TAB 2

Gifts and Incapacity

Wendy D. Templeton
Barrister and Solicitor

The Six-Minute Estates Lawyer 2009

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION

Law Society of Upper Canada
Six-Minute Estates Lawyer 2009
April 6, 2009

Gifts and Incapacity

Wendy D. Templeton, BA, LLb, TEP
Barrister & Solicitor

1. ANALYSIS OF CAPCITY TO MAKE A GIFT

There are three basic requirements for a gift that the cases and texts all set out with consistency[1]:

1) donor's intention to make a gift

2) acceptance, and

3) delivery.

In addition, the donor must have title to the property sufficient to effect a contract, and both the donor and the recipient must have capacity to make or receive the gift. Acceptance is generally assumed, and this paper will focus on the capacity of the donor not the recipient. Once the three basic requirements are met the gift is irrevocable as between the parties in the same manner as a binding contract.

The test for the donor's capacity is the same as for making a contract:[2]

> Capacity to make a gift is defined in most Canadian cases as the capacity to understand the nature and effect of the transaction.[3] Under this definition, the test is identical to that used in the law of contract. However, it has been held that the degree of understanding which the donor must possess varies with the circumstances of the case, and that in certain circumstances the requirement of testamentary capacity must be met.

The capacity to make a gift is not often litigated in isolation. In many cases gifts are made during lifetime but the gift is not challenged until the donor has died and the gift has

---

[1] See for example Bruce Ziff, *Principles of Property Law*, 4th ed., Toronto, Thomson Carswell, 2006 at 142.

[2] G. B. Robertson, *Mental Disability and the Law in Canada,* 2nd ed., Toronto, Carswell, 1994 at 209-210.

[3] *Ibid* footnote 109 at 209 - the text cites the following cases in support of this statement in footnote 109: *Baird (Trustee of) v. Baird* (1993), 10 Alta. L.R. (3d) 150 (Q.B.); *Royal Trust Co. v. Diamant,* [1953] 3 D.L.R. 102 (B.C. S.C); *Stoppel v. Loesner* (1974), 47 D.L.R. (3d) 317 (Man. Q.B.); *Nova Scotia Trust Co. v. Corkum* (1961), 31 D.L.R. (2d) 27 (N.S. C.A.); *Fairchild v. Mitchell* (1959), 19 D.L.R. (2d) 521 (N.S. C.A.); *Moore v. Stygal* (1914), 60 O.W.N. 126 (H.C.).

been discovered, often along with a new will which is also challenged. In such a case the main challenge may focus on the Will, not the gift with the result that the testamentary test is used. Even where an *inter vivos* gift is examined, the gift is often challenged on the basis of undue influence rather than lack of capacity, although the donor's state of mind is relevant in determining undue influence. Capacity to make a gift is a separate inquiry from that of undue influence. More often litigated in terms of capacity, is that to appoint an attorney. This also is a separate test, one that is set out in the *Substitute Decisions Act, 1992*[4] referred to here as the SDA.

An excellent review of the case law on capacity to make a gift[5] and for other transactions including marriage, is contained in a report entitled *Mental Competency, Final Report* prepared by David N. Weisstub and delivered to the Minister of Health for Ontario on September 18, 1990. It is beyond the scope of this paper to complete an extensive review of the case law, but I mention this report here for the benefit of those who may be looking for material and have discovered, as has the author herein, that sources are scarce and difficult to find.

The variation in the "degree of understanding" required and the circumstances where testamentary capacity is required for an *inter vivos* gift is set out in the leading case *Re Beaney* [6] a case applied and cited with approval in both in the U.K.[7] and in Canada.[8]

The *Beaney* case is important authority in the development of the test for capacity for a gift as few cases set out clearly the test, as is stated:

---

[4] S.O. 1992, c. 30, as amended.
[5] At pp 98- 100, and this includes a review of some of the cases listed *supra* note 3.
[6] [1978] 2 All ER 595 (Ch. D.) 595.
[7] See D. Goodman *et al, Probate Disputed and Remedies,* 2nd ed., Bristol, Jordans, 2008 at 4.
[8] *Supra* note 1 at 142.

