Law Society of Ontario | Barreau de l'Ontario

26th Estates and Trusts Summit – DAY TWO

CO-CHAIRS

Nimali Gamage
Goddard Gamage LLP

Cate Grainger
Harrison Pensa LLP

October 19, 2023

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Law Society of Ontario | Barreau de l'Ontario

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26th Estates and Trusts Summit – DAY TWO

CO-CHAIRS: **Nimali Gamage,** *Goddard Gamage LLP*

Cate Grainger, *Harrison Pensa LLP*

October 19, 2023
9:00 a.m. to 4:30 p.m.
Total CPD Hours = 5 h Substantive + 1h 30 m Professionalism (P)

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE23-0100701

Agenda

DAY TWO:

9:00 a.m. – 9:05 a.m. **Welcome**

Nimali Gamage, *Goddard Gamage LLP*

Cate Grainger, *Harrison Pensa LLP*

9:05 a.m. – 9:25 a.m. **A View from the Bench** (20 m (P))

The Honourable Bernadette Dietrich
Superior Court of Justice

9:25 a.m. – 9:30 a.m. **Question and Answer Session**

9:30 a.m. – 10:00 a.m.	**Caselaw Update and Other Developments** Carol Craig, *Nelligan O'Brien Payne LLP* Emily Hubling, *Fasken Martineau DuMoulin LLP*
10:00 a.m. – 10:05 a.m.	**Question and Answer Session**
10:05 a.m. – 10:25 a.m.	**Break**
10:25 a.m. – 11:00 a.m.	**Exploring the Intersection of Criminal and Estates Law – Murder, *Ex Turpi Causa*, Slayer Rule, Elder Abuse, Theft by POA** Lakin Afolabi, Barrister & Solicitor Fraser Kelly, Barrister & Solicitor Kimberly Whaley, *Whaley Estate Litigation Partners*
11:00 a.m. – 11:10 a.m.	**Question and Answer Session**
11:10 a.m. – 11:40 a.m.	**A Tax Refresher – An Overview of How Estates Are Taxed on Death, Taxation of Trusts, Problems with Appointing US resident Executor, etc.** Rahul Sharma, *Fasken Martineau DuMoulin LLP* Julian Franch, *Minden Gross LLP*
11:40 a.m.– 11:50 a.m.	**Question and Answer Session**

11:50 a.m.– 12:20 p.m.	**Advising Attorneys: Issues of Capacity and Vulnerability** Kathryn Balter, *Fogler Rubinoff LLP* Laura Geddes, *Siskinds Law Firm*
12:20 p.m. – 12:30 p.m.	**Question and Answer Session**
12:30 p.m. – 1:30 p.m.	**Lunch Break**
1:30 p.m. – 2:00 p.m.	**Assessing Capacity and Guarding the Client from Undue Influence where there Are Indicators of Vulnerability** Dr. Kenneth Shulman, MD, FRCPC, Professor, Department of Psychiatry, *Sunnybrook Health Sciences Centre, University of Toronto* Yasmin Vinograd, *Merovitz Potechin LLP*
2:00 p.m. – 2:10 p.m.	**Question and Answer Session**
2:10 p.m. – 2:40 p.m.	**How to Structure your Estate Planning Practice to Minimize Risk** (30 m P) Matthew Furrow, *Arkin Furrow Estate Law LLP* Dawn Phillips-Brown, *Madorin, Snyder LLP* Debra Stephens, *Tupman & Bloom LLP*
2:40 p.m. – 2:50 p.m.	**Question and Answer Session**
2:50 p.m. – 3:10 p.m.	**Break**

3:10 p.m. – 3:35 p.m.	**Bonds in Guardianships and Estates: When Are they Required, How to Dispense With them, What Information Is Required, What Is the Cost?** Gemma Charlton, *Harrison Pensa LLP* Laroux Peoples, *WeirFoulds LLP*
3:35 p.m. – 3:40 p.m.	**Question and Answer Session**
3:40 p.m. – 4:20 p.m.	**Technology, AI, and Estates Practice: The Promises and Perils** (40 m P) Jordan Atin, *Hull & Hull LLP* Amy Salyzyn, Associate Professor, Faculty of Law, *University of Ottawa*
4:20 p.m. – 4:30 p.m.	**Question and Answer Session**
4:30 p.m.	**End of Day Two**

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Table of Contents

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TAB 1

26th Estates and Trusts Summit – DAY TWO

Caselaw Update and Other Developments

Carol Craig
Nelligan O'Brien Payne LLP

Emily Hubling
Fasken Martineau DuMoulin LLP

October 19, 2023

Caselaw Updates and Other Developments

Carol Craig, Nelligan O'Brien Payne LLP & Emily Hubling,[1] Fasken Martineau DuMoulin LLP

***Rudin-Brown v. Brown*, 2023 ONCA 151- Capacity**

In 2009 Carolyn Brown, then age 79, updated her will and powers of attorney following the death of one of her daughters. She named her sister-in-law, Jeanne, as her attorney for property and her daughter and son as her powers of attorney for personal care, jointly and severally.

In 2016, at her son's suggestion and without legal advice, Ms. Brown executed new powers of attorney where she named her son as the only attorney for property and personal care. In July and August 2017, two assessors found Ms. Brown incapable of managing her property and personal care.

The issue before the court was which set of powers of attorney were valid. The trial judge found the 2016 powers of attorney invalid. The Appellant son's appeal was dismissed by the Ontario Court of Appeal.

The trial judge found the 2016 powers of attorney to be invalid because:

- Ms. Brown lacked the requisite capacity when she executed them; and
- They were a product of the son's undue influence over his mother.

This decision is a reminder to lawyers who draft powers of attorney to ensure a grantor meets the tests for both the power of attorney for property and personal care set out in the *Substitute Decisions Act*. Drafting solicitors need to ask a grantor the right questions and keep detailed notes.

***McKenzie v. Morgan*, 2023 ONSC 1457- Sale of property by attorney that is the subject of a testamentary gift**

Dawn McKenzie, attorney for property of her father, 85-year-old Raymond Morgan, brought this Application as she wanted to sell one of Raymond's properties, occupied by his common law spouse, Wendy Morgan.

Wendy resided in the property under a tenancy agreement she had made with Raymond, wherein she paid $800 in monthly rent. Further, Raymond's will provided for Wendy "to continue to reside at my home at 81 Springdale Drive, Barrie, Ontario, for the rest of her life, or until she chooses to move out, pursuant to the terms of a Residential Rental Agreement dated April 2, 2018. Upon Wendy Morgan moving out of the property, or dying, the house will form part of the reside (sic) of my estate and be dealt with as part thereof."

[1] The author would like to thank Latoya Brown, articling student at Fasken Martineau DuMoulin LLP for her assistance in preparing this paper.

Since the above provision was a specific testamentary gift in the form of a life leasehold interest to Wendy, the Court had to consider if Dawn could dispose of the property. The SDA prohibits an attorney for property disposing of property that is the subject of a specific testamentary gift of the alleged incapable unless the sale is required to permit the attorney to comply with their duties (i.e., if Dawn needed the funds to pay for her father's care).

First the court established that based on the evidence, Dawn had reasonable grounds to believe that her father was incapable both with respect to his personal care and with respect to his property. The court then turned to the question of whether the sale of the property was necessary. The court found the evidence was unreliable (estimates, exaggerated) and that there were other options available, enabling Dawn to keep the property and still afford her father's care. The court also expressed its concern that Dawn was in a financial conflict of interest and rejected Dawn's application to sell the property.

Fletcher's Fields Limited v. The Ontario Rugger Union*, 2023 ONCSC 373- Validity of non-charitable purpose trusts and the *Perpetuities Act

In the 1960s, the Ontario Rugger Union (ORU) purchased six rugby fields to be used by the six league rugby clubs. Pursuant to an agreement between the ORU and the clubs, the ORU owned the fields in trust for the Clubs.

Fletcher Fields Limited (FFL) was incorporated in 1970 with the ORU and the clubs becoming shareholders. Shortly after, the parties agreed to transfer the rugby fields from ORU to FFL. The agreement acknowledged that the ORU held the fields in trust for the rugby clubs and a declaration of trust was registered on title.

The FFL experienced financial difficulty and, in 2021, sold the Fields to the City of Markham for $21.5 million. A little more than half of the proceeds were donated to the Canadian Rugby Foundation and an application was brought to seek the court's opinion or direction on questions arising from the sale as well as how to distribute the remaining proceeds.

Were the Fields held in Trust?

The court noted that a non-charitable purpose trust is recognized where:

1. It meets the so-called "three certainties";

2. It does not violate the rule against perpetuities (s. 16 of the *Perpetuities Act*); and

3. There is a person with standing to enforce the trust.

The court found that FFL held the Fields as trustee for a specific, non-charitable purpose trust, with the trust's purpose being the promotion and playing of the sport of rugby in accordance with the 1971 conveyance agreement and the 1972 declaration of trust. In so doing, the court noted that a purpose trust can be charitable or non-charitable, with the common feature of the two being the advancement of a purpose, as opposed to benefiting specific people directly.

While noting that the promotion of sport itself (i.e., rugby) is not a charitable purpose, the court found that FFL held the Fields as trustee because the three-part trust test had been met, there was no violation of the rules against perpetuities and at least one person had standing to enforce the trust. On the last point, the court noted at paragraph 24:

Another historical objection to non-charitable purpose trusts is the lack of a beneficiary to enforce the obligation upon the trustee. However, the modern-day trend is to be flexible when deciding whether non-charitable purpose trusts are valid. Instead of prohibiting non-charitable purpose trusts, the legal rules try to ensure that the intention of the creator of the trust is carried out and that the trustee is able to perform in compliance with that intention. Here, there were parties with sufficient standing to enforce the trust – the members of the ORU and the shareholders of the FFL. They are identifiable in the agreements and, although they are not direct beneficiaries of the trust, they have a sufficient interest that they would have standing to enforce its objects.

Who was Entitled to Receive the Net Proceeds?

Section 16(2) of the *Perpetuities Act* requires that, after 21 years, the trust subject matter reverts to the person who would have been entitled to receive the trust property had the trust been invalid from the time of its creation.

The ORU held title to the Fields when the trust was first formed; so, under s. 16(2), after 21 years the Fields would have reverted to the ORU. However, the ORU conveyed its interest in the Fields to FFL in 1971 so the Fields reverted to FFL, as title holder at that time, entitling FFL to the proceeds of sale.

***Colbert v. Colbert et al*., 2023 ONSC 811- Vexatious Litigant**

Even though we often encounter ugly behaviour from estate litigation clients and/or their family members, it's uncommon for the courts to make a vexatious litigant order. This decision sets out what the court considered in finding one of the sibling parties to be a vexatious litigant.

The vexatious party brought several proceedings and threatened to bring others, all seeking to make some claim against the estate to enrich himself or set aside the will of his deceased father. He wrote to the opposing parties that he was challenging them to "obtain revenge" and that he intended to deplete the estate's value. He disregarded court orders and made multiple threats to the opposing party and their counsel.

Under s. 140(1) of the *Courts of Justice Act*, if a judge is satisfied that a person has "persistently and without reasonable grounds… instituted vexatious proceedings in any court" or "conducted a proceeding in any court in a vexatious manner", they may order that the person may not, without leave of the court, institute any further proceeding in any court or continue a proceeding previously instituted.

In this case, upon finding the party to be a vexatious litigant, the court ordered that he was not permitted to institute further proceedings related to the opposing party and, even then, only related to the estate, without leave from the court. The court also prohibited him from taking any additional steps in two other proceedings without leave from the court. However, the court did grant him

leave to present evidence and arguments on his notice of objection and to continue to represent himself in that proceeding.

***Jonas v. Jonas*, 2022 ONCA 845- Estate distribution/armchair rule**

The Ontario Court of Appeal considered the interpretation of the residue clause in a will and in particular the phrase "in equal shares per stirpes".

The deceased was survived by a common law spouse, four children and four grandchildren. The clause in question stated:

> "I DIRECT my trustees to divide the rest, residue and remainder of my estate as follows: forty per cent (40%) to be divided equally among my children who shall survive me and sixty per cent (60%) to be divided equally between my grandchildren and my great grandchildren (if any) who shall survive me or be born within ten years of my decease, in equal shares per stirpes. Provided that the share to my grandchildren shall be kept and invested by my trustee and used for the support of such grandchildren and for their education and then paid to each of them upon such grandchild attaining the age of 40."

There were two primary interpretations before the application judge, the first brought forth by the now appellant and the second by the Children's Lawyer:

1. 60% of the residue would be distributed equally among the children (in addition to 40% of the residue). If, at the time of the vesting period (10 years from date of death), a child of the testator had no children of their own then the child would receive an additional 15% share of the residue (or ¼ of the 60%). If, at the 10-year mark, a child of the testator had children of their own, then the 15% would be divided equally between or among those children. In other words, each child (and the "branch" of that child's family) would receive the same quantum amounting to ¼ of the residue.

2. The residue clause created two classes of beneficiaries: the first class was the children of the testator (to receive 40% of the residue); the second class was the grandchildren and great grandchildren of the testator alive at the death of the testator or born within 10 years of the testator's death. The 60% of the residue was for the second class of beneficiaries only, not to be distributed among those in the first class.

The application judge applied the "armchair rule" to determine the testator's intentions – i.e., the court sits in the place of the testator and assumes the same knowledge the testator had of their finances and family make-up based on the evidence presented to determine the testators' intentions. After doing so, the application judge agreed with the interpretation advanced by the Children's Lawyer.

The Court of Appeal found that the application judge had properly applied the armchair rule. When faced with different interpretations to consider, the application judge chose the one that most closely conformed to her assessment of the testator's intention, reading the Will as a whole at the time it was made.

***Alger v. Crumb*, 2023 ONCA 209 – Revoking beneficiary designations**

The Court of Appeal determined whether a general revocation clause that read:

> "I hereby revoke all Wills and Testamentary dispositions of every nature and kind whatsoever made by me heretofore made."

was effective under s. 52(1) of the *Succession Law Reform Act* to revoke the testator's existing beneficiary designations by instrument(s) for her Registered Retirement Income Fund ("RRIF") and Tax-Free Savings Account ("TFSA") plans.

S. 52(1) of the *Succession Law Reform Act* reads: "A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically."

The application judge found that because the general revocation clause did not relate expressly to the testator's existing designations by instrument(s) of her RRIF and TFSA plans, it was not effective to revoke those designations and they remained in effect. The Court of Appeal agreed.

***Lakhtakia v. Mehra*, 2023 ONCA 88 – lack of financial disclosure can be expensive**

This is a short decision dismissing the appeal of a lengthy trial judgement.

The appellant sought a reduction in the $950,000 costs awarded by the trial judge in the first instance family law proceedings. The trial judge found that the appellant had engaged in misconduct, with his most egregious misconduct being his withholding of key financial documents and his fraudulent misrepresentation of his income. The appellant had represented his annual income as being between $100,000 and $200,000 instead of the actual $5 - $7.5 million he earned on an annual basis.

The litigation was conducted over several years and involved 23 motions, multiple conferences, and over 40 judicial endorsements and orders. The trial judge awarded the respondent costs on a full indemnity basis because of the appellant's bad faith conduct throughout the lengthy litigation. The Court of Appeal upheld full indemnity costs as appropriate and did not accept that the award was "plainly wrong".

***D.L. v. E.C.*, 2023 ONCA 494 – Dependant's Relief**

Section 57 of the SLRA expands the definition of child for the purposes of dependants' support to include a person whom the deceased has demonstrated a "settled intention" to treat as a child of his or her family. In this decision, the court dismissed E.C.'s application for dependant support brought on behalf of her daughter, finding that the deceased did not demonstrate a settled intention to treat the daughter as his child.

E.C. and the deceased met in high school and had been involved in an on again off again romantic relationship for about 8 years before the deceased died of a drug overdose at the age of 26. They

were both dating other people when E.C. got pregnant. Towards the end of her pregnancy, E.C. asked the deceased for assistance and they were living together when E.C.'s daughter was born. The deceased was named as the child's father on her birth and baptismal certificates. He named E.C. and the child as beneficiaries of his life insurance.

The deceased had named his mother and sister as beneficiaries of his pension but had tried to change the designation to name E.C. and her daughter as his beneficiaries but used the incorrect form. E.C. then commenced an application for dependant support on behalf of her daughter, seeking payment of the pension.

The application judge concluded that:

(a) E.C. had not met her onus to demonstrate that the child was a dependant of the deceased;

(b) E.C. and B.L. were not common law spouses;

(c) The ordered DNA tests demonstrated the child was not the deceased's biological child;

(d) The deceased had not demonstrated "a settled intention" to treat the child as a child of his family in accordance with the expanded definition of "child";

(e) The deceased believed the child was his biological child and that E.C. knew that either the deceased was not or may not be the father and did not disabuse the deceased of his misunderstanding; and

(f) Had the deceased known the truth, the eight months may have been a sufficient time frame to have allowed for the settled intentions to be manifested.

On appeal, E.C. argued that the deceased's knowledge of whether the child was his biological daughter was irrelevant, particularly since there was evidence that he had suspicions he was not the father. She argued that the applications judge erred in considering that factor as part of the determination of settled intention.

The Court of Appeal held that determining whether a deceased has demonstrated a settled intention to treat a child as his own is a fact-driven exercise. The deceased's knowledge of parentage is one of many factors that can be considered.

***Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363 – Declaratory Relief Defined**

On appeal, Bryton contended that the application judge erred in refusing to grant a declaration in its favour to preclude or to dismiss creditor claims and ss. 95 and 96 BIA claims. Bryton asserted that the application judge erred in failing to assess the full test for declaratory relief set out in Solosky v The Queen. This test requires: (a) that the question be real and not theoretical; (b) that the person raising it has a real interest in raising it; and (c) that there is an opposing party. Bryton argued that the test has been met in this case.

The Court of Appeal, setting out the relevant legal principles, delved into an explanation of declaratory judgements/declaratory relief, defining a declaratory judgement as "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs." Declaratory relief, being restricted to a declaration of the parties' rights, is mainly sought in commercial matters to help parties define their rights and does not contain a provision ordering a party to do something or imposing any form of sanction.

The Court of Appeal held that the court's jurisdiction to make binding declarations of right does not allow a judge to do whatever seems fair; it allows the court to confirm legal rights that already exist. In the case at hand, Bryton was not simply seeking a declaration of its rights, but a dismissal of other claims/proceedings that were already underway. The Court of Appeal found that the appeal had no merit, because Bryton's application "was not a proper use of the application procedure, and … went beyond the proper scope of declaratory relief."

***White v. White*, 2023 ONSC 3740 – Substantial Compliance**

This case provides some clarity on the limitations of the substantial compliance regime pursuant to s. 21.1 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA"). In this case, the testator was in the process of updating her will, however she died before the new will was signed. The applicant, her son, sought production of the lawyer's file in accordance with s. 9 of the *Estates Act,* RSO 1990, c E.22, with the aim of producing the drafted will, so that he could submit a filing for substantial compliance to validate the draft will.

The court was wary of broadening the scope of s. 21.1 to include a draft will. The court noted that a will is a fixed an final expression of testamentary intention, and that a draft will is just a draft, with the potential for changes up until execution time. The court was concerned that setting such a precedent could open the flood gates for a fishing expedition, stating that if s.21.1 is expanded, "we go from looking for Wills – a fairly narrow search – to looking for things that creative people an try to get a court to accept as a Will. That search cuts a much wider swath."

Of note – this challenge was raised orally as a possible cause of action at a 15 minute uncontested case conference. The court was not willing to broaden the scope of definition of a "Will" in the circumstances but left the matter open for further review with additional arguments.

***Palichuk v. Palichuk*, 2023 ONCA 116 – Will challenge made during lifetime of testator**

The Court of Appeal upheld the decision of the application court dismissing a will challenge while the testatrix, Nina, was alive. Nina made changes to her will and power of attorney, and transferred property as a bare trust. The appellant, her daughter, claimed that Nina was unduly influenced and lacked capacity to make such changes, and also sought a guardianship application. A geriatric psychologist conducted two capacity tests and concluded that the testatrix had capacity.

The Court of Appeal also decided that there was no error in concluding that the testatrix had capacity. Although there were minor factual errors in the report, the Court accepted the psychologist's capacity tests as they aligned with that of the *Substitute Decisions Act,* 1992, S.O. 1992, C. 30 (the "SDA"). There were also no contravening expert opinion evidence put forward. Given that the testatrix had capacity to manage finances with assistance, manage her clothing, shelter and hygiene, and grant and revoke powers of attorney and a will, there was therefore no

basis for a guardianship claim. When addressing the issue of timing of the assessment, the Court concluded that the capacity assessment need not have been done at the time of the estate changes, but when the application was put forward. The Court also agreed with the application judge that there was no need to address the undue influence issue, reasoning that the testatrix was still alive and had the capacity to change her will at any time. Thus, the Court determined that questioning the validity of the Will before the testatrix's death would be premature, and a hypothetical contingent exercise that would result in a waste of judicial time and resources. The Court concluded that the application judge should not have provided their opinion, advice or direction on the testamentary documents since a will speaks from death, and the testatrix was still capable of making changes.

***Dors et al. v. The Public Guardian and Trustee*, 2023 ONSC 1503 – The Cy-Près Doctrine**

This case revisits the cy-près doctrine. Here, the deceased left 20% of the residue of her estate to a charity that no longer existed at the time of her death. There were also no instructions in the will directing how the executors should proceed in the circumstances. The court discussed two cases in making its decision. The first is *Re Jacobsen* (1977), 80 D.L.R. (3d) 122 ("*Jacobsen*") which sets out the principles to determine charitable intent. Using the test from *Jacobsen*, the court found that the testator had charitable intent as the gift "was a gift without limitation to a charitable institution, the gift is made from the residue of the estate, the other beneficiaries received cash legacies, there is no gift over in the event of a lapsed gift, and the remaining residual beneficiaries are all charities".[2]

The second case the court discussed was *La Fabrique de la Paroisse Sainte-Sophie et al*., 2020 ONSC 3534 to determine if the cy-près doctrine was applicable in the circumstances. This case quotes a test from *Conforti v Conforti* (1990), 39 E.T.R, which provides that the cy-près doctrine may be used by the court to direct a gift in a Will to an institution or organization other than the one named in the Will if: a) the gift in the Will is impractical or impossible; b) the testator manifested a general charitable intention in making the gift in the Will; and c) the gift to the alternative institution or organization would be a gift resembling the initial purpose of the gift in the Will. The court found that the cy-près doctrine was applicable for the following reasons: 1) the gift was impossible as the charity no longer existed; 2) the testatrix demonstrated a general charitable intent as 95% of her estate was gifted to charities; and 3) the Court was satisfied that the objectives of the charity was of particular importance to the testatrix as she continued to make gifts to the charity even though they had to be carried out through a power of attorney. In addition, the gift to this particular charity was the largest portion of the residue. Accordingly, the cy-près doctrine was utilized to benefit a charity with similar objectives.

***Gorgi v Ihnatowych*, 2023 ONSC 1803 – Rectification of Wills**

This case revisits the common law surrounding the rectification of wills. Here, the testator's will provided that his grandchildren were to receive 10% of the residue of his estate, and the testator's issue would receive the remainder of the residue in equal shares per stirpes. The Will did not specifically name the individuals; rather, it referred generally to "grandchildren" and "issue". The respondent, Alex, claimed to be a child of the deceased and that he and his children should be

[2] *Dors et al. v. The Public Guardian and Trustee*, 2023 ONSC 1503 at para 23

entitled to share in the residue. The Applicants, the deceased's daughter Ula and son Mark, sought to have the will rectified to exclude Alex and his children, on the basis that the testator did not know of Alex until after the Will had ben executed and as a result, did not intend to include him and his children as beneficiaries of his estate.

To determine if the will should be rectified, the court relied on *Re Estate of Blanca Esther Robinson*, [2010] O.J. No. 277, which provides three circumstances where the court will rectify an unambiguous will of unintended errors: (1) where there is an accidental slip or omission because of a typographical error or clerical error; (2) where the testator's intentions have been misunderstood; or (3) where the testator's instructions have not been carried out. The court concluded that there was no ambiguity on the face of the will, and no challenge of validity. However, the court relied on the drafting solicitor's evidence in deciding that the testator's instructions were not carried out. The solicitor's notes indicated the testator intended the residue to be left to his two children Ula and Mark. Therefore, Ula and Mark's names were read into the applicable provision of the will, thus excluding Alex and his children.

***Senthillmohan v. Senthillmohan*, 2023 ONCA 280 – Creditor's rights to assets held in joint tenancy**

The court dismissed this case, concluding that a creditor cannot seize the interest of a non-debtor joint tenant. In this case, a husband and wife were separating and held joint tenancy in the matrimonial home. In early 2020, the wife sought an equalization of net family property. In January 2021, the Court directed that the parties' matrimonial home be sold, and the proceeds held in trust. In September 2021, a third-party creditor obtained a default judgement against the husband. The parties entered into an agreement of purchase and sale for the home in October 2021, and in November 2021, before the sale was completed, the wife brought an urgent motion to sever the joint tenancy. In February 2022, after the sale the home was complete, the wife brought a motion to release her 50% interest in the proceeds of the sale. The third-party creditor sought to enforce against the wife's interest in the proceeds from the sale of the home on the basis that the parties were joint tenants at the time the default judgement was obtained.

The court concluded that it is not necessary to debate the date of severance as an execution creditor can only execute against the debtors' interest in jointly held property. The court relied on s. 9(1) of the *Execution Act,* R.S.O. 1990, c. E.24*,* which provides that *"*the sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in joint tenancy" (Emphasis added). The court concluded that seizure and execution only refers to the debtor's interest. The court also referenced s. 10(6) of the *Execution Act,* in conjunction with s. 9 and concluded that the writ also extends to the death of the debtor. The court reasoned that the writ binds the land against which it is issued, thus when one joint tenant dies, the surviving tenancy acquires the whole of the property through right of survivorship. However, if the writ is filed before that joint tenant's death, it does not bind the surviving, non debtors complete interest. Therefore, a creditor can only execute on the debtor's interest in a joint tenancy. The wife was entitled to her unincumbered share of the proceeds of sale.

***Di Nunzio v Di Nunzio*, 2022 ONCA 889 – Costs of estate litigation**

This case upheld the decision in *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ON CA), in which the Court of Appeal moved away from the "traditional" approach to costs in estate litigation, where costs are paid out of the estate. Instead, the Court confirmed the modern approach that is aligned with civil cost rules, which provide that the unsuccessful party pays the costs. There remains, however, an exception this rule: where the proceeding raises a question of public policy, the costs are to be paid out of the estate. The modern approach to costs seeks to "restrict unwarranted litigation and protect estates from being depleted by litigation." Public policy considerations may arise where there is ambiguity or omission in the testator's will or other conduct.

In the case at hand, the appellant sought to set aside her mother's will, which disinherited her. Since her mother vocalized her intention and reasons for disinheriting the appellant before she died, the Court of Appeal upheld the application judges' findings that the case did not fit into the public policy exception of ambiguity in the testator's conduct. However, the court reasoned that on the face of it, the facts of the case could have given rise to suspicious circumstances. Thus, the court used its discretion to order the appellate to bear her own costs rather than the additional costs of the other party, which were to be born from the estate.

***Gefen v. Gefen et al.*, 2023 ONCA 406 – Capacity of Estate Trustee**

The history of this estate dispute is quite lengthy. The parties have been engaged in litigation since 2013. Of central importance in the current case's history is the capacity of the estate trustee, the testator's wife. The court referenced *Abrams v. Abrams*, 2008 CanLII 67884, when considering the factors to order a capacity assessment, and ultimately ordered a capacity assessment, relying on the following observed facts that indicated capacity was at issue: the testator's wife was 98 or 99 years old, deaf and blind; there were questions as to her capacity to manage an estate as she was unaware of basic estate issues, such as who was managing property and debts; she could no longer remember many facts; she was non-responsive, answering different questions than what was posed to her, or none at all. Her last capacity assessment was in 2014, and there was potential harm and urgency if an assessment was not completed. She relied heavily on her son to make decisions and there were concerns of undue influence. The formal assessment verified that the estate trustee did not have the capacity to mange property or instruct counsel. As a result a litigation guardian was appointed, power of attorney for property was set aside, and counsel of the estate trustee was removed.

In the current case, the Court of Appeal upheld the lack of capacity finding, as well as the decision to appoint a neutral litigation guardian and set aside the power of attorney for property. The Court of Appeal also rejected the submission that a guardian of property cannot be appointed by motion but only through application. As the underlying application sought a guardian for property, the motion judge was able to appoint such. *Rule* 1.04 instructs to "secure the just, most expeditious and least expensive determination". The appeal was dismissed.

***Shafman v Shafman*, 2023 ONSC 1391 – Dependants' support**

This case highlights the importance of providing adequate support for dependants. The testatrix died leaving behind three sons and an estate worth approximately $3M. The value of the estate was largely split between the two older sons, while also providing an income of $1730.29 per month to the youngest son, the applicant. The court concluded that the applicant, though 67 years old, was a dependant of the testatrix. The testatrix was found to have been providing support to the applicant immediately before her death for the purposes of s. 51 of the SLRA. The testatrix was providing an annuity payment of $1500 per month that the applicant relied on to meet his day to day needs. Outside of the annuity, the testatrix routinely provided the applicant money or money in-kind immediately before her death. In addition, the applicant also ate two meals every day with the testatrix and resided with the testatrix every weekend. This was sufficient for the court to concluded that the applicant was a child of the deceased, to whom the deceased was providing support immediately before her death and thus a dependant pursuant to s. 51 of the SLRA.

The next issue was whether the testatrix provided support to the applicant in her will that was adequate to afford him the lifestyle to which he was accustomed prior to the testatrix's death. The court conclude that the applicant required a monthly income of $4,182.00, which amount included rent and utilities, food, clothing, personal care, transportation and health and lifestyle expenses. The applicant receives $1,509.66 per month of income in government benefits. When combined with the $1730.29 per month provided by the estate, there was a shortfall of $942.05. The Court ordered the estate to pay this additional amount to the applicant each month. This provided a comparable standard of living that the testatrix was providing to the applicant before her death.

