TAB 10

Part 4: The Legal Framework

Taking Instructions – Red Flags Relating to Capacity and Undue Influence (How do you know there is a Problem?)

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A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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CONTINUING LEGAL EDUCATION

Taking Instructions:
Red Flags Relating to Capacity and Undue Influence
(How do you know there is a Problem?)

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> **There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine....**
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> *Boyse v. Rossborough*, (1857), 6 H.L. Cas. 2 at 45.

Each area of the pactice of law has its particular challenges. For estates lawyers one of the central challenges can be the ability to identify the difference between what the Lord Chancellor in *Boyse v. Rossborough* called "twilight" and "darkness".

It is common for estates lawyers to be called upon to assess their client's legal capacity to make a will, power of attorney or significant gift. That important task is made more difficult because the concepts of legal capacity and undue influence are somewhat fluid and, at least at the margins, ill-defined.

Unfortunately, the difficulties inherent in the process of client assessment are matched by the risks arising from failing to do it properly. In the case of the elderly client the risks are particularly apparent, both because of their relative vulnerability, and their relative wealth. In addition, the solicitor is also at risk. The duty which a solicitor owes to the client encompasses a duty to competently assess the client's capacity and freedom of undue influence, and any failure to do so can lead to a claim of professional negligence. Arguably both areas of risk are

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becoming more pronounced. Dr. Kenneth Shulman and his colleagues suggest that the increasing complexity of family structures, combined with the high prevalence of dementia in older adults, point toward an increase in estate litigation, and specifically, challenges to wills.[1]

Notwithstanding the apparent trend toward litigation, it is important to remember that a lawyer's duty does not extend to guaranteeing the capacity of the client. The duty is to make reasonable and informed inquiries and to document his or her observations. If capacity is in issue the lawyer may be one of a number of witnesses whose evidence will be considered by the court. The lawyer's evidence is important and sometimes determinative of the issue, even in the face of evidence of medical professionals who conclude that the person is incapable.[2]

With these high stakes in mind, this paper will attempt to chart several of the minefields which a solicitor must cross when taking instructions, and in so doing, to highlight a number of the "red flags", or warning signs, which should put the solicitor on alert.

A. Testamentary Capacity

Capacity at law varies depending on the context, and in particular, depending on the task or transaction at hand. For purely personal decisions, the law sets a fairly undemanding standard; however, for financial decisions, and in particular, financial decisions that might affect

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[1] K.I. Shulman et al., "Contemporary Assessment of Testamentary Capacity (2009), 21 *International Psychogeriatrics* 433 at 434.

[2] See *Beaurone v. Beaurone Estate*, [1997] O.J. No. 1481 (Gen. Div.)

others, it sets a more exacting standard.[3] In the case of testamentary capacity, Canadian courts have adopted the test set out in the leading case of *Banks v. Goodfellow*[4]:

> **It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not been made.**[5]

Of course defining testamentary capacity as an abstract standard is much easier than identifying the lack of it in any particular case. The fact that an individual can answer questions when prompted may not be enough to indicate the presence of what the courts have referred to as a "disposing mind". In his decision for the Supreme Court of Canada in *Leger v. Poirier*[6], Justice Rand described a disposing mind as one that is able "to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions...." He also warned that "[m]erely to be able to make rational responses is not enough... There must be a power to hold the essential field of the mind in some degree of appreciation as a whole...." [7]

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[3] *Calvert v. Calvert* [1997] O.J. No. 553 (G.D.) at p. 11 (QL), aff'd [1998] O.J. no. 505 (C.A.), leave ref'd [1998] S.C.C.A. no. 161.

[4] (1870), L.R. 5 Q.B. 549 at 565 (Q.B.).

[5] Quoted with approval by Cullity J. in *Banton v. Banton* [1998] O.J. No. 3528 (G.D.) at para. 27. A brief search suggests that in the last 10 years *Banks v. Goodfellow* has been cited in over 60 decisions in Canada.

[6] [1944] S.C.R. 152.

[7] *Ibid.* at pp. 162-163.

