 14 per cent of all claims.[2] These numbers may only continue to rise as more Canadians reach the age of retirement.

This paper will briefly highlight the demographic changes occurring in Canada and the challenges this creates in the context of capacity and the use of Powers of Attorney. The different types of Powers of Attorney and their duties will be discussed, specifically relating to the transfer of property. Understanding the rights and obligations of an attorney acting under a Power of Attorney and the associated risks are vital for professionals working in the context of estates to detect misuse and abuse in order to protect vulnerable adults.

1.1 Shifting Demographics

Based on projections and recent national census data, seniors aged 85 and over are one of the country's fastest growing demographics. Accordingly, it has been reported that the number of people over 85 has more than doubled since the 2001 census.[3] What's more,

[1] Anita Balakrishnan, "LawPRO sees spike in claims from family law, wills" May 31, 2019, *Law Times News*, online: https://www.lawtimesnews.com/practice-areas/real-estate/lawpro-sees-spike-in-claims-from-family-law-wills/.

[2] See Lawyers Professional Indemnity Company, "Annual Report" 2020, online: https://www.lawpro.ca/wp-content/uploads/2021/04/FINAL-AODA-2020-Annual-Report-WEB.pdf.

[3] Michael Ranger and The Canadian Press, "Canada faces rapidly aging population, record retirements: 2021 census" April 27, 2022, *CityNews*, online: https://toronto.citynews.ca/2022/04/27/statistics-canada-2021-census-data/

the recent census data also indicates that “more than 20 per cent of the working age population is now between the ages of 55 and 64.”[4] As a result of Canada’s ageing population, estate plans are more frequently compromised due to the higher risk of vulnerability and later life illnesses. This has led to an increase in challenges based on testamentary incapacity or undue influence. With estate claims clearly on the rise, it is vital to try and understand what is motivating some of the conflict that frequently drives parties to litigation.

One of the major driving factors in the increase of estates litigation is financial conflict. In 2014, a study created by BMO Investorline[5] highlighted the emergence of the largest inter-generational transfer of wealth in Canadian history, from those born in the 1930s and 40’s to the baby boomers. According to the study, “about one trillion dollars will change hands in this country over the next two decades.”[6] Laura Tamblyn Watts, CEO of CanAge explained to the CBC in 2014 how the baby boomers are “the most indebted generation that Canada has ever had,”[7] leading to an entitlement to ‘spoils,’ and thus, relying on generous inheritance to help pay debts and meet financial goals. Tamblyn Watts continues, saying “We’re seeing a tension between their parents … the saving generation, and their children, who are coming into retirement in debt.”[8] As adults are living longer, which often requires expensive care, this is leading to financial conflicts between children and other family members.

[4] *Ibid*.

[5] BMO Investorline, “BMO InvestorLine Study: Average Inheritance in Canada Approximately $100,000” - Jul 8, 2014.

[6] Talin Vartanian, “Inheritance ‘tension’: Why more families may be headed for court” November 23, 2014, *CBC News*, online: https://www.cbc.ca/news/canada/inheritance-tension-why-more-families-may-be-headed-for-court-1.2840370.

[7] *Ibid*.

[8] *Ibid*.

1.2 *Burgstaler*: An Example of a Transfer for No Consideration

The case of *In the Estate of Irmgard Burgstaler (disability)*[9] surrounded the determination of whether the son and attorney for property of a vulnerable older adult had properly exercised his duty as a fiduciary.

Irmgard Burgstaler was 88 years old at the time of the decision. She was living in Penticton, British Columbia. Irmgard has six children: Erwin, Peter, Barbara, Christine, Wilfred and Edward Jr. Irmgard appointed her husband, Edward Wilhelm Burgstaler, as her attorney for property. Her son, Erwin, was appointed as the alternate. These appointments were made on November 17, 2008. On October 24, 2013, Irmgard appointed Edward as attorney for personal care. Her children, Erwin, Peter and Barbara were appointed jointly as the alternate attorneys for personal care.

On January 5, 2015, Irmgard's husband passed away, bringing into effect the substitute attorneys. On March 24, 2015, Irmgard was assessed by a Registered Nurse and found to be incapable of managing property.[10]

Irmgard and her husband lived in a family home at 504 Thunder Lake Road outside Dryden, Ontario. In 2012, this house was sold to four of their children: Barbara, Peter, Christine and Wildred. Irmgard and her husband continued to live in the home. Erwin began to allege that certain of his siblings were engaged in a conspiracy against him, that he was assaulted and his life was threatened. Police were called.[11]

When Irmgard's husband died, Wilfred served a "no trespass" notice on Erwin. Erwin testified that his access to his mother as a result, was severely restricted. In August of 2015, Barbara took Irmgard to live with her temporarily in Penticton. Irmgard shortly returned and continued to reside at 504 Thunder Lake Road. In October 2015, Erwin learned that Barbara intended to permanently move Irmgard to Penticton and brought an application to prevent Barbara from removing her and to set aside the power of attorney

[9] 2018 ONSC 1187 [*Burgstaler*].

[10] *Burgstaler*, *supra* note 9 at para. 4.

[11] *Ibid*, at para. 9

for personal care. The request was denied. Irmgard has been living in Penticton since October 2015.[12]

In November 2015, Barbara and Peter requested that Erwin pass his accounts as attorney for Irmgard's property. Erwin failed to take steps to pass his accounts. Barbara and Peter brought an application to compel Erwin to pass his accounts. Pierce J. ordered Erwin to pass his accounts by June 30, 2016. This was provided by Erwin's counsel on August 17, 2016. On September 8, 2016, Erwin's counsel provided a binder of documents supporting the accounts, however, these were not in the form required on a passing of accounts.[13]

The objectors raised issue with the amount of compensation claimed by Erwin. The basis of their objection was Rule 74.17, which provides that the accounts were not in the proper form, as the accounts did not truly reflect the state of Irmgard's assets. Most important, they objected to the purchase of a house for $82,000.00 in Erwin's name and that was improperly characterized as an asset of Irmgard.[14] There were further objections to additional expenses claimed by Erwin and legal costs.

The Court in its decision explained that the conduct of an attorney for property is governed by the provisions of the *Substitute Decisions Act* ("*SDA*"). Section 32 of the *SDA* sets out the duties of a guardian of property. Section 38(1) of the *SDA* provides that section 32 (other than ss. 10 and 11) and ss. 33, 33.1, 33.2, 34, 35.1, 36, and 37 apply to an attorney under a continuing power of attorney.