***Estate of Nordby*, 2023 ONSC 821 – Consequences of non-compliance with court order**

This case illustrates the importance of complying with court orders. Here, the testatrix died leaving behind two children, one of whom was a minor. She appointed her father, Mr. Nordby, as the estate trustee. Probate was obtained October 13, 2013, and subsequently the Children's Lawyer made multiple requests for an accounting of the estate. However, Mr. Nordby failed to comply. In 2017, the Children's lawyer was granted an order for the passing of accounts. Mr. Nordby still did not comply, thus the Children's lawyer filed a contempt motion in 2022 as it had been five years since the first request. Mr. Nordby was given 60 days to comply, at the expiry of this term he stated that he was seeking counsel. An additional 60 days was granted, however at the expiry his counsel requested an adjournment as he was retained just two days prior. Due to Mr. Nordby's longstanding non-compliance, the Children's Lawyer requested a penalty of imprisonment.

In assessing the appropriate penalty, the court relied on *Langston v. Landen*, 2010 ONSC 6993. The case outlined the principle that proper penalties make the public sit up and take notice, in addition that "the court will not take disobedience of its orders". The court also cited *Poulie v. Johnston*, 2922 ONSC 5186, that also outlined the principle that the rule of law is directly dependent on the ability of the court to enforce their process and maintain the dignity and respect of the court. In the current case, the court noted aggravating factors such as the long standing breach of the order, the fact that Mr. Nordby was warned by the court that contempt may include jail time, and that he was given multiple occasions to clear the contempt order but failed to do so. Furthermore, he was advised of his obligations as an estate trustee. The court decided that a fine was not appropriate in the circumstances, as the funds were to benefit his grandchildren and as of

date, the court was still unsure of the state of the estate assets. The court ordered imprisonment of five days for contempt of court, to make Mr. Nordby sit up and take notice.

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TAB 2

26th Estates and Trusts Summit – DAY TWO

The Intersection of Estates, Criminal & Elder Law

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Whaley Estate Litigation Partners

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October 19, 2023

cpd

Law Society of Ontario

26th Estates and Trusts Summit

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The Intersection of Estates, Criminal & Elder Law

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Contents

Introduction

Certain federal *Criminal Code* provisions are increasingly applied to elder abuses and as such, intersect with the function and operation of estates laws. This may occur as a result of many circumstances, however, the most prevalent reason for the intervention of the criminal law is often the suspected abuse of an older adult.

When this occurs, there are remedies available (to correct the wrong or punish the perpetrator) which can be sought under provincial laws,[1] as well as under federal laws, including under the *Criminal Code* of Canada.

The purpose of this paper will be to discuss the application of such federal laws in the purview of the physical, emotional, or financial abuse of an older adult. Other criminal applications that impact estates law including the forfeiture or 'slayer' rule and the equitable doctrine of *ex turpi causa* will also be examined

Contextual considerations, including societal demographics concerning rates of population, disability, and cognitive impairment, and community are relevant and bear mention. Scams targeting older adults, the United States of America's experience with the creation of criminal offences for elder abuse, Canada's relevant criminal laws, and a selection of illustrative cases from across the country will also be addressed

1. Demographics

1.1 - Population

The population in Canada is constantly growing. Within this growth exists the reality that the population is also rapidly aging. As evidence of this, Statistics Canada estimates that by 2031, close to 1 in 4 Canadians will be 65 years of age or older. It is also estimated that by the year 2061, there will be 12 million seniors in Canada.[2]

[1] Provincial laws can include legislation governing property, guardianship, capacity, health, and social services.
[2] Statistics Canada, "Canada's Population Estimates: Age and Sex", and "Age and Sex Highlight Tables, 2016 Census" online: https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/as/Table.cfm?Lang=E&T=21.

Recent data from Statistics Canada indicates that as of July 2022, the number of persons aged 65 years and older in Canada was 7,330,605. Of this figure, there were approximately 13,485 centenarians (individuals aged 100 years and older). The number of adults aged 65 years and older now represents 18.8 % of Canada's population. [3]

Across the globe, similar population trends are seen. In 2022, the United Nations ("UN") estimated there were 8 billion people on the planet, 10 per cent of which were adults over the age of 65. By 2050, the UN estimates that the number of adults over the age of 65 will increase to 16 per cent of the global population. The World Health Organization ("WHO") also estimates that between 2015 and 2050, the proportion of the world's population over 60 will nearly double from 12 per cent to 22 per cent.[4] According to WHO, by 2030, there will be 1.4 billion persons alive over the age of 60. This figure is expected to rise to 2.1 billion in 2050, and as high as 3.1 billion in the year 2100.[5]

Within this growing population, there is a significant rise in the number of older adults living with a physical or mental disability or experiencing cognitive impairment.

1.2 - Cognitive Impairment

Rising levels of cognitive impairment are an important factor to consider when evaluating the need to protect vulnerable older adults. Often, it is older adults who are frail or unable to voice their concerns due to cognitive impairment or incapacity who fall victim to abuse.

Globally, dementia in its various forms[6] is the seventh leading cause of death among all diseases. In 2022, the UN estimated that approximately 55 million people across the world were living with the disease. [7]

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[3] Statistics Canada, "Older Adults and Population Aging: Statistics" online: https://www.statcan.gc.ca/en/subjects-start/older_adults_and_population_aging

[4] World Health Organization, "Ageing and health" (October 1, 2022), accessed online: http://who.int/news-room/fact-sheets/detail/ageing-and-health.

[5] World Population Prospects: The 2017 Revision Population Database, UN Department of Economic and Social Affairs, online: http://www.un.org/en/sections/issues-depth/ageing/ Accessed on 04.07.18.

[6] Dementia is a general term used to describe a range of symptoms associated with a decline in mental function severe enough to reduce a person's ability to perform everyday activities. It is caused by a variety of diseases and injuries that affect the brain, with Alzheimer's disease being the most common.

[7] World Health Organization, "Dementia", n.d., accessed online: https://www.who.int/news-room/fact-sheets/detail/dementia.

Here in Canada, the Alzheimer Society reports that over 600,000 Canadians are currently living with dementia. By 2030, this figure is expected to rise to close to 1 million Canadians and by 2050, well over 1.7 million Canadians.[8] Statistics Canada estimates that by 2050, the percentage of Canadians over the age of 65 living with dementia will increase to 13.2 per cent. [9]

According to the Canadian Institute for Health Information ("CIHI"), approximately one-third or 33.3 per cent of seniors under the age of 80 with a diagnosis of dementia are living in long-term care homes. This proportion increases to 42 per cent for adults over the age of 80.[10] As rates of dementia increase in Canada, older adults who cannot be properly supported at home will need to move into long-term care facilities.

1.3 - Rates of Disability

The Canadian Survey on Disability ("CSD") revealed that in 2017, approximately 6.2 million or 22 per cent of Canadians over the age of 15 were living with a disability. Of this figure, 38 per cent were adults over the age of 65. The majority of these individuals also have two or more types of disabilities (71 per cent).[11] The CSD also revealed that approximately 315,000 (5.1 per cent) of Canadians over the age of 15 and living with a disability report having a developmental disability or disorder.[12]

[8] Alzheimer Society of Canada, "The Landmark Study: Path" (2022), accessed online: http://www.alzheimer.ca/sites/default/files/documents/Landmark-Study-Report-1-Path_Alzheimer-Society-Canada.pdf
[9] *Ibid*.
[10] Canadian Institute for Health Information, "Dementia in long-term care" (2023), accessed online: https://www.cihi.ca/en/dementia-in-canada/dementia-care-across-the-health-system/dementia-in-long-term-care#:~:text=Challenges%20of%20caring%20for%20seniors,or%20trauma)%20was%2087%25.
[11] Statistics Canada, "Measuring Disability in Canada" (December 2, 2022), accessed online: http://www.150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2022062_eng.htm
[12] Government of Canada, "Infographic: Developmental Disabilities or Disorders in Canada – Highlights from the 2017 Canadian Survey on Disability" (March 29, 2021), accessed online: http://www.canada.ca/en/public-health/services/publications/diseases-conditions/infographic-developmental-disabilities -disorder-highlights-canadian-survey-2017.html

2. Elder Abuse

2.1 - Understanding and Defining Elder Abuse

Elder abuse appears in many forms and includes financial, physical, psychological (mental or emotional), and sexual abuse. An often-overlooked form of abuse also includes neglect. There is a wide-range of definitions which describe what elder abuse entails.

The WHO uses the following definition from the 2002 Toronto Declaration on the Global Prevention of Elder Abuse:

> A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.[13]

The government of Canada provides a similar definition on its website, but refers to a "relationship of trust" rather than an "expectation of trust," and defines a lack of action separately as "neglect."[14] In the United States of America, the Centers for Disease Control and Prevention (the "CDC") defines elder abuse as:

> An intentional act or failure to act that causes or creates a risk of harm to an older adult.[15]

A consistent definition for elder abuse would be helpful in combatting violence against older adults. In the June 2021 report *Elder Abuse: Identifying the Issue and Combatting all Types of Abuse*, the Standing Committee on Justice and Human Rights recommended that the federal government, in consultation with the provinces, territories, and other relevant stakeholders, develop options to standardize the definition(s) of elder abuse in Canada and conduct a comparative analysis of the advantages and disadvantages of those options.[16]

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[13] World Health Organization, "Elder Abuse" (June 13, 2022), online: <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.
[14] Government of Canada, "Elder abuse: It's Time to Face the Reality." (July 26, 2012), accessed online: https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/prevention-resources-older-adults/elder-abuses-time-face-reality.html
[15] Centers for Disease Control and Prevention, "What is Elder Abuse" (June 2, 2021), accessed online: https://www.cdc.gov/violenceprevention/elderabuse/definitions.html; the CDC defines an "older adult" as "someone age 60 or older."
[16] *House of Commons*, Standing Committee on Justice and Human Rights, "Elder Abuse: Identifying the Issue and Combatting all Types of Abuse" (June 2021) at 1 [Standing Committee].

Unfortunately, elder abuse has been poorly or imprecisely defined, defined specifically to reflect the unique statutes or conditions present in select locations (e.g. states, countries, or cities), or has been defined specifically for research purposes.

In the absence of a universal definition, there is still a generally sound understanding of what elder abuse may entail.[17] Elder abuse includes but is not limited to the misuse of a power of attorney document,[18] acts of theft and fraud,[19] the imposition of a shared residence,[20] undue influence,[21] psychological abuse,[22] a failure to provide the necessaries of life,[23] predatory marriages,[24] and violence or assaults.[25]

There are subtle and unsubtle indicators that an older adult may be suffering from abuse. These may include physical signs of abuse such as unexplained injuries or bruising, changes in living arrangements (new friends or relatives moving in without permission or consent, as an example), an unexplained or sudden inability to pay bills, an unexplained or sudden withdrawal of money from accounts, poor living conditions in comparison to the value of the older adults assets, changes in banking patterns, changes in appearance or social behaviors, another person controlling the spending of an older adult, confusion or lack of knowledge about a certain financial situation or the execution of legal documents,

[17] See generally, for more information on the particulars of Elder Abuse, the resources available from the Advocacy Centre for the Elderly ("ACE"), accessed online: http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php.
[18] A Power of Attorney for Property is a legal document in which a person (the "grantor") gives another person (the "attorney") the legal authority to make financial decisions on the grantor's behalf and can be abused by the attorney who engages in self-dealing or financial misappropriation, for example.
[19] Acts of theft and fraud can include but are not limited to, stealing an older adult's money, pension cheques, or possessions, and/or committing fraud, forgery or extortion.
[20] A form of elder abuse includes sharing an older adult's home without paying rent or a fair share of the expenses.
[21] Often, perpetrators of elder abuse will unduly exert pressure on an older adult in order to sell personal property, invest or take out money, buy alcohol or drugs, make or change a testamentary document, draft and/or execute documents that are not understood by the older adult, give money to relatives or caregivers or even friends, and/or engage in paid work to bring in extra money.
[22] Psychological abuse includes isolating an older adult, or threatening such isolation. It can also include withholding of social and familial relationships in order to gain control or leverage a benefit (e.g., an adult child who threatens their older adult parent that he or she cannot see their grandchildren unless they guarantee a loan or give the adult child money).
[23] An attorney under a Power of Attorney document or similar fiduciary relationships are obligated to provide the grantor or vulnerable person with the necessaries of life which include, for example, shelter, food, medication, and assistive devices.
[24] Predatory marriages occur when an unscrupulous marries and older adult or similarly vulnerable person in order to gain access to their money and assets.
[25] Violence and/or assaults against older adults includes domestic violence, physical, and sexual abuse.

being forced to sign multiple documents at once, being coerced into a situation involving overwork and underpay, an unexplained disappearance of possessions (e.g. lost jewelry or silverware), changes in power of attorney documents, being overcharged for services or products by providers, and/or being denied the right to make independent financial decisions.[26]

One of the biggest contributors to the spread of elder abuse is ageism. The Ontario Human Rights Commission defines 'ageism' as a socially constructed way of thinking about older persons based on negative attitudes and stereotypes about aging and a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older adults.[27] Ageism is present in the media, the justice system, healthcare institutions, and workplaces.

Elder abuse has significant negative impacts and can lead to early death, cause harm to the physical and psychological health of an older adult, destroy social and family ties, and lead to devastating financial loss, amongst other concerns. In fact, any type of mistreatment can leave the abused older adult feeling fearful and depressed. Often, the victim believes the abuse they've suffered is a fault of their own. Intervention from adult protective service agencies, support groups and counseling can be instrumental to help the abused person heal from emotional wounds.[28]

There are also notable risk factors which increase the chance of becoming a victim of abuse. These factors include functional dependence and/or disability, poor physical health, cognitive impairment, poor mental health and low income. There are also individual level characteristics which increase the risk of becoming a perpetrator of abuse such as mental illness, substance abuse and dependency (often financial) of the abuser on the victim. At the relationship level, the type of relationship (e.g., spouse/partner or child/parent) and marital status may be associated with an elevated risk of abuse, but these factors vary by country and region. Community and societal-level factors linked to

[26] For more information on the indicators of elder abuse, see generally, Elder Abuse Prevention Ontario, "Learn the Facts", online: < https://eapon.ca/learn-the-facts/>.
[27] Ontario Human Rights Commission, "Ageism and age discrimination fact sheet" (2022), accessed online: http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet.
[28] National Institute on Aging, "Elder Abuse" (July 21, 2023), accessed online: https://www.nia.nih.gov/health/elder-abuse

elder abuse may include ageism against older people and certain cultural norms (e.g., normalization of violence).[29]

Where it concerns the prevalence of elder abuse in Canada, a recent study using data from the Canadian Longitudinal Study on Aging (CLSA) found one in ten adults aged 65 and older experience some form of elder abuse each year in Canada. [30]

2.2 – Financial Elder Abuse

Financial abuse has been defined as "the misuse of someone's property and resources by another person,"[31] or the "misappropriation of an older person's money or property,"[32] Financial abuse is also one of the most prevalent forms of elder abuse. Determining the level of financial abuse in Canada, however, is challenging for many reasons, including differences in age criteria and definitions of financial abuse,[33] resulting in probable under-reporting of financial abuse.

Financial abuse comes in many different forms. For example, the financial abuse of an older adult can occur in scenarios involving the improper use of a joint bank account, misappropriation or theft of an older adult's assets, the unauthorized or improper transfer of real property, ATM fraud, undocumented loans, or the withholding of an older adult's pension or social assistance cheques to name a few.[34] Financial abuse can also include more subtle circumstances where an older adult is financially supporting family members due to coercion or pressure.

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[29] World Health Organization, "Abuse of older people" (June 13, 2022), accessed online: https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people

[30] See Burnes, D., Pillemer, K., Rosen, T. *et al.* Elder abuse prevalence and risk factors: findings from the Canadian Longitudinal Study on Aging, (2022), *Nat Aging* **2**, 784–795 where the authors describe how being physically, cognitively and/or emotionally vulnerable increased the risk for elder abuse as does maltreatment in childhood, living with others, identifying as black, and reporting financial need. The authors also argued that "our findings may actually underestimate the true population prevalence because older adults tend to underreport personal problems such as family violence."

[31] Gray-Vickrey P. Combatting abuse, part 1. Learn how to assess the visible and invisible indicators and what to do if you recognize abuse in an older patient. *Nursing* 2000; 30(7): 6.

[32] National Center on Elder Abuse. Frequently asked questions. What is elder abuse? https://ncea.acl.gov/FAQ-(2).aspx (accessed 23 November 2021).

[33] The National Clearinghouse on Family Violence. *Abuse and neglect of older adults*. Health Canada, 1999.

[34] See M. Jasmine Sweatman and Kimberly A. Whaley, "Incapable and Capable Rights: The Rights of Adults in Vulnerable Circumstances – Sledgehammer v. Swiss Army Knife" (2022) 1:4 *ETPJ* 385 [Sweatman & Whaley].

No province or territory currently requires reporting of financial abuse for older adults outside a care facility.[35] Some investigatory agencies can impose a duty to report financial abuse after an investigation has been started. These institutions can disclose information to the government, next of kin, or authorized individuals when they suspect an individual is, or, has been a victim of financial abuse.[36]

The 2017, Vancity report, *Suffering in Silence: The financial abuse of seniors in British Columbia* revealed that 35 per cent of older adults surveyed who experience at least one form of financial abuse choose not to tell anyone. Of these older adults, 21 per cent say they didn't know who to tell. The report also revealed that over 80 per cent of seniors surveyed could not name any support services available for seniors who may be victims of financial abuse. The report also shared that the most common forms of financial abuse in B.C. reported to the Seniors Abuse and Information line were related to people exploiting seniors for shelter or money, pressuring them to give gifts or change their will, the misuse of a power of attorney, and real estate fraud.[37]

Recently, the Canadian Securities Administrators ("CSA") conducted a joint online survey in which only 42 per cent of respondents said they were able to recognize the signs of financial elder abuse. Only 47 per cent said they knew where to report cases of abuse while 29 per cent said they personally know someone who's been the victim of such abuse. Overall, 81 per cent of those surveyed recognized that in cases of financial abuse, older adults are usually victimized by someone close to them. [38]

For a number of reasons, financial abuse of older adults does not always attract criminal charges. A victim may be unable or unwilling to extricate themselves from the presence

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[35] Ontario, for example, has a mandatory financial abuse reporting provision in its *Fixing Long-Term Care Act*, 2021, S.O. 2021, c. 39, Sched. 1 at s. 28(1).
[36] See *Personal Information Protection and Electroncic Documents Act*, SC 2000, c 5 [*PIPEDA*].
[37] See Vancity, "Suffering in Silence: The financial abuse of seniors in British Columbia" (2017), accessed online: https://www.vancity.com/SharedContent/documents/pdfs/News/Vancity-Report-Seniors-Financial-Abuse-2017.pdf where the authors also note that there continues to be a large gap between unprompted reports of financial abuse (3 per cent) and reported abuse when respondents are presented with specific scenarios (36 per cent), indicating that many seniors may not understand the ways in which they may be victims.
[38] Leo Almazora, "Many Canadians ill-equipped to stop financial elder abuse" (June 15, 2021), *Wealth Professional*, accessed online: https://www.wealthprofessional.ca/news/industry-news/many-canadians-ill-equipped-to-stop-financial-elder-abuse/357149

of undue influence and may ultimately refuse to report a loved one, or care provider to the police. This is especially true in circumstances where the older adult relies on the perpetrator for care and needed assistance.

2.3 - Reported Elder Abuse

In 2020, there were 389,919 victims of police-reported violence in Canada. Of this figure, 15,157 (four per cent) of all victims were older adults. Between 2010 and 2020, the rate of reported violence against older adults increased by 22 per cent.[39] In contrast, since 2015, the rate of victimization among younger Canadian cohorts only increased by 12 per cent. The largest increase among older adults was observed in adults aged 85 and older (39 per cent), a figure that was almost entirely driven by the violent victimization of older women.[40]

In 2020, there were 7,241 police-reported incidents of violence against older adults in which there was a single victim and a single accused. Of these incidents, nearly six in ten (58 per cent) persons accused of violence against seniors had charges laid or recommended against them. This is significantly lower than the percentage of those accused of violence against non-seniors (74 per cent).[41] Compared to younger victims, a larger proportion of seniors requested that no further action be taken against the accused, despite there being sufficient evidence to support a charge.[42]

Data also reveals that the overall rate of police-reported violence against seniors in Canada is higher in rural areas compared to urban centers (247 versus 214 per 100,000 population). Between 2010 and 2020, similar rate increases for seniors were documented

[39] See Brijnath, B., Gartoulla, P., Joosten, M., Feldman, P., Temple, J. and B. Dow. 2021. "A 7-year trend analysis of the types, characteristics, risk factors, and outcomes of elder abuse in community settings." *Journal of Elder Abuse & Neglect.* Vol. 33, no. 4.; See also Weissberger, G. H., Goodman, M. C., Mosqueda, L., Schoen, J., Nguyen, A. L., Wilber, K. H., Gassoumis, Z. D., Nguyen, C. P. and S. D. Han. 2020. "Elder abuse characteristics based on calls to the National Center on Elder Abuse resource line." *Journal of Applied Gerontology.* Vol. 39, no. 10.
[40] There was a reported 63 per cent rate increase among women aged 85 and older (from 108 to 176 victims per 100,000 population) compared to a rate increase of only 3 per cent for senior men of the same age.
[41] Shana Conroy and Danielle Sutton, "Violence against seniors and their perceptions of safety in Canada" (July 7, 2022), accessed online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00011-eng.htm#n4-refa [Conroy and Sutton].
[42] These figures, according to Statistics Canada, were 26 per cent and 18 per cent respectively.

in both urban and rural areas (a 22 per cent and 21 per cent increase, respectively). In urban areas, the rate increase was larger for senior men (25 per cent) than senior women (19 per cent). In rural areas, the rate increase was also higher for senior men (25 per cent) than senior women (16 per cent).[43]

Where it concerns rates of homicide perpetrated against older adults, despite the rapid growth of the population, much less attention has been paid to this area. Based on available data in the US, researchers have documented an increase in the homicide rate among people aged 50 and older since 2007.[44] A recent trend analysis in Canada, however, has not been explored.

Utilizing the available data from Statistics Canada, between 2000 and 2020, 944 seniors have died by homicide in Canada, accounting for 7 per cent of all homicide victims during this time. The large majority (88 per cent) of homicides of senior victims were solved by police, meaning an accused person was identified. This rate of resolution was actually more common among senior victims than non-senior victims (77 per cent).[45]

2.4 - Unreported and Under-reported Elder Abuse

There are numerous reasons why an older adult may not report abuse to police including, but not limited to, fear of retaliation, dependency on the offender, shame or embarrassment, or a desire to protect the offender.[46] While police-reported data can be crucial to providing measurements of crime in Canada, they are limited to incidents that come to the attention of authorities. The majority of criminal incidents—especially those involving intimate partner violence and sexual assault—are not reported to police.

[43] Conroy and Sutton, *supra*.
[44] Allen, T., Salari, S. and G. Buckner, "Homicide illustrated across the ages: Graphic descriptions of victim and offender age, sex, and relationship." (2020), *Journal of Aging and Health.* Vol. 32, no. 3-4.; Logan, J. E., Haileyesus, T., Ertl, A., Rostad, W. L. and J. H. Herbst. 2019. "Nonfatal assaults and homicides among adults aged ≥ 60 Years—United States, 2002-2016." *CDC Morbidity and Mortality Weekly Report*. Vol. 68, no. 13.
[45] Conroy and Sutton, *supra*.
[46] Dowling, C., Morgan, A., Boyd, C. and I. Voce. 2018. "Policing domestic violence: A review of the evidence." *Australian Institute of Criminology*.; Roger, K., Walsh, C. A., Goodridge, D., Miller, S., Cewick, M. and C. Liepert. "Under reporting of abuse of older adults in the Canadian prairie provinces." (2021), *Sage Open*.

In addition, elder abuse often goes unreported because of stigmatization, embarrassment, or lack of awareness or ability to properly vocalize concerns. As previously discussed, elder abuse is often perpetrated by persons familiar to an older adult. Victims may be dependent on their perpetrator for their care or physical well-being and may want to protect the abuse. As such, there is the added concern that reporting abuse will cause trouble or even eliminate the support which the older adult is reliant on.

Older adult victims may be fearful of their perpetrator or even fear the police or other authorities, making it difficult to report the abuse. Sometimes, an older adult victim may desire companionship, in which case they try to rationalize that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is a family member or friend. As previously discussed, an older adult victim may not even recognize the abuse. Additionally, they may not be able to report the abuse, physical or otherwise, even if they would like to (e.g., the victim may be suffering from dementia or lack the requisite capacity to make a report). Finally, some older adult victims may be worried about the stigma that could be placed on the family while others may be resistant to having strangers in their home to provide services that their abuser already provides.

2.5 - A Snapshot of the Perpetrators

The most frequent perpetrators of abuse against older adults are their adult children, their service providers, strangers, or even spouses (especially in the context of a predatory marriage where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain).

Adult children who harm their parents may have various health concerns themselves, including issues related to mental health, substance abuse, social isolation, and employment and financial dependency on the older person.[47] The abuser may rationalize the abuse thinking that they deserve the benefit of the victim's money as they are the older adult's child.

[47] Laura Tamblyn Watts, "Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" (March 2013), *Canadian Centre for Elder Law*, accessed online: https://canlii.ca/t/27wk

The most recent statistics which address the rate of police-reported violence and family violence against seniors were compiled and released by Statistics Canada in 2019. These statistics revealed that one-third (32 per cent) of older adults who experienced violence were victimized by a family member (representing 4,518 victims in total).[48] Of this figure, the violence was most often perpetrated by an adult child (34 per cent), followed by a spouse (26 per cent) and a sibling (12 per cent).[49] The most commonly reported type of family violence perpetrated against seniors was physical assault.[50]

The rate of family violence against seniors was 1.4 times lower in Canada's largest cities, referred to as census metropolitan areas ("CMA"), than it was in non-CMAs (64 versus 89). Among the CMAs, rates were highest in Kitchener–Cambridge–Waterloo (123), Gatineau (107) and Kelowna (94). Meanwhile, they were lowest in Peterborough (26), Ottawa (28) and Thunder Bay (28).[51]

2.6 - Systemic Gaps

In 2021, the Canadian Centre for Elder Law told the Standing Committee on Justice and Human Rights that "Canada lacks a robust infrastructure to support charging and conviction,"[52] and that there is a lack of policy direction and professional development for police, Crown counsel, and the judiciary about elder abuse—seniors are not always taken as seriously as younger people when they report abuse and that their cases may be seen as un-prosecutable because of their age, frailty, or mental capacity.

The nature of the legal system can also discourage older adults from pursuing criminal charges. In Canada, most jurisdictions do not have Crown counsel policies to guide prosecutors working with victims and witnesses who may have mental capacity issues such as dementia. A lack of specific policies and knowledge can affect the quality of evidence in elder abuse cases and thus, the likelihood of conviction. As the Canadian Bar Association told the Standing Committee, "[e]vidence comes from witnesses. Witnesses

[48] Statistics Canada, "Police-reported family violence against seniors in Canada" (March 2, 2021), accessed online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00001/04-eng.htm
[49] This pattern was the same for female and male seniors. Women were also overrepresented as victims of family violence against seniors (58 per cent).
[50] Physical assaults accounted for 72 per cent of all victims representing a rate of 52 per 100,000 population.
[51] *Ibid*.
[52] Standing Committee, *supra* at 18.

who are safe and secure and receive proper supports in telling their story tell the most effective story—compelling stories. Those stories are what inform judges, what causes them to adjudicate matters, what causes them to find guilt in appropriate cases where elder abuse has happened."[53]

3. Scams Targeting Older Adults

Aside from the abuse perpetrated against seniors by persons generally known to them, there has been an alarming rise in the number of scams and exploitative schemes perpetrated against older adults in Canada. The following will examine some of the most prevalent reported scams.

3.1 - Predatory Lending Scam

Since approximately 2017, a cross-Ontario Mortgage and Notice of Security Interest ("NOSI") scheme has been targeting vulnerable older adult homeowners. The scheme, which has been described by the Ontario Provincial Police ("OPP") as a complex and multi-jurisdictional scam, targets highly vulnerable home-owning seniors and often starts with exploitative, unfair door-to-door sales contracts financed by high-interest loans that are secured with an NOSI or private mortgages.

As reported by the Advocacy Centre for the Elderly ("ACE"), adult homeowners are frequently approached by a "groomer", who makes repeated visits and false promises to get the adults out of the unfair contracts, free of charge. They promise the homeowners "rebates" if they sign documents presented to them which can pay for "free" renovations. The older adults are pressured to sign immediately, not given time to review the documents, and not provided with copies of the documents they signed.[54] Afterwards, the lenders will register an NOSI on the title to their property to secure the loans. Often, the older adult has no idea this has taken place and is later induced to take out larger mortgage loans, secured against their homes, to pay off some of the NOSI and finance

[53] Standing Committee, *supra* at 19.
[54] Advocacy Centre for the Elderly, "Cross-Ontario Mortgage & Notice of Security Interest (NOSI) Scheme" (2023), accessed online: https://www.acelaw.ca/consumer-protection-resources/warning-scams-targeting-seniors/cross-ontario-mortgage-notice-of-security-interest-nosi-scheme/.

further home renovations. The mortgages feature significantly higher than market interest rates and substantial lender and broker fees.[55] Under some of the mortgages, enforcement proceedings have been commenced where the homeowner defaulted on payments.

3.2 - Emergency/Grandparent Scam

Another prevalent scam targeting older adults is known as the grandparent or emergency scam. In these situations, a fraudster will place a phone call or send an email to an older adult, pretending to be their grandchild or other loved one. The fraudster will then claim to be in some sort of trouble and ask for help, usually proceeding to request money. The funds are supposedly for such things as bail, medical bills, fines, the cost of repairing something important (like a cellphone), or to pay bills. Scammers will often plead with the older adult to keep the transaction a secret from the rest of the family because they are embarrassed or scared.[56] In 2023, the Canadian Anti-Fraud Centre ("CAFC") reported a variation of this scam which sees fraudsters claiming to be a family member or loved one saying their cellphone is broken or has been dropped in water. They will then provide an alternate number to contact them at and proceed to request funds to repair the broken phone or pay a bill.[57]

In February of 2023, a joint statement between the Royal Canadian Mounted Police ("RCMP"), the OPP, and the CAFC revealed that over $9.2 million in losses were reported by older adults who fell victim to emergency or grandparent scams.[58]

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[55] See Caitlin Taylor, Stephanie Kampf, David Common, and Katie Swyers, "Elaborate scam leaves seniors with high-interest mortgages they didn't want or understand" (March 31, 2023), accessed online: https://www.cbc.ca/news/business/seniors-mortgages-marketplace-1.6795104 where a CBC Marketplace investigation found that most of the reported mortgages involve a one-year term with 25 per cent interest and monthly payments paid up from, meaning that most of the homeowners don't realize they have a mortgage until it comes due a year later.