> There appears to be no authority which deals clearly with the degree or extent of understanding required for the validity of a voluntary disposition made by deed.[9]

The case continues with an extensive review of authorities and sets out what is now the "textbook" test for capacity in making an *inter vivos* gift:

> In the circumstances, it seems to me that the law is this. The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.[10]

Mrs. Beaney transferred her home, which was her only asset of value to Valerie, the oldest of her three children. Valerie arranged for the deed of transfer to be prepared, and visited her mother in the hospital along with the solicitor who had administered her husband's estate and an old friend of the widow's husband from work. Prior to signing the transfer the mother was questioned several times and she confirmed on the basis of "yes and no" questions, and by nodding her head, that she understood she was transferring the property to the daughter. The witnesses all testified that they thought she knew what she was doing. At this time the mother was suffering and advanced state of senile dementia. The Court found that notwithstanding the apparent understanding of the transaction that Mrs. Beaney lacked the capacity to make the gift:

---

[9] *Supra* note 6 at 600.
[10] *Supra* note 6 at 601.

> In all the circumstances, I might be prepared to accept that Mrs. Beaney knew that the transfer had something to do with the house and that she knew that its effect was to do something which her daughter Valerie wanted. But I am quite satisfied on the evidence, and I find as a fact, that she was not capable of understanding, and did not understand, that she was making an absolute gift of the property to Valerie.[11]

Prior to the *Beaney* decision, the Supreme Court of Canada came to a similar conclusion; in the circumstances of that case the capacity required for a valid gift was testamentary capacity. In *Mathieu v. Saint-Michel*[12] a simple gift of an apartment building was made by deed of donation, subject to a life interest along with an obligation upon the recipient to maintain the property and provide for the widow's personal requirements. The recipient was a stranger not related to the donor and the widow was suffering from severe senility at the time of the gift. It is not entirely clear whether the Court was considering the transfer of the property a gift or a quasi-contract, and it relied on the provisions of the Civil Code relating to agreements. The evidence of mental capacity based on the facts and medical opinion, were held to be sufficient to shift the burden of proof of capacity to the party supporting the gift. The Court found that in these circumstances, the test for capacity for the donation of the property was the same as that of making a Will. The nature of the understanding, or "consent" required on the part of the donor is set out in some detail:

> Among the persons declared by the Civil Code to be incapable of contracting are those who "by reason of weakness of understanding are unable to give a valid consent": Art. 986. The evidence...was sufficient to raise a prima facie presumption of that degree of mental weakness or unsoundness and to cast upon those supporting the instrument of donation the burden of displacing it by convincing proof that the deceased at the time was able to give such a consent: Russell v. Lefrancois [(1884) 8 Can. S.C.R. 335 at 372]; Phelan v. Murphy [Q.R. (1938) 76 S.C. 464 at 467]. This would mean that she was of an understanding adequate to the act done, that she was able to grasp its

---

[11] *Supra* note 6 602.
[12] [1956] S.C.R. 477.

> character and effect in the setting of her circumstances, that she appreciated the value of the property, about $20,000, her own physical condition, her future, that she was disposing of her property to a virtual stranger whom she would not have as a neighbour for at least two years, and that the donation was irrevocable: that she had, in short, the intellectual capacity in some degree to view these matters in their entirety in the perspective of her present and possible future life and her family relationships.
>
> So formulated and in the circumstances of the particular case, the test of competency in making the agreement is the same as that of the will.[13]

This case does not stand for the conclusion that the test for capacity for a gift is the same as that for making a Will. Rather, the test is a subjective one, and as in *Beaney* all the circumstances of the donor must be considered in determining the level of understanding and capacity required. In normal circumstances, the capacity test for a gift requires a lesser degree of mental faculties than that of testamentary capacity.

Can a gift be valid if the donor is under the influence of drugs or alcohol at the time of the gift? Intoxication *per se* may not invalidate a gift, however if the donor is so impaired as to be *non compos mentis* and not know the nature of the transaction, the gift is void as between the immediate parties as would be the result in the case of a contract.[14]

There are different tests for capacity for different actions or transactions. A summary of these is contained on page 7 of Wendy Greisdorf's paper, *A review of the Various Tests for Capacity,* [15] and this is attached to this paper.

---

[13] *Ibid* at 487.

[14] H. R. Gray, *Garrow and Gray's Law of Personal Property in New Zealand*, 5th ed, , Wellington, Butterworths 1968 at 45; see also E. L. G. Tyler, N. E. Palmer, *Crossley Vaines' Personal Property*, 5th ed., London, Butterworths 1973 at 299.