The Court laid out the relevant sections of the *SDA*:

> [40] Section 32(1) of the SDA provides:
>
> 32 (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.
>
> [41] Section 33 (1) and (2) of the SDA provide:

[12] *Ibid*, at paras. 10-12.

[13] *Ibid*, at paras. 14-19.

[14] *Ibid*, at para. 19.

> 33 (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty.
>
> (2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability.

[42] Section 37(1) of the SDA provides:

> 37 (1) A guardian of property shall make the following expenditures from the incapable person's property:
>
> 1. The expenditures that are reasonably necessary for the person's support, education and care.
>
> 2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.
>
> 3. The expenditures that are necessary to satisfy the person's other legal obligations.

In his decision, the Honourable Justice D.C. Shaw explained that these provisions exist to protect vulnerable persons and that Irmgard is herself, a vulnerable person. As a fiduciary, Erwin was obligated to act only for Irmgard's benefit, putting his own interests aside.

As explained by Strathy J. in *Zimmerman v. Fenwick et al*., 2010 ONSC 2947:

> It is an "inflexible rule of the Court of Equity" that a fiduciary must not make a profit or put himself/herself in a position where his/her interests and his/her duty conflict unless the trust instrument so provides. As a fiduciary, an attorney for property is not entitled to exercise that power for his or her own benefit unless expressly authorized to do so. [citations omitted].

The Court held that in the case at bar, Erwin breached his fiduciary duty to act in Irmgard's interest when he took the $82,000.00 from her bank account, bought the house and registered title in his name alone. The Court also held that Erwin had not established that the legal costs he had billed to Irmgard's account were for her benefit. The expenditures were not reasonably necessary for her support and care.

Erwin put himself in a position where his interests and his duty to Irmgard were in conflict. As stated by Brown J. (as he then was) in *Fiacco v. Lombardi*, [2009] O.J. No. 3670, at para. 37:

> I must emphasize that it would be a serious mistake for members of the Bar to presume that all parties to contested capacity litigation will have their costs paid by the estate of the incapable person. Such an attitude would misapprehend the principles which must guide the court's exercise of its discretion on costs.

The Court granted a declaration, pursuant to s. 97 of the *Courts of Justice Act*, that title to 191 Florence Street, Dryden, held by Erwin, is subject to a resulting trust in Irmgard's favour. Within three months of the decision, 191 Florence Street would be listed for sale with net proceeds paid to Irmgard's estate. Erwin was ordered to repay the estate the $82,000.00 he took to purchase the home plus interest. Depending on how much is earned on the sale of the home, Erwin's obligation to repay the shortfall plus accrued interest shall be satisfied, in whole or in part, by the net proceeds of the sale.[15]

2. THE FINANCIAL ABUSE OF OLDER ADULTS IN CANADA

Elder abuse in Canada is a rising issue, deserving of increased attention and focus. According to Statistics Canada, in 2019, the rate of police-reported violence against persons aged 65 to 89 was 227 per 100,000 persons. In Canada, there are no specific charges for elder abuse.

The Criminal Code addresses 'Theft by Person Holding Power of Attorney' at section 331.[16] This charge relies on a specific type of property theft with an added element of breach of a fiduciary duty. Where it concerns the neglect of an individual, section 215 (1)(a),[17] Failing to Provide the Necessities of Life, places a parent or guardian under a legal duty to provide the necessities of life for a child under section 16, however, this also applies to the necessities of a spouse or common-law partner and anyone else under that person's charge. Where it concerns what is considered a necessity of life, courts have held that these are the things that "tend to preserve life and not necessaries in their ordinary legal sense.[18] Courts have also concluded that necessities of life also include

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[15] *Ibid*, at paras. 128-132.

[16] *Criminal Code*, R.S.C., 1985, c. C-46, s.331.

[17] *Criminal Code*, R.S.C., 1985, c. C-46, s.215 (1)(a).

[18] See Generally *R v JAR*, 2012 BCPC; *R v Brookes*, 1902 BCSC.

protection from harm.[19] These offences are especially important for the protection of older adults who are dependent on others for healthcare or supervision. Other negligence-based offences include failing to take reasonable steps to prevent bodily harm when directing another's work at section 217.1 and Criminal Negligence at sections 217 to 221.[20]

Offences dealing with psychological or emotional abuse are covered by the offence of uttering threats at section 264.1,[21] and intimidation at section 243.[22] These offences generally seek to protect individuals, including older adults, from situations where a perpetrator seeks to exert control over their autonomy in some way or another. This kind of behavior can often escalate which has created the need for offences dealing with physical or sexual violence. Physical harm of an older adult falls under assault at sections 265 – 268,[23] while sexual assault is covered under sections 271-273 and, finally forcible confinement at section 279 (2).[24] Also, "Sections 22.1 and 22.2 of the Code address when an organization, such as a long-term care provider, can be considered a party to an offence."[25]

Where it concerns offenders who have been charged with some form of elder abuse, section 718 (a)(i), Other Sentencing Principles, provide authority commonly used in the context of spousal assault cases but has wide application to cases involving age as a criterion for victim selection.[26]

3.1 Office of the Seniors Advocate British Columbia Report (2021)

[19] *R v JF*, 2007 ONCA affirmed in *R v JF*, 2008 SCC.

[20] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 217–221.

[21] *Criminal Code*, R.S.C., 1985, c. C-46, s.264.1.

[22] *Criminal Code*, R.S.C., 1985, c. C-46, s.243.

[23] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 265-268.

[24] *Criminal Code*, R.S.C., 1985, c. C-46, s.279 (2).

[25] *Ibid*.

[26] *Criminal Code*, R.S.C., 1985, c. C-46, ss. 718.1, 718.2.

The Office of the Seniors Advocate British Columbia recently published a report examining the current legislative protections, assessing reporting practices, and existing data on abuse and neglect of British Columbia's seniors. The review indicates that reports of abuse and neglect of people aged 65 and over have increased significantly in the past five years. The report chronicles an 87 percent increase in of reports of financial abuse to the Vancouver Police; and a 30 percent increase of reports of abuse to the senior's hotline through the bc211.[27] The Report of the Office of the Seniors Advocate British Columbia also revealed an 87 percent increase in the amount of financial abuse cases reported to the Vancouver Police.