[56] Advocacy Centre for the Elderly, "Grandparent Scheme" (2023), accessed online: https://www.acelaw.ca/consumer-protection-resources/warning-scams-targeting-seniors/grandparent-scheme/

[57] Canadian Anti-Fraud Centre, "Emergency" (May 16, 2023), accessed online: https://www.antifraudcentre-centreantifraude.ca/scams-fraudes/emergency-urgence-eng.htm

[58] Sean Boynton, "Grandparent scams cost seniors over $9.2M last year. Here's how to protect yourself" (February 2, 2023), *Global News*, accessed online: https://globalnews.ca/news/9455006/emergency-grandparent-scams-canada-rcmp/

3.3 - Cyber Scams

With the rise of cryptocurrencies and the use of social media, there has been a significant increase in the number of cyber scams targeting older adults. In fact, the OPP recently reported that older adults in Ontario lost over $135 million to cyber-based scams in 2022.[59] One common type of cyber scam is known as phishing and is designed to trick victims into disclosing personal or financial information to facilitate fraud or identity theft.[60] Similar to phishing are smishing scams which involve fraudsters targeting their victims through the use of SMS messaging (text messages). According to Elder Abuse Prevention Ontario ("EAPO"), research suggests that people are more likely to trust a message that comes in through text versus email and are largely unaware of smishing attacks. In fact, while only 20 per cent of emails are opened, and 6 per cent are replied to, 90 per cent of text messages are opened, and 45 per cent are replied to.[61]

In the United States of America, the Federal Bureau of Investigations ("FBI") reported that in 2022, 88,262 victims over the age of 60 lost of $3.1 billion to internet-based crimes. The most commonly reported crime involved investment fraud.[62] The FBI's Internet Crime Complaint Center's Elder Fraud Report details the rise in cryptocurrency scams directed at older adults.[63] The Report revealed that in 2022, there were over 4,500 cryptocurrency investment scam victims over the age of 60 who reported just under $1 billion in losses.[64]

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[59] See Jaime McKee, "Beware of people scamming seniors, police warn" (June 15, 2023), *CTV Northern Ontario*, accessed online: https://northernontario.ctvnews.ca/beware-of-people-scamming-seniors-police-warn-1.6443281 where OPP Detective Constable John Armit reports that on average, seniors lose 33 per cent more than any other demographic. Despite this, Detective Constable Armit said that less than 10 per cent of victim's report being scammed.

[60] Often, scammers will send an email that appears to be from a legitimate source, directing potential victims to a fake website. The fake website will look authentic by copying the brand name and logo of a real company and then ask the user for personal information such as credit card numbers, account numbers, passwords, date of birth, driver's licence number, and social insurance or social security numbers.

[61] Elder Abuse Prevention Ontario, "5 Cyber Scams Targeting Seniors" (2023), accessed online: https://eapon.ca/5-cyber-scams-targeting-seniors/

[62] See Federal Bureau of Investigation Internet Crime Complaint Center, "Elder Fraud Report 2022" (2023), accessed online: http://www.ic3.gov/Media/PDF/AnnualReport/2022-IC3ElderFraudReport.pdf. at page 4 where the report explains how these frauds involve complex financial crimes which are often characterized as low-risk investments with guaranteed returns.

[63] In 2022, IC3 received almost 10,000 complaints from victims over 60 involving the use of some type of crypto such as Bitcoin, Ethereum, Litecoin, and Ripple. Adults over 60 experienced over $1 billion in losses with investment scams accounting for approximately 66 per cent of all losses regarding cryptocurrency.

[64] *Ibid*., at page 13.

3.4 - Romance Scams

Romance scams target older adults seeking companionship and occur when an online relationship begins, usually through a dating or social media site.[65] The fraudster is often from another country and declares their love. They may offer to visit or have the older adult visit them. At some point, they begin requesting money from the older adult.[66]

In February 2022, the CAFC reported that romance scams were responsible for the second highest amount of fraud-related dollar loss in 2021 (second only to investment scams). In 2021, the CAFC received over 1,300 complaints regarding romance scams from victims who reported combined losses of approximately $43 million. These figures represent a sharp increase from 2018 where 760 victims reported losses of approximately $22.5 million.[67] The CAFC also reported an increase in the number of cryptocurrency investment scams linked to romance scams.

3.4-1 - Sha Zhu Pan

A highly sophisticated romance and cryptocurrency investment scam originating from China has been targeting older adults across the globe and is known as the sha zhu pan or 'butchering the pig' scam. In these situations, fraudsters, mainly working for Chinese organized crime gangs, pose as attractive professionals or entrepreneurs looking for love.[68] The scammers use a combination of fake online profiles and psychological manipulation to gain victims' trust while playing the role of the romantic partner of their dreams. Contrary to more traditional romance scams, these fraudsters convince their victims that they aren't interested in their money, but rather, in building a future together by investing in cryptocurrency together as a couple. Once the victim lets their guard down,

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[65] See Competition Bureau of Canada, "The Little Black Book of Scams: Your Guide to Protection Against Fraud" 2012, online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04333.html.
[66] The reasons for the requests often include the need to cover expensive medical bills or to assist with a family emergency.
[67] Canadian Anti-Fraud Centre, "Fraud Alert – Romance Scams" February 2022, online: https://www.anti-fraudecentre-centreantifraude.ca/scams-fraudes/romance-recontre-eng.htm.
[68] See Carlo Handy Charles, "Analysis: Organized crime has infiltrated online dating with sophisticated 'pig-butchering' scams" March 2, 2022, *McMaster University Brighter World Research*, online: https://brighterworld.mcmaster.ca/articles/analysis-organized-crime-has-infiltrated-online-dating-with-sophisticated-pig-butchering-scams/ where the author explains that these fraudsters use dating apps such as Tinder, Grindr, and Hinge, as well as social media platforms like Facebook and Instagram to match with their potential victims.

they are convinced into investing their money. Victims have emptied out their bank accounts, spent inheritances and life savings, taken out loans and mortgages, and sold houses and cars to invest in fake crypto currency platforms.

4. Criminal Remedies

4.1 - *Criminal Code* Offences

The *Criminal Code*[69] plays a role directly and indirectly in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are certain select offences under which such a perpetrator could be charged, including:

Section	Offence
215	Failing to provide the necessaries of life (e.g., criminal neglect)
220	Causing death by criminal negligence (e.g., where neglect leads to the death of an older adult)
264.1	Uttering threats
265 & 266	Physical assault
271	Sexual assault
279	Unlawful confinement
322	Theft
331	Theft by person holding a power of attorney
336	Criminal breach of trust (i.e., conversion by trustee)
342	Theft or forgery of a credit card
346	Extortion
366	Forgery
386-388	Fraud
423	Intimidation

[69] RSC 1985, c. C-46.

4.2 - Sentencing Factors

Notably, section 718 of the *Criminal Code*, a sentencing provision introduced in 2013, now provides our courts with additional factors that can be considered to increase the severity of sentencing, such as where the victims of these crimes are older and vulnerable. Furthermore, section 718 references a wide range of aggravating factors that can be considered by the court in determining appropriate sentencing principles. For example, longer sentences are warranted if the crime was motivated by age or disability and evidence exists that the offender abused a position of trust or authority in relation to the victim. A similar provision can be found in section 380.1 of the *Criminal Code*, which outlines aggravating circumstances in sentencing for certain financial crimes.

Cases which deal with the aggravating factor of age are rarely seen, however, in 2022, a decision out of Quebec was rendered which demonstrated the use of the sentencing provision found in 718 in the context of violence against older and vulnerable victims. In *R. c. D'Onofrio*,[70] two elderly victims were kidnapped inside their home in New York State and taken to Canada under the cover of night. The couple was held for ransom due to a major drug debt incurred by their grandson, with whom they had little connection.[71] In *D'Onofrio*, the court held that the fact the couple was elderly and vulnerable constituted an aggravating factor, recognizing that "[the couple] were 70 and 76 at the time of their abduction and each had pre-existing health conditions."[72] The offender in that case received a 17-year prison sentence.

In 2015, the *Canadian Victims Bill of Rights*[73] came into force. This Bill provides clear rights for victims of crime, including the right to information, participation, protection, and restitution. Some examples of victim's rights include receiving information about the review of an offender's conditional release, timing and conditions of that release, and providing a current photo of the offender prior to release.

[70] 2022 QCCQ 7241 [*D'Onofrio*].
[71] *D'Onofrio*, *supra* at para. 4.
[72] *Ibid*., at para. 117.
[73] *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

In cases of financial abuse, courts can make orders for restitution (or compensation) which relate to losses suffered as a result of the crime. It can include such losses as stolen property, lost wages, and moving costs."[74] The difficulty with restitution orders is that they are challenging to enforce, meaning victims will likely have to initiate their own court proceedings as restitution orders are not paid voluntarily in Canada.

4.3 - Reporting a Crime

Where there is suspected abuse, a family member or the victim can make a police report. According to the Canadian Resource Centre for Victims of Crime ("CRCVC"), "reporting to the police might involve making a detailed verbal statement about the nature of abuse, having the police interview family members, caregivers, and neighbors who may have evidence, taking photographs of evidence, performing a physical examination if a sexual or physical assault occurred, and identifying the abuser and testifying against him or her in court."[75] Criminal charges may be filed by police or Crown prosecutors. The case is then heard in either criminal court or a special set court for domestic violence cases. A peace bond may be issued when personal injury or damage to property is feared. A peace bond, however, cannot be used to protect a victim from emotional or financial abuse. According to the CRCVC, "a court can grant a peace bond that requires the abuser to have no contact with the older adult and to stay away from specific locations."[76] Peace bonds last up to 12 months, don't require a lawyer for an application, and can generally be accessed at a local Provincial court through its criminal division.

5. Criminal Considerations in the Estates Context

5.1 - Forfeiture Rule

A person who commits murder is not allowed to retain assets acquired through their victim's death. This is known as the forfeiture or 'slayer rule' and applies whenever a killer

[74] *Ibid*.
[75] Canadian Resource Centre for Victims of Crime, "Elder Abuse" (May 2022), accessed online: http://crcvc.ca/wp-content/uploads/2021/09/Elder-Abuse_-DISCLAIMER_-Revised-April-2022_-Final-1.pdf at para. 11.
[76] *Ibid*., at para. 12.

otherwise would become entitled to property by reason of a deceased's death.[77] According to Professor Oosterhoff, "[a]though the property is allowed to pass to the wrongdoer, it is immediately impressed with a constructive trust in favour of the person who would have received it if the victim had outlived the murderer."[78]

The slayer rule commonly applies when a beneficiary murders a testator,[79] when an heir murders someone who dies intestate,[80] when a joint tenant kills the other joint tenant,[81] when a beneficiary of social insurance benefits kills the insured,[82] and when a beneficiary of an insurance policy kills the insured.[83] The slayer rule, however, does not apply if the killer was determined to be insane of if the killing was not intentional.[84]

It should also be noted that the court may refuse to apply the aforementioned rules even though the circumstances might demand otherwise. An example of this was seen in the decision in *Rosenfeldt v. Olson*,[85] a case involving notorious serial killer Clifford Olson. In that case, Olson was charged with the murders of children in British Columbia. The Crown was concerned the evidence was circumstantial and struck a deal with Olson: in exchange for a statement leading to the location of the bodies of ten children, the RCMP made a $100,000 payment to Olson's wife and child. The money was paid into trust with the provision that Olson could not benefit from it. Based on the information provided to authorities, Olson was convicted of murdering eleven children.

In the 1950 Manitoba Court of King's Bench decision in *Re Johnson*,[86] the executors of Olina Johnson's estate sought the direction of the courts on a determination of the right

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[77] Albert H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed. (Toronto: Thomson Reuters, 2019) at 803 [Oosterhoff].
[78] *Oosterhoff*, *supra* at 803.
[79] See *McKinnon v. Lundy*, (1895) 24 S.C.R. 650.
[80] See *Nordstrom v. Bauman*, (1961) [1962] S.C.R. 147; *Re Missirlis*, (1970) 15 D.L.R. (3d) 257 (Ont. Surr. Ct.); *Re Gore*, (1971) 23 D.L.R. (3d) 354 (Ont. H.C.); *Re Charlton*, (1968) 3 D.L.R. (3d) 623 (Ont. C.A.).
[81] See *Re Gore*, (1971) 23 D.L.R. (3d) 354 (Ont. H.C.); *Re Charlton*, (1968) 3 D.L.R. (3d) 623 (Ont. C.A.); *Schobelt v. Barber*, (1966) 60 D.L.R. (2d) 519 (Ont. H.C.); *Singh Estate v. Bajrangie-Singh*, (1999) 29 E.T.R. (2d) (Ont. S.C.J.).
[82] See *R. v. National Insurance Commissioner, Ex Parte Connor*, (1980) [1981] 1 All E.R. 769 (Q.B.).
[83] See *Cleaver v. Mutual Reserve Fund Life Association* (1891), [1892] 1 Q.B. 147 (C.A.); *Re Gore* (1971), 23 D.L.R. (3d) 354 (Ont. H.C.); *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, 96 D.L.R. (4th) 609.
[84] Oosterhoff, *supra* at 804.
[85] (1986) 25 D.L.R. (4th) 472 (B.C. C.A.), reversing (1984), 16 D.L.R. (4th) 103 (B.C. S.C.).
[86] [1950] 2 D.L.R. 69, [1950] 1 W.W.R. 263 (Man. K.B.).

of Walter Johnson's estate to share in Olina's distribution. In 1945, Olina was murdered by Walter who then killed himself. Olina left a will which devised a substantial portion of her estate to Walter. In denying the claim of Walter's estate, Beaubien J. speaking for the Manitoba Court of King's Bench, quoted the statement of Fry L.J. in *Cleaver v. Mutual Research Fund Life Association* and also adopted the words of Lord Esher M.R. from the same case, stating:

> That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy … [a]nyone claiming through the [wrongdoer] is shut out by the rule of public policy; so that any assignee from [him], or other person through [him], cannot recover.[87]

As Professor Oosterhoff has shared in his blog *the 'Slayer Rule'*: The Bank of Nova Scotia Company v. Rogers, while denying the murderer benefits flowing from the crime is often a simple application of the rule, it is sometimes more difficult determining who should get those benefits. That was the issue in *The Bank of Nova Scotia v. Rogers*.[88]

The facts in *Rogers* are complex and the terms of the wills made it a particularly difficult case for the court to resolve. The adopted son of David and Merrill Rogers murdered his parents in 2016, plead guilty in 2018, and was sentenced to two concurrent life sentences without the possibility of parole for 20 years. In applying an implied intention approach,[89] the adopted son was disentitled, Merrill's three brothers became entitled as per terms of certain annuities and the alternative beneficiaries became entitled as if the adopted son predeceased his parent with no issue living at his death.[90]

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[87] *Cleaver v. Mutual Reserve Fund Life Association* (1891), [1892] 1 Q.B. 147 (C.A.) at pp. 152, 155.
[88] 2021 ONSC 1747.
[89] As Professor Oosterhoff wrote, this was the approach followed in *Brissette Estate v. Brissette* (1991), 42 E.T.R. 173 (Ont. Gen. Div.), a case where a husband murdered his wife. Her will left the residue of her estate to him, but if he predeceased her or failed to survive her by 30 days, the residue was to be paid to other persons named in the will. If the result of what happened was an intestacy, the wife's mother would inherit her estate. The court held that it should not find in favour of an intestacy. It found an implied condition in the testator's will that the husband had to be a legal beneficiary. Since he was not, because he could not inherit from her for public policy reasons, the alternative beneficiaries named in the will should be allowed to take, as they were next in line. In the court's opinion, this was in accord with the testator's will.
[90] See Albert Oosterhoff, "The 'Slayer Rule': The Bank of Nova Scotia Company v. Rogers" (June 21, 2021), *WEL Blog*, accessed online: https://welpartners.com/blog/2021/06/the-slayer-rule-the-bank-of-nova-scotia-company-v-rogers/

Another decision which addresses the question of who is entitled to inherit when one person kills another feloniously is *Re Unger Estate*.[91] In that case, Ms. Unger was a widow with two sons, Clayton and Logan. In 2016, Ms. Unger died and Clayton pled guilty to the charge of second-degree of his mother. Clayton and his common law partner conceived a child which was born 11 days after the death of Ms. Unger. The terms of her will provided that should either of her two sons predecease her, leaving one or more children who were alive on her death, the deceased's son's share should be divided among his children. Her will also provided that if any part of her estate 'should fail to vest in anyone', that part of the estate should be paid to two charities in equal shares.

In *Re Unger Estate*, the court concluded that Clayton's share should pass to his daughter because of Ms. Unger's clear intention and because Clayton's daughter was a substitute or alternate beneficiary to Clayton. As Professor Oosterhoff has written, the court in *Re Unger Estate* accepted the submission of the executors and the PGT that the court should do its best to ensure that the testator's wishes are not defeated.[92]

5.2 - *Ex Turpi Causa*

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"[93] or "illegal, wrongful or of culpable immorality"[94] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. The principle comes from the Latin maxim "no cause of action may be founded on an immoral or illegal act."[95] While this doctrine is similar to the doctrine known as the forfeiture or slayer rule, it is wider in scope.

The earliest reported decision dealing with *ex turpi causa* is the English decision of *Everett v Williams*,[96] also known as the *Highwayman's Case*. In that case, the plaintiff sued his "business partner," alleging that he did not receive his fair share of the partnership's

[91] 2022 BCSC 189, 74 ETR 4th 34 [*Re Unger Estate*].
[92] See Albert Oosterhoff, "The Slayer Rule: Re Unger Estate" (August 29, 2022), *WEL Blog*, accessed online: https://welpartners.com/blog/2022/08/the-slayer-rule-re-unger-estate/
[93] *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.
[94] *Hall v. Hebert* 1993 2 S.C.R. 159.
[95] Lincoln Caylor and Martin S. Kenney, "*In Pari Delicto* and *Ex Turpi Causa*: The Defence of Illegality – Approaches Taken in England and Wales, Canada and the US." (September 2017) 18:3 *Business Law International* 259. [Caylor and Kenney].
[96] *Williams v Everett* (1725) 104 ER 725 (*sub nom The Highwayman's Case* (1889) 9 LQR 197).

proceeds. The complaint was particularly ambiguous[97] and the Court of Exchequer determined that the business itself was actually robbery, and that the claim amounted to a dispute between two 'highwaymen.'[98] The claim was ultimately dismissed, the lawyers held in contempt of court, and the parties themselves were later arrested and hanged.

Approximately fifty years later, in *Holman v Johnson*, Lord Mansfield articulated the illegality defence as one which is grounded in public policy, stating that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[99]

In their text, *The Law of Restitution* Peter Maddaugh and John McCamus have written that "[a]s a general proposition, we would suggest that whenever a party commits a wrongful act, whether it be serious or not, with the express motive of obtaining some benefit from his victim, that party ought not be permitted to retain the benefit."[100] In the absence of a specific motive, the authors argue that "so long as the wrongdoer commits a crime with the intention of causing harm to another, the wrongdoer should be prohibited from acquiring any benefits that are a direct result of the wrong done to the person whom the wrongdoer intended, and did in fact, harm."[101]

In the Alberta decision in *O'Meara v Hall*,[102] the Alberta Court of Appeal dealt with the issue of whether a father should be prevented from sharing in an award to his child's estate as his negligence had allegedly caused the child's death. Here, the Court of Appeal cited *Re Bowlen (Estate)*[103] for the proposition that where a beneficiary is criminally responsible for the death of a testator, the beneficiary is excluded from a gift for reasons of public policy. In *O'Meara* the suggestion was that the respondent was contributorily

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[97] In *Williams*, *supra*, the complaint was for 'dealing for commodities with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch.'
[98] A highwayman was a robber who stole from travellers on the road, often by horse.
[99] *Holman v Johnson* (1775) 98 All ER 1120 at 1121.
[100] Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, 2nd ed. (Aurora: Canada Law Book Inc., 2004) [Maddaugh & McCamus].
[101] Maddaugh & McCamus, *supra* at 703 citing *McKinnon v. Lundy* (1894), 21 O.A.R. 560 (C.A.), at p. 562 where Burton J.A. held that "the crime must be of such a character as to show an intent to bring about the result," then went on to say that "a party seeking to enforce a contract brought about by his own fraud, cannot recover, because he would be profiting by his own wrong; so a party who intentionally kills another cannot profit by that act."
[102] 2006 ABCA 86 [*O'Meara*].
[103] 2001 ABQB 1014.

negligent in the accident which resulted in the death of his child.[104] The Court held that if the allegation of contributory negligence can be borne out, it may be that the appellant should be able to discount the distribution made to the respondent to the extent the award received by the child's estate was diminished as a result of his negligence. Counsel in *O'Meara*, however, were unable to offer authority for the proposition that the respondent, having been contributorily negligent, was therefore barred from any recovery. The Court was not persuaded that the position was correct in law.[105]

5.3 - Voidable Life Insurance Policies

Life insurance policies can have a significant impact on an estate. In most cases, the insurance policy of the deceased can add value to an estate, cover liabilities, or provide a designated beneficiary with financial support. However, as the next case demonstrates, a payout can be denied where it can be proven that the insured's death came about as a result of the insured committing a criminal act.

The Saskatchewan Court of Appeal decision in *Jantzen Estate v TD Life Insurance Company*[106] is illustrative on the subject. In that case, the insured was found dead of a cocaine overdose. A Court of Queen's Bench judge granted summary judgment dismissing the estate's claim under the applicable insurance policies.[107] The estate appealed that judgment to the Court of Appeal for Saskatchewan. At issue was whether the estate could collect on two policies that insured the debts of the deceased to Toronto-Dominion Bank [TD] in the face of exclusions that deny coverage if death is as a result of, or happens while committing, a criminal offence. The Court of Appeal dismissed the estate's appeal.

The deceased, Mr. Jantzen, was found dead in his home on February 1, 2018. The results of an autopsy disclosed that he had a fatal quantity of cocaine in his system. The pathologist listed the cause of death to be "a combined drug intoxication of cocaine and

[104] The precise nature of his alleged contribution was not disclosed, however, it appears not to have been significant as his vehicle was struck from behind by another vehicle traveling at a very high speed.
[105] *O'Meara*, *supra* at para. 8.
[106] 2023 SKCA 76 [*Jantzen*].
[107] *Jantzen Estate v TD Life Insurance Company*, 2022 SKQB 113, [2022] 7 WWR 162.

alcohol."[108] The deceased had two loans insured under two policies of insurance. Each policy featured its own exclusions, which were relied on by the insurer in denying coverage.[109]

In reaching a determination, the trial judge identified that, at the time of Mr. Jantzen's death, the possession of cocaine was an offence under s. 4(1) of the *Controlled Drugs and Substances Act*.[110] There was also evidence from the pathologist that cocaine was found on the person of the deceased, in a small plastic bag and on a 20-dollar bill. The judge summarized the evidence and concluded on a balance of probabilities that Mr. Jantzen died while committing the criminal offence of possession of cocaine.

The Court of Appeal held that the insurers properly denied coverage because Mr. Jantzen died as a result of committing the crime of possession of the cocaine he consumed. As a result, it was held that the judge did not err in granting the insurers summary judgment dismissing the claim against them.

6. Expanding the Criminal Law

6.1 - Standing Committee on Justice and Human Rights

On February 2, 2021, the House of Commons Standing Committee on Justice and Human Rights (the "Committee) agreed to conduct a study based on the following motion:

> That pursuant to its mandate under Standing Order 108(2), the committee study the issue of elder abuse including the insufficiency of current laws in fighting elder abuse…explicitly penalizing those who neglect seniors under their care and how to more effectively combat elder abuse.[111]

Based on the findings of the Committee, they recommended that the federal government table amendments to the *Criminal Code* that would explicitly penalize elder abuse and in

[108] *Jantzen*, *supra* at para. 7.
[109] See *Jantzen*, *supra* at para. 9 where the court provides that the Mortgage policy states that the insurers will not pay a life or terminal illness benefit if "*your* death is a result of or while *you* were committing a criminal offence." The LOC policy exclusion which is worded more expansively states that no benefit would be payable if "*your* death is a result of, associated with, or happens while *you* are committing a criminal offence"
[110] SC 1996, c 19 [*CDSA*].
[111] Standing Committee, *supra* at 5.

doing so, consider the offence of criminal endangerment, specifically with elements covering failure to provide care where a contract for care exists and that failure endangers the health and/or safety of those in care.[112] The Committee also recommended that the federal government, in consultation with relevant stakeholders, examine the aggravating factors in sentencing in the *Criminal Code* and identify whether amendments to those sections could be made to strengthen referencing seniors in those sections.[113]

In testimony, advocate and witness Marie Beaulieu encouraged the Committee to consider amendments to criminal procedures such as allowing recorded testimony or testifying by videoconference for older adults, as is already done with other vulnerable witnesses.[114] Testifying on behalf of ACE was Graham Webb. Mr. Webb suggested that to address abuse and neglect in long-term care homes, a new offence is required, along with whistleblower protection, and personal criminal liability for directors and officers of such facilities.[115]

The Canadian Bar Association expressed concern that adding new offences to the *Code* "may be counterproductive because it can increase the complexity of the legislation without changing society's response to the acts in question," while the Canadian Centre for Elder Law cautioned against age-specific provisions in the *Code* because "specifications can further marginalize vulnerable groups."[116]

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[112] *Ibid*., at 1.
[113] *Ibid*., at 3 where the Committee also recommends that consideration should be given to whether potential maximum terms of imprisonment and fines for long-term care administrators, officers, and directors convicted of offences related to incidents of elder abuse are adequate or require *Criminal Code* amendments.
[114] See Standing Committee, *supra* at 20 where Jody Berkes of the Canadian Bar Association testified that such measures already exist and could be used by vulnerable seniors, including sections 486.2 and 715.2 of the *Criminal Code*.
[115] See Standing Committee, *supra* at 24 where Mr. Webb suggested one or more new offences of criminal endangerment if an individual or organization has entered into a contract to provide care and/or supervision to a person, has failed to do so, and the result has been to endanger the health and/or safety of the person. Mr. Webb suggested a maximum penalty of five years' imprisonment, with separate offences for criminal endangerment where bodily harm or death is caused, with higher maximum penalties. Mr. Webb also proposed an administration of justice offence for retaliation against a long-term care resident for making a complaint relating to criminal endangerment, modelled on sections 139(2) and (3) of the *Criminal Code*.
[116] Standing Committee, *supra* at page 25.

6.2 - The United States of America's Experience

The United States of America provides an appropriate case study in the debate on whether Canada should table legislation which creates an age-specific offence targeting elder abuse. The following will briefly summarize rates of elder abuse in the United States of America before turning its focus to the impact of some of the age-specific laws that have been implemented in the United States.

The National Council on Aging (the "NCOA") reports that approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates, range as high as 5 million older adults who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities.[117] The NCOA also reports that the perpetrator in 60% of elder abuse and neglect incidents, is a family member with 2/3 of the perpetrators being adult children or spouses.[118] Older adults who have been abused have a 300% higher risk of death when compared with those who have not been mistreated.[119]

In a recent research study, the American Association of Retired Persons ("AARP") collaborated with the National Opinion Resource Center ("NORC") at the University of Chicago to provide a comprehensive, accurate, and up-to-date analysis of elder financial exploitation losses experienced by adults over the age of 60. The study found that annually, in America, adults over the age of 60 experience $28.3 billion in losses. It was also estimated that an additional $20.5 billion in losses go unreported. Where it concerns understanding the scope of the problem, AARP shared that "the lion's share of total losses – about 72% (20.3 billion) – arises from fraud by people the victim knows, compared with losses from stranger-perpetrated incidents ($8 billion in losses representing 28%).[120]

A 2019 study reveals that older adults in America are more often scammed by members of their own families than by strangers. Experts at the Keck School of Medicine at the

[117] National Council on Aging, *Elder Abuse Facts*, online https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ Accessed on 03.07.18. [NCOA Elder Abuse Facts"]
[118] NCOA Elder Abuse Facts, *supra* note 33.
[119] *Ibid*.
[120] Jilenne Gunther, AARP BankSafe Initiative, "The Scope of Elder Financial Exploitation: What It Costs Victims" (2023) accessed online: http://aarp.org/content/dam/aarp/money/scams-and-fraud/2023/true-cost-elder-financial-exploitation.doi.10.26419-2Fppi.00194.001.pdf.

University of Southern California analyzed data from reports made to the National Center on Elder Abuse ("NCEA") resource line. They found that more than 42% of the calls made logged abuse and 55% of those were financial abuse. Almost half of the calls alleged abuse by family members and of those 62% were of a financial nature, far exceeding the 35% citing emotional abuse and the 20% alleging neglect.[121]

6.2-1 - America's Criminalization of Elder Abuse

In 2012, Professor Nina Kohn wrote the first substantive critique of the American criminal justice response to elder abuse. In her article, Kohn argues that the criminalization of elder abuse can protect elder abuse victims and improve public attitudes toward the abuse of older adults, however, cautions that by failing to engage elder abuse victims in the punishment process and criminalizing certain consensual interactions involving older adults, the current criminal justice system response actually threatens to further oppress victims, perpetuate negative stereotypes about older adults, and may undermine the delivery of victim services.

According to Kohn, while advocates have worked hard to raise awareness that the acts constituting elder abuse can be classified as crimes, the federal legislative response to elder abuse has been limited. As an example, the federal government "has not made elder abuse a federal crime as it has domestic violence and certain instances of child abuse."[122] Despite the above, the United States Department of Justice has supported, and to a degree, led collaboration among law enforcement personnel and provided funding to state-level programs which aim to prevent elder abuse.[123]

Notwithstanding the aforementioned, there has been a federal effort in the United States to develop forensic resources and knowledge surrounding elder abuse.[124] In support of

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[121] Steve Randall, "Seniors more likely to be scammed by their family than strangers" (August 16, 2019), *Wealth Professional*, accessed online: https://www.wealthprofessional.ca/news/industry-news/seniors-more-likely-to-be-scammed-by-their-family-than-strangers/287367

[122] Kohn, Nina A., "Elder (In)Justice: A Critique of the Criminalization of Elder Abuse" (August 1, 2012). *American Criminal Law Review*, Vol. 49, No. 1, 2012, at 6 where the author references 18 U.S.C. § 2261 (2010) (making interstate commission of domestic violence a federal offense); § 2251 (2010) (making sexual exploitation of children a federal offense in many situations) [Kohn].

[123] Kohn, *supra* at 6.