But what, precisely, does one look for? In answering this question it is important to begin by noting that the question of testamentary capacity is a question of fact to be determined in light of the circumstance of the particular case.[8] Moreover, although it is an issue on which expert opinion can shed an invaluable light, the courts assume that testamentary capacity is something which laypersons "of good sense" should be able, at least in broad terms, to evaluate.[9] It follows that a solicitor is assumed to have the basic ability to assess capacity.

Apart from the ability, the solicitor also has a duty to assess capacity. The courts have made it clear that a solicitor has a professional obligation to inquire into capacity, and to document the evidence in that regard.[10] The scope of the duty was given cogent expression by Justice Cullity, in *Scott v. Cousins*, in language since approved by the Ontario Court of Appeal:

> **The obligations of solicitors when taking instructions for wills have been repeatedly emphasized in cases of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and, if there is any possible doubt - or other reason to suspect that the will may be challenged - a memorandum, or note, of the solicitor's observations and conclusions should be retained in the file.... Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God - or even judge - and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question.[11]**

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[8] *Biggins v. Rock*, [1990] O.J. no. 601 (G.D.) at p.13 (QL).

[9] *Re Davis*, [1963] 2 O.R. 666 (C.A.) at p. 7 (QL).

[10] *Hall v. Bennett Estate* [2003] O.J. No. 1827 (C.A.) at para. 22; *Graham v. Bonnycastle*, [2004] CarswellAlta 1098 (C.A.), at para. 28, leave to appeal ref'd [2005] CarswellAlta 493 (S.C.C.).

[11] *Scott v. Cousins,* [2001] O.J. No. 19 (S.C.J.) at para. 70. Quoted with approval in *Hall v. Bennett Estate supra* note 9 at para. 23.

Although Justice Cullity concludes that a solicitor is not required to "play God", the authorities nonetheless suggest the solicitor's questioning in this regard should be diligent, that unusual circumstances should prompt inquiry, that the process should be well-documented, and that, where appropriate, a medical examination should be arranged.[12]

Finally, it is important to note that where a will is challenged, the burden of proving capacity lies with the propounder of the will.[13] As a result, not only will the solicitor be required to consider capacity before the instrument is executed, but after the fact that solicitor's conclusion may become the centerpiece in any defence of the will itself.

Given the importance of the solicitor's assessment, not only to the client, but also to the professional well-being of the solicitor herself, a practical appreciation of the different elements of the standard in *Banks v. Goodfellow* is crucial. In its decisions in *Re Schwartz*[14], and again in *Hall v. Bennett Estate*[15], the Ontario Court of Appeal translated that standard into a checklist of considerations:

In order to have a sound disposing mind, a testator:

* **must understand the nature and effect of a will;**
* **must recollect the nature and extent of his or her property;**
* **must understand the extent of what he or she is giving under the will;**

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[12] See the discussion in M. Litman & G. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity", 62 *Can. Bar Rev.* 457 at 493.

[13] *Vout v. Hay*, [1995] 2 S.C.R. 876; *Scott v. Cousins, supra* note 10 at para. 39.

[14] [1970] 2 O.R. 61 (C.A.) at p.14 (QL), aff'd [1971] S.C.J. no. 96 (S.C.C.).

[15] *Supra* note 10.

* **must remember the persons that he or she might be expected to benefit under his or her will; and**

* **where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will.**[16]

Inevitably questions will arise as to how the individual criteria in this list should be evaluated. The second criterion--the testator's recollection of "the nature and extent of his or her property"--was considered in some detail in *Palahnuk v. Palahnuk Estate*.[17] In that case the testatrix had suffered from depression for years, and in fact, prior to her death in 2002, the Office of the Public Guardian and Trustee had managed her property. However she had executed a will in 2001. Following her death that will was challenged by her surviving son. Plaintiff's counsel argued, *inter alia*, that the testatrix's solicitor had only elicited quite general statements from the testatrix concerning her property. Nonetheless Justice Stach concluded that the testatrix understood the extent and value of her property to a sufficient extent to meet the requirements of the standard in *Banks v. Goodfellow*:

> **Testators are not required to be accountants nor to have an accountant's knowledge and understanding of their estate. If such a meticulously demanding standard were required as urged by counsel for Bobby Edward Palahnuk many testators would be unable to meet it.**[18]

The fourth and fifth criteria on the list in *Hall v. Bennett Estate*--being the testator's recollection of possible beneficiaries, and her appreciation of possible claims--was considered in *Boghici Estate v. Benke*.[19] In that case the testator had correctly described his assets to his

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[16] *Ibid.* at para. 14.