The report offered five recommendations:

1. Establish provincial standards of practice, policies, and front-line training to respond to seniors' abuse and neglect;
2. Create province-wide public awareness initiatives and training on seniors' abuse and neglect;
3. Develop a central, single point of contact to report calls of concern of seniors' abuse and neglect;
4. Ensure consistent data collection, methods, and definitions to record, track and monitor abuse and neglect cases; and,
5. Undertake a full comprehensive review of the *Adult Guardianship Act.*[28]

3.2 *Canadian Securities Administrators Report (2021)*

In early 2021, the Canadian Securities Administrators ("CSA") published a report on their findings that nearly 29 per cent of Canadians know a victim of financial elder abuse.[29] The report also revealed that 42 per cent of Canadians surveyed could not recognize the signs of financial abuse while only 47 per cent know where to report suspected cases of abuse. According to the CSA, "Financial abuse is the most common form of elder abuse, and it typically occurs over an extended period. Financial abuse of older adults can include the use and/or control of the individual's money or investments through undue

[27] Office of the Seniors Advocate British Columbia, "Hidden and Invisible Seniors Abuse and Neglect in British Columbia" December 8, 2021, online: https://www.seniorsadvocatebc.ca/app/uploads/sites/4/2021/12/Hidden-and-Invisible-Report.pdf

[28] *Ibid*, at p.41.

[29] Canadian Securities Administrators, "Securities regulators' study reveals many Canadians unaware of the signs of financial elder abuse" June 19, 2021, online: https://www.securities-administrators.ca/news/securities-regulators-study-reveals-many-canadians-unaware-of-the-signs-of-financial-elder-abuse/

pressure, illegal or unauthorized acts."[30] Louis Morisset, CSA Chair and President and CEO of the Auorité des marches financiers shares that, "Older Canadians are particularly susceptible to financial exploitation and fraud. Checking in regularly with the older adults in our lives about their finances – no matter their financial situation – is critical to raise awareness of financial abuse and ultimately help prevent it."[31] Among the other findings of the report include that 81 percent of Canadians recognize, when older an older adult is financially abused, its usually by someone close to them. Among Canadians with an older adult in their life, 91 per cent perceived barriers preventing the discussion of financial matters,[32] 61 per cent indicated that the older adult in their life would share if they were a victim to financial abuse, and 73 per cent indicated that they know who manages their finances.

3. WHEN CAPACITY BECOMES AN ISSUE

In order to understand the importance of capacity issues, we must examine current trends in our demographics. Our population is aging rapidly. Globally, we are facing the largest demographic shift in the history of humankind. According to data from the *United Nations "World Population Prospects: the "2019 Revision by 2050,"* one in six people in the world will be over 65, up from 1 in 11 in 2019. By 2050, one in four persons living in Europe and North America could be aged 65 or over. Two years ago, for the first time in history, persons aged 65 or above outnumbered children under five years of age globally. The number of persons aged 80 years or over is projected to triple, from 143 million in 2019, to 426 million in 2050.[33]

[30] *Ibid*.

[31] *Ibid*.

[32] The most common barriers were a belief that their loved one has their finances under control (38%), the belief that its not their place to talk about finances (37%), and one third of respondents said that finances don't come up in conversation (30%).

[33] United Nations, *2019 Revision of World Population Prospects*, online: https://population.un.org/wpp/ [accessed on 02/10/20].

3.1 Considerations on Aging in Canada

Closer to home, in 2019 there were more than 6.5 million Canadians over the age of 65 years, and, over 10,000 centenarians.[34] According to various projection scenarios, the proportion of seniors (aged 65 and older) in the population will increase from 17.2% in 2018, to between 21.4% and 29.5% in 2068. The increase in this group is expected to be the most pronounced between 2018 and 2030, a period during which all members of the Baby Boomer cohort will reach 65 and over. The number of older seniors (aged 80 and over) will continue to increase rapidly in the coming years, particularly between 2026 and 2045 as the Baby Boom cohort enters this age group. According to projection scenarios, the population aged 80 and over, will increase from 1.6 million in 2018 to between 4.7 million and 6.3 million by 2068.[35] Recently increased, in Canada, a man's life expectancy is now 86, while a woman's life expectancy is now 89.[36]

According to the most recent statistics from the Alzheimer Society (Canada), there are over half a million Canadians living with dementia, plus about 25,000 new cases diagnosed every year. By 2031 that number is expected to rise to 937,000, an increase of 66 per cent.[37] Dementia refers to a set of symptoms and signs associated with a progressive deterioration of cognitive functions that affect daily activities.

3.2 Understanding Capacity

Colloquially we may speak of individuals as being "capable," or "incapable." However, there is no one-size-fits-all determination for establishing general decisional capacity. In the legal context there is no single definition for "capacity," or for "mental capacity". Capacity is determined on a case-by-case basis in relation to a particular task, or decision, and at a specific moment in time. Professor Gerald B. Robertson states in, *Mental*

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[34] Statistics Canada, *Table 17-10-0005-01 Population Estimates on July 1st by age and sex*, online: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000501 [accessed on 02/10/20].

[35] Statistics Canada, *Population Projections for Canada (2018-2068)*, online: https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/hi-fs-eng.htm [accessed on 02/10/20].

[36] Statistics Canada, *Summary of Long-Term Projection Scenario Assumptions, Canada*, online: https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/sect01-eng.htm [accessed on 02/10/20].

[37] Alzheimer Society, Canada, *Latest Information and Statistics*, online: https://alzheimer.ca/en/Home/Get-involved/Advocacy/Latest-info-stats [accessed on 02/10/20].

Disability and The Law in Canada, that "legal capacity is task specific, incapacity in one area does not necessarily mean incapacity in another."[38]

All adults are deemed or presumed capable of making decisions at law. This presumption of capacity stands, unless, and until, that presumption of capacity is legally rebutted.[39] This presumption is found in both legislation across Canada and in case law. Alberta's *Adult Guardianship and Trusteeship Act*,[40] states: "an adult is presumed to have the capacity to make decisions until the contrary is determined."[41] Ontario's *Substitute Decisions Act, 1992*[42] states: "A person who is eighteen years of age or more is presumed to be capable of entering into a contract," and, "A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care."[43]

Some lawyers and court decisions refer to "tests" to determine requisite decisional capacity. The term "test" simplifies the legal analysis for the layperson. However, it is important to understand that there are no actual "tests," but, rather standards to be applied, or factors, or criteria to be considered. In other words, capacity is determined on factors of mixed law and fact, and by applying the evidence available to those applicable factors. All references to "test" should be understood with this in mind.