[124] *Ibid*., where the author references Diana Cafaro Schnieder et al., *Elder Abuse Forensic Centres*, 22 J. ELDER ABUSE & NEGLECT 255 (2010).

this, President Barack Obama signed the Elder Justice Act into law in March 2010.[125] According to Kohn, the Act created a new role for the federal government in coordinating responses to elder abuse and neglect but also, to authorize funding for prevention and services. The Act also, "implicitly recognized the importance of the criminal justice system's role in addressing elder mistreatment by authorizing significant funding for the development of forensic expertise to facilitate its prosecution."[126]

At the state level, there has been a notable increase in legislation outlawing "abusive" behavior, even in situations where the victim may not see the behavior as abusive or may have even consented to it.[127] For example, the state of Illinois has created a separate crime for the "financial exploitation of an elderly person or a person with a disability [by a person] in a position of trust of confidence with the elderly person." The law states one of the ways this crime can be committed is through the "misappropriation of … assets or resources by undue influence."[128]

Many states have also enacted new crimes which apply when the victim is above a certain age or has a qualifying disability or dependency. For example, California makes it a crime to willfully cause or permit a person 65 or older to suffer "unjustifiable pain or mental suffering" or to inflict such suffering on a person age 65 or older.[129] The penalties increase where the victim is at least 70 and suffers great bodily injury or death.[130] California also makes it a misdemeanor for a person who has care or custody of an older adult to "cause or permit" that adult "to be placed in a situation in which his or her person or health may be endangered."[131]

California further amended its legislative regime on June 26, 2019 when the state approved Chapter 10 of the Acts of 2019 which amended the California Probate Code at Part 7, *Effect of Homicide or Abuse of an Elder or Dependent Adult*. These amendments

[125] Kohn, *supra* at 7 where the author refences the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, subtitle H (2010) (subtitle H is referred to as the "Elder Justice Act").
[126] Kohn, *supra* at 7.
[127] Kohn, *supra* at 9 where the author uses the example of legislation that seeks to attack the financial exploitation of older adults, by adopting statutory provisions that make undue influence a crime.
[128] Kohn, *supra* at 11 referencing 720 ILL. COMP. STAT. ANN. 5/17-56(a), (c) (2011).
[129] Kohn, *supra* at 8 referencing CAL. PENAL CODE § 368(b)(1).
[130] *Ibid*., citing CAL. PENAL CODE § 368(b)(2).
[131] *Ibid*., citing CAL. PENAL CODE § 368(c).

expand the presumption of fraud to include coverage for omitted spouse claims by caregivers and donative gifts to caregivers. The statute presumes fraud or undue influence when a donative instrument makes a gift to a caregiver who began a marriage with the grantor while providing services to the grantor or within 90 days of the cessation of such services and the relevant document was executed less than six months into the marriage.[132] California's Probate Code also precludes such a caregiver spouse from receiving a pretermitted spouse's share of the decedent's estate if the decedent died within six months from the marriage date, unless the caregiver can prove by clear and convincing evidence the marriage was not the product of fraud or undue influence.

Pros

In her article, Kohn uses the criminal justice system's response to domestic violence to inform the evolution of the federal and state-level response to elder abuse. Kohn argues that "[a]s the criminal justice approach to domestic violence has evolved, it has been characterized by two key developments that parallel developments in the elder abuse arena: first, the recognition that domestic violence involves a prosecutable crime, and second, the creation of new legal tools to facilitate that prosecution."[133]

Kohn argues that treating elder abuse as a prosecutable crime will protect certain victims and would-be victims from future abuse but also, as a means to powerfully publicly communicate condemnation of elder abuse. It can also provide a strong deterrent to future offenders. There are, however, some notable critiques of this approach.

Cons

Kohn looked at feminist critiques of victim disengagement in the context of domestic violence which suggest serious negative consequences emerge when victims are disengaged from the process of punishment. In this regard, Kohn argues that "by removing victims from the decision-making process, elder abuse laws and policies may have the counterproductive effect of promoting stereotypes about older adults."[134]

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[132] Mark J. Esposito, "Predatory Marriage," (2021) 17 *NAELA J* 1, at 11, where the author cites Cal. Prob. Code § 21380 (a) (4).
[133] Kohn, *supra* at 15.
[134] Kohn, *supra* at 20-22.

Kohn also recognized that elder abuse victims are unique from traditional domestic violence victims in that when they are brought to the attention of authorities, they risk being stripped of a broad range of rights. Victims are frequently subjected to plenary guardianships and subsequently lose the right to make virtually every decision about their own lives as a consequence of their interaction with authorities.[135]

As a potential take-away for the debate on whether Canada should implement a federal crime targeting elder abuse, Kohn argues that:

> in designing the criminal justice response to elder abuse, policymakers need to recognize that facilitating convictions of alleged abusers shout not be their only—or even their primary—goal. If it is, the unintended consequences will likely include re-victimizing abuse victims, promoting harmful stereotypes, and undermining victim services. Ultimately, we may discover that the most effective criminal justice interventions for protecting older adults are not those that maximize elder abuse conviction rates.[136]

7. Caselaw examples

7.1 – *R. v. Saucier* - 2019 – Cornwall, ON

Offences: s. 380(1) (Fraud over $5,000); ss. 368(1) and 366(1) (Forgery, use, trafficking or possession of forged document).

In this case, a financial advisor stole (i.e., defrauded and misused funds) from his elderly retired clients over a period of three years.[137] In doing so he forged and used forged documents. His clients paid him money expecting that it would be used for their life insurance premiums. Instead, he deposited the stolen money into two bank accounts that he controlled. Ultimately, however, when his clients asked for their money back, all of the money was repaid to the clients.

The offender was found guilty of 10 counts of fraud over $5,000, 4 counts of use, trafficking or possession of forged documents and 1 count of forgery.

[135] *Ibid*., at 27.
[136] Kohn, *supra* at 29.
[137] *R v Saucier*, 2019 ONSC 3611.

In the sentencing decision, the court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The court, in sentencing the offender to 15 months incarceration, also noted that:

> many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. …some also needed the accused to translate documents and make out their cheques because of language and literacy issues…[138]

7.2 – *R. v. Barker* - 2019 – Pictou, NS

Offence: s. 380(1)(a) (Fraud over $5,000).

This decision opens with the words: "*This is a case of elder abuse*." In *R v Barker*,[139] a married couple forced the wife's 83-year-old mother, who had dementia, dysphasia, and needed around-the-clock care to sign a number of lending and financing documents. The mother lacked the requisite capacity to enter into the aforementioned financial services contracts, but she gave in to the pressure that the offenders placed on her. It is important to note that the mother was living with the offenders and dependent upon them for her care. The offenders made off with over $50,000 of the mother's money and left her on the hook for repayment of the loans.

The court noted that it is not always the case that a non-violent crime, like theft or fraud, will be regarded as less serious than a violent one:

> Violence or threats of violence are not needed when one seeks to exploit someone who is elderly and infirm or incapacitated. Breach of trust which enables elder abuse may be as serious as employing violence against someone capable of putting up a fight.[140]

After looking at both the aggravating and mitigating factors, the court ultimately decided to suspend the passing of sentence on the offenders and placed them on probation for terms of three years each, starting with 6 months of house arrest and restitution of amounts taken. Additionally,, the offenders were to cooperate with any lawyer

[138] *Ibid*, at para 15.
[139] 2019 NSPC 24 [*Barker*].
[140] *Ibid*., at para 13.

representing the mother to have the fraudulent loan documents set aside or voided and to assume responsibility for any obligations arising from the documents. They were also not allowed to contact the mother without the mother's prior approval and the approval of her guardian.

7.3 – *R. v. Banoub* - 2019 – Halton, ON

Offences: s. 322 (Theft), s. 334 (Theft over $5,000).

In this case, a daughter pled guilty to theft over $5,000 for depleting her mother's bank accounts and investments by approximately $161,000 in four years.[141] While her mother was in a long-term care home, the daughter, who was appointed as her mother's attorney pursuant to a Power of Attorney document, used her position of power to make consistent withdrawals and advances from her mother's accounts for her own personal benefit. She spent the money on things such as gambling, living expenses, and an overseas trip. What's worse was that, in doing so, she ceased paying her mother's long-term care home costs. Exacerbating these actions was the fact that the daughter offered "no reason" as to why she did these things.

In sentencing the offender to six months imprisonment, followed by a three-year probation order, the Court held:

> The most aggravating factor is that instead of taking care of her mother, she took advantage of her. She treated her mother's money, which was entrusted to her on a fiduciary basis, as if it were her own… She took this money despite having been gifted $288,000 following the sale of her mother's house…It is… an aggravating factor that this gift was not enough to satisfy her greed. Instead she stole the rest of her mother's assets. In the process she put her mother at risk of being denied the same level of services which she had been receiving at the long-term care facility.[142]

7.4 – *R. v. Cvetas* - 2022 – Toronto, ON

Offence: s. 322(1) (Theft Over $5,000).

[141] *R v Banoub*, 2019 ONCJ 681.
[142] *Ibid*., at paras 87-92.

In this case, a banking executive plead guilty to the charge of theft over $5,000 after admitting to taking $317,0000 from a bank account he held jointly with his 81-year-old godmother. In 2014, the older adult, who had no surviving family, grew close to accused and added him as joint holder on her bank accounts. She appointed him her attorney under a power of attorney for property and personal care as well as the executor and trustee of her estate.

At the time, the accused was an executive at the Bank of Montreal, earning approximately $160,000 per year. However, between late 2015 and October 2016, the majority of the older adults' funds in the bank account were dissipated. By November 2016, there were insufficient funds in the account. By February 2017, after being told the money was moved to an investment account, the older adult contact a lawyer who then contacted the police.

On October 11, 2017, Mr. Nick Cvetas turned himself into police. Through his lawyer, he made restitution of the funds to the older adult. In reaching its decision, the court highlighted how Mr. Cvetas abused the trust of a vulnerable person and breached his fiduciary duty under a power of attorney. To this end, the court held that the most important objectives in sentencing for this crime are denunciation and general deterrence.[143] Mr. Cvetas was sentenced to 12 months in jail and two years' probation, including conditions prohibiting him from contacting the older adult and having authority over the real property, money or valuable security of another person. [144]

7.5 - *R. v. Brush* - 2022 – Kamloops, B.C.

Offence: s. 215(2)(b) (Failing to provide the necessaries of life).

On March 9, 2021, a Kamloops-based care provider entered a guilty plea to the offence of failing to provide the necessaries of life in the decision of *R v Brush.*[145] The victim was an older adult in her 70s with significant physical and cognitive challenges requiring 24-hour care. She was under the care of the accused for 13 years.[146]

[143] *Ibid*, at para 40.
[144] *Cvetas*, *supra* at para 60.
[145] 2022 BCSC 1194 [*Brush*].
[146] *Brush*, *supra* at para. 5 where the court explains that the accused was responsible for all of the older adult's care and was paid to provide that care. Her responsibilities included ensuring that the older adult

In May of 2019, the older adult's physician grew suspicious after realizing she had not seen the older adult since 2017. He had his office call the accused. On May 6, 2019, the accused and the older adult attended the physician's office. Immediately, the physician noticed the older adult was cachectic and had lost muscle mass to the point where she was "just almost bone." Because of this condition, the older adult was taken to Royal Inland Hospital ("RIH") immediately. She weighed 72 pounds on admission and was noted to have crust on her eyes and smelled strongly of urine.[147] The older adult received good care at RIH and was discharged on July 3, 2019. She currently lives in an assisted living facility in Kamloops.

On May 10, 2019, a police investigation commenced. After executing a search warrant on the residence of the accused, it was discovered that she had not been filling prescriptions for the older adult since July 2017, despite altering and initialing medical administration record sheets to indicate that she had.[148] A police search of the older adult's residence revealed unsanitary conditions.

The accused had worked in the field of medical healthcare for 32 years. She had no prior criminal history, however, reported having a gambling addiction that began in 1991. Around 2010, she entered a lost her home and had her trailer repossessed and by 2013, she entered 12-step program for her addiction. In 2017, however, she began playing internet games that cost money.[149]

In determining an appropriate sentence, the court looked to the decision in *R. v. Davy*[150] where the court held at paras. 126-128:

> [126] This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the victim] suffered from severe dementia and was vulnerable. In *R. v. Foubert* Justice McKinnon addressed elder abuse as a growing problem in our society that must be seriously addressed. At para. 30, Justice McKinnon states:

attended medical appointments, received her medications, was properly fed, clothed, bathed, and housed.

[147] *Ibid*., at paras 7 – 8 where the initial assessment of the older adult also revealed that she was emaciated, had unkempt and matted hair, overgrown nails, a pressure sore on her right hip and buttock, and had a sore on her head.

[148] *Ibid*., at para. 9.

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

[150] 2015 CanLII 10885 (ON SC) [*Davy*].

> Caregivers of the elderly, particularly those suffering from Alzheimer's disease and dementia, owe tremendous power. That power cannot be abused.

[127] He goes on to state at para. 31:

> Caregivers must know that if they abuse their position of trust and authority over vulnerable individuals, the court will deal with them harshly. Caregivers often work in environments where witnesses are not present. As such, they must deal with those entrusted to their care in the utmost good faith.

[128] At para. 32 he goes on to state:

> In my view the only way to ensure that this bond of trust remains intact is for the courts to determine that caregivers who breach that trust will be sent to jail. In my view, incarceration is the only reasonable alternative to ensure a safe and secure environment for those extremely vulnerable individuals who are at the mercy of their caregivers.

The Court therefore determined that the appropriate sentence for the accused was a period of 18 months incarceration followed by an 18-month probation order. This sentenced was described as balancing the "serious nature of the offence, the specific harm it has been proven to have caused, the other aggravating factors, and the primacy of the objectives of denunciation and specific and general deterrence."[151]

7.6 - *R. v. Wentworth* - 2023 – Kingston, ON

Offences: s. 234 (Manslaughter); s. 343 (Robbery).

On June 2, 1995, 92-year-old Henrietta Knight was bound to a chair and beaten in the head in her small home in Kingston, where she lived alone. She was taken to the hospital and released the same day, but returned on July 1, 1995, showing signs of confusion. She was released on July 3rd and returned again on July 11 with bleeding on her brain. She remained in hospital and was eventually transferred to a chronic care facility where she sadly died on November 4, 1995.[152]

Were it not for a sworn videotaped statement Ms. Knight made to police three days after the attack, it might have been impossible to apprehend and convict her assailant. Over

[151] *Brush*, *supra* at para. 76.
[152] *R. v. Wentworth*, 2023 ONSC 5319 at paras. 4-5.

the course of her 33-minute interview, Ms. Knight described the attack and provided a detailed description of her assailant.[153]

Nearly 27 years later, Mr. Wentworth was charged with robbery and manslaughter. The evidence presented at trial included photographs of Ms. Knight and her home following the invasion. The photographs revealed extensive bruising to her face, neck, shoulders, arms and hands. Some of Ms. Knight's skin had been torn off her arms where the accused taped her up. The photographs of her home revealed that it was ransacked while another photograph showed a chair with tape attached. The tape from the chair was analyzed and revealed to have samples of DNA consistent with Ms. Knight's.[154]

The court was unable to conclude based on the evidence available that Ms. Knight either died because the assaults produced the conditions that caused her death, or because the assault left her more vulnerable to death because of age-related decline or a pre-existing condition.[155]

In concluding that Mr. Wentworth was guilty of the robbery but not the manslaughter of Ms. Knight, Justice Lacelle held that:

> One could much more easily reach a conclusion that Ms. Knight probably died because the accused either caused her death or because his conduct left her vulnerable to a hastened decline from other health issues. But proving something is probable (or likely) is not enough to satisfy the burden that the Crown bears. More is required in a criminal trial in order to rebut the presumption of innocence.[156]

Mr. Wentworth received a 12-year sentence for the robbery. He was also found guilty of the two unrelated murders of Richard Kimball in 1995 and Stephen St. Denis in 2001 and of robbing a TD Bank branch in Kingston in 1995 and a 2000 car bombing in Toronto that damaged homes and vehicles.

[153] *R. v. Wentworth*, 2023 ONSC 5319 at paras. 36-42.
[154] *R. v. Wentworth*, 2023 ONSC 5319 at para. 9.
[155] *R. v. Wentworth*, 2023 ONSC 1165 at para. 395.
[156] *R. v. Wentworth*, 2023 ONSC 1165 at para. 396.

CONCLUDING COMMENTS

ABUSES and predatory schemes targeting older adults continue to exist and rise in prevalence, the public, police, and those involved with advocating for the rights of older adults must be aware of the devastating impact of abuse. It is therefore, of utmost importance to keep a watchful eye out for older family members, neighbors, and acquaintances. While remedies exist to address the abuse of older adults once it is detected and reported, many may be under-utilized, unknown or simply unavailable. Where the elements of a criminal charge can be met by the evidence, criminal courts are often better equipped than civil courts to deal with abuse, especially when the victim may lack the resources or ability to advance a claim in civil courts.

RESOURCES

Advocacy Centre for the Elderly: www.advocacycentreelderly.org

Alberta Law Reform Institute, “Enduring Powers of Attorney: Safeguards Against Abuse” (Edmonton: February 2003), online at www.law.ualberta.ca

British Columbia Law Institute’s Canadian Centre for Elder Law: www.bcli.org (A Practical Guide to Elder Abuse and Neglect Law in Canada (2011), Report on the Common-Law Tests of Capacity (2013) Background Paper: Financial Abuse of Seniors – An Overview of Key Legal Issues and Concepts (2013))

Canadian Network for the Prevention of Elder Abuse (CNPEA): www.cnpea.ca

CBA Elder Law Section Website: http://www.cba.org/cba/sections_Elder/main/

Law Commission of Ontario, A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice (Toronto: April 2012) http://www.lco-cdo.org/en/older-adults-final-report

OBA Elder Section Website: https://www.oba.org/Sections/Elder-Law

STEP Canada’s Client Service Resource: A Guide for Assisting Persons in Vulnerable Situations (2023): https://online.fliphtml5.com/zskjb/zjwz/#p=1

Western Canada Law Reform Agencies: “Enduring Powers of Attorney: Areas for Reform” (2008) online at www.law.ualberta.ca

WEL Partners Resource Centre: http://welpartners.com/resources/

APPENDIX "A" Provincial / Territorial Legislation

Alberta

The Adult Guardianship and Trusteeship Act, SA 2008 c A-4.2

Protection Against Family Violence Act, RSA 2000, c P-27

Protection for Persons in Care Act, SA 2009 c P-29.1

British Columbia

Adult Guardianship Act, RSBC 1996, c 6

Adult Guardianship Act, Designated Agencies Regulation, BC Reg 19/2002

Community Care and Assisted Living Act, Residential Care Regulation, BC Reg 96/2009, Schedule D

Adult Guardianship (Abuse and Neglect) Regulation, BC Reg 13/2000

Public Guardian and Trustee Act, RSBC 1996, c 383

Health Professions Act, RSBC 1996, c 183

Personal Information Protection Act, RSBC 2003, c 63

Freedom of Information and Protection of Privacy Act, RSBC 2003 c 165

Manitoba

Protection for Persons in Care Act, CCSM, c P144

Vulnerable Persons Living with a Mental Disability Act, CCSM c V90

The Domestic Violence and Stalking Act, CCSM c D 93

New Brunswick

Family Services Act, SNB 1980, c F-2.2

Personal Health Information Privacy and Access Act, SNB 2009, c P-7.05

Public Trustee Act, SNB 2005 c P-26.5

Newfoundland

Adult Protection Act, SNL 2001, c A-4.01

Family Violence Protection Act, SNL 2005, c.F-31

Personal Health Information Act, SNL 2008 c P-7.01

Access to Information and Protection of Privacy Act, SNL 2002, c A-1.1

Nova Scotia

Adult Protection Act, RSNS 1989, c 2

Protection for Persons in Care Act, SNS 2004 c 33

Domestic Violence Intervention Act, SNS 2001, c 29

Ontario

Fixing Long-Term Care Act, SO 2021, c39 Sch 1

Substitute Decisions Act, 1992, SO 1992, c 30

Health Care Consent Act, 1996, SO 1996, c 30 Sch A

Mental Health Act, 1990, RSO 1990 c M7

Residential Tenancies Act, SO 2006 c 17

Consumer Protection Act, *2002* SO 2002 c 30, SchA

Freedom of Information and Protection of Privacy Act, RSO 1990, c F 31

Prince Edward Island

Adult Protection Act, RSPEI 1988, c A-5

Victims of Family Violence Act, RSPEI 1998, c V-3.2

Quebec

The Charter of Human Rights and Freedoms, RSQ c C-12, art 48

Public Curator Act, RSQ c. C-81

An Act respecting access to documents held by public bodies and the protection of personal information, RSQ c A-2.1

Professional Code, RSQ c C-26

Code of Ethics of Advocates, RRQ 1981 c B-1 r.1

Saskatchewan

Victims of Domestic Violence Act, SS 1994, c V-6.02

The Public Guardian and Trustee Act, SS 1983, c P-36.3

Yukon

Adult Protection and Decision Making Act, SY 2003, c 21 Sch A

Family Violence Prevention Act, RSY 2002, c 84

Public Guardian and Trustee Act, SY 2003, c 21 Sch. C, Part 2

Nunavut

Family Abuse Intervention Act, SNu 2006, c 18

Northwest Territories

Protection Against Family Violence Act, SNWT 2003, c 24

Law Society of Ontario | Barreau de l'Ontario

TAB 3

26th Estates and Trusts Summit – DAY TWO

A Tax Refresher: *An Overview of How Estates Are Taxed on Death, Taxation of Trusts and Issues with Having a Foreign Beneficiary* (PowerPoint)

Rahul Sharma
Fasken Martineau DuMoulin LLP

Julian Franch
Minden Gross LLP

October 19, 2023

cpd

MINDEN GROSS LLP

A Tax Refresher:

An Overview of How Estates Are Taxed on Death, Taxation of Trusts and Issues with Having a Foreign Beneficiary

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The Law Society of Ontario

26th Estates and Trusts Summit – Day Two

October 19, 2023

Rahul Sharma, *Fasken Martineau DuMoulin LLP*

Julian Franch, *Minden Gross LLP*

FASKEN

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TOPICS

- 1. Graduated Rate Estate ("GRE")
- 2. Post-Mortem Planning
- 3. Implications of Estate Freeze Planning
- 4. Implications of Foreign Beneficiaries

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Graduated Rate Estate ("GRE")

- **What is the general timeline for a GRE?**

  - Date of death – deemed disposition under 70(5) of assets not subject to rollover treatment (such as spousal rollover under 70(6)).
  - Upon death – start of GRE period for 36 months from date of death (income of the estate taxed at graduated rates).
  - End of GRE period – deemed year-end for the estate and start of calendar-year taxation period for the estate.
  - After GRE period – top marginal rate taxation for the estate if income is earned and retained in the estate.

Graduated Rate Estate ("GRE")

- **What are the requirements for a GRE?**

  - Estate that arose on and as a consequence of an individual's death if that time is no more than 36 months after the death.
  - The estate is a "**testamentary trust**" (fort the purpose of the *Income Tax Act* (Canada)).
  - The deceased individual's social insurance number is provided in the estate's tax return for the taxation year and earlier taxation years that ended after 2015.
  - The estate makes the appropriate designation (as a GRE) in its income tax return under Part 1 of the *Income Tax Act* (Canada) for its first taxation year that ends after 2015.
  - No other estate designated itself as a GRE for a taxation year that ends after 2015.

Graduated Rate Estate ("GRE")

- **What are the requirements for a "testamentary trust"?**

  - Arises "on or as a consequence of the death of an individual" (a trust established by Will or under the terms of a court order for dependent's relief).
  - The estate is a "testamentary trust" (for the purpose of the *Income Tax Act* (Canada)).
  - Complex definition of a "testamentary trust" has multiple components; it is important to ensure that payments are not inadvertently made to the testamentary trust or on behalf of the testamentary trust that could cause testamentary trust status to be lost, such that the estate could cease to be a GRE.

Graduated Rate Estate ("GRE")

- **What may not be considered a "testamentary trust"?**

  - A trust established by someone else than the person whose death has caused it to come into existence.
  - Generally, a trust that has received contribution of property after an individual's death and other than as a consequence of the individual's death.
  - A trust that incurs a debt or other obligation owed to or guaranteed by a beneficiary or non-arm's length party to the beneficiary.

Graduated Rate Estate ("GRE")

- **What are the key benefits of a GRE?**

  - Graduated rate taxation for 36 months.
  - Benefit from the basic exemption from alternative minimum tax.
  - Certain benefits regarding charitable gifting, including donations of publicly traded securities.
  - Preferential treatment under Part XII.2.
  - Investment tax credits can be made available to beneficiaries.
  - **Ability to make a loss carryback election under 164(6) Planning**, which is further addressed in the post-mortem planning topic of this presentation.

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Post-Mortem Planning

- **Why is post-mortem planning needed?**
  - To avoid the double (or even triple) tax for situations where a deceased owns shares in a private corporation:
    - Individual taxation – deemed disposition on death.
    - Corporate taxation – tax payable when a corporation sells its assets.
    - Estate/beneficiary taxation – dividend tax when a corporation pays a dividend or is wound up.

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Post-Mortem Planning

- **What post-mortem planning is available?**

  - 1. **164(6) Planning**
    - Replaces terminal capital gain with deemed dividend to the estate.
    - Due to dividends being taxed at higher rates than capital gains, this planning is often most efficient when there is refundable dividend tax on hand ("RDTOH") and a capital dividend account ("CDA").
  - 2. **88(1)(d) Bump Planning**
    - Increases the cost base of non-depreciable corporate owned assets and it can be used in combination with Pipeline Planning.
  - 3. **Pipeline Planning**
    - Creates pipeline to allow access to high cost base assets/cash from a corporation on a tax free basis and it can be used in combination with 88(1)(d) Bump Planning.

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Post-Mortem Planning

- **How is Subsection 164(6) Planning implemented?**

  - The estate redeems shares of a corporation having a high adjusted cost ("ACB") base or winds up the corporation to create a deemed dividend and a loss to the estate due to high ACB.
  - The estate files a section 164(6) election to designate loss against the terminal return capital gain.
  - Implemented within the **first year** of the estate.
  - As of January 1, 2016, this is **only available for a GRE**.
  - Consideration must be given to stop-loss rules.

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Post-Mortem Planning

- **How is 88(1)(d) Bump Planning implemented?**

  - The estate transfers high cost base shares of an operating corporation ("Opco") to a new holding corporation ("Holdco").
  - Opco is amalgamated/wound up into Holdco under subsection 88(1)(d), which results in a bump in the cost base of non-depreciable assets, subject to certain limits.
  - Conditions that must be met:
    - The assets were continuously owned since the corporation's last change of control; and
    - Bump is limited to fair market value immediately following death.
  - The available bump is reduced by:
    - Net tax cost of assets (including cash) immediately before the wind-up;
    - Amount of taxable dividends and capital dividends received by parent from subsidiary; and
    - Gains in respect of disposition of assets by subsidiary pre-bump.

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Graduated Rate Estate ("GRE")

- **How is Pipeline Planning implemented?**

  - Assume an operating corporation ("Opco") has cash and an estate transfers high ACB shares of Opco to a holding corporation ("Holdco") for a promissory note.
  - Opco pays a dividend to Holdco (alternatively, a redemption, wind-up or amalgamation could be used if there are tax concerns as to a tax-free dividend) and Holdco uses cash to repay the promissory note to the estate.
  - The Canada Revenue Agency has generally held that subsection 84(2) will not apply if the following conditions are met:
    - Opco's business or investment activities will continue for at least **one year** following the implementation of Pipeline Planning;
    - Opco will not be amalgamated or wound-up into Holdco for at least **one year**; and
    - Opco's assets will not be distributed to the shareholders for at least **one year** after the amalgamation or wind-up, following by a **gradual distribution** of assets over time (restricted to 15% of the principal amount of the promissory note each quarter).

Implications of Estate Freezing

- **How does estate freeze planning impact an estate?**

  - An estate freeze refers to a transaction that "freezes" or locks-in the value of an appreciating asset in fixed value preferred shares with the intent of having future growth of that asset accrue to new common/growth shares for the benefit of (most often) family members/next generation (a discretionary family trust is often used in this regard).
  - Subject to a client having a vested interest in a discretionary family trust, the *trust property* should not form part of the client's estate.
  - As fixed value preferred shares and thin voting shares are generally issued to the client as part of an estate freeze, these shares will form part of the client's estate if not fully redeemed prior to death.
    - A "wasting freeze" strategy may be used to slowly redeem the fixed value preferred shares during the lifetime of the freezer to reduce the capital gain realized on the deemed disposition of the shares on the freezor's passing.

Implications of Estate Freezing

- **What points are often forgotten after implementing an estate freeze?**

  - As the value of the new common/growth shares increases, planning to fund the ultimate tax liabilities attaching to those shares should not go ignored.
  - While tax considerations are often central to estate freezing, do not forget the potential non-tax implications of implementing an estate freeze, such as family law and corporate governance considerations. Domestic agreements and shareholders agreements can be valuable companions to an estate freeze/reorganization.
  - Needless to say, if a family trust will hold the future growth/common shares post-freeze, it is essential to ensure that the trustees of the trust meet all tax compliance obligations. New compliance obligations will need to be complied with as of January 1st.

Implications of Foreign Beneficiaries

- **What do you need to consider when an estate has a foreign beneficiary?**

  - At the planning stage: need to consider tax and legal implications to the beneficiary in the country of the beneficiary's residence in terms of receiving a Canadian and the *manner in which the inheritance is received*.
    - Eg: Estate tax considerations in the US for US resident/citizen beneficiaries
    - Eg: Considerations regarding foreign resident executors of Canadian estates, both on the Canadian and foreign legal/tax end
  - Does an interest in the estate constitute "taxable Canadian property" under the *Income Tax Act* (Canada) (does the estate derive more than 50% of its value from Canadian real estate, for example?)? If so, consider the need for tax compliance obligations under s. 116 of the *Income Tax Act* (Canada).
  - Particularly where the estate has one or more corporations that are to be liquidated as part of the administration process, consider the Canadian tax implications of dividend and other payments to non-residents, including potential foreign withholding tax considerations under Part XIII of the *Income Tax Act* (Canada).

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QUESTIONS?