[15] (2004) *Estates and Trusts Conundrums in Cognition – Legal Issues in Capacity*, The Law Society of Upper Canada.

2. ANALYSIS OF THE STATUTORY SCHEME IN THE SUBSTITUTE DECISIONS ACT REGARDING CAPACITY

Section 2 of the *Substitute Decisions Act, 1992*[16] or SDA, provides for certain presumptions of capacity and a reverse onus of proof where there is a guardian of property:

> **2.** (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract. 1992, c. 30, s. 2 (1).
>
> (2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care. 1992, c. 30, s. 2 (2).
>
> (3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be. 1992, c. 30, s. 2 (3).
>
> (4) In a proceeding in respect of a contract entered into or a gift made by a person while his or her property is under guardianship, or within one year before the creation of the guardianship, the onus of proof that the other person who entered into the contract or received the gift did not have reasonable grounds to believe the person incapable is on that other person. 1992, c. 30, s. 2 (4).

It is notable that the presumption of capacity for entering into a contract is not extended to gifts in the SDA. This may because while it is important for contracting parties to be able to rely on the validity of their commercial transactions, such a rationale has no application to the gift situation. Since there is no statutory presumption of capacity for a gift, donees, and their advisors must be careful to ensure that capacity is not in question. It is not clear, but it is likely that ss. (3), which permits a person to rely on the presumption of capacity refers only to the presumption in ss. (1) and not the presumption of capacity at common law.

---

[16] S.O. 1992 c. 30 as amended

The onus of proof required by ss. 2(4) is interesting. Unlike ss. 2(1) it includes contracts *and gifts*. Generally at common law a person under a guardian for property could not make a gift and the gift was void not merely voidable. This was to prevent conflict with the management of the estate by the guardian. The SDA has not specifically changed the common law rule, but implicitly this is the result; if there is a statutory reverse onus, then gifts made by the individual where a guardian of property exists are valid - providing the donee can prove capacity.[17] It is axiomatic therefore that a person who has a property guardian may have capacity the capacity to make a gift.

The ability of persons to enter into valid transactions even while under a guardianship order is consistent with the recommendations made in the *Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons* made to the Government of Ontario prior to the reforms that resulted in the current SDA. The values reflected in the Charter pertaining to an individual's rights and freedoms were to be reflected in any new law. In addition, interference with right, and self determination were to be interfered with only to the extent necessary:[18]

> Mental incapacity should be defined so that the legislation to provide substitute decision making for persons who are incapable cannot be used to interfere with the freedom of action of persons who know what they are doing and appreciate the consequences of their acts, or can do so with assistance.[19]

The SDA sets out the following "incapacity test" for managing property:

> **6.** 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

---

[17] *Supra note 2 at pp 201-204 for a detailed discussion of the common law rule and its status in Canadian law, including Ontario.*
[18] See the final report, sometimes referred to as the "Fram Report", 1988, at 41 *et seq.*
[19] *Ibid* at 92.

or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1992, c. 30, s. 6.

And the SDA sets out a "capacity test" for appointing an attorney for Property:

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

(a) knows what kind of property he or she has and its approximate value;

(b) is aware of obligations owed to his or her dependants;

(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(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. 1992, c. 30, s. 8 (1).

(2) A person is capable of revoking a continuing power of attorney if he or she is capable of giving one. 1992, c. 30, s. 8 (2).

9. (1) A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property. 1992, c. 30, s. 9 (1).

The statutory tests make it clear that the capacity to grant a power of attorney is possible even where the person is incapable of managing his or her property. It is consistent with the cases as well, particularly given the subjective test in *Beaney*, that a person who is incapable of managing property may be capable of making a gift. In such a case, unless there

is a guardian for property, the statutory reverse onus does not apply, but the case law would support a reverse onus where evidence of mental incapacity exists.

3. ANALYSIS OF THE POWER TO MAKE GIFTS UNDER THE SUBSTITUTE DECISIONS ACT

The scheme for managing property by an attorney and guardian is contained in sections 31 to 42 of the SDA. Within these sections are a number of provisions permitting and regulating gifts made by attorneys for property and guardians of property. The language in the statute is sometimes confusing, referring sometimes only to guardians of property, but section 38 provides that these provisions (or at least the ones under discussion) also apply to attorneys under a continuing power of attorney. However, these provisions apply only to attorneys where the grantor is incapable of managing property, or the attorney has reasonable grounds to believe that the grantor is incapable of managing property. I will refer to attorney in this discussion to include both attorneys and guardians of property, except where discussing the incapacity test for the provisions to apply to attorneys.