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.

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[38] Gerald B Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Carswell 1994), at 179.

[39] *Palahnuk v Palahnuk Estate*, [2006] OJ No 5304 (QL), 154 ACWS (3d) 996 (SCJ); *Brillinger v Brillinger-Cain*,[2007] OJ No 2451 (QL), 158 ACWS (3d) 482 (SCJ); *Knox v Burton* (2004), 6 ETR (3d) 285, 130 ACWS (ed) 216 (Ont SCJ.) See also Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" ET & PJ 215- 250 (2013).

[40] SA 2008 c A-4.2.

[41] *Adult Guardianship and Trustee Act*, SA 2008 c A-4.2 at s 2(a). See also, *KC (Re)* 2016 ABQB 202 at para 26 and *Dank (Re),* 2013 ABQB 112 at para 12.

[42] SO 1992 C 30.

[43] *Substitute Decisions Act, 1992*, SO 1992 c 30, s 2(1) & (2).

Capacity is decision specific since for example, the requisite capacity to grant an enduring power of attorney for property is different than the requisite capacity to make a will. Or a person may be capable of making an *inter vivos* gift, but, may not be capable of entering into a marriage. The combinations are limitless since each task, or decision has its own specific capacity criteria.

Capacity is also time specific due to the fluid nature of legal capacity. This fluidity allows for "good" and "bad" days where capacity can, and does, fluctuate.[44] For example, a person incapable of making personal care or property decisions and who is under guardianship, can regain decisional capacity and terminate the guardianship.[45] Any expert assessment or examination of capacity must clearly state the time of the assessment and address decisional capacity as at the time that the particular task was undertaken.

Lastly, capacity is situation specific in that under variable or differing circumstances, an individual may have capacity or have diminished capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, a person at home may have capacity that may not have been apparent in a lawyer's or doctor's office.

3.3 Capacity to Make an *Inter Vivos* Gift

Making a gift during one's lifetime is characteristically different than making a gift through a testamentary instrument. *Inter vivos* gifts come in all different shapes and sizes and can range from a small cash gift to the gift of a deed to a substantive real property. The gift could include a very small portion of the gift-maker's possessions, or could amount to their entire life savings. Testamentary gifts, on the other hand, have the same

[44] See *Montreal Trust Company v Mackay*, 1957 CanLII 641 (ABCA), 21 WWR (ns) 611 at 613 *Klippenstein v Manitoba Ombudsman*, 2015 MBCA 15 at para 36, *Starson v Swayze*, 2003 SCC 32 at para 118.

[45] Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" ET & PJ 215-250 (2013).

characteristics, in that the will-maker is gifting away the entirety of their estate, all of their assets, and the gift takes place upon death.

There are no statutory criteria to assist with determining the requisite capacity to make a gift. Common law factors are applicable, and these factors depend in part, on the size and nature of the gift.

In general, the criteria to be applied were set out in the 1829 case of *Ball v Mannin,*[46] which found that in order to have capacity, a gift-maker must be able to understand the "nature and effect" of the transaction. This has been refined over the years through case law and is easily divided into two requirements. 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.[47]

The 1977 English decision of *Re Beaney,*[48] re-iterated the criteria set out in *Ball v Mannin. Re Beaney* was subsequently adopted and followed in Canadian case law. [49]

The law on capacity to make a gift was also discussed in the 1953 British Columbia decision of *Royal Trust Co v Diamant.*[50] In that case, Justice Whittaker determined that 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

[46] (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 ER 1241 HL (Irish Court of Exchequer).

[47] See *Royal Trust Company v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; and *Bunio v Bunio Estate* 2005 ABQB 137 at paras 4 and 6.

[48] [1978] 1 WLR 770, [1978] 2 ALL ER 595 (Ch D).

[49] See for example, *Lynch Estate v Lynch Estate*, 1993 CanLII 7024 (ABQB) at para 96; *MacGrotty v Anderson*, 1995 CanLII 2952 (BCSC) at para 20(2); *Elsie Jones (Re)*, 2009 BCSC 1723 at para 100; *Estate of Emiel Cyrille Van de Keere*, 2012 MBQB 33 at para 27; *Gironda v Gironda*, 2013 ONSC 4133 at para 99; *Wasylynuk v Bouma*, 2018 ABQB 159 at para 123; *Gordon Estate (Re)*, 2018 BCSC 487 at para 44, *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11; *Slover v Rellinger*, 2019 ONSC 6497 at para 277; and *Bolster Estate(Re)*, 2020 ABQB 100 at para 21.

[50] [1953] (3d) DLR 102 (BCSC).

capacity to *understand substantially the nature and effect of the transaction*."[51] *Royal Trust Co v Diamant* has been cited favourably in a large number of subsequent cases on capacity to make a gift.[52]

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

> A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it….[53]

Citing earlier case law on the capacity to gift, the court in *Dahlem (Guardian ad litem of) v Thore*[54] stated:

> The transaction whereby Mr. Dahlem transferred $100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore. On the authority of *Kooner v.Kooner* (1979), 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed**.**[55]

While some case law suggests the onus is on the person attacking the gift to prove the incapacity of the maker, [56] the general consensus is that the onus is on the party alleging a valid gift to prove that the gift-maker had capacity.[57] The standard of proof is always the

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[51] *Royal Trust Co v Diamant*, [1953] (3d) DLR 102 (BCSC) at 6; most recently cited and applied in *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 103 and *Gauthier et al v Gauthier*, 2019 MBCA 71 at para 11.

[52] *Ewart v Abrahams* (1988), 22 BCLR (2d) 138 (CA) at 143; *Dahlem (Guardian ad litem of) v Thore* (1994) 2 ETR (2d) 300 at para 45, 47 ACWS (3d); *Booth Estate v McGowan* (1998), 72 OTC 115, [1998] OJ No 3464 (SCJ) at para 52; *Lodge (Attorney for) v Royal Trust Corp of Canada*, 2003 BCSC 1416 at para 51; *St.Onge Etsate v Breau*, 2009 NBCA 36 at para 29; *York v York*, 2011 BCCA 316 at para 38

[53] *Re Bunio (Estate of)*, 2005 ABQB 137 At para 4.

[54] [1994] BCJ No 809 (SC).

[55] [1994] BCJ No 809 (SC) at para 6.