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TAB 4

26th Estates and Trusts Summit – DAY TWO

Advising Attorneys: Issues of Capacity and Vulnerability

Kathryn Balter
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Laura Geddes
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October 19, 2023

Advising Attorneys: Issues of Capacity and Vulnerability

Kathryn Balter, *Fogler, Rubinoff LLP*[1]

Laura Geddes, *Siskinds LLP*

Legal Tests for Capacity

When dealing with Powers of Attorney and advising attorneys it is important to keep in mind the different tests for capacity that may arise.

1. To execute a Continuing Power of Attorney for Property

The capacity to give a power of attorney for property is set out in section 8(1) of the *Substitute Decisions Act*, *1992,* S.O. 1992, c. 30 ("SDA") and requires the person to:

1. Know what kind of property they have and its approximate value
2. Be aware of obligations owed to dependents
3. Know the attorney will be able to do anything on the person's behalf with their property that the person could do while capable other than make a Will
4. Know that the attorney must account for their dealings with the person's property
5. Know that they can revoke the continuing power of attorney while still capable
6. Appreciate that unless the attorney manages the property prudently its value may decline
7. Appreciate the possibility of the attorney misusing the authority given in the power of attorney

2. To execute a Power of Attorney for Personal Care

The capacity to give a power of attorney for personal care is set out in section 47(1) of the SDA and requires the person to:

1. Have the ability to understand whether the proposed attorney has a genuine concern for the person's welfare and
2. Appreciate that the person may need to have the proposed attorney make decisions for them

3. To make a decision regarding personal care

Section 45 of the SDA provides that a person "is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision"

4. To manage property

Section 6 of the SDA provides that a person "is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his

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[1] Thank you to Max Samuels, articling student at Fogler, Rubinoff LLP, for his research contributions to this resource.

or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision"

Sections 9(1) and 47(2) of the SDA contemplate the possibility that a person may be capable of granting a continuing power of attorney for property or a power of attorney for personal care, respectively, even if that person is incapable of managing property or incapable of personal care.

It is important to also remember that there are presumptions of capacity contained in the SDA. Individuals eighteen years of age or older are presumed to be capable of entering contracts. Individuals sixteen years of age or older are presumed to be capable of giving or refusing consent in connection with their own personal care.

Someone who is dealing with a person is entitled to rely on these presumptions of capacity unless they have reasonable grounds to believe that the other person is incapable of entering into the contract or of giving of refusing consent (sections 2(3) of the SDA) .

Capacity Assessments

May be conducted by a qualified capacity assessor. An updated list of qualified capacity assessors is maintained by the Capacity Assessment Office and can be found at: List of capacity assessors | Ontario.ca

Precedent Clause for Retainer Agreement

If you prepare powers of attorney for the grantor and may provide advice to the attorney on their duties and obligations under the power of attorney when they begin to act, you may wish to clarify with the grantor at the time they retain you that you may provide advice to their attorney in the future. Consider including a clause in your retainer agreement permitting you to act for the attorney[2]:

> If your Powers of Attorney need to be used, it is common for us to be contacted by one or more of the Attorneys named in your Power of Attorney for Personal Care or Power of Attorney for Property for guidance on the proper use of the document and their obligations. Notwithstanding that I have performed legal services for you, you authorize me, if requested, to provide legal services to any one or more of your Attorneys named in your Power of Attorney for Personal Care or Power of Attorney for Property in connection with all of the duties and obligations of such Attorney or Attorneys.

Precedent Clause for Personal Care Power of Attorney on Visitation

Although an attorney for personal care does not have custodial powers over the grantor (except as authorized by a court or as set out in a Ulysses Contract (pursuant to section 50 of the SDA), attorneys for personal care may need to deal with visitors who aggravate the grantor when acting in this role.

[2] A similar clause may be included to authorize you to advise the executors or administrators of a deceased client's estate, but we have only provided the precedent relating to attorneyship given the nature of this presentation.

It is arguable whether an attorney for personal care has the right to deny visitation to a grantor for two reasons:

1) Although the grantor may be incapable of making decisions about where he or she should live or what medical treatment to receive, the capacity needed to consent to a visitor is very low and an attorney cannot make decisions for a grantor with respect to his or her personal care where the grantor is capable of making such decision; and

2) There is no automatic right to attorneys to deal with visitors unless such visitation affects one of the aspects of personal care (i.e. health care, nutrition, shelter, clothing, hygiene or safety). Where a visit is considered unsafe or likely to affect the health of a grantor, the attorney should have the power to deny such visitation[3].

When drafting powers of attorney for personal care, you may wish to consider including a clause specifically authorizing this power (although it will still be subject to the issues indicated above) as follows:

> I direct that my attorneys seek to maintain the family relationships and friendships I have valued during my lifetime, even if I am no longer capable of being as active a participant in such relationships. This includes receiving visitors and making visits with others where possible, and taking part in family celebrations. Those family relationships and friendships I have now I have chosen of my own free will. In the event that I become incapable, I do not wish any person who has been a valued friend or family member to be excluded from my life. **However, in the event that I am restricted in my ability to tolerate visits due to the state of my health, it is my direction that my attorneys shall have complete discretion to decide when, how frequently, and for how long any particular person shall visit me.**

Scope of Duties on Attorney for Capable Versus Incapable Grantor

Section 38 of the SDA notes the following provisions that apply to an attorney acting under a Power of Attorney for Property if the grantor is incapable of managing property or the attorney has reasonable grounds to believe the grantor is incapable of managing property:[4]

- S.32 (except subsections (10) and (11)) – Duties of Guardian
- S.33 – Liability of Guardian
- S.33.1 – Will
- S.33.2 – Property in Another Person's Control
- S.34 – Completion of Transactions
- S.35.1 – Disposition of Property Given by Will

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[3] https://cares-ot.ca/wp-content/uploads/2021/01/Can-I-Visit-Mom.pdf
[4] *Substitute Decisions Act*, *supra* note 4 at s.38.

- S.36 – Proceeds of Disposition
- S.37 – Required Expenditures

The effect of s.38 is to make all matters relating to the duties, powers, standard of care and liability of guardians of property as set out in ss.32-37[5] applicable to an attorney under a continuing power of attorney (with necessary modifications) if the grantor has become incapable of managing property or the attorney has reasonable grounds to believe so. It stands to reason that where the grantor is still capable of managing property and the attorney has no reasonable grounds to believe that they are incapable, these duties, powers, standard of care and liability do not apply to the attorney. Nonetheless, it is prudent to exercise as many duties as possible where capacity is in issue (as there could always be a later finding that the grantor was incapable at the time and if the standard of care was not met, the attorney could be held liable).

The Ontario Court of Appeal in *Richardson Estate v Mew*, 2009 ONCA 403 (citing *Banton v Banton* (1998), 164 DLR (4th) 176) has determined that an attorney for property is a fiduciary regardless of the status of the grantor's capacity; however, the fiduciary obligation of an agent (when the grantor is capable) is far less onerous than the fiduciary obligation of an attorney acting on behalf of an incapable grantor.

While still owed a fiduciary duty, the scope of an agent's duty "pales in comparison" to those of an attorney when the grantor has lost capacity.[6] If the grantor is incapable, the relationship is similar to one of trustee.[7] Here, the attorney must perform their powers and duties diligently, with honesty and integrity and in good faith, for the incapable person's benefit.[8] In that case, the attorney is tasked with making the decisions on behalf of the incapable grantor.[9]

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[5] Except for references to compliance with the management plan in s.32(10) and (11) and the Public Guardian and Trustee's powers as an executor (s.35)
[6] *Richardson Estate v Mew*, *supra* note 3 at para 48.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ekelschot-Kumelj v Bradley*, *supra* note 43 at para 18.

Relevant and Interesting Case Law

Naccarato v. Naccarato, 2023 ONSC 3944

The grantor prepared powers of attorney for property and personal care naming her husband of thirty-three years as her primary substitute decision maker. She also signed a direction to the law firm that prepared the documents to only release them upon her written instructions or receipt of a letter from her physician confirming her incapacity to manage property. The grantor refused any medical treatment, refused all doctor's visits and assessments, and grew suspicious of others – refusing to sign any paperwork or deal with her own assets. Despite a lack of medical evidence, the court concluded based on extensive evidence from her family members and information provided by section 3 counsel appointed for the grantor, that the grantor lacked the capacity to manage her property or to make personal care decisions. The court looked at several examples of the grantor's inability to appreciate information relevant to specific decisions and her inability to appreciate the reasonably foreseeable consequences of her decisions and lack of decisions. The court concluded that she was no longer capable and ordered the release of her power of attorney for property.

The court further considered a court ordered capacity assessment but noted that it was unlikely that the grantor would comply, that an assessment would not add materially to the evidence, and that in this case it could significantly agitate the grantor. The court noted that a capacity assessment can be an intrusive and demeaning process and, in this case, would be inconsistent with the objective of the *Substitute Decisions Act* to protect vulnerable people, including from unnecessary or demeaning processes.

While the grantor had executed a personal care power of attorney in favour of her husband, the court noted that the powers granted thereunder were insufficient to fully meet the grantor's current needs and would not permit her spouse to admit her to hospital for diagnosis and treatment. The court ordered a time limited guardianship in favour of the spouse to give him the custodial powers necessary to admit the grantor to hospital for diagnosis and treatment.

Overtveld v. Overtveld, 2023 ONSC 460

The court was called on to make a declaration of incapacity of the grantor who had participated in several capacity assessments and had prepared competing powers of attorney for property and personal care, first in favour of his children and accountant, and then in favour of a friend and a lawyer. The court recognized capacity as a cognitive function with two fundamental components: the ability to understand information relevant to making decisions and the ability to appreciate consequences of a decision. The court noted that the test for incapacity is objective and that capacity is decision specific. Based on the capacity assessments and evidence provided the Court concluded that the grantor had lost capacity to manage property and personal care decisions by 2017 and had further lost the capacity to execute new powers of attorney for property and for personal care by November of 2018.

Simpson v. Mehta, 2023 ONSC 3063

The grantor's daughter sought to set aside two recent powers of attorney made in favour of the grantor's husband and other children (the respondents in the proceeding) and to be appointed guardian of the grantor's personal care. The grantor's daughter also sought an order regarding her ability to visit with the grantor. The court concluded that the grantor was capable of giving powers of attorney and capable of making decisions concerning her personal care. A diagnosis

of dementia, by itself, was not sufficient or determinative of the grantor's capacity either to execute powers of attorney or to make her own decisions. On the topic of visitation, the court declined to make an order but noted that the grantor was capable and had expressed a desire to see her daughter to her section 3 counsel. The court noted that the responding family members should respect the grantor's wishes and make reasonable efforts to facilitate the grantor's wish to visit with her daughter.

Lewis v. Lewis, 2019 ONCA 690

The court considered whether the trial judge erred in finding that the grantor had the necessary capacity to execute new powers of attorney for property and personal care. The court reaffirmed the presumption of capacity in favour of the grantor and the onus on those seeking to set aside the documents to prove that the grantor was not capable at the time they were executed. Evidence of chronic medical conditions did not necessarily lead to a lack of capacity. Referring to sections 9(1) and 47(2) of the *Substitute Decisions Act*, the court noted that evidence of an inability to manage property or personal care decisions does not automatically equate with a lack of capacity to execute powers of attorney.

McKenzie v. Morgan, 2023 ONSC 1457

In *McKenzie*, the ONSC assessed whether the attorney for property had reasonable grounds to believe the grantor was incapable of managing their property. In determining that the attorney had reasonable grounds for their belief, the court looked at the grantor's deteriorating mental health, the assumption of the grantor's affairs by his attorneys for property, the assessment by a Local Health Integration Unit for the purposes of long-term care eligibility and notes from various individuals that dealt with the grantor during the relevant period. All of this supported the attorney's reasonable grounds to believe the grantor was incapable with respect to his personal care and property.

Foisey v. Green, 2019 ONSC 4989 (Div. Ct.)

In *Foisey*, the ONSC highlighted the following test for the purposes of determining whether someone entering into a contract or receiving a gift from a person under guardianship or within one year of the creation of a guardianship did not have reasonable grounds to believe that such person was incapable at the relevant time:

> "The appropriate test…is for the court to consider the facts that were known to the person who is seeking to uphold a contract…and then to consider whether a reasonable person with the same knowledge as the person seeking to uphold a contract would have had reason to believe that the other party to the contract…was incapable of entering into the contract."

In discussing "reasonable grounds to believe" incapacity, the court held that the application judge erred by not addressing: (a) what was actually known to the person claiming reasonable grounds, and (b) whether that knowledge would give a reasonable person grounds to believe the other person lacked capacity.

Although the test was considered with respect to section 2(4) of the SDA, the case law cited also related to section 79(1) of the SDA and would therefore likely be applicable to any determination of what constituted "reasonable ground to believe" someone is incapable pursuant to the SDA.

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TAB 5A

26th Estates and Trusts Summit – DAY TWO

Susceptibility to Undue Influence: The Role of the Medical Expert in Estate Litigation

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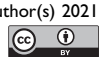

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TheCJP.ca | LaRCP.ca

Susceptibility to Undue Influence: The Role of the Medical Expert in Estate Litigation

Susceptibilité à une Influence Indue : Le Rôle de L'expert Médical Dans un Litige Successoral

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Abstract

Objectives: Medical experts are increasingly asked to assist the courts with Will challenges based on the determination of testamentary capacity and potential undue influence. Unlike testamentary capacity, the determination of undue influence has been relatively neglected in the medical literature. We aim to improve the understanding of the medical expert role in providing the courts with an opinion on susceptibility to undue influence in estate litigation.

Method: Medical experts with experience in the assessment of testamentary capacity and susceptibility to undue influence collaborated with experienced estate litigators. The medical literature on undue influence was reviewed and integrated. The lawyers provided a historical background and a legal perspective on undue influence in estate litigation and the medical experts provided a clinical perspective on the determination of susceptibility to undue influence. Together, they provided recommendations for how the medical expert could best assist the court.

Results: Susceptibility to undue influence is frequently used in estate litigation to challenge the validity of Wills and is defined as subversion of the testator's free will by an influencer, resulting in changes to the distribution of the estate. While a determination of undue influence includes the documentation of indicia or suspicious circumstances under which the Will was drafted and executed, medical experts should focus primarily on the susceptibility of the testator to undue influence. This susceptibility should be based on a consideration of cognitive function, psychiatric symptoms, physical and behavioural function, with evidence derived from the medical documentation, the medical examination, and the history.

Conclusions: The determination of undue influence is a legal one, but medical experts can help the court achieve the most informed legal decision by providing relevant information on clinical issues that may impact the testator's susceptibility to undue influence.

Abrégé

Objectifs : On demande de plus en plus souvent aux experts médicaux leur aide dans les tribunaux pour des contestations de testament basées sur la détermination de la capacité de tester et d'une influence indue potentielle. Contrairement à la capacité de tester, la détermination d'une influence indue a été relativement négligée dans la littérature médicale. Nous cherchons à améliorer la compréhension du rôle de l'expert médical qui offre aux tribunaux une opinion sur la susceptibilité à une influence indue dans un litige successoral.

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Méthode : Les expert médicaux expérimentés dans l'évaluation de la capacité de tester et de la susceptibilité à une influence indue ont collaboré avec des avocats spécialisés en succession. La littérature médicale sur l'influence indue a été révisée et intégrée. Les avocats ont fourni des antécédents historiques et une perspective légale sur l'influence indue dans le litige successoral et les experts médicaux ont offert une perspective clinique sur la détermination de la susceptibilité à une influence indue. Ensemble, ils ont apporté des recommandations à l'égard de la façon dont l'expert médical peut aider au mieux en cour.

Résultats : La susceptibilité à une influence indue est souvent utilisée dans un litige successoral pour contester la validité des testaments et elle se définit comme étant une subversion de la volonté propre du testateur par un influenceur, ce qui produit des changements au partage de la succession. Bien que la détermination d'une influence indue comporte la documentation des indices ou des circonstances suspectes dans lesquelles le testament a été rédigé et exécuté, les experts médicaux devraient se concentrer principalement sur la susceptibilité du testateur à une influence indue. Cette susceptibilité devrait se fonder sur un examen de la fonction cognitive, des symptômes psychiatriques, de la fonction physique et comportementale, et sur des données probantes extraites de la documentation médicale, de l'examen médical et des antécédents.

Conclusions : La détermination de l'influence indue est de nature légale, mais les experts médicaux peuvent aider les tribunaux à parvenir à la décision légale la mieux éclairée en offrant de l'information pertinente sur les enjeux cliniques qui peuvent influer sur la susceptibilité du testateur à une influence indue.

Keywords
medico-legal issues, undue influence, testamentary capacity, geriatric psychiatry, forensic psychiatry

Introduction

As the baby-boomer generation ages, we will witness the largest transfer of wealth in human history.[1] This will occur in the context of increasingly complex social circumstances and family organization, as well as adverse economic circumstances for a younger generation. Most recently, this has been further complicated by the COVID-19 pandemic which has not only led to a disproportionately high death rate amongst older adults but has also forced younger generations to become more reliant on parents and grandparents for financial support because of job losses and unemployment. Accordingly, we expect an increasingly large number of challenges to Wills based on the question of testamentary capacity and/or the presence of undue influence. While the determination of testamentary capacity and undue influence are ultimately legal determinations, medical experts can help the courts understand how complicated cognitive, psychiatric and medical factors might affect capacity and make testators more susceptible to undue influence. There is a reasonable amount of literature available on the assessment of testamentary capacity including recent comprehensive guides on the role of the medical expert.[2] Much less has been written on undue influence and this can be seen as a gap in the literature, as lawyers frequently ask medical experts to comment on this, and in some jurisdictions, Will challenges based on undue influence are even more common than challenges to testamentary capacity.[3]

Unlike testamentary capacity, which has been invariably based on criteria derived from *Banks v Goodfellow*[4] undue influence has not been universally defined by the courts. Historically, it has been described as external coercion or compulsion by an influencer that removes or reduces the testator's free will and results in a change to the distribution of the estate. More recently, the notion of the subversion of will or "will substitution"[5] has been considered the essential feature of undue influence without necessarily invoking threats or coercion. This type of definition implies that multiple factors need to be considered by the courts in order to determine whether the threshold for undue influence has been crossed. These include factors related to the influencer, characteristics and susceptibility of the testator, the nature of the relationship between the testator and the influencer, the circumstances under which the influence takes place, and the outcome of the proposed influence. Most of the existing literature on undue influence focuses on the "indicia" (meaning "signs" or "distinguishing features") of undue influence, which are factors that appear to make undue influence more likely, though we are unaware of any studies which have demonstrated the validity and reliability of these factors.

Training as a medical expert in areas related to estate litigation and testamentary capacity is largely ignored in Canada. In the most recent Royal College of Physician and Surgeons Adult Neurology (2020), Adult Psychiatry (2020), and Geriatric Psychiatry (2018) training experiences, there is no mention of testamentary capacity, though the Geriatric Medicine Competencies (2019) do identify varying capacities, including the making of Wills and Testaments under assessment competencies. Acting as a medical expert in estate litigation has therefore been a role that has had to rely on the suboptimal "see one, do one, teach one" model of education, though there are increasing numbers of published primers[2] and limited continuing education courses (involving both lawyers and medical experts) that are available for the interested learner. In this article, we will review the medical literature on undue influence, the conceptual models proposed for undue influence, and discuss the role of the medical expert in Will challenges which involve suspected undue influence. We will also briefly review some of the legal aspects related to undue influence. Most importantly,

Table 1. Conceptual Models of Undue Influence.

Name	Elements
SCAM[15]	Susceptibility of victims, Confidential relationships between victim and abuser, Active procurement of assets, Monetary loss
IDEAL[16]	Isolation, Dependency, Emotional manipulation and/or Exploitation of a vulnerability, Acquiescence, Loss
CULT[17]	Keep person unaware, control time and environment, create dependency, suppress old and create new behaviours/attitudes, allow no criticism
UI Wheel[18]	Based on a domestic violence model
SODR[19]	Susceptibility of the victim, Opportunity for undue influence, Disposition to exert undue influence, Result
IPA Task Force[3]	Social and environmental risk factors, psychological and physical risk factors, legal risk factors

we will discuss the medical and psychiatric factors that could make individuals particularly susceptible to undue influence. Finally, we will propose what we consider to be the limited role of the medical expert in providing an opinion to the court related to undue influence.

Methods

The authors were two lawyers specializing in estate litigation, and two academic geriatric psychiatrists with extensive experience acting as medical experts in estate litigation cases. The authors have previously worked together on legal cases and/or continuing legal and medical education programmes related to testamentary capacity/undue influence and estate litigation. The authors discussed a rationale and a specific outline for the article. The lawyers wrote a draft of the legal aspects section and the psychiatrists wrote the sections pertaining to the medical literature and the clinical aspects. The medical literature search utilized the Web of Science (WOS) with the search term "undue influence" and restriction to WOS categories of Law, Psychiatry, Ethics, and Psychology Clinical. All of the authors discussed and agreed on the role of the medical expert and the conclusions, and then revised and approved the final document.

Undue Influence: Historical and Legal Issues

In common law, the onus is on the person challenging the Will to prove undue influence. The propounder (meaning the party that puts the Will forward for consideration) must demonstrate testamentary capacity, knowledge, approval, and due execution. However, as early as the 1800s, it was recognized that other factors might invalidate the Will. If a Will maker signed a Will "under coercion, or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations—in none of these cases can the instrument be properly described as being his will."[6] Furthermore, it has been noted that if the propounder is the sole or major beneficiary, the propounder must dispel the suspicious circumstances.[7]

But what kind of conduct amounts to undue influence? One of the first cases to address this was *Wingrove v. Wingrove* (1885).[8] The conduct in question must "overcome the free will of the Will-maker."[9] The conduct could include force, threat of force, or other pressure. The frailty of a person impacts on the degree of force or pressure necessary to equate to undue influence.[10] While the conduct may include actual violence, the threat of violence, and/or withholding care, it could also be a very ill person agreeing to anything just to get the influencer to stop. The conduct goes beyond simple persuasion and could include pleading, suggestions, urging or appeals. The conduct may also be fraudulent, which would include manipulation, telling lies, orchestrating isolation, use of threats.[11] Importantly, the conduct destroys the free agency of the testator and constrains him to make a Will he would not have made in the absence of the influence.

More recently, the Wills, Estates, and Succession Act in 2014 in British Columbia addressed the issue of undue influence.[12] It noted that if a person claims that a Will resulted from another person (a) being in a position where the potential for dependence or domination of the Will-maker was present and (b) was using that position to unduly influence the Will-maker to make the Will and establishes that the other person was in a position where the potential for dependence or domination of the Will-maker was present, the party seeking to defend the Will has the onus to prove that the person did not exercise undue influence over the Will-maker. This new provision provided that once a position of dominance or potential for dominance is established, the onus shifts to the recipient to prove the Will was not the product of undue influence.

In California, a state statute was enacted in 2014, which defined undue influence as excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.[13] The statute requires judges to consider the vulnerability of the victim, the influencers' authority, the actions or tactics used by the influencer, and the equity of the result.

Finally, the legal literature identifies "suspicious circumstances" as—circumstances which could involve the preparation of the Will, or circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud—which could shift the burden of proof in cases where a Will is contested. Because these suspicious circumstances are dealt with frequently in the medical literature as well, they will be discussed below.

Table 2. Testator Characteristics.

Personal Characteristics of Testator	Circumstantial Characteristics of Testator
Greater age (>75 years old)	Living alone
Female > Male	Recent loss of spouse/bereavement
Unmarried/widowed/divorced	Social isolation
Financially independent	Estranged from children
Mid-upper income levels	Presence of family conflict
Illiteracy	Living in a remote location
Cultural subservience to an authority figure	Cultural, religious, or language barriers
Taking multiple medications	
Frailty/multimorbidity	
Physical/medical factors (see text)	
Psychological/psychiatric factors (see text)	
Cognitive impairment (see text)	
Substance abuse	

Note: See References 3, 22 to 24.

Conceptual Models and Screening Tools for Undue Influence

Several conceptual models have been used to describe undue influence (see Table 1). These models, developed by physicians, social workers, neuropsychologists and lawyers, have served as the basis for the development of screening tools and guidelines to be used in the identification and assessment of undue influence. For example, in response to the 2014 California statute mentioned above, Quinn et al. developed a screening tool for the California Adult Protective Services. The tool, developed from a literature review, focus groups, and interviews of experts, in the form of a checklist providing check boxes for a number of characteristics falling under 4 major areas: client vulnerability, influencer authority/position of power, actions or tactics, and unfair or improper outcomes.[14] There are no studies that have assessed the validity and reliability of this checklist or any other formal assessment tool for undue influence.[5]

Undue influence has also been conceptualized as a form of elder abuse. In fact, one of the few studies to examine the prevalence of undue influence based on a community sample of over 2,000 older adult Canadians, determined that elder abuse occurred in about 40 per 1,000, and that "material abuse" was the most common form of abuse.[20] Material abuse was defined as having anyone they knew who had taken any actions to obtain or use their funds, property, or other assets. Attempts to influence them to change their Will was one of 6 examples of material abuse and was reported by 0.4% of respondents. The abused were in poorer physical health which limited their activities, they were less likely to have someone to confide in, less likely to have someone to help them in the event of illness and had high levels of depression and suicidal ideation. In another study that attempted to address the prevalence of this type of abuse, over 10% of Irish Nursing Home staff reported seeing cases where they felt a resident who lacked capacity was visited by a solicitor or where a resident was placed under undue pressure to make a change to their Will.[21] These authors did caution, however, that although some of the comments which were reported by staff were unequivocally coercive and abusive, the line between acceptable or reasonable attempts to persuade is not always clear.

Risk Factors, Red Flags, Suspicious Circumstances, and Indicia of Undue Influence

Much of the published medical and legal literature deals with conditions and circumstances that have typically been associated with undue influence. These have been variously referred to as risk factors, red flags, suspicious circumstances, and indicia of undue influence. There are dozens of these factors which can be divided into those characteristics pertaining to the testator, the influencer, the relationship between the testator and the influencer, and the circumstances surrounding the making of the Will. Many of these factors have been summarized in Tables 2, 3, 4, and 5. While these factors have been recognized by the courts as being important in the determination of undue influence, they have neither been subjected to empirical studies regarding their prevalence and importance, nor do we know which of these factors are necessary or sufficient to suggest undue influence.

The Role of the Medical Expert and Undue Influence

The routes to involvement in estate litigation vary. For the treating clinician, they may be asked to act primarily as a witness, testifying to their observations of their patient, and then possibly opining on testamentary capacity and susceptibility to undue influence, whether or not they were formally assessed. An external medical expert may also be requested to provide an opinion on testamentary capacity and susceptibility to undue influence either via a contemporaneous assessment (which would include a patient interview) or a

Table 3. Influencer Characteristics.

Male > Female
History of current or past substance abuse
Mental or physical health problems
History of legal difficulties
Socially isolated
Unemployed and/or financial stressors
Has a confidential or fiduciary relationship with testator
Lives with testator
Non-resident child
More distant relative
Formal or informal caregiver
A "suitor"

Note: See references 3, 22–24.

Table 4. Characteristics of Relationship between Testator and the Alleged Influencer.

Testator is dependent on influencer (physically, psychologically)
Influencer exploits testator's vulnerabilities
Influencer providing care and assistance with activities of daily living
Influencer isolates testator from other friends and relatives
Influencer threatens to withdraw care, attention, love
Influencer threatens to institutionalize
Influencer intimidates and deceives

Note: See references 3, 22–24.

retrospective (and often post-mortem) assessment based on a review of medical records.

The role of the medical expert in providing an opinion on undue influence, however, is controversial. From a legal perspective, the British Columbia Law Institute notes that when lawyers request an opinion from a medical expert about a testator's capacity, they should appreciate that assessing susceptibility to undue influence is "not normally addressed" by medical experts.[23] Should the lawyer specifically request this type of assessment, they should describe the legal concepts involved, and ask the medical expert to opine on the question "Does the Will-maker's mental status impair his or her ability to make independent dispositive decisions despite pressure imposed by others?" In one of the earliest attempts to describe the role of the medical expert in assessing testamentary capacity, Spar and Garb[23] make suggestions on how to provide testimony regarding undue influence. They suggest that testimony should cover: (1) the testator's mental status and personality; (2) specific factors that could affect susceptibility to undue influence (including personality, function, cognitive deficits, physical and social circumstances); (3) the implications of these in the context of the indicia of undue influence, and discrepancies between the testator's attitudes, goals and values; (4) provide a diagnostic impression. The International Psychogeriatric Association's (IPA) Task Force on Testamentary Capacity and Undue Influence[3] noted that the clinician's role is to advise the court about a person's vulnerability to undue influence, but it is the court that decides if undue influence actually occurred. While it is unclear from the recommendations whether the IPA believes the expert should document and testify as to the presence of the indicia of undue influence, the IPA clearly stresses the need to assess the risk factors/red flags of undue influence, going as far as to suggest that the greater the number of red flags, the more likely that undue influence occurred. Similarly, as part of the assessment process, the IPA recommends an examination of the Will-making patterns looking for changes in patterns of trust and expressed wishes with respect to the distribution of assets. More recently, Plotkin et al.[5] suggest a somewhat different role for the medical expert regarding undue influence. While agreeing with the IPA about the determination of undue influence being the responsibility of the courts, they disagree with the assessment of Will-making patterns, which in their opinion is beyond the expertise of the medical expert. While they emphasize that the role of the medical expert should focus on the vulnerability of the testator (cognitive function, emotional and physical dependency), they also note that the medical expert can provide input into the influencer's apparent authority ("... can the individual say "no" to the alleged influencer?"). Furthermore, while they suggest that less should be said about the influencer's actions (including whether the influencer should have known about the testator's vulnerability) medical experts can comment on the testator's emotional reaction to the actions of the influencer.

Table 5. Circumstances Surrounding Making of the Will.

Radical change from previous will favouring influencer
Frequent and/or unusual changes to will
Influencer arranges for and attends appointments with lawyer
Influencer speaks for or provides documents for testator
Lawyer is unknown to testator
Will executed on a death-bed
Other legal changes e.g. POAs, deeds, *inter vivos* gifts

Note: See references 3, 22–24.

We suggest that the medical expert must primarily focus on the susceptibility of the testator to undue influence based on specific cognitive, psychiatric, and physical function, as documented in the medical records and/or demonstrated in the clinical examination. This protects the expert from having to act as a detective or to opine on areas that are beyond their expertise, leaving those determinations of fact to the court. Experts must be careful not to be perceived as usurping the authority of the court. While in general, this de-emphasizes the need to review many of the indicia of undue influence, there may still be occasions when this is necessary. For example, in the case of retrospective assessments, there could be pertinent history provided in the medical records that might speak directly to the red flags. An example of this might be the social work and nursing notes from a hospitalization that document conversations between testator and the influencer about will-making and/or observed abuse and coercion.