[17] [2006] O.J. No. 5304 (S.C.J.).

[18] *Ibid.* at para. 82.

[19] [2005] O.J. No. 214 (S.C.J.).

solicitor. However, he also advised that he did not have a will. In fact he did have a will; and under its terms one of his stepsons was to be his executor and sole beneficiary. On reviewing the evidence, Justice Day concluded that despite appearances the testator did not have a faulty memory. It appeared that his apparent lapse was simply an attempt to prevent his stepson, with whom had a poor relationship, from inheriting.[20]

The case law thus makes it clear that although a solicitor has a duty to assess the capacity of an intending testator, the task of determining whether the standard in *Banks v. Goodfellow* has been met may be problematic, even difficult. Keeping in mind the specific *Bennett Estate* criteria, the realities of practice suggest that a number of "red flags"--indicators of less than adequate testamentary capacity--should be noted. Specifically, concern might be prompted where the client is:

1. elderly;
2. has intellectual impairments and/or memory problems;
3. is taking medications that affect cognition;
4. cannot readily identify assets or family members;
5. is unsure if he or she has a will;
6. has hearing or vision problems affecting comprehension or ability to communicate;
7. brings in typed list of Will instructions but cannot articulate wishes independently;
8. defers to caregiver/partner on questions of assets or wishes;
9. has difficulty understanding or reading language spoken by lawyer;

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[20] *Ibid.* at paras. 22-23.

10. has recently suffered emotional or physical upheaval, such as the loss of a spouse, or a relocation;

11. has recently been hospitalized, or has suffered a change or change in medical status;

12. is making accusations against one or more close family members, extreme enough to suggest possible delusions.

B. The Capacity to Give a Power of Attorney

As will be recalled, capacity is task or context-specific. The capacity to give a power of attorney therefore has a different quality than testamentary capacity. Powers of attorney are unique in that, being a species of agency, they integrate the principles of the law of agency. In *Godelie v. Pauli (Committee of)*[21] Justice Misener stressed that when evaluating the capacity of a party to give a power of attorney, one must be conscious of the requirements implicit in any agency relationship, and in particular, one must recall that agency relationships are ultimately founded on contract.[22]

Powers of attorney also differ from wills in that the capacity requirements have been codified in statute. Subsection 2(1) of the *Substitute Decisions Act*[23] ("SDA") provides that a person aged 18 years or more is capable of entering into a contract, and subsection 2(3) provides that a person is entitled to rely on the presumption of capacity with respect to another person

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[21] [1990] O.J. No. 1207 (Dt. Ct.).

[22] *Ibid.* at p.5 (QL). Justice Misener held as follows:

> **Agency is really no different than contract. Indeed in many cases the agency relationship is created by contract. The criteria here will be the capacity to understand the nature of agency, and the nature of the terms of the particular appointment under consideration. And if the particular appointment is confined to one specific act or circumstance, obviously less capacity is required than if the appointment is a general one. Indeed, if the appointment is the latter, then the capacity to appreciate the extent of the donor's estate would, I think, become part of the criteria....**

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

unless he or she has "reasonable grounds" for believing that the other person is incapable of entering into the contract. As a result of these provisions Ontario's courts have made it clear that under the SDA capacity is presumed, and that presumption will be held to be rebutted only on the basis of "compelling evidence".[24] Finally, subsection 8(1) of the SDA provides that a person is capable of giving a continuing power of attorney[25] 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.**

When interpreting and applying these criteria it is useful to keep in mind the proper approach to the interpretation of remedial legislation. In *McDougald Estate v. Gooderham*[26] the Ontario Court of Appeal followed the trial judge in concluding that the language of the *Substitute Decisions Act* should be given a liberal interpretation "to ensure the intended purpose of the

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[24] *Knox v. Burton,* [2004] O.J. No. 1267 (S.C.J.) at paras. 26, 33, aff'd [2005] O.J. No. 864 (C.A.).