There is a general power to make gifts in section 37 (3) and (4) of the SDA:

(3) The guardian may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.

2. Charitable gifts. 1992, c. 30, s. 37 (3).

(4) The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).

2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.

3. Charitable gifts may be made only if,

   i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or

   ii. there is evidence that the person made similar expenditures when capable.

4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.

5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.

The power to made gifts to friends and relatives under this section is subject to the requirement *inter alia* that there be sufficient funds to meet the incapable person's financial needs for support education and care and that of any dependant's and the other expenditures set out in ss. 37(1). It must be reasonable to believe based on intentions expressed by the incapable person that he or she would have made such gifts if capable. In addition, the gift is not to be made if the incapable person expressed a wish to the contrary. These provisions would counsel making sure that gifts are authorized in the power of attorney document and that if gifts are to be made by the attorney, that the incapable person be consulted. Further, the attorney may consider obtaining financial plan that demonstrates financial security to meet the needs of the incapable person as expressed in 37(1).

An attorney is restricted from dealing with any property that is the subject of a specific gift in the incapable person's Will, but may also make accelerate gifts in the grantor's Will by completing them during the lifetime of the testator:

35.1 (1) A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will. 1996, c. 2, s. 22.

(2) Subsection (1) does not apply in respect of a specific testamentary gift of money. 1996, c. 2, s. 22.

(3) Despite subsection (1),

(a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or

(b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37. 1996, c. 2, s. 22.

Under section 33.1 an attorney has the obligation to determine whether the grantor has a Will and its provisions. These two sections, 33.1 and 35.1 combine to assist the attorney in managing the property to ensure the grantor's wishes are respected, but that such wishes are not to compromise the best interests of the incapable person during lifetime.

The final statutory provision in this regime for gifts by attorneys is in section 36. This provides:

36. (1) The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property disposes of under this Act, and anyone who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest. 1996, c. 2, s. 23.

(2) If the residue of the incapable person's estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection (1) shall share the residue in amounts proportional to the amounts to which they would otherwise have been entitled. 1996, c. 2, s. 23.

(3) Subsections (1) and (2) are subject to a contrary intention in the incapable person's will. 1996, c. 2, s. 23.

Accordingly, even if it is necessary for an attorney to dispose of property that is the subject of a specific gift in the Will, the intended beneficiary may be compensated from the residue of the estate, if it is sufficient, and if the Will does not contain a contrary intention.

This statutory scheme in the SDA for gifts by an attorney, raises some very interesting questions and issues.

One problem is the requirement for incapacity for an attorney to have the power to make gifts (as opposed to a guardian). The incapacity test for managing property must be met[20], or the attorney must have reasonable grounds to believe it has been met.[21] Capacity under any test is always a gray area, and it can fluctuate from time to time. If the person is capable of managing his or her affairs, will the gift be valid if the attorney acts in good faith? What does the attorney have to do to establish "reasonable grounds"? Would an assessment be sufficient, or would it be mandatory? Would doctors at least need to be consulted? Assuming there is not an assessment, what kind of advice does the attorney need in order to show that he or she determined correctly what constitutes incapacity to manage property? The cases have been clear that a person can be frivolous, or exercise bad judgment without conclusion *per se* that the person is incapable to manage his or her property. The attorney may be taking a risk that the gift will be set aside by a disappointed beneficiary or disgruntled family member, and may face liability as well. Will a motion for directions under the Rules of Civil Procedure be entertained, or should the attorney get the consent of all potentially affected parties?

---

[20] Under sections 6 and 38.
[21] Section 38

The case of *McDougald Estate v. Gooderham*[22] provides some very helpful assistance in the interpretation and application of the provisions of the SDA relating to capacity and gifts. Although there was a sale of property by the attorney's rather than a gift, the statutory scheme in the SDA would apply equally to a gift of property.