As noted above, Plotkin et al.[5] and the IPA[3] disagree about the use of examining Will-making patterns for the purposes of providing an opinion on undue influence. It is unclear if noting whether the Will and beneficiaries have changed, and the number of changes over a specific period of time requires any specific expertise. It is clear, however, that such changes could be important in determining testamentary capacity and specifically whether the testator had the cognitive capacity to make and sustain a choice (often a function of intact executive function and/or memory). However, in the context of undue influence, we conceptualize a significant change in Will-making pattern to be one of the indica of undue influence, and perhaps one of the strongest indica. Will-making patterns can be considered indica of undue influence and still be left for ultimate determination by the courts, while the medical expert focuses more on susceptibility to undue influence.

Clinical Determination of Susceptibility to Undue Influence

What are the symptoms and medical conditions that could potentially make someone more susceptible to undue influence and what is the relationship between vulnerability and the strength of undue influence required to interfere with the free will of the testator? Unfortunately, there are no studies that provide empirical answers to these questions. In the absence of such studies, however, medical experts can still provide valuable insights to the courts, derived from clinical experience.[24]

The medical expert will need to take an approach that considers both symptoms, as well as syndromes that lead to susceptibility. Broadly, these can involve: (a) cognitive function; (b) psychiatric symptoms; (c) physical function; and (d) behavioural function and addictions.

Cognitive function. Almost all types of cognitive deficits might increase susceptibility to undue influence either directly, by specifically impaired cognitive function, or indirectly, by increasing the testator's dependence on the influencer. For example, impaired memory might make it easier for the influencer to convince the testator they had already agreed to Will changes, made promises about asset distribution, or deceive the testator about the lack of involvement and negative behaviours of other potential beneficiaries. Impaired language function or aphasia might impair understanding of communication related to the Will or might make the testator more isolated and reliant on the influencer. Impaired executive function might make the testator more susceptible because of the associated decrease in insight and judgement, and inability to assess competing claims including the sincerity, honesty and motivation of individuals in a position to exert influence.[5] This could ultimately affect the ability of a testator to make and sustain a reasoned choice. Specific diagnoses of dementia, delirium (especially death bed Wills) and Mild Cognitive Impairment (MCI) help to document the presence of cognitive dysfunction, though there should still be an attempt to highlight the specific cognitive deficits and link them to susceptibility to undue influence. The medical expert can also help the court in the interpretation of scores on commonly used cognitive screening instruments.

Psychiatric symptoms. The presence of depression, bereavement, anxiety, and psychosis could all potentially increase susceptibility to undue influence. Depressive symptoms are often associated with loneliness, feelings of isolation, and negative views of oneself and the future. Moreover, these symptoms often occur in the early stages of dementia and MCI at a time when the cognitive changes are often not recognized. An influencer's attention and promises of care can be very powerful in these situations. Suspiciousness and even overt paranoid delusions are also often signs of early dementia or MCI whereby individuals suffering from early cognitive changes either misperceive events and behaviours or attempt to compensate for memory deficits by paranoid explanations. These feelings are often directed against people close to the testator and with whom they may have had an ambivalent relationship thus influencing the disposition of their estate. In our experience, this is a common phenomenon in Will challenges. While persecutory ideation and paranoia might be protective against undue influence, it is also possible that the influencer could exploit these symptoms to turn the testator against other potential beneficiaries. The specific DSM diagnoses (e.g., Affective Disorders, Anxiety Disorders, Personality Disorders, Schizophrenia/Schizoaffective Disorder) will all help document the presence of psychiatric symptoms, but the medical expert should also attempt to explain how the specific symptoms associated with the disorder may increase susceptibility to undue influence. If a patient has significant suicidal ideation, they might not care about what happens to their estate in the context of an influencer pressuring them to make Will changes—they might do anything to get the influencer to leave them alone. Testators with Schizoid and Dependent Personality Disorders might be particularly susceptible to undue influence.[3]

Physical function. Impaired abilities to perform activities of daily living will make many testators more dependent on others for their care and in their ability to survive in their own homes. Physical characteristics such as vision and hearing as well as mobility play major roles in isolation and increasing dependency. Threats to institutionalize because of physical problems and frailty can be immensely powerful forms of influence for many vulnerable older individuals.

Behavioural function and addictions. Substance abuse can increase susceptibility to undue influence from both the neurotoxic effects of the drug as well as the dependence on an influencer to provide the addictive substance. Obtaining a regular supply of alcohol and/or cigarettes has long been a powerful potential influence for some testators, but more

recently, access to a regular supply of medical marijuana is becoming an increasingly common scenario. Other potential behaviours that can be associated with undue influence include sexual bargaining.

In many cases, there are more than one of the factors described above, and the concept of multimorbidity should be considered when forming an opinion about susceptibility to undue influence. The notion of multimorbidity has also been characterized by Geriatric Medicine as "frailty syndrome" especially among the very old. Rockwood et al.[25] have defined frailty as "a term widely used to denote a multi-dimensional syndrome of loss of reserves (energy, physical ability, cognition, health) that gives rise to vulnerability." Finally, it is helpful for the medical expert to comment on the relationship between the number and severity of factors mentioned above and the relative force of the influence that would need to be exerted in order for it to be considered undue. For example, in the highly vulnerable individual with cognitive impairment, depression, and social isolation, the degree of influence necessary to be considered undue might be modest. In contrast, for the relatively healthy testator without physical, psychiatric, or cognitive dysfunction, the degree of influence necessary to be considered undue might be considerable.[26] Even in the absence of red flags and factors which increase susceptibility to undue influence, a testator could still be influenced against their will, though this would require coercion or threats.

Conclusions

The legal concept of undue influence can be used to challenge a Will. Given the changes in population demographics as well as added pressures from pandemics, it is anticipated that this will become an increasingly important aspect of estate litigation. While it is the responsibility of the court to determine if indue influence has occurred, we have argued that the medical expert can perform an important and useful function for the courts by focusing primarily on the susceptibility of the testator to undue influence. This susceptibility should be assessed based on evidence derived from the medical documentation, the medical examination, and the history. The medical expert should consider cognitive function, psychiatric symptoms in the mental status, as well as the physical and behavioural function of the testator in so far as such pertain to the susceptibility to undue influence. Medical experts must learn to accept a limited but important role in a medico-legal collaboration that facilitates the court's ability to make the most informed decisions.

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TAB 5B

26th Estates and Trusts Summit – DAY TWO

Assessing capacity to make a will and powers of attorney: guarding the client from undue influence where there are indicators of vulnerability.

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LEGAL FRAMEWORK

Capacity - General

At law, there is a presumption of capacity.

The presumption applies to those who are at least eighteen years of age in relation to management of property[2] and to those who are at least sixteen years old in relation to giving or refusing consent to personal care[3].

Capacity is at its core a cognitive function. It is task, situation, and time specific. Capacity can fluctuate and change over time and depending on the task/decision. There is no single legal definition of "capacity". As such, and because of the fluid nature of capacity, the test for incapacity is an objective one.

Capacity has two fundamental components: (i) ability to understand information relevant for making decisions; and (ii) ability to appreciate the consequences of a decision. To be deemed mentally capable, an individual must satisfy both parts of the test.

To "understand" refers to a person's cognitive abilities to factually grasp and retain information. This requires the individual to have a working knowledge of their financial circumstances, health or personal care status and be aware of any issues that call for decision-making. This extends to the person being able to remember the choices they have previously made and being able to express those choices in a predictable and consistent manner over time.

To "appreciate" refers to the evaluative nature of capable decision making. It requires the individual to not only possess the intellectual and cognitive capabilities to factually understand information, but also to rationally manipulate the information, identify the major risks and consider the consequences of his/her choice. The decision needs to be a "reasoned" one and based in reality[4].

The assessment process is regulated by the Ministry of the Attorney General of Ontario. To become an assessor, a person must meet certain professional requirements, and complete specific training. A roster of the capacity assessors in Ontario can be found at https://www.ontario.ca/page/list-capacity-assessors.

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

[3] *Ibid*, s. 2(2).

[4] Guidelines for Conducting Assessments of Capacity, Capacity Assessment Office Ontario Ministry of the Attorney General, May 2005, pages II.2-II.5.

There are two broad categories of capacity assessments: those performed under statutory authority (the *Substitute Decisions Act*, the *Mental Health Act*, and the *Health Care Consent Act*), and those commissioned privately.

Privately commissioned assessments are generally commissioned without the involvement of the government and do not, usually, hold severe repercussions if they result in a finding of incapacity. Nevertheless, they require the consent and cooperation of the person being assessed[5].

Section 3 of Ontario Regulation 460/05[6] incorporates the "Guidelines for Conducting Assessments of Capacity", established by the Capacity Assessment Office, into the assessment process, both for assessments conducted under statutory authority and those privately commissioned. All assessors are required to comply with the Guidelines. All assessments must be conducted in accordance with the Guidelines.

One of the important protections afforded to the person being assessed is the requirement to obtain their informed consent, also referred to as "rights advice". Before conducting the assessment, the assessor is required to explain to the person being assessed (i) the purpose of the assessment, (ii) the significance and effect of a finding of incapacity and (iii) that they have the right to refuse an assessment[7].

If the person refuses to be assessed, the assessment cannot continue[8] and a court order will be required.

The Different Legal Tests for Capacity

Below is a brief summary of the legal tests in the various domains.

1. Capacity to manage property

The test for capacity to manage property is set out in section 6 of the SDA:

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

The ability to understand refers to having knowledge of one's property and the nature of it or its approximate value. The ability to appreciate is the ability to recognize the potential consequences of decisions made regarding property disposition or management.

In its 2023 decision, the Ontario Consent and Capacity Board[9], serves as a reminder that:

> The SDA does not require that an individual have a sophisticated or in depth understanding of the information provided to them relevant to the management of their property. They need not have a degree of understanding that is as

[5] M Jasmine Sweatman, *Powers of Attorney and Capacity: Practice and* Procedure, 2014 (Toronto: Thompson Reuters Canada Ltd), page 245.
[6] Capacity Assessment, O Reg 460/05, section 3.
[7] *Supra note 5,* page 243.
[8] *Supra* note 1, s. 78 (1).
[9] *DS (Re),* 2023 ONCCB 49707, page 4.

detailed as the physician/capacity assessor. They need not express their understanding in the same terms used by the physician/capacity assessor.

2. Capacity to manage personal care

The test for capacity to manage personal care is set out in section 45 of the SDA:

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

A similar test can be found in section 4 of the *Health Care Consent Act*[10]:

> A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The Supreme Court of Canada in *Starson v. Swayze*[11] has articulated the test for capacity to manage personal care as a two-component test, which can be summarized as follows:

> The first component is that the person is able to understand the information that is relevant to making a decision about the treatment at issue. The person must be capable of intellectually processing the information as it applies to his or her treatment, including its potential benefits and drawbacks. This refers to two types of information: information about the proposed treatment and information as to how that treatment may affect the patient's particular situation.
>
> Relevant information, in this context, includes the person's symptoms and how the proposed treatment may affect them. The patient must be able to acknowledge his or her symptoms in order to be able to understand the information relevant to a treatment decision. However, the patient does not need to agree with diagnosis.
>
> The second component is that the person is able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. It is a more stringent test than that of understanding. Whereas the understanding criterion focuses on the patient's ability to acquire information and understand the facts, the appreciation criterion focuses on the patient's ability to evaluate the information and the foreseeable consequences of accepting or refusing treatment.

[10] *Health Care Consent Act*, 1996, SO 1996, c 2, Sch A.
[11] 2003 SCC 32, paragraphs 16-17.

3. Capacity to grant or revoke a power of attorney for property

The test for capacity to grant/revoke a power of attorney for property is set out in section 8 of the SDA.

> (1) A person is capable of giving a continuing power of attorney if he or she,
>
> (a) knows what kind of property he or she has and its approximate value;
>
> (b) is aware of obligations owed to his or her dependants;
>
> (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
>
> (d) knows that the attorney must account for his or her dealings with the person's property;
>
> (e) knows that he or she may, if capable, revoke the continuing power of attorney;
>
> (f) appreciates that unless the attorney manages the property prudently its value may decline; and
>
> (g) appreciates the possibility that the attorney could misuse the authority given to him or her.

To be able to grant or revoke a power of attorney for property, the grantor ought to know, be aware of, and appreciate the seven factors outlined under section 8(1) of the SDA.

If a person is capable of granting a power of attorney for property, then he/she is also capable of revoking a power of attorney for property[12].

4. Capacity to grant or revoke a power of attorney for personal care

The test for capacity to grant/revoke a power of attorney for personal care is set out in section 47 of the SDA:

> (1) A person is capable of giving a power of attorney for personal care if the person,
>
> (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 the person.

To be able to grant or revoke a power of attorney for personal care, a person must meet both parts of the test. Similar to power of attorney for property, if a person is capable of granting a power of attorney for personal care, then he/she is also capable of revoking a power of attorney for personal care[13].

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[12] *Supra* note 1, s. 8(2).
[13] *Ibid*, s. 47(3).

5. Capacity to make a will

The legal test for testamentary capacity was set by the 1870's decision *Banks v. Goodfellow*[14], followed by the Supreme Court of Canada's decision *Skinner v. Farquharson*[15] and recently restated in *De Smedt v Cheshire et al.*[16], *and requires the following*:

> (1) Understanding the nature of the act of making a will and its consequences;
>
> (2) Understanding the extent of one's assets;
>
> (3) Comprehending and appreciating the claims of those who might expect to benefit from the will, both those to be included and excluded;
>
> (4) Understanding the impact of the distribution of the assets of the estate; and
>
> (5) That the testator is free of any disorder of mind or delusions that might influence the disposition of his or her assets.
>
> • It is also important to remember that isolated memory or other cognitive deficits on their own do not establish a lack of testamentary capacity.
>
> • It is unnecessary for a competent testator to know the precise makeup of her entire estate to the last detail. Testators are not required to be accountants or to have an accountant's knowledge and understanding of their estate. Nor it is necessary for the testator to understand the provisions of a will the way a lawyer would.

In short, to have capacity to make a will, a person needs to have a firm understanding of what their estate includes, how they wish to divide their estate and what effect their distribution will have, but they are not expected to know every detail of the assets who make up the estate. The person needs to arrive at their decision about distribution on their own and not because of the influence of others. The testamentary capacity should be assessed both when the client is giving instructions and when they are executing the will[17].

RULES OF PROFESSIONAL CONDUCT

The *Rules of Professional Conduct* instruct us to try and maintain, as much as possible, a normal client-lawyer relationship when dealing with clients with diminished capacity[18]. The commentary lists several factors which can impact the client's ability to make decisions (experience, age, intelligence, mental and physical health) and notes that the ability to make decisions can change over time[19]. It further notes that the impairment may be minor or severe, such that the client no longer has the legal capacity to provide instructions or retain counsel[20].

In the event that the impairment is such that the client can no longer manage his/her legal affairs, the lawyer may have to take steps to have a representative appointed or alert the Office of the

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[14] L.R. 5 Q.B. 549 (C.A.), pages 567-569.
[15] 1902 SCC 87.
[16] 2023 ONSC 249, paragraph 157.
[17] *Smith Estate v. Rotstein*, 2010 ONSC 2117, paragraph 118.
[18] *Rules of Professional Conduct*, Rule 3.2-9.
[19] *Ibid,* Rule 3.2-9, commentary [1].
[20] *Ibid*, Rule 3.2-9, commentary [1.1].

Public Guardian and Trustee. The lawyer has an ethical obligation to ensure that the client's interests are not abandoned.[21]

In the case of a limited scope retainer, the Rules direct the lawyer who is asked to provide legal services to a client who has diminished capacity to make decisions to "carefully consider and assess in each case if, under the circumstances, it is possible to render those services in a competent manner"[22].

THE SOLICITOR'S ROLE IN ASSESSING CAPACITY

Lawyers are required to satisfy themselves that the client has capacity to instruct them. Bearing in mind the presumption of capacity, adult clients are presumed capable of instructing counsel. This is rebuttable presumption. Lawyers are not capacity assessors and they are not trained to assess the client's ability to understand and appreciate.

Although in the context of a Family Law dispute and the appointment of a litigation guardian, the decision in *Costantino v Costantino*[23] provides helpful guidance for assessing the client's ability to instruct counsel. The court held that to meet the test for capacity to instruct legal counsel, the client must:

> (a) Understand what they have asked the lawyer to do for them and why,
>
> (b) Be able to understand and process the information, advice and options the lawyer presents; and
>
> (c) Appreciate the advantages and drawbacks and the potential consequences associated with the options they are presented with.

A solicitor taking instructions from a client where there are indicators of vulnerability should be cognizant of the test and take steps, including by referring the client for a capacity assessment, to ensure the client's understanding and appreciation of the legal service, the options, and the consequences of their decision.

In the decision *Aba M. Alamin v. Royal & Sunalliance Insurance Company of Canada*[24], the Court expressed the need for counsel to satisfy himself that the client is able to instruct him:

> Likewise the ability to instruct counsel is dependent upon capacity. In the light of evidence of possible incapacity, ***a solicitor has an obligation to enquire into the capacity of his client***. As Chancellor Boyd stated in Murphy *v. Lampier* (1914) 31 O.L.R. 287:
>
> The solicitor may in some perfunctory way go far enough to satisfy himself as to capacity, **but it is to be remembered that his duty is to go far enough to satisfy the Court that the steps he took were sufficient to warrant his satisfaction**.

Below are examples of cases where the solicitor was found negligent in taking instructions from a vulnerable client:

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[21] *Ibid*, Rule 3.2-9, commentary [3].
[22] *Ibid*, Rule 3.2-1A.1, commentary [5.2].
[23] 2016 ONSC 7279, paragraph 47, p.19
[24] 2002 ONFSCDRS 148, page 4.

In the decision *of* *De Smedt v Cheshire et al*.[25], the applicant filed a motion for summary judgment challenging the 2017 will of her late common law partner. The deceased wrote a will in 2017, two years before he died. The applicant alleged suspicious circumstances around the writing of the new will, including mild to moderate dementia. When the Court examined the notes of the solicitor who drafted the will as well as the surrounding circumstances, the Court could not rely on the solicitor's notes to attest the capacity of the testator. The court based its decision on five reasons:

- The solicitor met the client twice: once in person and once over the phone where the reception was weak;
- The client was not an existing client;
- The solicitor did not discuss with the client his history and/or medical condition;
- The solicitor's note did not address why she thought the client was capable of making a will; and
- The solicitor's notes were incomplete and from memory[26].

The solicitor's opinion as for the testator's capacity was not given significant weight and the applicant's motion for summary judgment was granted.

In the decision *Baron v. Mamak*[27], there was an understanding that the testator would have his housekeeper look after him and his house until he died, in exchange for marriage and his home. The plaintiffs, the housekeeper and her son, were seeking damages from the lawyer who prepared the transfer of the testator's house to the son, as well as other documents. The court held that the solicitor:

- Did not take into consideration, when writing the will, that the client spoke poor English;
- Did not arrange for an interpreter;
- Failed to meet the client separately from his wife-to-be before making the will which left the wife-to-be his entire estate. The wife-to-be was the client's housekeeper and was 24 years younger than him; and
- Did not talk about the value of the house the client was leaving the wife-to-be or if the marriage, happening the next day, was appropriate in circumstances[28].

The solicitor was found to have fallen below the requisite standard of care, but damages were not awarded because of the specific circumstances of the case.

In the case of *Walman v. Walman Estate*[29], the testator was diagnosed with Parkinson's Disease in 1999 and Lewy Body Dementia in 2003. He executed wills in 2003, 2005 and 2007. The third will was challenged. The testator wanted to remove his children from his will in order to give everything to his second wife. The solicitor failed to explore previous dispositions by the client to for the benefit of the wife as well as large capital transfers from the testator to the wife during the last five years of his life. The court held that taking good notes and meeting with the testator alone were not enough to neglect the suspicious circumstances. The solicitor failed to make sure that:

- the testator had knowledge of his assets (his and his wife-to-be); and

[25] *Supra* note 16.
[26] *Supra* note 16, at paragraph 186.
[27] 2018 ONSC 2169.
[28] *Ibid*, at paragraphs 16 and 28.
[29] 2015 ONSC 185.

- failed to pursue an assessment where there was skepticism of the client's capacity/instructions[30].

The court found that the solicitor who drafted the 2007 will was wrong in concluding that the testator had testamentary capacity.

In the case of *Dans 117-112chuk v. Calderwood*[31], the testator was in the beginning stage of senile dementia and the caretaker was speaking for the testator at the meetings with the solicitor. The defendants objected to the testator's 1994 will. They argued that the will was written under suspicious circumstances and that the testator lacked testamentary capacity. The Court held that the solicitor:

- Should have treated the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;
- Should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;
- Should have inquired about prior wills, and if one existed, the reasons for variations or changes;
- Should have inquired into why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney a new power of attorney was to be given by the deceased to the plaintiff; and
- Should have investigated the health of the deceased.

The court specifically stated that "a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words" and "I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory."[32]

As a result of the findings, the solicitor's testimony was given very little weight in assessing the testator's capacity.

In the case of *Shannon v. Hrabovsky*[33], the applicant was seeking to invalidate the will of the testator, on the basis of lack of testamentary capacity or undue influence by her brother. The court found the will to be invalid due to the lack of testamentary capacity of the testator. The solicitor was found to be negligent because:

- Her notes did not reflect why she thought the testator had capacity. They only contained the testator's instructions; and
- She did not ask questions to the testator to verify his capacity[34]

[30] *Ibid*, at paragraph 55
[31] 1996 BCSC 914.
[32] *Ibid*, at paragraphs 117-120.
[33] 2018 ONSC 6593, paragraphs 20 and 96.
[34] *Ibid*, at paragraph 96.

Tab 2

Red Flags in Drafting Testamentary Documents: Possible Indicators of Undue Influence and/or Manipulation

A solicitor meeting with a client to obtain instructions in relation to their will and/or powers of attorney has a professional obligation to satisfy themselves that the client can instruct them.

In some circumstances, the client (or a third party) may present certain behaviours that could, and sometimes should, give the solicitor a pause. The solicitor may make some observations in their dealings with the client that could be indicative of vulnerability, incapacity or undue influence.

In such circumstances, the solicitor should exercise caution. In some cases, it is advisable or even necessary to send the client for a capacity assessment before moving forward with drafting the will or power(s) of attorney. To assist in detecting such indicators and whether a capacity assessment is warranted, below is a non- exhaustive list of possible scenarios for consideration:

1. Before the Initial Meeting

Not an Existing Client

Behaviour/possible indicator	**What to do**
The individual is not an existing client and has no prior history with the law firm. The client has had a long-standing relationship with another lawyer or law firm.	Ask the potential client if they have a lawyer or have worked with a lawyer in the past. If the answer is yes, ask them why they are making this change, how they found you and why they chose you. Ask the client if there was a recent change to their will/powers of attorney. If the answer is yes, inquire about the change and why another change is now being sought. Obtain copies of prior documents executed by the client. If you are acting for another family member or a third party involved, consider whether you may be placed in a conflict of interest position
The initial contact is made by a third party and not by the client directly.	In addition to the above, make sure to meet with the client alone, preferably in-person, before taking instructions. Inquire why the initial contact was made by the third party. Probe the client about their ability to find a lawyer by themselves (i.e., are they able to do an online search, did they ask friends for recommendation, etc.).

Urgency

Behaviour/possible indicator	What to do
The potential client requests or demands immediate action, especially when there is no apparent reason for the urgency.	Note the nature of the urgency expressed by the client (deathbed, unplanned urgent trip, change in the family structure) and the client's concerns. Probe the client to determine if there is an objective urgency or if the urgency is subjective. If it is subjective, probe the client why they feel there is urgency, including whether they are being told that there is urgency.

2. Initial Consultation

Meeting Scheduled by a Third Party

Behaviour/possible indicator	What to do
The meeting is scheduled by someone other than the client, especially when that third party has a vested interest in the outcome.	Confirm with the client, independently and privately, their desire to proceed with the meeting. Inquire why the meeting was scheduled by the third party and the client's involvement in the process.

Presence of Third Party During the Meeting

Behaviour/possible indicator	What to do
A third party is present during the meeting.	Ask the third party to leave after the initial introduction and meet with the client alone. Once alone, probe the client about the reason for the meeting, the nature of the relationship with the third party, the involvement of the third party in the decision to draft or make changes to the will or powers of attorney and the client's dependency on the third party. For example: is the third party living with the client? Is the client dependant on the person for care or other services? Is the client receiving any

Behaviour/possible indicator	What to do
	help from PSWs or other government organization? Is the client aware of any family dispute?
The third party appears to exert control or dominance over the conversation (i.e., speak over, or for, the client, interrupt, correct the client).	If the client insists on having the third party present during the meeting, in addition to the above, note any concerns regarding control or dominance by the third party. As much as possible, direct questions to the client and record their answers. Note which answers were provided by the third party, note any interruptions or corrections by the third party. If it is impossible to get answers/instructions from the client, consider whether you should end the meeting and/or refuse the retainer.
The client consistently seeks approval or confirmation from the third party present during the meeting.	In addition to the above, note the behaviour and ask the client why they are seeking approval or confirmation from the third party (i.e., is it to confirm dates, or is it to confirm that they are saying the “right” thing). Ask the client questions with respect to their underlying wishes and note their responses, in an effort to ensure that the client’s decisions reflect their wishes. Make sure to keep the questions simple and relevant. Suggest, again, that the third party leave the meeting. Consider insisting on removing the third party from the meeting as a condition to continuing with the meeting and refusing the retainer.

Client's Ability to Provide Financial Information

Behaviour/possible indicator	What to do
The client is unable to provide information regarding their assets and beneficiaries.	Try to gather financial information from the client. Ask simple questions, broken down into topics, focus on relevant facts. For example: ask the client about the property they live in, do they own it? is there a mortgage? If they live in a retirement home, do not ask them about the now sold family home, unless there is concern about the sale. How many bank accounts do they have? Are any of them joint with anyone, and if yes, who and why. Do they have registered investments? Non-registered investments? Do they have any dependants, such as ex-spouses, minor children, incapable adult children). Record all information provided by the client and seek clarification. Ask the client to prepare a list of assets. Remember that this is not a memory test. The evaluation is of the client's ability to access the information, process it and use it. Inquire with the client about their family member to determine who would be the 'natural' beneficiaries. If any beneficiaries are excluded, probe with the client as to the reason of the exclusion (i.e., were gifts made to the beneficiaries? Loans? Has there been estrangement?) Inquire and consider whether the client is dependant on a family member or another individual. Compare the information with any independent information obtained (medical records, information from other family members, friends, referring professional).

Undue influence/ Vulnerability

Behaviour/possible indicator	What to do
The client displays signs of anxiety or fear. The client's responses and/or body language indicate pressure from potential beneficiaries or other interested parties to make certain decisions or changes. For example: repeated and/or constant discussions with third parties, mentioning of "threats" of being moved to a retirement home, talk of financial need by the third party or concerns by the client of not having sufficient funds to support themselves.	If you have concerns for the client's safety or well-being, reinforce your role as solicitor for the client, not the third party. Direct the client to resources available to them (the Elder Abuse Unit, seniors help line, the OPGT, family doctor), inquire if there are other family members, close friends, who may be able to assist the client. Remind the client that it is ok to care for the third party but not like their conduct, and that the situation is not the client's fault. Obtain client's direction and instructions to contact other family members or medical professionals to obtain additional information or assistance and investigate the circumstances surrounding these pressures. If you are satisfied that the client is independently and freely making decisions despite the external influence or pressure, continue assisting the client. Document the client's statements and concerns regarding the outside influence, and the factors leading to your decision to continue to work with the client.
The client is excluding close family members from the Will or powers of attorney without a reasonable explanation.	Inquire the reasons behind the client's decisions and confirm that the client's intentions are genuine. Note that the decision needs to be reasoned, not reasonable. Advise the client about the legal consequences of their choices.
The client appears isolated from family members, friends or advisor who could provide balanced input.	Inquire with the client about family members, close friends or long time advisors. Ask the client about social interactions and outings (i.e., who their friends are, when they last saw their friends, attended family dinners or celebrations, participated in an activity

Behaviour/possible indicator	What to do
	outside of the home, spoke to family/friends on the phone).
The client avoids interactions with trusted financial or legal advisors who could provide valuable guidance	Inquire as to the reasons for the avoidance and investigate possible external influence on the client that is preventing them from seeking professional guidance for informed decision-making. Document any reluctance on the client's part to involve those who should reasonably be involved in their day to day lives, and in the drafting process for the client's will or power of attorney.
Client displays signs of emotional distress stemming from recent loss or trauma.	Be cautious of the client's capacity to give clear instructions, especially if the loss/trauma is recent and/or if the client indicated that they are taking certain medications to regulate the emotional distress. Depending on the severity of the client's vulnerability, you may wish to postpone the meeting if the client is too distressed to continue with the meeting.

Radical Departure from Previous Will

Behaviour/possible indicator	What to do
The proposed will or power of attorney represents a significant departure from the previous will or powers of attorney, particularly if the changes appear to favor a specific individual or group.	Review the previous documents with the client. Make special note of any changes and discuss them with the client to understand the motivation for these changes. Probe the client about requests for the changes from any interested parties, family disputes, changes in family circumstances (divorce, death, sickness). Ask the client about their intentions, what they hope to achieve with the new documents and discuss whether the changes will achieve it.

Behaviour/possible indicator	What to do
	Carefully record all information provided by the client.

Lack of Focus/Medical Concerns

Behaviour/possible indicator	What to do
The client is unable to maintain focus on the conversation. The client is unable to provide coherent instructions. The client exhibits signs of mental illness/ decline.	Have you been provided with medical records/opinions re: client's medical condition? Depending on the severity of the client's inability or signs of mental illness/decline, you should refrain from proceeding with any further discussions related to the will/powers of attorney. Insist on an assessment by a capacity assessor or ask permission to speak to their treating physician. If, despite the limitations, the client is able to provide instructions, respond to questions in a consistent manner, and provide reasoning for their choices, consider whether an assessment by a capacity assessor is beneficial. Note that a diagnosis of Alzheimer's, is not, on its own, determinative of a finding that the client is incapable of providing instructions or execute documents. Document, in detail, your observations and concerns about the client's capacity. Record the client's behaviour and responses during the meeting, any signs of concerns and any signs mitigating the concerns. Consider holding a second meeting with the client and note any differences in the client's conduct between the two meetings.