[25] It should be noted that the test for capacity to give a power of attorney for personal care is different yet again. Subsection 47(1) of the SDA provides that a person is capable of giving a power of attorney for personal care if he or she has the ability to understand whether the proposed attorney has a genuine concern for his or her welfare and appreciates that he or she may need to have the proposed attorney makes decisions for him or her.

[26] [2005] O.J. No. 2432 (C.A.).

legislation is respected."[27] In *Abrams v. Abrams*[28] the purpose of the SDA was held to be the protection of the vulnerable.[29] In fact, in his decision in that case, Justice Strathy adopted dicta from Justice Kiteley's decision in *Re Phelan*[30] in which the latter agreed that the social values that underpin the S.D.A.--which she characterized as being the protection of "those who cannot protect themselves"--are of "superordinate importance".[31] Therefore, although the case law dealing with this issue is not extensive, it seems probable that the requirements listed in s.8(1) should be given a liberal interpretation--and more specifically, an interpretation that is sensitive to the needs of the party granting the power of attorney.[32]

How, then, should the individual items listed in s.8(1) be interpreted? For example, how much knowledge or understanding, on the part of the party granting the attorney, is required so as to satisfy the requirements of the provision? A superficial comparison of the relevant sections of the SDA suggests that the test for competence under s.8(1) is less demanding than that for determining capacity to manage property noted in s.9(1). Thus in *Covello v. Sturino*[33] Justice Boyko held as follows:

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[27] *Ibid.* at para. 20.

[28] [2008] O.J. No. 5207 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 1223 (Div. Ct.), aff'd [2009] O.J. no. 2645 (C.A.).

[29] *Ibid.* at para. 47.

[30] [1999] O.J. no. 2465 (S.C.J.).

[31] *Ibid.* at paras. 22-23.

[32] The difference between the "strict" and "liberal" approaches was described by Professor Sullivan (*Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2009)) at p. 467:

> **The difference between strict and liberal construction is largely one of attitude and elasticity. ...Liberal construction, by contrast, favours and facilitates the application of legislation to advance the remedial goal. ... If reasonable doubts or ambiguities arise, they are resolved in favour of those seeking the benefit of the statute.**

[33] [2007] O.J. No. 2306 (S.C.J.).

> **There is little case law defining the degree of knowledge that will be sufficient to refute claims of incapacity under section 8(1). When compared with the test for determining capacity to manage property in section 9(1) of the *Act*, however, it seems that granting a Power of Attorney requires a lesser level of capacity than that required to manage property. In conducting a capacity assessment under section 8(1), the court need not be satisfied that a person has a sophisticated understanding of her financial situation...**[34]

However, Justice Boyko then goes on to suggest that superficial comparisons of the tests may be deceptive: "[c]ase law does suggest, however, that the possibility of impaired intellectual capacity makes the s.8(1) test more difficult to satisfy..."[35] As an example she cites the situation in *Re H.(E.)*[36]. There, the Ontario Consent and Capacity Board held that the party had some capacity to manage her day-to-day financial affairs, but still questioned whether she would have been able to meet the test under s.8(1). The Board noted that the party "knew to the penny how much money she had in the bank." However, she also suffered memory loss and cognitive dysfunction. In consequence her capacity to pay her bills and calculate account balances was a "small island of capacity ... in an otherwise diminished capacity to manage her own property."[37]

The foregoing suggests that although somewhat different considerations arise when assessing a client's capacity to give a power of attorney, a solicitor would be ill-advised to assume that he or she can somehow be less vigilant. Indeed the red flags noted in the case of testamentary capacity would appear to be equally applicable in the case of capacity to give a power of attorney.

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[34] *Ibid.* at para. 20.

[35] *Ibid.* at paras. 19, 21.

[36] 2001 CarswellOnt 8209 (O.C.C.B.).

[37] *Ibid.* at paras., 30, 32-33.

C. Is Memory Loss Synonymous With Loss of Capacity?

The issue of memory is integral to the test for testamentary capacity set out in *Hall v. Bennett Estate.* Specifically, the Ontario Court of Appeal held that the testator "must recollect the nature and extent of his or her property", and "must remember the persons that he or she might be expected to benefit under his or her will...."[38] However, it is apparent from a review of the case law that the courts approach the issue of memory loss with a degree of flexibility. The absolute loss of memory may amount to incapacity; however, the process of losing one's memory need not, in itself, render the individual incapable.