[56] John E.S. Poyser, *Capacity and Undue Influence*, 1st ed (Toronto: Carswell) at 414, citing *Rogers (Re)* 1963 CarswellBC 51. See also *Archer v St John*, 2008 ABQB 9 at para 22 [Poyser].

[57] *Elsie Jones (Re),* 2009 BCSC 1723 at para 5; *Breau v The Estate of Ernest St. Onge et al*, 2009 NBCA 36 at paras 27; *Lodge v Royal Trust Corp*, 2003 BCSC 1416 at para 49; *Weisbrod v Weisbrod*, 2013 SKQB 282 at para 18; *Blake v Blake*, 2019 ONSC 1464 at paras 24-25; *Slover v Rellinger*, 2019 ONSC 6497 at para 41; *The Canada Trust Company v Umanoff et al; Re Estate of John Alan Kell*, 2019 MBQB 88 at para 6.

civil standard, requiring proof on a balance of probabilities. A gift or other *inter vivos* wealth transfer is void, not voidable, for want of capacity.[58]

3.3.1 Significant Gifts

The determination of the requisite capacity to gift changes if the gift is significant in value in relation to the donor's estate. In such cases, the capacity threshold is raised to that required for capacity to make a will, known as testamentary capacity.

In *Re Beaney,* the court explained the difference in approach:

> 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.[59]

The court 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 goes further and imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. For instance, in the earlier 1956 case of *Mathieu v Saint-Michel* [60] the Supreme Court of Canada ruled that the standard of testamentary capacity applied for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle is that if the gift is *significant* relative to the donor's estate, despite not comprising all of the estate, then the standard for testamentary capacity applies for the gift to be valid.

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[58] See Poyser, *supra* note 56 at 401.

[59] *Re Beaney*, [1978] 2 All ER 595 (Ch Div) at 601.

[60] [1956] S.C.R. 477 at 487

Several Canadian cases[61] have used the testamentary capacity criteria to determine whether an individual had the requisite capacity to make a substantial *inter vivos* gift, most recently in *Geluch v Geluch,*[62] where an older adult's most significant asset, her home, was "gifted" away. Justice Francis noted that if the solicitor who drafted the deed (along with a will) "had asked [the older adult] the *Banks v Goodfellow* questions and recorded the answer in his file, it would no doubt assist this Court in determining the validity" of the transfer. Ultimately, Justice Francis concluded that while the older adult was capable of executing the property transfer, she was "not satisfied that [the older adult] *knew or approved of* the choices that she purportedly made."[63] The transfer was declared invalid.[64]

One Alberta case has gone even further and stated that testamentary capacity is required for all gifts, regardless of value. In *Petrowski v Petrowski Estate*,[65] Justice Moen concluded that:

> The mental capacity required to give effect to an *inter vivos* transfer is the same as that for the execution of a will. The standard for capacity applied to an *inter vivos* transfer is no less stringent than that for testamentary dispositions.[66]

This view, that testamentary capacity is required for all *inter vivos* gifts, is not a common one, and most case authority supports the position that the requisite capacity relates to the significance of the gift.

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[61] *Re Rogers* (1963), 1963 CanLII 472 (BCCA0, 39 DLR (2d) 141 (CA) at 148; *Re Elsie Jones*, 2009 BCSC 1723 at paras 98-101; *Lynch Estate v Lynch Estate*, 1993 CanLII 7024 (ABQB) at para 92, *Brydon v Malamas*, 2008 BCSC 749 at para 230; *Miller v Turney*, 2010 BCSC 101 at paras 32-33, *Gironda v Gironda*, 2013 ONSC 4133 at para 99; *Wasylynuk v Bouma*, 2018 ABQB 159 at para 123; *Slover v Rellinger,* 2019 ONSC 6497 at para 277.

[62] 2019 BCSC 2203.

[63] *Geluch v Geluch Estate*, 2019 BCSC 2203 at para 125 [emphasis added].

[64] *Ibid,* at para. 135.

[65] 2009 ABQB 196.

[66] *Petrowski v Petrwoski Estate*, 2009 ABQB 196 at para 392.

4. UNDERSTANDING THE POWER OF ATTORNEY

The Power of Attorney document (the "POA") has long been viewed as one way in which a person can legally protect their health and their financial interests by planning in advance for when they become ill, infirm or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. In certain circumstances, however, POA documents may cause rather than prevent conflict.

In our practice, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. This includes POA being used as a means of protection against predators, of which there is a very real risk. Unfortunately, we have also seen these documents abused by fiduciaries, causing the grantor harm through fraud, neglect, and depletion of wealth. This necessarily accompanying with negligence in the provision of necessary care requirements.

The general consensus is that POAs are a good planning vehicle. This is evident from the fact that, since 1994 the Ontario Ministry of the Attorney General has distributed free POA kits to the public and solicitors have routinely recommended them as part of an estate plan. It is, however, not always clear to attorneys what legislative principles they are to follow in carrying out their duties. Do they follow the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "*SDA*") or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "*HCCA*")) or, if they are indeed aware of such principles.

While a POA document can be used for the good of a vulnerable adult or an incapable person, there are significant risks involved in what is a very powerful and far-reaching document. First, it is possible the grantor does not fully comprehend the extent of the powers being bestowed upon them or possess the ability to do the job and fulfill his/her duties. Second, there is the issue of whether the attorney chosen can truly be trusted to act in an honest and trustworthy manner. A vulnerable or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very

likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system.

For practitioners, one of the primary ways of diminishing the chances of abuse of a POA document is to choose the right attorney for the adult being advised. This can be done by choosing someone who understands the role and responsibilities, has familiarity with the circumstances and can act diligently. Secondly, understanding the various types of POA documents as well as their provisions can ensure that all parties are clear on the legal relationship they are entering into. Thirdly, a review of the duties of attorneys for property will allow legal practitioners to properly advise those acting as attorneys. Finally, a familiarity of common abuses of POA documents can help identify financial abuse at an early stage.

4.1 What is a Power of Attorney?

In summary, a POA document allows a grantor to delegate maintenance or control over their affairs to plan for situations of extended absence, infirmity, and even incapacity. Thorough preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

(1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;

(2) the Continuing POA for Property (or "**CPOAP**"), pursuant to the provisions of the *SDA*; and

(3) the POA for Personal Care (or "**POAPC**") pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;

- ❖ a general authority granting the power to do all that is permissible under the governing principles and legislation; and
- ❖ a continuing authority which survives subsequent incapacity.