Mrs. McDougald died with an estate of over forty million dollars. The following is a chronology of events:

- In 1986, she made her last Will in which she left her Palm Beach Florida property to her sister. The Will also directed that if the property was owned by a corporation controlled by her at the time of her death, the Trustees do whatever was necessary to transfer the property to the sister.
- In 1992 a power of attorney was executed appointing four attorneys who were also the four directors of Mrs. McDougald's holding company "El Brillo".
- In February 1996, during Mrs. McDougald's lifetime, her attorney's for property sold the Palm Beach home for five million US dollars and placed the proceeds in a separate account. The property was sold because the testator could no longer use the property (she was to ill to travel), the upkeep was very expensive and there were difficulties with the tenants; and finally the estate was asset rich and cash poor – and the attorneys were encroaching on capital to maintain the property.[23] At the time the property was sold, the Palm Beach property was held by El Brillo.

[22] (2005) 17 E.T.R. (3d) 36 (Ont. C.A.)
[23] *Ibid* at para 10, and see the lower Court decision (2003) 2 E.T.R. (3d) 1027 (Ont.Sup.Ct .J.) at para. 64.

- In June 1996 Mrs. McDougald executed a codicil that delayed the distribution to two of her nephews who were also the applicants in the litigation until age 25. Evidence was provided that there was a concern that these two children would be too young to receive their inheritance at age 18 and that the postponement until age 25 (the appeal decision says age 21) would forestall "riotous living".[24] Mrs. McDougald's legal counsel determined that at the time of the codicil, she had testamentary capacity on the narrow issue of the codicil, but given the complexity of her financial affairs, she would not have had capacity to do a new Will, or deal with the Palm Beach property.
- In November 1996 Mrs. McDougald died.

The executors brought an application for an order permitting them to pay the proceeds of the sale of the Palm Beach property to the estate of the sister consistent with the terms of the Will, and the anti-ademption provision s. 36 of the SDA. The nephews, who were entitled to a small portion of residue of the estate, argued that s. 36 did not apply on the grounds that Mrs. McDougal was capable at the time of the sale, and that the property was held by a corporation and not disposed of by the "attorneys" as required by s. 36.

The application was granted and the nephews appealed unsuccessfully, and were ordered to pay costs of the appeal. The decision stands for the following principals:

[24] *Ibid* lower Court decision para. 33.

- Although the property was held by a corporation, the attorneys were also directors of the corporation, the decision to sell was made in their capacity as attorney's, thus the property was disposed of by the attorneys as required by s. 36 of the SDA.

- There was ample evidence of Mrs. McDougald's mental incapacity. Even if she were capable, the attorney's had reasonable grounds to believe that she was incapable at the time of the sale as required in s. 38 of the SDA.

- The fact that it was accepted and supported by impartial testimony that Mrs. McDougald had capacity to make the codicil four months after the sale did not undermine the finding of incapacity to manage her property at the time of the sale. There was even speculation by the Court that at the time of the codicil:

> she had one of her "windows" of superficial lucidity and, thus, was mentally capable for the purpose of executing the "very narrow codicil".[25]

- Section 36(1) was not restricted to situations where dispositions were made under s. 37(1) as this would undermine the purpose of the anti-ademption provision. In disposing of the property the attorney's were acting to preserve the assets of the estate without disturbing the gift under the Will. The sale was not necessary to make the expenditures as required by s. 37(1) for Mrs. McDougald's needs for support but this was not necessary for the application of s. 36.

- While section 35.1 was not law at the time of the sale, even if it did apply the language in (3)(b) which permits a disposition where it was "necessary to comply

---

[25] *Supra* note 22 at para. 59.

with the guardian's duties" was broad enough to encompass "prudent dispositions of specifically bequeathed property".[26]

Any review of an attorney's power to make gifts would be incomplete without a reference to the decision of Cullity J. in *Banton*.[27] Mr. Banton's attorney's transferred his term deposits to an irrevocable *inter vivos* trust to protect them for his own benefit and that of his beneficiaries, his children, under his then existing Will. Mr. Banton was the beneficiary of the trust during his lifetime, with his children being the beneficiaries upon Mr. Banton's death.

Muna, Mr. Banton's third wife, a waitress at the nursing home where he was a resident challenged the transfer to the trust. Mr. Banton's marriage to Muna revoked his existing Will and although he had capacity to marry, he lacked testamentary capacity to make a new Will. Thus his estate was intestate, with the resulting scheme of distribution.