The approach of the Saskatchewan Court of Appeal in *Royal Trust Corp. of Canada v. Ritchie*[39] is instructive. In its decision the Court upheld the finding of the lower court that evidence suggesting incidents of short-term memory loss and stress did not give grounds for finding a lack of testamentary capacity. In so doing, the Court made it clear that memory is a matter of degree:

> **As noted above, in my view, the affidavits of the children, including the exhibits to Russell's affidavit, merely refer to incidents of short-term memory loss, losing objects and stress in emotional circumstances which are consistent with the general condition of dementia referred to in Dr. Balaton's affidavit. They do not speak to the critical point of testamentary capacity or to the relevant time. Accordingly, I am of the view that the chamber judge was correct in concluding that there was uncontradicted evidence of testamentary capacity such that proof of the will in solemn form should not be ordered. Accepting the test that the matter to be determined by the chamber judge is whether there is a genuine issue to be tried, the evidence in this case more than meets the test and leads to the conclusion that there is not**

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[38] *Supra* note 10 at para. 14.

[39] [2007] S.J. No. 275 (C.A.), leave to appeal ref'd [2007] S.C.C.A. no. 417.

such an issue to be tried disclosed in the material filed before this chamber judge.[40]

The same flexibility of approach can be found in the case law dealing with the related issue of delusions. Thus in *Royal Trust Corp. of Canada v. Saunders*, Justice Blishen noted that only some delusions will negate testamentary capacity:

In order to affect testamentary capacity, a delusion must:

1. **be one of "insanity"; and**
2. **be in relation to the testator's property or expected beneficiaries.**

With respect to the facts before the court, Justice Blishen concluded that the testators' beliefs about his children were "unreasonable, unfair and somewhat irrational", although they were not "insane delusions" in the sense that the testator did not hold beliefs that were contrary to all the evidence.[41]

The same approach is highlighted in *Fuller Estate v. Fuller*[42], a decision of the B.C. Supreme Court, confirmed by the B.C. Court of Appeal. In that case the court ultimately found that the testator had lacked capacity to make a will. Nonetheless, in reaching that decision the court stressed that delusional beliefs need not, in themselves, negate testamentary capacity:

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[40] *Ibid.* at para. 20. See also *Hall v. McLaughlin Estate* [2006] O.J. No. 2848 (S.C.J.) at paras. 45, 48 (party losing memory in 1992, but not found to have lost capacity until 1997); *Re Coughlan Estate* [2003] P.E.I.J. No. 85 (SCTD) at paras. 106, 140 (court accepting expert evidence suggesting that memory loss is not the equivalent of loss of capacity).

[41] See also the helpful discussion in *Banton v. Banton*, *supra* note 4 at paras. 32ff.

[42] [2002] B.C.J. No. 2555 (B.C.S.C.), aff'd [2004] B.C.J. no. 757 (C.A.). To the same effect, it is worth noting *Re Weidenberger Estate*, [2002] A.J. no. 1157 (Q.B.), in which a will was upheld despite evidence concerning the testator's "delusional belief system".

> **It is not enough to vitiate a will if the testator is delusional. The authorities are clear that only delusions that bear directly on and influence the testator's deliberations may bottom an attack on testamentary capacity. The question becomes, then, whether Mr. Fuller was delusional about his children in 1997, and if he was whether that delusion affected his decision to disinherit them ...**[43]

It is also helpful to recall the Supreme Court Canada case of *O'Neil v. Brown Estate.*[44] In his decision Justice Estey held that delusions do not, in themselves, invalidate a will "unless they have brought about the will or constituted an actual impelling influence in the making thereof."[45]

This curial flexibility with respect to the issue of both memory and delusions increases the difficulty for the solicitor when taking instructions. In particular it means that the solicitor must ask sufficiently detailed questions to be able to evaluate fully the client's memory and his beliefs about those around him.

D. Vulnerability to Undue Influence: Wills and Gifts

Although the issue of undue influence often overlaps that of capacity, it is nonetheless conceptually separate and as such gives rise to a distinct set of red flags. Moreover the issue of undue influence itself has different characteristics, depending on whether it arises in connection with testamentary gifts or inter vivos gifts.