4.2 What are the Different Types of Power of Attorney Documents?

1. The General Power of Attorney: Power of Attorney Act

The *Powers of Attorney Act* has only three sections. This Act governs general Powers of Attorney but without imposing formality on the document. The general Power of Attorney contemplated by this Act does not survive the incapacity of the grantor. The language of the *Powers of Attorney Act* refers to the "donor" which is different from that of the *SDA* which refers to the giver of the Power of Attorney as the "grantor". This Act does not set out any of the formalities dealing with a prescribed form, validity or execution requirements, as does the *SDA*.

A general Power of Attorney, if coupled with adequate consideration and if given for the purposes of securing a benefit to the donee or grantee, is not revoked by death, incapacity or bankruptcy. This topic is beyond the scope of this paper but, as with the construction or drafting of any document, certainty with respect to the revocability is best achieved within the document itself. There is extensive English case law on this subject and there are evidentiary rules with respect to the irrevocability on death, incapacity or bankruptcy, and some Canadian case law which too, should be considered.[67]

2. The Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property (or "CPOAP") is commonly used to ensure that the financial affairs of a person are looked after in circumstances where that person is unable to look after them on their own, temporarily, as agent, and permanently when incapable.

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[67] *Spooner v. Sandilands* (1842) 1 Y. & C. Ch. Cas. 390; *Wilkinson v. Young* [1972] 2 O.R. (H.C.J.) 239-241; *Smith v. Humchitt Estate* 1990 B.C.J. No. 298 S.C., are useful cases to refer to in determining the degree of certainty with respect to irrevocability on death and irrevocability generally. Fridman's Law of Agency, 7th Edition, Butterworths 1996 appears to indicate that irrevocable powers do not terminate on the bankruptcy of the principal.

Pursuant to the *SDA*, a POA for Property is a CPOAP if:

(a) the document states that it is a continuing power for attorney; or

(b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

A person is considered incapable of managing their property if they are unable to understand information that is relevant to deciding the management of their own property. This includes being unable to appreciate the reasonably foreseeable consequences of a decision or lack thereof. A CPOAP document can be limited to specific dates or contingencies and/or it can continue during the incapacity of the grantor, hence the name "*Continuing* Power of Attorney for Property."

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal test of capacity to give or revoke a CPOAP is lower from that of capacity to manage property, to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property.

The CPOAP is effective immediately upon signing *unless* there is a provision or "triggering" mechanism in the document which specifies that it will come into effect on a specified date or event, such as incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance[68]

The powers granted to an Attorney acting on behalf of an incapable person are extensive. An Attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to compliance with the *SDA* and any court-imposed conditions.

Guidelines for the execution, resignation, revocation, and termination of a CPOAP can be found in the *SDA*.

[68] *Substitute Decisions Act, 1992*, SO 1992 c 30, s7 (7)

4.3 What are the Duties of an Attorney?

An Attorney is a fiduciary who is in a special relationship of trust with the grantor, they have the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary must do. Thus, in addition to any duties specified by the grantor in the POA document itself, the common law imposes the following general duties upon an attorney:

- The attorney must stay within the scope of the authority delegated;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his or her own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);
- The attorney must not make secret profits;
- The attorney must cease to exercise authority, if the POA is revoked;
- The attorney must not act contrary to the interests of the grantor or in a conflict with those interests;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

Notably, in situations where a *capable* grantor appoints an Attorney to deal with property, the Attorney is considered to be an *agent* of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). While the legal standard

is lower in such a relationship, an Attorney in this position is still a fiduciary with a duty only to act diligently and in good faith.

4.3 The Specific Duties of an Attorney for Property

All of the duties of the CPOAP are detailed in the *SDA.* In the case of *Banton v. Banton*, Justice Cullity discussed many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. According to the Court, some of the specific duties and obligations of an Attorney for Property include the following:

(1) Manage a person's property in a manner consistent with decisions for the person's personal care;

(2) Explain to the incapable person the Attorney's powers and duties;

(3) Encourage the incapable person's participation in decisions;

(4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;

(5) Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will; and

(6) Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into account the value of the property of the incapable person, including considerations as to the standard of living and other legal obligations.

The Attorney for Property must consider whether a given transaction is in the 'best interests' of the individual for whom he is acting, and also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA.* The Attorney must keep detailed records of all transactions as well as ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the

wishes of the incapable person and so on. An Attorney for Property must be prepared to keep accounts for the passing of such accounts, in the event it is required by the grantor, or with leave of the Court requested by an interested person, or indeed after the death of the grantor if required by the Estate Trustee.

While an attorney is required to keep accounts, an attorney is not required to pass the accounts. The court may, however, order that all or a specified part of the accounts of an attorney be passed.[69] The accounts are filed in the court office and follow the same procedure as the passing of estate accounts.[70] Although the passing of accounts may not be required, it may still be advisable to do so because once the accounts have been passed, they have received court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Attorneys for Property are statutorily entitled to compensation pursuant to the *SDA*.[71] The compensation taken should be in accordance with the prescribed fee schedule. Section 40 of the ***SDA*** sets out the guidelines to follow when an attorney is taking compensation. Often the Power of Attorney document itself will provide guidance as to compensation to be taken; however, in cases where the document is silent, section 40(1) of the Regulations to the *SDA* provide that compensation may be taken as follows:

> An attorney may take annual compensation from the property of:
>
> - 3% of capital and income receipts,
> - 3% on capital and income disbursements, and

[69] *SDA, supra* note 2, s. 42(1): The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. Note: This would be done by way of Notice of Application

[70] *Ibid.,* s. 42(6): The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators' accounts and *Rules of Civil Procedur**e***, RRO 1990, Reg 194, R. 74.16-74.18.

[71] *Ibid*., s. 40(1): A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale (see *SDA*, O. Reg. 26/95, amended by O. Reg. 159/00).

- 3/5 of 1% on the annual average value of the assets as a care and management fee.[72]

Notwithstanding such provision within the Act, the attorney can have compensation increased or reduced by the court when passing accounts.