Cullity J. acknowledged that an attorney could do anything an incapable person could do, except make a Will and had the authority to create the irrevocable trust. However, the attorney's went further than was necessary to protect Mr. Banton's interests. The attorney's who were Mrs. Banton's children, and who were also the beneficiaries under the trust after Mrs. Banton's death, were making an unauthorized *inter vivos* gift to themselves. The attorneys had the authority to set up the trust, but they did not have the authority to set up the trust with respect to the irrevocable capital interests to themselves.

---

[26] *Supra* note 21 para 39.

[27] *Banton v. Banton* (1998), 154 D.L.R. (4th) (Ont. Gen. Div.). Much has been written about this case, and the power to do estate planning generally under a power of attorney, see for example *infra* note 29, and a detailed discussion is beyond the scope here.

Actions of attorney's in making gifts may also be set aside pursuant to the *Family Law Act*[28] and the *Fraudulent Conveyances Act.*[29] While there are not any cases specifically on point, the Courts have set aside transactions where transfers were effected to defeat creditors or a spousal claim,[30] and these grounds could easily be applied to the misuse of an attorney's power to made gifts, even if otherwise authorized under the SDA.

4. CONCLUSION

The test for capacity varies with the circumstances and the nature of the transaction. The owner of property may have the capacity to make a gift even if incapable for other purposes, as the capacity test is a subjective one, depending on many factors. A person may also be incapable of managing his or her own property and still have testamentary capacity for very limited purposes such as a codicil making a minor change.

An attorney's power to make gifts is only authorized if the grantor is incapable of managing his or her property, or the attorney has reasonable grounds to believe so. A gift of property may be made by an attorney if it is consistent with a specific gift in the grantor's Will, and it does not otherwise offend the obligations in the SDA.

Where an attorney wishes make a gift and capacity is an issue it may be wise to obtain legal and medical advice. The attorney might also consider having the grantor join in the gift, in the event the attorney does not meet the criteria for making gifts as set out in s. 38 of the SDA. This should be done with extreme

---

[28] R.S.O. 1990, c. F.3
[29] R.S.O. 1990, c. F.29
[30] M. Elena Hoffstein *et..al.,*(2002) Family and Estate Law Issues for the Power of Attorney, Capacity, Consent and Substitute Decisions: An Essential Update, the Law Society of Upper Canada, at 4-25 to 4-28.

caution if there is a specific gift in the grantor's Will of the property and capacity is an issue. If the grantor turns out to be capable to make the gift and capable of managing property, the anti-ademption provision may not apply, but as *McDougald* has shown, the grantor may be incapable of remedying this in a new Will.

Full Adult Capacity

Capacity to make a will – the person must understand the nature and effect of a will, the extent of the property that he is disposing, and appreciate the claims of those who would normally expect to benefit.

Capacity to make a beneficiary designation – see capacity to make a will.

Capacity to enter into a contract – the person must understand the nature of the contract and its specific effect in the specific circumstances.

Capacity to create a trust – the person must understand the nature of the trust and its specific effect in the specific circumstances.

Capacity to hire an agent - see capacity to enter into a contract. Also, the person must understand that the hiring agent confers authority on the agent to impose contractual liability on the principal's behalf.

Capacity to retain a solicitor – see capacity to hire an agent. (also see SDA s. 3)

Capacity to give a gift – the person must understand the nature of the gift and its specific effect in the specific circumstances.

Capacity to manage property – the person must understand information relevant to making a decision regarding his property and must appreciate the reasonably foreseeable consequences of a decision or lack of decision. (see SDA s. 6)

Capacity to grant a continuing power of attorney for property – the person must know his property and its value, his dependants, the wide powers he is granting, the accountability of the attorney, his own revocation power, the risk of imprudent management, and the risk of misuse of the power. (see SDA s. 8)

Capacity to manage personal care - the person must understand information that is relevant to making a decision concerning his own health care, nutrition, shelter, clothing, hygiene, or safety, and be able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. (see SDA s. 45)

Capacity to grant a power of attorney for personal care –the person must understand whether the attorney has a genuine concern for the grantor's welfare and must appreciate that the attorney may make such decisions for him. (see SDA s. 47)

Capacity to marry – the person must appreciate the nature and responsibilities of the relationship, the state of previous marriages, the effect of the marriage on one's children, (and possibly have the capacity to care for his own person and property).

Capacity to divorce – the person must want to be separated and no longer be married.

Capacity to separate – the person must know with whom he does not want to live.

Incapacity