When considered in a testamentary context, influence will be considered "undue" when it amounts to coercion. The test in this regard was summarized in the late nineteenth century in

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[43] *Fuller Estate v. Fuller, supra* note 41. at paras. 30, 32.

[44] [1946] S.C.R. 622.

[45] *Ibid.* at p. 7.

Wingrove v. Wingrove[46]: " to be undue influence in the eye of the law there must be - to sum it up in a word - coercion."[47] This test continues to be utilized in the case law. For example it was noted in *Banton v. Banton*[48], Justice Cullity both approving the test, and embellishing it as follows:

> **A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator and is no more effective than if he or she simply delegated his will-making power to the other person. [emphasis added]**[49]

But while the cases continue to cite the *Wingrove* test, it should be stressed that what is in issue is often more subtle than the word "coercion" might suggest. In fact in *Wingrove* itself, in language that has since been adopted in Canada, the Court noted that persistent persuasion at a time when the testator is particularly vulnerable might constitute undue influence:

> **The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced for quietness sake to do anything, this would equally be coercion, though not actual violence. [emphasis added]**[50]

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[46] (1885) 11 P.D. 81.

[47] *Ibid.* at p.82.

[48] *Supra* note 5.

[49] *Ibid.* at paras. 58-59.

[50] *Wingrove v. Wingrove, supra* note 45 at pp. 82-83, quoted with approval in *Kirkham v. Fox,* [1993] B.C.J. No. 2518 (B.C.S.C.) at para. 8.

On the other hand the cases also suggest that, depending on the circumstances, pressure, persuasion, even begging, by a potential beneficiary, is permissible. Thus in *Ravnyshyn v. Drys*[51] the court noted as follows:

> **There is nothing improper in equity for one to attempt to solicit a will in his or her favour and to use all lawful means toward effecting that end. Indeed some amount of persuasion and mere influence is permissible so long as it does not amount to undue influence....**

For the solicitor, the practical problem becomes distinguishing between pressure that amounts to coercion and pressure that is an acceptable feature of human interaction. In the case of the elderly this distinction may be particularly difficult to draw because of their particular vulnerability to undue influence. As Dr. Peisah and his colleagues note[52], a variety of factors, including physical impairment, age-related mental disorders, and the deterioration of neuropsychological function, also suggest that, everything else being equal, the older client may be especially vulnerable to undue influence.

In the case of gifts, the legal starting-point for the assessment of undue influence is different. A party challenging an inter vivos gift need only demonstrate that the donor and the recipient enjoyed the type of relationship in the context of which the recipient could persuasively influence the donor. It is not necessary to demonstrate that the recipient actually did influence the donor to make the gift. Once the special relationship is proven, the onus then shifts to the recipient of the gift to rebut the presumption. In her separate concurring decision in the leading

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[51] [2005] B.C.J. No. 831 (B.C.S.C.) at para. 104, applic. to reinst. appeal dismissed [2007] B.C.J. no. 1662 (C.A.).

[52] C. Peisah, "The Wills of Older People: Risk Factors for Undue Influence" (2008), *International Psychogeriatrics* at pp. 5-7.

case of *Geffen v. Goodman Estate*[53], Wilson J. noted that equity has long recognized that transactions between persons standing in certain relations--including, in particular, formalized fiduciary relationships--will be presumed to be relationships of influence until the contrary is shown. However, she also made it clear that relationships in which undue influence will be presumed are not confined to the traditional fixed categories.[54]

Following the lead in *Geffen*, Canadian courts have found a variety of relationships to have given rise to a presumption of undue influence, including the following:

1. adult child and infirm parent[55];
2. aunt and nephew, where the aunt's mental capacity was waning and the nephew had taken it upon himself to manage his aunt's affairs to such an extent that he became her fiduciary[56];
3. heir of fortune and his brother-in-law, where finances were managed by brother in law[57];
4. man and his attorney under a power of attorney, where the donor of the power of attorney was in a diminished mental and physical state[58];
5. farmer and his live-in housekeeper and her husband, where the farmer was a simple man easily led by persons in whom he had placed his trust, and where he considered his housekeeper and her husband as family[59]; and

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[53] (1991), 81 D.L.R. (4th) 211 (S.C.C.).

[54] *Ibid.* at para. 28.