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in certain circumstances. However, accounts or records must be produced to the incapable person, the incapable person's other attorneys, and the Public Guardian and Trustee if required.[73]

5. AUTHORIZING A TRANSFER UNDER A POWER OF ATTORNEY

The participation of lawyers in a transfer of property is mandatory. As such, lawyers have a professional responsibility to see that it is done properly. For some years, the Law Society, Law Pro and title insurers have all published recommended fraud-prevention guidelines for real estate documents signed in this way:

1. A statement by the attorney for property that, to the best of the attorney's knowledge and belief:

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[72] *Ibid.,* s. 40(3): The guardian or attorney may take an amount of compensation greater than the prescribed scale allows,

(a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or

(b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.

[73] *Ibid.,* s. 42(3): A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.

Others entitled to apply – s. 42(4) – The following persons may also apply;

1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. The Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person, with leave of the court.

(i) when the POA was executed, the principal was at least eighteen (18) years old and had the legal capacity to grant it; and

(ii) the POA is still in full force and effect.

2. A statement by the solicitor (handling the transfer or charge) that confirms that they have reviewed the POA with the attorney and that to the best of the solicitor's knowledge and belief:

(i) the attorney is the lawful party named in the POA;

(ii) the attorney is acting within the scope of authority granted under the POA; and

(iii) the POA was lawfully given and has not been revoked.

In addition, the POA document itself must also be registered and then referred to by Instrument Number in the authorized document.

5.1 Responsibilities of the Solicitor for the Seller/Principal

Where a POA is used to effect a transfer or charge, the solicitor for the seller/principal has an elevated professional responsibility. Accordingly, the solicitor must:

- Obtain the original or an authenticated copy of the POA;
- Be informed as to the details of its use, including examining the POA for conditions and/or restrictions, understanding whether the principal does in fact lack capacity, and questioning why the use of a POA is even necessary;
- Understand what becomes of the funds generated;
- Determine if the attorney's decisions are a proper exercise of their fiduciary duty.

Relying on the attorney's word alone to make sure these responsibilities are carried out may well be insufficient. Solicitors should make independent verifications as necessary, especially when they did not prepare the POA document and do not already know the parties involved in the transaction.

Remember: A sale or mortgage of a property is a highly significant transaction. If the owner is capable, they ought to be involved and, if it is possible to effect the transaction without a POA, then it should be done. Mere inconvenience is not enough.

5.2 Responsibilities of the Solicitor for the Buyer

A solicitor for a buyer in real estate transactions involving POAs must be similarly vigilant. Notably, they should:

- Review the agreement of purchase and sale to look for any indication that the transaction is being completed with the use of a POA;
- Obtain an authenticated copy of the POA;
- Ensure the POA was executed in accordance with the statutory requirements;
- Be informed as to the details of its use, including examining the POA for conditions and/or restrictions that would be relevant to the use of the document;
- Make inquiries as to why the POA is necessary and follow up if the answer is evasive or otherwise unsatisfactory;
- Notify the mortgage lender that documents will be executed under a POA, obtain the lender's consent (which is required), and respond to the lender's request for information; and,
- Inform the title insurer that documents will be executed under a POA and respond to their requests for information.

6. MISUSE/ABUSE OF A POWER OF ATTORNEY

An Attorney for Property misuses / abuses a grantor's property when:

- stealing money, pension cheques, or possessions.
- committing fraud, forgery or extortion.
- making unauthorized, questionable or even speculative investment decisions, or investment decisions lacking diversity.
- failing to consider the tax effects of action/inaction
- when inappropriately dealing with jointly held assets/accounts.
- misappropriating the grantor's assets.
- sharing the grantor's home without paying a fair share of the expenses.
- withholding from the grantor bank statements and/or other financial documents.
- denying the grantor access and/or control over finances (e.g., credit cards, cheques).

It is more often we see an Attorney misappropriate funds than we do steal them, and this is a distinction worth noting.

To “misappropriate” means to dishonestly or unfairly take something, especially money, belonging to another for one's own use.

To “steal” means to take another person's property without permission or legal right and without intending to return it.

An Attorney for Property also abuses their powers when unduly pressuring the grantor to:

- sell personal property;
- move from and/or sell his or her home;
- invest or take out money;
- buy alcohol or drugs;
- make or change a Will;
- sign legal documents not understood including
- that transfer assets into joint names;
- give money to relatives, caregivers or friends; and/or
- engage in paid work to bring in extra money.

7. UNDUE INFLUENCE

The doctrine of undue influence is used by courts to set aside certain *inter vivos* gifts, wealth transfers, transactions, or planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the donor’s mind falls short of being wholly independent. In situations where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[74]

Inter Vivos undue influence, which is what these paper focuses on, is distinct from Testamentary Undue Influence. Testamentary undue influence arose from common law courts, whereas *inter vivos* gift undue influence was developed by the courts of equity in the 18th and 19th centuries. It is available against a broader spectrum of conduct and

[74] See *Dmyterko (Litigation Guardian of) v. Kulikowsky*, [1992] O.J. No. 1912 (Gen. Div.).

renders the gift of wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void.). There are two Classes of undue influence: Actual and Presumed.

7.1 Actual Undue Influence

Actual undue influence has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating"[75] Actual undue influence is not reliant on any sort of relationship. The onus to prove actual *inter vivos* gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.

7.2 Presumed Undue Influence

This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being abused.[76] These relationships are determined by a "smell test": is the potential for domination inherent in the relationship itself?

Relationships where presumed undue influence has been found include: solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy are not easily categorized. However, even close, traditional relationships (*i.e.*, parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination.

7.2.1 Shift in Evidentiary Burden

Once a presumption of undue influence is established there is a shift in the onus to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden not a legal one. The legal burden is always on the person alleging undue influence.

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[75] *Allcard v. Skinner*, [1887] C.C.S. NO. 149 at para. 181 Eng. C.A. Ch. Div.

[76] See, for example, *Ogilvie v. Ogilvie Estate*, [1998] B.C.J. No. 722 at para. 14 (C.A.).

The presumption of undue influence can be rebutted by demonstrating:

- ❖ no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;
- ❖ the donor had independent legal advice or the opportunity to obtain independent legal advice;
- ❖ the donor had the ability to resist any such influence;
- ❖ the donor knew and appreciated what she was doing; or
- ❖ there was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

8. UNCONSCIONABLE PROCUREMENT

The doctrine of unconscionable procurement is used to set aside significant gifts and other *inter vivos* wealth transfers where the maker did not fully appreciate the effect, nature, and consequence of those transactions.

To trigger the doctrine, two standards must be met: (1) there must be a significant benefit obtained by one person from another; and (2) the receiver had to have an "active involvement" in arranging the transfer.