Language Barrier

Behaviour/possible indicator	What to do
The client cannot effectively communicate their wishes or understand the process (i.e., the client does not speak the language/ doesn't speak it well, the client can speak but cannot read.	Engage in a discussion with a client to assess their ability to understand you and respond to your questions. Specifically inquire with the client about their ability to understand the terminology used. Arrange for an independent translator or interpreter to be present. Record any concerns about the client's ability to understand and communicate and the steps taken you take to alleviate the concerns.

Hearing/vision issues

Behaviour/possible indicator	What to do
The client is hard of hearing or has diminished eyesight.	Inquire with the client about whether they require a hearing aid or eyeglasses/contact lenses and whether they are wearing them. Speak clearly, loudly (if needed) and provide the clients with documents in a large font.

3. <u>Subsequent Meetings:</u>

Changes in Client's Behaviour/Conduct

Behaviour/possible indicator	What to do
The client's conduct between the first and subsequent meeting is materially different. For example: The client does not remember the prior meeting(s) or the information discussed. The client seems "too" prepared or rehearsed in their answers. The client is agitated with being asked the same questions again. Client seems tired or nervous.	You should ensure that the client is aware of the purpose of the meeting. Review the previous meeting with the client. Confirm with the client their desire to proceed with the process and what they want to achieve. Probe the client as to whether they had any discussions with interested parties about the prior meeting(s), and what was discussed. Inquire with the client about their mood change, their demeanour, whether they

Behaviour/possible indicator	What to do
	have been sleeping well, whether they are nervous about the process and why. Carefully document each change and its reasoning and be alert to potential signs of undue influence. Consider scheduling a subsequent meeting to a later date.

Inconsistent or Contradictory Information

Behaviour/possible indicator	What to do
The client provides inconsistent or contradictory information about their assets or beneficiaries.	Carefully record all information provided by the client. Present the client with the previous information provided and seek clarification for the change. Ask the client for supporting documentation or permission to obtain information from financial institutions or family members. Inquire with the client if there has been any change in the family relationships that would explain the change in the list of beneficiaries. Consider referring the client for a capacity assessment.

Changes in Instructions

Behaviour/possible indicator	What to do
The client appears indecisive, unable to make a decision as to their wishes and bequests. The client frequently and significantly changes their instructions, particularly if these changes appear to favour a specific beneficiary or group.	Probe the client about the reasons for the change(s), and whether there are circumstances that support the change(s). Carefully document each change and its reasoning and be alert to potential signs of undue influence. Consider referring the client for a capacity assessment.

Behaviour/possible indicator	What to do
A beneficiary actively participates in suggesting or pressuring for changes in the will or power of attorney.	Question the beneficiary's involvement and assess whether it raises concerns about undue influence. Encourage the client to make decisions independently from the pressure exerted by the beneficiaries. If unable to obtain directions from the client without the influence of the beneficiaries, refuse to act.
New beneficiaries who have not been previously mentioned in the client's estate planning documents are suddenly added	Verify the client's reasons for adding new beneficiaries, ensure the client understands the implications of these changes, and record the information. Remain alert for possible undue influence by the new beneficiaries, document the indicators and assess them against the information provided in previous meetings.

4. <u>At Signing of the Will or Power of Attorney:</u>

Unexplained Changes

Behaviour/possible indicator	What to do
The client requests last-minute changes to the contents in the will or power of attorney that are not adequately explained by the client.	Question the reasons for the changes and why they were not requested earlier. Document the client's reasons. Ensure that the client fully understands the legal consequences of the changes. Make the changes only after you are satisfied that the changes are not as a result of undue influence.

Client's Demeanor

Behaviour/possible indicator	What to do
If the client struggles to comprehend the document or the implications of their decisions at signing.	Review each paragraph with the client. Explain the terms and the meaning of the paragraph in simple terms. Clarify any confusing aspects of the document or the estate planning process. Confirm that the

Behaviour/possible indicator	What to do
	client is able to hear you, read the document and understand you. Relying on previous interactions with the client as a baseline, determine whether the client's struggle is limited to understanding the legalese and complex legal terms in the will or powers of attorney, or if the client is unable to understand the document and its legal meaning and consequences. If you have determined that the client is unable to understand, do not proceed with the execution. Record your concerns and refer the client to a capacity assessment.
The client's demeanor displays signs of confusion, hesitation, or discomfort.	Probe the client about how they are feeling, whether they are comfortable with the document. Ask them what bothers them, what they are worried about. Discuss their concerns with them. Confirm that the document represents their wishes. If the client continues to display concerning behaviours, do not proceed to execute the document(s). Schedule another meeting with the client and consider referring them to a capacity assessment.

When these red flags are present, solicitors should exercise caution, conduct further assessments of the client's ability to independently instruct them, and consider whether they should refuse/terminate the retainer, bearing in mind that the solicitor's primary duty is to protect the client's interests when creating and assisting in the execution of valid legal documents.

Tab 3

Checklist for Capacity Assessments

When concerns about a client's capacity to provide instructions for a will or powers of attorney arise, it's crucial to handle the situation with care and professionalism. Here's a suggested approach for when and how to request an assessment, whom to use, and what to communicate to the assessor:

When to Request an Assessment:

1. **Early Identification of Concerns**: If you, as a solicitor, notice any signs or receive information that raises doubts about the client's capacity during the initial consultation or subsequent interactions, it's advisable to address these concerns promptly, including by referring the client for a capacity assessment.

2. **Objective Observation**: Request an assessment if the client demonstrates significant memory lapses, confusion, or any other signs of cognitive impairment that could affect their decision-making.

Whom to Use for the Assessment:

The Capacity Assessment Office trains eligible health professionals to be capacity assessors in accordance with the *Substitute Decisions Act*. The list can be found online by clicking the link **List of Capacity Assessors.**

What to Communicate to the Assessor:

For more information about requesting a capacity assessment or when someone is deemed incapable, see **"Mental Capacity"** website by the Government of Ontario.

1. **Objective and Specific Concerns**: Provide the assessor with a clear and detailed account of the specific concerns you have observed or received regarding the client's capacity. Avoid making judgments; instead, focus on observable behaviors and interactions.

2. **Relevant Background Information**: Share relevant background information, such as the client's medical history, known medical conditions, medications, and any history of cognitive impairment. If there is a family dispute, avoid taking sides or providing comments regarding the **validity** of any party's claim. Limit the information to the objective facts, as much as possible.

3. **Legal Context**: Inform the assessor about the legal context in which the capacity assessment is required, i.e., that **it** pertains to the creation of a will or powers of attorney.

4. **Purpose of the Assessment**: Clearly communicate the purpose of the assessment, For example: “to determine **whether** the client has the capacity to provide instructions to grant or revoke a power of attorney for property” or “to determine whether the client has the capacity to provide testamentary instructions”. Remember that the legal test for capacity is different for each action.

5. **Confidentiality and Consent**: Confirm the client’s consent to proceed with the assessment. Remind the assessor of the need to maintain confidentiality and obtain informed consent from the client for the assessment.

6. **Documentation and Reporting**: **Request** that the assessor provide a comprehensive written report that includes the following:
    a. A summary of their assessment process.
    b. Findings related to the client's capacity, including strengths and limitations.
    c. Opinions and recommendations, specifically addressing whether the client has the capacity to provide instructions for the will or powers of attorney.
    d. Any potential limitations or uncertainties in their assessment.

7. **Timeline**: Set a reasonable timeline for receiving the assessment report to avoid unnecessary delays in the legal **process**.

Remember that the objective is to obtain an unbiased, professional evaluation of the client's capacity. Be transparent with the client about the need for an assessment and their rights throughout the process, ensuring that their interests and well-being are prioritized. Ultimately, the assessment will help guide the legal proceedings and ensure that the client's wishes are respected while complying with legal and ethical standards.

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TAB 6

26th Estates and Trusts Summit – DAY TWO

Top Tips to Avoid Risk in Estate Planning with Clients

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Top Tips to Avoid Risk in Estate Planning with Clients

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Risk can arise in estate planning in a number of ways. Claims against Will-drafting solicitors can and do arise from:

- A failure to implement the testator's testamentary intentions through a drafting error;
- A failure to implement the testator's testamentary intentions because of a lack of necessary information regarding the testator's assets, family members, or other key details;
- A failure to implement the testator's testamentary intentions because of a lack of knowledge of relevant law, particularly (but not only) with respect to tax treatment of assets or with respect to planning for beneficiaries with disabilities;
- A failure to advise the client of their financial obligations to others, or of other limitations on their ability to dispose freely of certain asserts in their Will.
- A failure to observe the formalities of execution, with the result that a testamentary document is invalid;
- A failure to draft clearly, with the result that court intervention is required to ascertain the proper interpretation of a testamentary document;
- A decision not to prepare a testamentary document for a client whose capacity the solicitor deems lacking;
- Preparation of a testamentary document that is later challenged on grounds of incapacity or undue influence.

A drafting solicitor may face a potential claim from the estate trustee of the deceased, from a would-be beneficiary who received less than intended by the testator, or from a litigant seeking costs in connection with a Will challenge proceeding.

Given the nature of Wills, a potential claim usually does not come to light until many years after the retainer of the drafting solicitor. By the time an error is alleged with respect to the preparation of a testator's Will, the testator is likely deceased and the opportunity to correct any error is limited or non-existent.

A drafting solicitor can take many preventative measures to avoid a claim:

1. Develop a standard process for intake, meetings, review of drafts, and execution meetings. Stick to this process, or document why an exception was made.

2. Ensure that the client is alone when meeting and taking instructions with them, whether in-person or virtually. If an interpreter is required, it is best to rely on an independent professional rather than a family member with a potential interest.

3. Take notes, or get help taking them. You won't remember the meeting 10+ years later when asked. Dictate memos or use voice transcription after a meeting if necessary. Use another person in your meetings if possible (student, staff, etc.) to take notes – it is difficult to talk and write at the same time.

4. Ask the client for all possible information you might need, and document their responses. They know best the details of assets, spelling of names and your prompting them can help them to advise you of relevant information. A good questionnaire goes a long way.

5. Ask about the ownership of real estate and corporate assets. When the client is in doubt, check these independently.

6. Ask what assets and benefits may pass outside of the Estate (e.g. jointly-held assets, RRSPs/RRIFs/other assets with beneficiary designations, insurance, interest in other Estates).

7. Ask about, and get if possible, prior Wills and documents.

8. What toppings do you want, and would you like fries with your burger? Explore the relevance of Primary/Secondary Wills, mirror vs. mutual Wills, Trusts (including Alter Ego, Joint Partner, and *Henson*), Powers of Attorney,

etc. If a client does not want a document drafted or clause included that you recommend, document their refusal.

9. Be aware of the limits of your knowledge and capacity. Refer a client for external assistance if the client's needs require it.

10. When traditional 'red flags' are present, document instructions and observations thoroughly. These include advanced age, illness or infirmity, unequal distributions, significant changes to previous estate planning, circumstances creating real or artificial urgency, and the strong presence (influence) of another party in the client's life.

11. Be familiar with the basic requirement of capacity: a sound disposing mind. When there could be doubt, document observations that demonstrate the client's ability to reason through the decisions they have made. "Forceful in opinion" is not the same as "capable." Neither is "well-dressed."

12. Be aware of the special risks of virtual meetings – particularly the possibility that another party is secretly present, and the greater difficulty of assessing capacity by video call. Consider at least one in-person meeting to confirm instructions.

13. Send drafts to review any time you can.

14. Report back to the client on what you did, and what they told you. Send the questionnaire back to them, summarize what you were told.

15. Advise on what you are not advising on.

16. Precedents, templates and good training of staff are all important and helpful, but the lawyer is ultimately responsible for the finished product. Before execution, the lawyer should conduct a final review and check the fine details (e.g. "Primary" versus "Secondary" references in multiple Wills; names and relationships in mirror Wills; name spelling, clause numbering).

17. After execution and before final reporting letter, have the final signed document(s) reviewed with a clean set of eyes – look for signatures, obvious errors, wrong pages, etc.

Risk can never be completely mitigated, but the drafting solicitor who follows the guidelines above will be in a strong position to defend themselves in case a claim is ever brought.

GENERAL ESTATE PLANNING CLIENT CHECKLIST

Client Appearance

Glasses? Yes_____ No_____

Hearing Issues? Yes_____ No_____

Mobility Issues? Yes_____ No_____

Frail? Ill? Yes_____ No_____

Client independence? Yes_____ No_____

General Appearance?_____

Particulars related to above _____

Client Interaction

Able to read and speak English fluently? Yes_____ No_____

Provided own ID and contact details? Yes_____ No_____

Complete questionnaire on own? Yes_____ No_____

Did client deliver prior wills, POAs, etc.? Yes_____ No_____

Where reporting letter/bill to be sent?_____

Meet with client alone? Yes_____ No_____

If not, who there and why? _____

Did someone else bring client? Yes_____ No_____

Who and why? _____

Details of attendance of others _____

(expand in notes)

Reporting letter; when sent and to whom? _____

Account; when sent and to whom? _____

Who paid account? _____

What happened to original signed client documents? _____

ANY ADDITIONAL RELEVANT COMMENTS OR CHANGES FROM FIRST MEETING?

_____

_____

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TAB 7A

26th Estates and Trusts Summit – DAY TWO

Security and Bonds in Guardianships

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October 19, 2023

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Security and Bonds in Guardianships

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When is a bond/security required in a guardianship application?

(i) The Substitute Decisions Act

a. Court-Appointed Guardians of Property

Under subsection 25(2) of the *Substitute Decisions Act*, when appointing a guardian for someone who is mentally incapable of managing their own property, the Court can make an order requiring that the guardian "post security in the manner and amount that the court considers appropriate."[1]

There is no legal test for when a security or bond is required. In determining whether it is necessary in any given situation, the Court will consider the entire circumstance of a case. Guardianship bonds are more common in the following circumstances:

- Where the person appointed as guardian does not reside in Ontario;[2]
- A minor or incapable individual has considerable assets;
- Guardianship is disputed between several parties;
- The person who is appointed is not a close relative of the minor or incapable individual;
- Where there is a conflict of interest, even if the guardian has not demonstrated bad faith;
- Where the guardian will have a high level of direct access to the incapable person's assets; and

[1] *Substitute Decisions Act*, 1992, SO 1992, c. 30 section 25(2).
[2] *Substitute Decisions Act,* 1992, SO 1992, c. 30 section 24(3).

- Where the guardian is not a spouse, partner or parent and the incapable person has assets in excess of $100,000.[3]

The Public Guardian and Trustee (PGT) is often of the position that a bond should be posted and so the courts can be strict with requiring guardians to post security.[4] Whether a bond will be required will be considered from the perspective of what is in the best interests of the party under disability.[5] As stated in *Gryszczuk v Gryszczuk*, the duty of the Court is to ensure that the property of the incapable person is protected. Particularly, "the law is clear that the security for the due performance of the duties of a guardian of property is to guard against the unforeseeable and unexpected."[6]

b. Statutory Guardians of Property

Pursuant to section 17(6) of the *Substitute Decisions Act,* in an application to replace the PGT as an incapable person's statutory guardian of property, the PGT may refuse the appointment unless the applicant provides security, in a manner approved by the PGT, for an amount fixed by the PGT.[7]

The PGT has its own thresholds at which point they will request a bond. Bonds are often required "if the incapable person's assets are $250,000 or more or $500,000 including real estate and the applicant is a spouse, partner, or parent."[8]

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[3] *Robillard v Robillard,* 2015 ONSC 5450 at para 22 [*Robillard*].
[4] K. Whaley, *WEL Partners on Guardianship*, 2015, <www.welpartners.com/resources/WEL-on-guardianship.pdf>.
[5] *Gryszczuk v Gryszczuk*, [2002] O.J. No. 5944 (SC) at para 7.
[6] *Ibid*.
[7] *Substitute Decisions Act,* 1992, SO 1992, c. 30 section 17(6).
[8] Ministry of the Attorney General, *Helpful Hints in Completing your Application to replace the Public Guardian and Trustee as Statutory Guardian*, 2021, <www.publications.gov.on.ca/300539> [Helpful Hints].

Subsection 17(7) of the *Substitute Decisions Act* states that "if security is required under subsection (6), the court may, on application, order that security be dispensed with, that security be provided in a manner not approved by the PGT, or that the amount of security be reduced, and may make its order subject to conditions."[9] Where the applicant is the incapable person's spouse, the PGT will generally not require a bond if the applicant swears an affidavit stating that they will not commence any property division claims against their spouse without the express consent of the PGT. The PGT may also required that the incapable person's children, if any, consent to dispensing with the bond for the spouse.[10] The Court may require that the guardian provide the PGT with accounting on an annual basis as a condition to reduce or eliminate the bond.

(ii) The Children's Law Reform Act

Where a child is to receive money from an estate, life insurance or court order for damages, the funds will be paid into court or a court appointed guardian of property (unless the amount owing to the child is less than $35,000).

Section 55(1) of the *Children's Law Reform Act* (*CLRA)* states as follows:

Bond by guardian

> **55** (1) A court that appoints a guardian of the property of a child shall require the guardian to post a bond, with or without sureties, payable to the child in such amount as the court considers appropriate in respect of the care and management of the property of the child. R.S.O. 1990, c. C.12, s. 55 (1).

Where parent appointed guardian

> (2) Subsection (1) does not apply where the court appoints a parent of a child as guardian of the property of the child and the court is of the opinion that it is appropriate not to require the parent to post a bond.[11]

[9] *Substitute Decisions Act,* 1992, SO 1992, c. 30 section 17(7).
[10] *Helpful Hints, supra* note 7.
[11] *Children's Law Reform Act,* RSO 1990, c C.12 section 55(1) and (2).

As such, while a bond under the *CLRA* is always required initially, the Court may dispense with a bond where the applicant is a parent of the child. Usually, the Court will not dispense with a bond where the applicant does not have assets in excess of the amount of the child's funds.[12]

Cases where a bond was required for Guardianship

Section 24(3) of the SDA provides that a non-resident of Ontario shall not be appointed as a guardian of property unless the person provides security in a manner approved by the Court. However, the Court can order that this requirement not apply to a person or reduce the amount.[13]

The Court has made it clear that if the applicant is not a parent, biological or adoptive, a bond will likely be required for guardianship of a minor. In *Cusson v. Denofrio*[14], the Court noted that the use of the term "parent" in subsection 55(2) of the *Children's Law Reform Act*, without any expanded definition as seen in parallel legislation, rendered the great aunt and uncle of the minor unable to dispense with the bond.

Often, security will be required where there is a potential for a conflict of interest to arise that could affect how the applicant performs their guardianship duties. In *Barnes v Barnes*,[15] the Court required security from the applicant who wanted to manage her incapable aunt's property. The applicant was a beneficiary of her aunt's will. While there was no evidence that she would not act in her aunt's best interest, the court indicated that the less that the applicant spent on her aunt's care, the more she stood to inherit.[16]

[12] Ministry of the Attorney General, "Guardianship of a child's money and property", (May 20, 2021), online: Ontario <www.ontario.ca/page/guardianship-childs-money-and-property>.
[13] A. Casey and M. Salman, "The Annotated Guardianship Application 2021", March 25, 2021, The Law Society of Ontario [Annotated Guardianship].
[14] *Cusson v. Denofrio*, 2006 CarswellOnt 9912 (Ont Sup Ct).
[15] *Barnes v. Barnes*, 2008 CarswellOnt 4391 (Ont Sup Ct).
[16] *Ibid* at para. 27

In *Robillard v Robillard*, the Ontario Superior Court held that the bond would only be required if the incapable person's assets exceeded $100,000. After the six months given to "realize the respondent's assets", it turned out that the assets were worth less than $100,000 and the bond was dispensed with. The Court also noted that since the applicants were family of the incapable person, this weighed in favour of dispensing with the need for a bond.[17]

Cases where a bond/security was dispensed with

In *Sundell v Donylyk*[18], the Court appointed a daughter of an incapable person and relied on the following facts to dispense with security:

- The PGT did not recommend that security be posted;
- The person requesting security was a sibling of the applicant whose conduct had prompted the applicant to bring the application in the first place;
- The incapable person was living with someone other than the applicant;
- The applicant had offered to prepare annual financial accounts; and
- The parties had the ability to demand passing of accounts by the applicant at any time.[19]

In *Brown v Rowe*[20], the Ontario Superior Court dispensed with security because the PGT did not insist on a bond and the child's mother took no issue with the Court doing so.[21] Additionally, the Court noted that the record showed that the father had the child's best interests in mind and there was no reason to believe that he would be dishonest about his own son's funds.[22]

In *Connolly v Connolly and PGT*[23], the Court dispensed with the requirement to post security because the cash flow was going to be managed primarily by the Bank. Particularly, the portfolio

[17] *Ibid* at para 22.
[18] *Sundel v. Donylyk,* 2010 ONSC 5019.
[19] *Ibid* at para 5.
[20] *Brown v Rowe,* 2016 ONSC 5153.
[21] *Ibid at* para 190.
[22] *Ibid* at para 191
[23] *Connolly v Connolly and PGT,* 2019 ONSC 4148 [*Connolly*].

was subject to "several layers of internal checks and balances – providing protection of Taylor's assets."[24] In this case, the applicant would have only had access to a very small amount of money. Since the security would have cost 0.5 percent of the total assets and is typically paid out of the incapable person's assets, the payment would have only served to erode the incapable person's capital.[25] The court was to reassess the need for the posting security on each occasion the guardian of property passed accounts.[26]

In *Salzman v Salzman*[27], the Court did not require security because the applicant had managed his mother's finances for many years and had even paid out-of-pocket expenses for her. Further, the applicant's brother also consented to dispensing with a bond and his sister did not oppose it. While the Court granted the order without the bond, the Court permitted the sister to move for an order for security on notice to the parties.[28]

As part of dispensing with posting a bond, the Court can place restrictions on the guardian's power or ability to deal with the incapable person's assets, particularly real estate, without first obtaining approval of the PGT. The Court can also put a limit on the term of the bond or appoint two guardians who must act together jointly.[29]

How is security dispensed with?

Give the Court has discretion over bonds, pursuant to sections 25(2)(a) and 17(7) of the *Substitute Decisions Act* and section 55(2) of the *Children's Law Reform Act,* the affidavit accompanying the application should outline the reasons why the applicant should not be required to post a bond.

[24] Ibid at para 31.
[25] *Ibid* at para 32.
[26] *Ibid* at para 33.
[27] *Salzman v. Salzman,* 2011 ONSC 3555 at para 6.
[28] *Ibid.*
[29] Annotated Guardianship, *Supra* note 13.

The applicant should set out the incapable person's assets, wishes and needs and should indicate that the applicant is acting in the best interests of the incapable person in requesting to dispense with posting a bond. The Court will review this and consider the recommendations and concerns of the PGT.[30] Some sample Affidavit language is as follows:

> I understand that, pursuant to section 25(2)(a) of the *Substitute Decisions Act*, I may be asked to post security in the manner and amount that the Court considers appropriate.
>
> XX has a bank account into which his/her ODSP payments are deposited to each month. His/Her only other assets are the RDSP and TFSA, both of which are funded by me. In light of XX's modest assets, I am asking this Honourable Court to consider exercising its discretion to waive the requirement for me to post a bond.
>
> I am not under a disability; I am ordinarily resident in Ontario; I have never declared bankruptcy nor do I have any criminal convictions or judgments against me related to financial improprieties or mismanagement; I am not seeking compensation; I have no interest adverse to that of XX and I will bring an application to pass my accounts before the Court for the period ending two years from the dates of my appointment, should this Honourable Court issue an Order granting same.
>
> Should this Honourable Court determine that a security bond is in XX's best interests, I will undertake to obtain one.

Where the incapable person or minor has income in the form of a structured litigation settlement and the guardian will only have access to the fixed monthly payment from the structure at any given time.

> As is evident from the management plan, I will only have access to reasonable fixed sums of XX's property to be used solely for his/her benefit.

[30] *Robillard, Supra* note 8 at para 22.

Joint appointment with a trust company could also form the basis for a request to dispense with the bond requirement.

> YY trust company will be our joint guardian for property and will have control of XX's funds, I am requesting this Court to exercise its discretion, pursuant to section 55(2) of the Children's Law Reform Act, to waive the requirement for a security bond.
>
> YY is a trust corporation within the meaning of the *Loan and Trust Corporation Act* and shall keep, in its custody, all of XX's investable assets, with the exception of those held in trust with the Accountant for the Superior Court of Justice, which funds are to be readily available for the needs and for the benefit of XX, pending Court Approval of the Management Plan.

Limits on the ability to deal with certain assets, particularly real property, can also form the basis for dispensing with a bond.

> In the even that I am appointed as XX's guardian of property and am required to obtain a guardianship bond, I am requesting that the value of the bond required need not include the value of XX's home since he/she would like to remain living there as long as caregivers can provide him/her with the care that he/she needs and that he/she can afford, and that, instead of a bond being required for the value of the home, a condition be placed on my appointment that XX's home shall not be encumbered or disposed of without the approval of the Public Guardian and Trustee. The value of the bond, if required, would therefore reflect only the value of XX's investments."[31]

When does a bond/security end?

A bond/security would be terminated in the event that it is dispensed with; a party dies; the incapable person is no longer incapable; or the guardian is no longer suited to manage the incapable person's property. Generally, most guardianship bonds last until the guardianship is terminated or the Court dispenses with the bond. Some bond companies may require renewal of their bonds in order for them to remain valid.

[31]Annotated Guardianship, *Supra* note 13.

How much is a bond?

Subsection 25(2) of the *SDA* gives the Court discretion in fixing the amount of security. The amount of the bond/security is a calculation made by the Court based primarily on the total finances and assets owned by the incapable person. In applications to replace a statutory guardian, the PGT typically requires a security bond equal to double the value of the assets of an incapable person.

Bonds or security are obtained through a bonding or insurance company. To be bondable, the guardian generally must own assets in their own name. The bond premiums are usually paid from the incapable person's assets.[32] The cost is a percentage of the face value of the bond itself, which is imposed by a court (referred to as the premium). In *Connolly v Connolly*, the premium costs of the bond the PGT was recommending, for assets totalling approximately $1,600,000, would have been $8,000.00 annually.

What information is required to obtain a bond?

The bond or insurance company will need information regarding the guardian's credit history, occupation and personal net worth as well as the Management Plan submitted to the PGT. A "soft credit check" will likely be performed on the guardian so the bond/insurance company can be satisfied the individual is reliable in meeting financial obligations. A strong credit history and personal net worth increases the chances of obtaining the bond. Similarly, an applicant is more favourable if they have worked in an occupation that has helped them develop an understanding of their role as a guardian (i.e. bank or law firm). While people with low net worths can still be approved, more information or the assurance of working with a lawyer may be required to give the bond company more confidence.

[32] *Connolly*, supra note 23 at para 32.

What criteria should a client use when assessing bond companies?

Surety bonds are only to be issued by companies that are licensed by the federal government or provincial regulatory body (in Ontario, the Financial Services Regulatory Authority of Ontario). The PGT has a list of surety providers that it provides to guardians applying to replace a statutory guardian. A prudent broker should explain the process to the client, discuss documents, and outline the costs involved. Some companies have expertise in surety bonds for guardianships and estates, which can smooth the process.

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TAB 7B

26th Estates and Trusts Summit – DAY TWO

Estate Administration Bonds in Ontario – the WHATs, the WHENs and the HOWs

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October 19, 2023

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Estate Administration Bonds in Ontario – the WHATs, the WHENs and the HOWs

By: Laroux Peoples and Sanaya Mistry

What is an estate administration bond?

In Ontario, estate administration bonds are covered by the *Estates Act*, R.S.O. 1990, c. E.21, (generally covered under sections 35 – 43) and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (generally covered under Rule 74.04 – 74.11).

An estate administration bond (a "bond") is a security provided to the court by the executors of an estate to assure the Court that they will perform their duties as the executors in accordance with the provisions of the Will (if there is one) and the applicable legislation. A bond can be thought of as an insurance policy for the estate and is intended to cover any financial losses suffered by the estate of the deceased due to any dishonest or improper acts performed by the executors.

When is a bond required?

A bond is required from every applicant who applies to the Court for a Certificate of Appointment (also known as "probate") unless an exemption applies. As specifically noted in section 35 of the *Estates Act*,

> "except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased".[1]

Some examples in which the Court will typically require a bond (subject to the exceptions) are as follows:

1. an estate where the deceased died without a Will;
2. an estate where the deceased had a Will but the applicant is not named in the Will as the executor;
3. an estate where the deceased had a Will but the applicant who is named in the Will as an executor is a non-resident of Ontario or elsewhere in the Commonwealth;
4. a resealing of an appointment of an estate trustee without a Will; or
5. an ancillary appointment with a Will (for example, the applicant has obtained a probate certificate in another jurisdiction and requires probate for an Ontario asset).

[1] *Estates Act*, R.S.O. 1990, c. E.21, s. 35.

The following are some examples of applicants who are exempt from the requirement to post a bond with the Court:

1. the Government of Ontario or any ministry thereof or any Provincial commission or board created under any Act of the Legislation (for example, the Public Guardian and Trustee);

2. the surviving spouse of the deceased if the surviving spouse is the applicant, the net value of the estate for the purposes of section 45 of the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 does not exceed the preferential share under subsection 45(6) of that Act (which is currently $350,000 as of March 1, 2021[2]), and there is a list of the debts of the estate filed with the application;

3. a "small estate" which the current prescribed amount is $150,000 or less unless a beneficiary is a minor or incapable within the meaning of section 6 of the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, in respect of an issue in the proceeding[3]; and

4. a trust company authorized to do business in Ontario.[4]

What can the estate trustee expect the amount of the bond to be?

Typically, the amount of the bond is double the value of the estate. As noted in section 37(1) of the *Estates Act*,

> "the bond shall be in a penalty of double the amount under which the property of the deceased has been sworn, and the judge may direct that more than one bond be given so as to limit the liability of any surety to such amount as the judge considers proper."[5]

That said, a judge has the power to reduce the amount or dispense with the bond in special circumstances.[6]

In situations where there is an ancillary appointment or a resealing, the value of the bond will relate to the amount of assets in Ontario that the estate trustee is seeking jurisdiction over.[7]

How can a bond be dispensed with?

In order to dispense with a bond, an applicant typically submits a draft order dispensing with the bond and an affidavit in support of such request to dispense with the bond with the application for a Certificate of Appointment.