[55] *Coish v. Walsh*, [2001] N.J. No. 230 (C.A.). See also *Brandon v. Brandon*, [2001] O.J. No. 2986 (S.C.J.), aff'd, [2002] O.J. no. 4593 (C.A.), leave to appeal ref'd [2004] S.C.C.A. No. 37.

[56] *Streisfield v. Goodman*, [2001] O.J. No. 3314 (S.C.J.), aff'd [2004] O.J. no. 1992 (C.A.), leave to appeal ref'd S.C.C.A. no. 356.

[57] *Ogilvie v. Ogilvie Estate*, [1996] B.C.J. No. 1506 (B.C.S.C.), aff'd [1998] B.C.J. no. 722. (B.C.C.A.).

[58] *Co-operative Trust Co. of Canada v. Mellof*, [1996] S.J. No. 188 (Q.B.).

[59] *Paquette Estate v. Labine*, [1987] O.J. No. 28 (S.C.J.).

6. sister and her brothers, – where the sister had a mood disorder and was advised by her brothers regarding the disposition of her assets immediately after her mother's death.[60]

What emerges from these cases is that the category of relationship is not, in itself, determinative. Instead, the key is that the substance of the relationship can be characterized, in some manner, by dependence. In fact a predominant theme of the recent cases is that the donor was dependent on, or relied upon, the recipient in some manner.[61] For example, the donor has been dependent on the recipient for personal care, for mobility, for assistance in managing financial affairs, or simply for companionship.

In many of these cases, the pattern of dependence is correlated with a difference in ages between the parties, the donor being, for example, an elderly parent, and the recipient being his or her adult child. As Justice Shannon noted in *Kovach v. Beardsley*[62], "courts have not been hesitant in finding that a relationship giving rise to the presumption exists where the dominant relationship is that of child and aged or infirm parent".[63] It is true that this type of relationship will not, in itself, give rise to the presumption of undue influence. It is only where the child could potentially dominate the parent will it be presumed that the child has exercised a persuasive influence. The decision in *Dmyterko v. Kulikowsky*[64] is instructive on this issue. In *Dmyterko,* the Court examined the relationship between a father and his eldest daughter at discrete points in time to determine if the presumption of undue influence applied with respect to

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[60] *Geffen v. Goodman Estate, supra* note 52.

[61] Liza C. Sheard & Grant E. Brailsford, "Undue Influence and Inter Vivos Gifts", *The Hamilton Law Association, 15-Minute Estates & Trusts Lawyer, February 5, 2004*

[62] [1991] A.J. No. 671 (Q.B.).

[63] *Ibid* at p. 6 (QL).

[64] *Dmyterko (Litigation Guardian of) v. Kulikowsky*, [1992] O.J. No. 1912 (G.D.).

certain gifts. The father was of Ukrainian descent and did not speak English well. Because of the language difficulty, he relied on his three daughters and their families to assist him with his banking, and to communicate with his doctor or lawyer. At the time of the first gift, the father was living on his own and was essentially an independent, strong-willed person. Despite the fact that the father looked to his eldest daughter for advice, particularly in financial matters, his gift to her of a cottage was found not to give rise to presumption of undue influence.

In summary, the case law dealing with undue influence suggests that the potential for concern will vary according to the context. In the testamentary context the solicitor must be sensitive to the possibility of pressure by potential beneficiaries, particularly where that pressure appears to be evolving beyond acts of simple persuasion. In the gift-giving context the solicitor must be sensitive to the possibility of dependence, particularly where it appears that that dependence might have been exploited by the recipient.

Allegations of diminished capacity are often intertwined with those of undue influence. Thus, when a lawyer is facilitating the making of a gift, he or she must consider the client's capacity to make the gift. Courts have agreed with the learned author Brian Schnurr, that the general rule is that the person must understand the nature and effect of a specific transaction "...however, depending on the size of the gift, the test for determining capacity shifts. If the gift is significant, the test shifts towards that used to judge testamentary capacity."[65]

Against this background, the following red flags should be noted:

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[65] Brian A. Schnurr, "Mental Capacity and Undue Influence", cited with approval in *Booth Estate v. Connor Estate*, [1988] O.J. No. 3464 (Gen. Div.) at para.52.