Equitable unconscionable procurement does not focus on the conduct of the person receiving the gift but rather, on the gift-maker and their understanding. The gift-maker could be without fault.[77] When a large and potentially impoverishing gift was made, the courts of equity took the position that the gift-maker had to have a full and conscionable understanding not only of the nuts and bolts of the gift transaction but also of the future impact the transaction might have on their ability to support themselves in future.

Equitable undue influence focused on the conduct of the person receiving the gift. Traditionally, this was described by conduct utilizing such language implying culpability that justified setting aside a gift, words like "unfair," "improper," "coercion," "overreaching,"

[77] As was the case in two of the cases detailed earlier, being true of the niece in *Anderson v. Elsworth*, and of the Mr. Phillipson in *Phillipson v. Kerry*.

"cheating," "fraud," and "wrongful."[78] In claims of direct or actual undue influence, the court would look for conduct on the part of the gift-recipient fitting that description. Where the claim was undue influence derived from a relationship ("presumed undue influence"), the court would look for a relationship of trust and confidence and, where present, presume that some conduct of that character had occurred behind the scenes – at least until given evidence that the transaction was indeed fair and proper sufficient to rebut the presumption and allow the transaction to equitably go forward.[79] Equity protected against victimization. Cotton L.J. described undue influence as flowing from the principle that "no one shall be allowed to retain any benefit arising from his own fraud or wrongful act."[80]

In contrast, equitable unconscionable procurement did not focus on the conduct of the person receiving the gift but rather, on the gift-maker and their understanding. The gift-maker could be without fault.[81]

When a significant and potentially impoverishing gift was made, the courts of equity took the position that the gift-maker had to have a full understanding of the nature of the gift transaction and how the transaction may impact their finances in the future. If the understanding of the gift-maker was flawed, so to was the gift.

The presumption built into unconscionable procurement was easily triggered, requiring only a large and potentially impoverishing gift coupled with an act of procurement. It was far harder to trigger the presumption built into equitable undue influence, requiring a relationship of trust and confidence. Sometimes the relationship is obviously absent.[82]

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

[79] No evidence is necessary of the wrongful conduct where undue influence is presumed. Even where actual undue influence is alleged, and actual conduct has to be pointed to in evidence, no evidence is required of *mala fides*. A person who does not intend to take advantage can take advantage nonetheless. A glancing blow was provided on point in the recent decision in *Kalanj v. Kalanj Estate*, 2022 CarswellBC 1190, 2022 BCSC 427 (B.C.S.C.), at para. 70.

[80] *Allcard v. Skinner* (1887) L.R. 36 Ch. D 145 (Eng. C.A., Ch. Div.), at pg 171.

[81] As was the case in two of the cases detailed earlier, being true of the niece in *Anderson v. Elsworth*, and of the Mr. Phillipson in *Phillipson v. Kerry*.

[82] That appears to have been the situation in the cases detailed earlier. A relationship of trust and confidence was considered but not found in *Hoghton v. Houghton*. In the balance of the cases it does not

Sometimes a relationship of some kind is there, but ambiguous in a way making it very difficult to weigh the evidence and predict an outcome.[83]

Recently, a case in British Columbia came before the courts which featured a claim of unconscionable procurement. In *Sandwell v Sayers*[84] the plaintiff was the 91-year-old father of the defendant, who is his youngest daughter and a realtor in the Fraser Valley. The plaintiff lives alone in his Kelowna home with no mortgage valued at approximately $464,000. In 2008, the plaintiff had previously executed a transfer of his home to his son, Floyd Tayler for $1.00. When his daughter learned of this, she convinced the plaintiff he was in danger of losing his home. In December 2020, he transferred an interest in his home to his daughter, making them joint tenants. The Court upheld the transfer but not before concluding that "the circumstances here are unfortunate. It would always be preferable for disputes between parents and children to be resolved privately, but sadly that is often not the case. This and many other cases are proof."[85] The decision then went on to say that:

> The evidence of the parties reveals a troubled and, at times, estranged relationship over the years. The transaction occurred in what appears to have been a brief reconciliation period between the parties. In her oral submissions, the defendant expressed a desire for there to be respect for her father's wishes. That is contrary to her position in this litigation that ignores what her father's wishes currently are, in favour of earlier wishes that benefit her.[86]

The decision in *Sandwell* was also notable as it discusses the prospective place of the doctrine of unconscionable procurement as an attack on gifts and suggests that modern Canadian courts may desire to pause and reflect before accepting the doctrine as a part

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appear to have been actively pressed by the litigants or considered by the courts (except in *obiter* remarks describing the general law).

[83] Consider the difficulties grappling with this issue illustrated in *Bradley v. Crittenden*, [1932] S.C.R. 552, [1932] 3 D.L.R. 193, 1932 CarswellAlta 75 (S.C.C.). Various judges at trial, at the Alberta Court of Appeal, and at the Supreme Court of Canada wrestled and flip-flopped with whether a particular boyfriend-girlfriend relationship qualified as a relationship of trust and confidence. At the end of the day, the justices at the Supreme Court ended up divided on point and wrote dissenting decisions.

[84] 2022 BCSC 605 [*Sandwell*].

[85] *Sandwell*, *supra* note 9 at para 68.

[86] *Ibid*, at para 69.

of the current law. John E.S. Poyser points out that in *Sandwell*, the defendant resisted the application of the doctrine and argued "that the law of resulting trust and undue influence have taken the place that unconscionable procurement may have had." [87] The judge did not rule on point, leaving it open, but did comment "I have real doubt about the place of the doctrine of unreasonable procurement in British Columbia law."[88] The court ultimately took the position that it made no difference as the party alleging unconscionable procurement had not made out the necessary elements to successfully make the doctrine applicable on the facts of the case.

8. CONCLUSION

Special care must be exercised whenever it is discovered that an Attorney for Property is making a significant transfer or charge on behalf of an incapable individual. There are extensive duties and responsibilities, imposed under Canadian common law and statute, that governs the Power of Attorney (POAP) role. It is important that lawyers and other professionals recognize these valid and invalid power of attorney documents and inform themselves with the statutes that govern these documents.

The bottom line; misuse and abuse of a power of attorney document can and does happen. Professionals must equip themselves with the knowledge and tools to recognize the signs of undue influence and abuse.

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

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[87] *Ibid*, at para 35.

[88] *Ibid*, at para 61.