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[2] O. Reg. 54/95, s. 1(b).
[3] *Estates Act*, R.S.O. 1990, c. E.21, s. 36(3).
[4] *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25 at s. 175(4).
[5] *Estates Act*, R.S.O. 1990, c. E.21, s. 37(1).
[6] *Ibid* at s. 37(2).
[7] *Rules of Civil Procedure*, s. 74.11(1)(f).

As noted in the decision of *Re: Henderson Estate*[8] and reiterated in the recent decision of the *Estate of Tanya Claudia Davies*[9], the necessary contents of the affidavit in support of the request for an order to dispense with a bond should include:

1. the identity of all beneficiaries of the estate;

2. the identity of any beneficiary of the estate who is a minor or an incapable person;

3. the value of the interest of any minor or incapable beneficiary in the estate;

4. executed consents from all beneficiaries who are sui juris to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit (and if consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries by way of posting security or otherwise);

5. the last occupation of the deceased;

6. evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;

7. evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount; and

8. if all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt — amount and name of creditor — and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those creditors.[10]

How can a bond be cancelled at the end of the administration of an estate?

A bond may be cancelled by the court if the executor has passed their final accounts and distributed the entire estate (or paid the monies into court). According to section 42 of the *Estates Act*,

> "Where an executor or administrator has passed their final account and has paid into court or distributed the whole of the property of the deceased that has come to their hands, the judge may direct the bond or other security furnished by the executor or administrator to be delivered up to be cancelled."[11]

Furthermore, pursuant to section 43 of the *Estates Act,* a bond may be cancelled if the executor is able to provide the Court with evidence that the debts of the deceased have been paid and the

[8] *In the Estate of Robert James Henderson,* [2008] O.J. No. 5407.
[9] *Estate of Tanya Claudia Davies*, 2022 ONSC 4017.
[10] *In the Estate of Robert James Henderson,* [2008] O.J. No. 5407 at para 12 and *Estate of Tanya Claudia Davies*, 2022 ONSC 4017 at para 7.
[11] *Ibid* at s. 42.

residue of the estate has been distributed. This is typically done by filing an affidavit with the Court outlining the above.[12]

What are some recent decisions relating to bonds?

The following are some recent decisions by the Ontario Superior Court of Justice in respect of estate administration bonds.

The main takeaways from the cases discussed below are that (i) a court is unlikely to grant an order to dispense with a bond where the interests of all interested parties have not been considered, and (ii) the "small estate" designation likely eliminates the need for the court to grant an order to dispense with the bond (so long as there are no minor or incapable beneficiaries).

In the Estate of Sylvia Rotter, deceased, 2023 ONSC 625

In the Estate of Sylvia Rotter, deceased is a recent 2023 decision of the Ontario Superior Court of Justice where the Court was asked to grant an order to defer the payment of the Estate Administration Tax and an order dispensing with the bond of administration. Although the court granted the order to defer the payment of the Estate Administration Tax, the court did not grant the order to dispense with the bond due to the lack of information provided by the applicants in respect of the interests of one of the beneficiaries.

In this case, the applicants were the deceased's daughter and son-in-law. The individuals who would be entitled to the estate on an intestacy were the deceased's three children and the deceased's surviving husband and step-father to the deceased's children, Mr. Horst Rotter. The court was satisfied that the administration bond was likely not required for the protection of (i) creditors (as among other things the deceased's known debts were satisfied), and (ii) the deceased's three children all of whom had indicated/confirmed their consent for the appointment of the applicants as executors and an order dispensing with the bond.

In respect of the deceased's surviving husband, the court found that despite having a letter prepared by a designated Capacity Assessor indicating that Mr. Rotter was incapacitated, unable to act as executor and unable to sign any renunciation and consent, there was no indication in the materials provided to the court that (i) anyone was formally authorized to address this matter on Mr. Rotter's behalf pursuant to any ongoing power of attorney or any order formally appointing a guardian, and(ii) the Office of the Public Guardian and Trustee had not been consulted on this matter.

The Court specifically noted that the administration bond requirement "exists in part to protect an incapacitated estate beneficiary"[13] and that in the Court's view, "the consent of his step-children

[12] Ibid at s.43 which states the following: "Where an executor or administrator has produced evidence to the satisfaction of the judge that the debts of the deceased have been paid and the residue of the estate duly distributed, the judge may make an order directing the bond or other security furnished by the executor or administrator to be delivered up to be cancelled, but where a minor was or is entitled to a part of the estate under the distribution, the order shall not be made until after such notice as the judge may direct has been given to the Children's Lawyer, and where any person who is a patient in a psychiatric facility under the Mental Health Act was or is entitled to a part of the estate under the distribution, the order shall not be made until after like notice has been given to the Public Guardian and Trustee."

[13] *In the Estate of Sylvia Rotter*, *deceased*, 2023 ONSC 625 at para 4(d).

to dispense with the bond requirement, on its own, does not suffice to address the question of whether or not such a bond may be needed to protect [Mr. Rotter's] interests in the circumstances."[14] Further more, the Court noted that it should be provided with "the views of an attorney, guardian or Office of the Public Guardian Trustee appropriately addressing, on [Mr. Rotter's] behalf, whether a protective administrative bond is required here."[15]

As such, although the court granted the order to defer the payment of the Estate Administration Tax, the court did not grant the order to dispense with the bond.

In the Estate of Troy Deveron Haggitt, deceased, 2023 ONSC 4411

In the Estate of Troy Deveron Haggitt, the court did not grant an order dispensing with a bond because the requirement for a bond did not exist in the circumstances.

The applicant was the mother of the deceased who requested an order dispensing with the necessity for filing for an administration bond. The deceased was unmarried, had no surviving children, and was predeceased by his father. The applicant was the sole surviving parent and sole beneficiary to his estate valued at $112,450.01.

The Court went through the analysis of whether a bond was required in the first place and determined that given the fact that the value of the deceased's estate was less than $150,000 (which is the prescribed amount), the estate was considered a "small estate" and fell within the exceptions to the requirement of an administration bond as noted in section 36 of the *Estates Act*.[16]

As a result, the Court noted that "there accordingly is no need for a formal order dispensing with a bond requirement that does not exist in the circumstances, and in my view the court should not make unnecessary orders."[17] The Court conclusion was that "the requested Certificate of Appointment as Estate Trustee Without a Will should issue, without the applicant having to post any administration bond as security."[18]

In the Estate of Endre Gyorgy Kocsis, deceased, 2023 ONSC 627

In the Estate of Endre Gyorgy Kocsis, *deceased* is another decision of the Ontario Superior Court of Justice where the court did not grant an order dispensing with a bond, finding that this estate fell within the definition of a "small estate".

In this case, Brandee Lynn Kocsis-Hooper, the only child and only beneficiary entitled to a share of the estate, applied for a certificate appointing her as the estate trustee with a will for her father's estate. Her father died with an estate which was valued at approximately $66,063.21.[19]

Although the deceased was married to Deborah Lynn Kocsis at the time of his death, they had entered into a formal separation agreement which included a provision stating that the surviving

[14] *Ibid.*
[15] *Ibid.*
[16] *In the Estate of Troy Devron Haggitt, deceased,* 2023 ONSC 4411 at paras 9-10.
[17] *Ibid* at para 11.
[18] *Ibid* at para 12.
[19] *In the Estate of Endre Gyorgy Kocsis, deceased,* 2023 ONSC 627 at paras 1-2 and 5.

spouse would not act as the other's personal representative and that the deceased spouse's estate would be administered as if the surviving spouse had died first.[20] Further, Deborah Lynn Kocsis executed a renunciation regarding any entitlement to apply for a certificate of appointment of estate with a will, prioritizing Deborah Lynn Kocsis.[21]

Based on the estate value the court made a similar finding and decided that the application fell within the "small estate" exception and an order dispensing with the requirement of the bond was not required. [22]

In the Estate of Sylvia Judy Nizzero, deceased, 2023 ONSC 117

In the Estate of Sylvia Judy Nizzero, deceased was another recent decision in which an application for a certificate of appointment was made by two sisters to the Ontario Superior Court of Justice to administer their late sister's small estate.

Sylvia Judy Nizzero died without a will, was unmarried, had no children and had outlived her parents. Her two sisters were the only beneficiaries of the estate under the rules of intestacy.[23]

Given that the value of the estate was $13,173.68, the court also decided that an order to dispense with the bond was unnecessary, classifying the estate as a "small estate". The court also commented that the court should not be asked to make unnecessary orders in a world of scarce judicial resources providing further evidence that so long as the estate can be classified as a "small estate" an application to dispense with a bond is not required.[24]

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[20] *Ibid* at para 4.
[21] *Ibid* at para 6.
[22] *Ibid* at paras 14-16.
[23] *In the Estate of Sylvia Judy Nizzero,* deceased at para 3.
[24] *Ibid* at para 11.

Law Society of Ontario | Barreau de l'Ontario

TAB 8A

26th Estates and Trusts Summit – DAY TWO

Technology for Estate Lawyers

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October 19, 2023

TECHNOLOGY FOR ESTATE LAWYERS

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The will lawyer's tools have not changed for hundreds of years - a pen and a pad of paper.

Currently, most lawyers interact with their clients and perform their job in exactly the same manner as the previous 10 generations of solicitors did - a purely verbal discussion with the client and the lawyer.

1. Lawyers still expect their clients, including older clients, to be able to comprehend spoken descriptions of complex and difficult concepts.

2. The lawyer must then draw on a mental checklist of a multitude of estate, probate tax, income tax, family law, corporate law, real estate, intellectual property, foreign law, trust law and other issues. The lawyer then has to correlate those to the client's specific information.

3. Handwritten scribbles of the instructions with pen and paper are often illegible by the time it comes to draft the will and are rarely as comprehensive as the meeting itself.

4. The client leaves with only a handshake and a promise to get her a draft of the will. Clients often have very little recollection of the contents of that meeting after they leave.

5. The final product is a cut and pasted document- not easily understood by the client and, more often than not, containing typographic, if not more serious, errors.

Is it any wonder that, according to LawPRo, estate-related liability claims have doubled in 7 years? Nearly 1/3 of those claims relate to not asking the client the right questions. Another 30% relate to ensuring that the will reflects the instructions and that the communication between lawyer and client is understood by both. Almost 15% relate to missing an important legal or tax issue. Making clerical errors or not drafting the will in a timely manner account for most of the rest.

Many of these claims could be avoided if technology was properly utilized by the estate bar. Historically, lawyers have been slow to embrace technology due to conservatism and skepticism. Changing processes that have been in place for centuries is no easy task. Learning to use new technology requires an investment of time, which lawyers often lack due to their demanding schedules. However, these common justifications for resisting technology adoption should be reconsidered:

"**It's different than what I do now.**" – The question is whether it is better than a process that is decades, and in some cases, hundreds of years old.

"**I like my way better**." – Of course, past familiarity breeds subjective preference. Consider whether the focus should be on what is better for clients and for your practice in the long run.

"**It takes time to learn**." - Learning technology is an investment, but also qualifies as continuing legal education.

"**It costs money.**" – Efficiency almost always leads to savings in the long run.

"**It's not perfect.**" – No technology is perfect, but neither are humans.

"**It doesn't do everything.**" – Doesn't doing even 50% of a job more efficiently make a substantial difference?

Technology does not replace human skills – explanation, empathy and experience-attributes that are most important in a good will planning lawyer. Instead, skills like memory (did I remember to ask them about loans to their children?) and typping (sic) are assisted by technology.

Technology will not replace lawyers. Lawyers who use technology will replace lawyers who don't.

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TAB 8B

26th Estates and Trusts Summit – DAY TWO

AI and Legal Ethics 2.0: Continuing the Conversation in a Post-ChatGPT World - Slaw

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cpd

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Slaw

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AI and Legal Ethics 2.0: Continuing the Conversation in a Post-ChatGPT World

by Amy Salyzyn

Six months ago, I wrote a column about ChatGPT and other tools using large language models ("LLMs"). My aim there was to introduce this technology to readers and briefly outline intersections with legal ethics and access to justice issues. This column provides an update on this topic, including a deeper dive into legal ethics considerations.

I. What are we talking about?

My previous column included a basic overview about how ChatGPT and other tools built on LLMs work. I reshare the following two quotes as a starting point here:

> **A basic explanation of how ChatGPT works:**
>
> "It is trained on a large dataset of text, such as books and articles, to understand and generate human language. When given a prompt, it uses patterns it has learned from the training data to generate a response. It can answer questions, write stories, and have conversations, but its responses are based on patterns it has seen in the training data, rather than its own understanding of the world."
>
> **Another simple explanation:**
>
> "[W]hat ChatGPT is always fundamentally trying to do is to produce a 'reasonable continuation' of whatever text it's got so far, whereby 'reasonable' we mean 'what one might expect someone to write after seeing what people have written on billions of webpages, etc.'"

These are, of course, simplifications that do not capture all the nuances of how these models are created and work. A more thorough and technical explanation can be found in this video primer by Professor Harry Surden.

Two further caveats. First, a tool like ChatGPT is not created only by feeding it data. Human feedback is also used to improve the quality and appropriateness of outputs (see here for more detail). Second, there are vigourous debates among experts about how capable (and perhaps even dangerous) this sort of technology is or could become. One strand of these debates centres on whether such tools can (or will eventually be able to) engage in something akin to human reasoning. There are strong views on both sides.

II. Lawyer-use of ChatGPT and LLM-empowered legal tools

Following its November 2022 release, some lawyers have started to use ChatGPT in their legal work, sometimes with problematic results.

For example, an American lawyer made headlines in May after referencing fake cases in their submissions to a New York court. It eventually came to light that the source of the fake cases was ChatGPT, with the submitting lawyer explaining, "I heard about this new site, which I falsely assumed was, like, a super search engine." The lawyer admitted they "did not comprehend that ChatGPT could fabricate cases." The lawyer (and another lawyer involved with the court brief at issue) were fined $5000 by the court.

That ChatGPT fabricated cases is not surprising to those familiar with the technology. Because it has "seen" many citations and can replicate citation formatting conventions, ChatGPT can present users with a case citation

that looks real but does not refer to an actual case. As noted above, the tool's outputs are based on statistical modelling rather than "looking up" answers in a database.

Bottom line? "ChatGPT is not a reliable legal research tool. Do not use it for this purpose."

Lawyers need to understand these limitations.

However, the story of legal AI doesn't end here. There are several reasons why there is more to consider when it comes to using AI tools in legal practice, including: (1) legal research is not the only possible way lawyers might use ChatGPT; there are less risky applications; (2) ChatGPT is not the only LLM-empowered tool available to lawyers; there are other tools are built specifically for the legal services context with tailored training and controls; and (3) tools that use LLMs are not the only type of legal AI used by lawyers; for example, for over a decade, AI has been deployed to help lawyers with e-discovery and to detect patterns in case law with predictive analytics tools.

Given that this column focuses on LLM-empowered tools, I'll address points 1 and 2 in more detail below. For more on point three, you can see some of my previous writing, here and here.

(a) How are lawyers using ChatGPT?

While the American lawyer who misused ChatGPT for legal research has attracted lots of attention, other lawyers are using ChatGPT for a variety of tasks other than legal research, including:

- **Marketing:** ChatGPT can write a draft of a blog or social media post, or suggest catchy language for a firm's holiday card.
- **Correspondence**: ChatGPT can generate a first draft of a client email or help assistants prepare drafts of routine correspondence to courts.
- **Editing:** ChatGPT might offer suggestions on improving or "tightening up" first drafts of various legal documents.
- **Visualizing information:** ChatGPT could suggest ways to present evidence in a table as part of a factum.
- **Brainstorming:** ChatGPT could help generate possible risks associated with a client's business activity or provide an initial outline or set of questions for discoveries.

These are all "real life" examples of actual uses that I've seen lawyers share online (see, e.g. here and here) or talk about at legal conferences.

These uses of ChatGPT don't carry the same risks as using it for legal research; the "fake case" problem doesn't exist. That said, some of these use cases could raise concerns about client confidentiality. The ChatGPT privacy policy is clear that the information a user inputs does not remain private and may be used to train the tool unless you opt-out. Concerns about users leaking sensitive business information through ChatGPT have arisen in other industries.

(b) Other LLM-empowered tools

But, also, ChatGPT isn't the only AI tool powered by a LLM that lawyers can use. An increasing number of tools, trained and purpose-built for the legal services context, are available.

In February 2023, global law firm Allen & Overy made headlines by announcing that it was "deploy[ing] GPT-based legal app Harvey firmwide". A month later, PricewaterhouseCoopers announced that it was giving thousands of legal professionals access to Harvey. Casetext's CoCounsel tool, marketed as using AI to do "document review, legal research memos, deposition preparation, and contract analysis in minutes", has also attracted significant attention and high-profile users (see, e.g. here).

These are just two examples; the list of LLM-empowered legal tools being newly developed and marketed is long (see, for example, this list from February 2023) and continues to evolve. Large legal research companies are

also moving into this space. LexisNexis has announced Lexis+ AI, "a new product that uses large language models (LLMs), including GPT-4, to answer legal research questions, summarize legal issues, and generate drafts of documents such as demand letters or client emails." Last summer, Thomson Reuters acquired Casetext (maker of the CoCounsel tool referred to above) for $650 million. Some law firms are even building their own internal tools using LLMs (see here and here).

Increased reliability is a focus for those developing tools tailored to legal practice. A variety of techniques are used to improve reliability, including pairing LLM-empowered tools with legal databases to ensure more accurate results. For example, on the question of "hallucinations" (such as presenting users with fake cases), a LexisNexis representative noted, in the context of discussing its new Lexis+ AI product:

> "I don't think it possible to warrant, at this stage of AI development, that any model can hallucination-free…but we try to minimize it to the greatest degree possible by interconnecting the model and its answers to content that it's exposed to from LexisNexis in real time as that query interaction is taking place."

These tailored tools also use a variety of techniques to improve privacy. As noted on the webpage for Casetext's CoCounsel, that tool,

> "uses dedicated servers to access GPT-4, meaning your data isn't sent to 'train' the model as part of publicly accessible knowledge. Your and your clients' information stays private and is secured by bank-grade AES-256 encryption."

These added measures to increase accuracy and privacy make tailored legal AI tools more "fit for purpose" than ChatGPT, especially for legal research and drafting tasks. While it is still unclear what might be the full set of use cases for which these tools can be used effectively, reliably and securely, a lot of resources are being dedicated to trying to find out. I noted six months ago that "we are undoubtedly closer to the beginning of the story of how this technology may impact legal practice rather than the end." This is still the case.

And lawyers, or at least some subset of them, are engaged. 53% of the 610 Canadian lawyers who responded to a recent LexisNexis survey stated that they have used or were planning to use "generative AI" (another way of describing LLM-empowered tools) for legal purposes.

III. Intersections of legal AI and legal ethics

(a) Lawyer competence

One of the obvious intersections between legal ethics and LLM-empowered legal AI tools relates to a lawyer's **duty of competence.** In most Canadian jurisdictions, lawyers now have an explicit duty of lawyer technological competence, requiring them to have an "understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities."[1] In the few hold-out jurisdictions that have not yet adopted this duty, there is little doubt that the long-standing general duty of lawyer competence, which includes, among other things, "adapting to changing professional requirements, standards, techniques and practices" requires lawyers to understand and use relevant technology.[2]

What does competent practice mean in an age of AI and LLM-empowered tools? As a starting point, it is important to avoid *misuse*. The story of the American lawyer presenting fabricated cases is a stark example of what can go wrong if one doesn't properly understand a tool they are using. We also ought to be on guard for less obvious errors. In an article titled "Hallucination is the last thing you need", the authors warn of "common law contamination with subtle, non-obvious errors". Totally fake cases should be easy for courts to spot, but what about smaller changes in the words of a quoted passage? In the legal field, where so much depends on the particular words used, the potential for this sort of "contamination" is concerning. For example, an AI tool might substitute the word "fair" for the word "reasonable". This change may make little or no difference in non-legal

contexts but could have unintended but dramatic effects in law – a court applying a "fair person" standard of care in a negligence case may well reach a different result than one applying a "reasonable person" standard.

These accuracy concerns circle back to the discussion above. What it means for a lawyer to use an AI tool competently will turn on context or the task at hand. The risks and stakes associated with asking a tool to generate holiday card language are vastly different than those arising from using it to brainstorm discovery questions which are again different than attempting to locate a case that will help win your matter or to draft a final contract from scratch. Some people see the most promising (and possibly less risky) uses of LLM-empowered legal tech tools to be extractive as opposed to generative (see, e.g. this podcast discussion). For an example of an extractive use, see this LinkedIn post discussing using an AI tool to "hoover through the 500 page deposition of former President Donald Trump, extracting everything he said related to inflating his net worth, which is one of the NY AG's principal claims in its civil fraud lawsuit" and noting the tool's ability to provide results in minutes, as opposed to the hours which it would likely otherwise have taken to complete the task.

Not only do benefits and risks turn on what one is doing with a particular tool, it also matters *which tool* a lawyer uses. Doing legal research with a tool connected to a legal database and that provides links to actual cases is different than trying to search for cases or statements of law with a general "all-purpose" public tool, like ChatGPT.

Another important angle on the competence issue: when does failing to use a particular legal tech tool amount to *incompetence*? While there isn't, in my mind, a compelling argument that lawyers must now use LLM-empowered AI tools to practice competently, this could change in the future if reliable and secure tools become widely available and adopted. We have in the past reached this tipping point with other legal technologies – for example, the transition from doing legal research with print resources to using computerized resources (e.g. CanLII, Quicklaw and/or Westlaw). As an Alberta Court of King's Bench judge recognized in 2010, "the practice of law has evolved to the point where computerized legal research is no longer a matter of choice." In that context, lawyers had to adjust and start using certain newly available tools.

To some extent, the issue of AI use may end up being somewhat forced on lawyers if and when AI functionality becomes embedded within common tools that they are already using, like, for example, word processing software or email programs (see, e.g. here), practice management software or commonly used legal research databases. Engaging with AI may become hard to avoid, making it necessary for lawyers to have the requisite skills and awareness of limitations and risks.

(b) Lawyer efficiency and fair/reasonable fees

Lawyers are also subject to a **duty of efficiency.** Rules of professional conduct across Canada explicitly include an obligation to provide efficient legal services.[3] If there is a sufficiently accessible, reliable, and secure AI technological tool that can radically, or even materially, reduce the time that a lawyer takes to do a task, then there would seem to be a strong argument that a lawyer's efficiency obligation mandates its use (or the use of similar tools).

Relatedly, lawyers have a professional obligation **to only charge fair and reasonable fees.**[4] The prospect that AI might significantly reduce the time it takes lawyers to complete certain tasks has led to increased interest in moving away from billable hours and toward adopting alternative fee arrangements (see, e.g. here). But what does ethical value pricing (by way, for example, of a flat fee) look like in a scenario in which a lawyer can complete a task that used to take ten hours in only one? Charging a flat fee for this task that is equivalent to ten billable hours doesn't seem reasonable given the vast reduction in time spent, but, arguably, neither is only charging for the equivalent of one hour if we consider the necessity of applying the lawyer's legal training and expertise (and the costs associated with acquiring this training and expertise). The market will surely do some work sorting out what "reasonable" means in this new context, but that doesn't absolve lawyers from considering what ethical codes require when setting fees, especially when dealing with less powerful clients.

(c) Lawyer-client confidentiality

A lawyer's duty of **client confidentiality** is also engaged. As noted above, the legal tech industry is aware that lawyers have strong obligations to protect client confidentiality and are deploying a variety of techniques to mitigate confidentiality concerns with legal AI tools. It is also worthwhile to consider whether existing client confidentiality rules are sufficient in a digital era. The current confidentiality rule requires that "a lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless [certain narrow exceptions apply]."[5] As I've noted elsewhere, in a digital era, it can be very challenging to use standard tools or to operate without *some* exposure of client confidential information, either as a result of inadvertent data sharing with third-party service providers or because of sophisticated attacks by malicious actors. The current confidentiality rules don't meaningfully engage with or explicitly account for these confidentiality risks. The American Bar Association's *Model Rules of Professional Conduct* include language mandating lawyers "make reasonable efforts" to prevent inadvertent or unauthorized disclosure. The commentary to this rule elaborates:

> The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation …if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)

In my view, the contextual and proportionate approach described in this commentary provides more realistic and helpful guidance in a digital era than a simple hard-and-fast rule that only tells lawyers they must protect client information.

(d) Lawyer candour

Another place where American rules may offer a helpful template is in relation to lawyer **candour** with clients. In Canada, our candour rules focus, in large part, on the need to be candid with a client about their legal position.[6] The American Bar Association's rules recognize the importance of this type of candour but also mandate that lawyers "reasonably consult with the client about *the means* by which the client's objectives are to be accomplished" (emphasis added). Several U.S. commentators have argued, quite reasonably in my view, that this rule requires lawyers to disclose their use of AI tools to their clients. Indeed, in discussing this rule in a 2019 resolution, the American Bar Association stated:

A lawyer's duty of communication under Rule 1.4 includes discussing with his or her client the decision to use AI in providing legal services. A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool. In certain circumstances, a lawyer's decision not to use AI also may need to be communicated to the client if using AI would benefit the client. Indeed, the lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.

This reasoning seems equally applicable in the Canadian context. Law societies ought to consider issuing guidance specific to this issue.

(e) Supervision and delegation

One of the trickiest ethical questions about using AI tools in legal practice is what constitutes appropriate **supervision** and **delegation**. Rules of professional conduct state that lawyers retain "complete professional responsibility" for all matters that they delegate and contain restrictions on what work can be delegated to "non-lawyers".[7] Obviously, lawyers must remain responsible for their work product, whether they or not they have assistance and whether or not this assistance comes from other humans or machines. But, also, what does appropriate supervision mean when a lawyer uses AI tools, especially when it isn't always entirely clear how

such tools arrive at a particular output or conclusion? Elsewhere, I've suggested that, in the case of AI tools, law societies should consider "introducing a new due diligence rule that requires lawyers to take reasonable steps to ensure that the technology they are using is consistent with their professional obligations." Additionally, the issue of delegation raises some new questions when it comes to LLM-empowered legal AI tools, given their potential to do significant work across a range of lawyering tasks. Just because a machine may be technically able to complete a task that doesn't necessarily mean that it should be taken out of human hands. If LLM-empowered legal AI tools become more ubiquitous and powerful, determining what tasks are essential for lawyers to do (and why) will become an increasingly pressing issue.

(f) Administration of justice

Finally, when it comes to AI tools, it is crucial that lawyers be engaged with the broader ethical, legal, and normative issues that arise in this context. The production and use of AI tools raise very serious concerns in relation to copyright, privacy, environmental impacts, labour practices, and bias. Under rules of professional conduct, lawyers have an ethical duty to "try to improve" **the administration of justice**, which includes "a basic commitment to the concept of equal justice for all within an open, ordered and impartial system."[8] Lawyers and law societies have an important role to play in ensuring that the use of AI in our legal system is appropriate, fair, just and equitable. The American Bar Association has already urged lawyers to address the emerging issues relating to the use of AI in the practice of law, including "bias, explainability, and transparency of automated decisions made by AI" and the "ethical and beneficial usage of AI".

Conclusion

It has been a whirlwind year for AI, resulting in a vast amount of commentary, experimentation, and financial investment relating to the use of LLM-empowered legal AI tools. These developments raise important questions about lawyers' ethical obligations, the fundamentals of which are not new but which do require new consideration and application in the context of this particular technology.

Helpfully, many stakeholders, including Canadian law societies and courts, have already started to seriously engage with these questions. And, we can also potentially benefit from work in other jurisdictions. The Task Force on Responsible Use of Generative AI for Law, hosted at MIT, has already come out with draft principles that aim to ensure "factual accuracy, accurate sources, valid legal reasoning, alignment with professional ethics, due diligence, and responsible use of Generative AI for law and legal processes." Several American state bars are also actively considering what guidance they can and should provide to lawyers regarding AI usage (see here for some more discussion).

As developments in legal AI technology continue, so must our conversations about how lawyer's ethical obligations are impacted. Stay engaged and stay tuned!

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[1] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.1-2, Commentary [4A] and [4B], and corresponding provincial and territorial rules.

[2] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.1-1(k).

[3] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.2-1.

[4] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.6-1.

[5] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.3-1.

[6] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 3.2-2.

[7] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 6.1-1 and 6.1-3.

[8] See Federation of Law Societies of Canada, *Model Code of Professional Conduct,* Rule 5.6-1 and commentary thereto.

Comments

Verna Milner
September 28th, 2023 at 1:37 pm

Thank you for a very thought-provoking post. On the subject of the use of ChatGPT and the subject of "reasonable fee" could it not be argued that despite the shortcomings of ChatGPT for certain legal tasks because legal information is siloed a lawyer or legal professional might be tempted to choose the latter over having to subscribe to at least two if not more information providers? Would subscribing to one information provider suffice to meet the lawyer's duty of efficiency, and competent service to their client?

Law Society of Ontario | Barreau de l'Ontario

TAB 9

26th Estates and Trusts Summit – DAY TWO

A View from the Bench
(Linkable case citations)

The Honourable Bernadette Dietrich
Superior Court of Justice

October 19, 2023

cpd

26th Estates and Trusts Summit – DAY TWO

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A View from the Bench

The Honourable Bernadette Dietrich
Superior Court of Justice

1. Claims for Dependant's Support by Adult Children

- *Shafman v. Shafman*, 2023 ONSC 1391, 87 E.T.R. (4th) 231
- Bolte v. McDonald, 2022 ONSC 1922, 87 E.T.R. (4th) 231 (Div. Ct.)
- *Reeves v. Inglis*, 2022 ONSC 209
- *Paquette v. Darwin Patterson, Estate Trustee of the Estate of Diane Gail Paquette, Deceased*, 2023 ONSC 4062

2. Abuse of a Power of Attorney for Property

- *Stewart v. Zawadzinski*, 2023 ONSC 387, 87 E.T.R. (4th) 99
- *Ventura v. Ventura*, 2022 ONSC 6351, 82 E.T.R. (4th) 138
- *Ianuzziello v. Miguel et al.*, 2023 ONSC 4671
- *Zagorac v. Zagorac*, 2022 ONSC 3733

3. Powers of Attorney for Personal Care

- *Stewart v. Zawadzinski*, 2023 ONSC 387, 87 E.T.R. (4th) 99
- *Ventura v. Ventura*, 2022 ONSC 6351, 82 E.T.R. (4th) 138
- *Zagorac v. Zagorac*, 2022 ONSC 3733

- *McDowell v. McDowell*, 2021 ONSC 3139
- *Simpson v. Mehta*, 2023 ONSC 3063