1. the client is new to the lawyer;
2. the client has been brought in by a beneficiary;
3. the usual family members have been cut out of the will;
4. the client seeks a dramatic change from prior an earlier will;
5. family conflict appears to be in play;
6. the client has suffered a loss of independence, and is living with or under the control of beneficiary;
7. the client has designated an unusual beneficiary, such as a neighbour, or a caregiver, and especially so if this is in preference to a family member;
8. cultural influences restrict free decision-making;
9. the client's family members have themselves raised concerns over influence;
10. instructions are ultimately coming from someone other than the testator;
11. the will is to be sent to or paid for by beneficiary;
12. the client has been assisted by others in doing his or her will planning;
13. the client cannot afford the proposed gift;
14. the gift out of keeping with the client's past behaviour;
15. the client is secretive about plans or finances.

E. Assessing the Assessment, and Ensuring its Validity

Where there are grounds for suspecting capacity, the solicitor must seek an expert assessment of the client's capacity.[66] Inevitably this step carries its own set of difficulties--and its own series of possible red flags.

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[66] *Covello v. Sturino, supra* note 32 at para. 22.

In this respect the underlying issue is that not all assessments are created equal. The cases suggest that a court will look for certain qualities:

1. The assessor should be qualified. In *Forgione v. Forgione*,[67] Justice Ferguson ordered a new assessment in part because the assessor, although a psychiatrist, was "not a qualified capacity assessor and his report does not follow the Guidelines."[68]

2. The assessment must be objective. In *Banton v. Banton*, Justice Cullity preferred one assessment over another, in part, on the following grounds:

> **.... I intend no disrespect to Dr. Silberfeld when I add that I found Dr. Chung to be a more impartial and objective expert witness. He was appointed by the Court to provide an independent assessment pursuant to the Substitute Decisions Act. Dr. Silberfeld was retained by Mr. Lee on behalf of George Banton. Although the retainer letter of May 10, 1995 speaks of an "independent assessment" by Dr. Silberfeld, it purports to provide George Banton's views on his competence and states that "Mr. Banton recounts many instances of abuse suffered at the hands of his own children"....**[69]

3. As the foregoing indicates, an assessment should also be thorough and detailed. In *Forgione v. Forgione*, Justice Ferguson ordered a new assessment in part because the original assessment lacked the requisite detail:

> **I am concerned about the adequacy of the assessment by Dr. Dief. The court does not know what background information the doctor had or what, if any, influence anyone other than Marcel Forgione may have had on the process. The report is very brief and for the most part consists of conclusions without**

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[67] [2007] O.J. No. 2006 (S.C.J.), at para 3.

[68] See the *Guidelines for Conducting Assessments of Capacity* prepared by the Ministry.

[69] *Supra* note 5 at para. 40. See also *ibid.* at para. 125.

any analysis. There is no mention of the troubling features of the evidence I shall discuss below. There is no mention of the fact that Marcel Forgione is unable to read or write. [70]

4. In the same vein, a process in which the assessor collects balanced background information prior to meeting with the party is to be preferred over a process in which such information, if collected, is one-sided in nature, or is not collected at all until after the meeting.[71] Dr. Shulman and his colleagues suggest that the assessor should review the following material before conducting the assessment:

   a. **prior will(s);**
   b. **the specific will in question or multiple wills in question;**
   c. **a list of the testator's assets from a corroborative source;**
   d. **medical records and reports;**
   e. **residential care notes;**
   f. **community care notes.**[72]

5. The assessor should avoid excessive personal comment, the latter giving rise to the suspicion of bias. In *Mesesnel (Attorney of) v. Kumer*[73] Justice Greer ordered a new assessment in part because of the original assessor's "personal criticisms of [the party] throughout this report are, in my view, enough to raise the suspicion of bias in the reports.... Such bias taints all three reports."[74]

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[70] *Supra* note 67 at para. 3.

[71] *Knox v. Burton, supra* note 23 at para. 24-25.

[72] K.I. Shulman et al. *supra* note 1 at p. 436.

[73] [2000] O.J. No. 1897 (S.C.J.).

[74] *Ibid.* at paras. 10(5) and 10(7)

6. The assessor should make some effort to verify what he or she is told. Thus in *Banton v. Banton* Justice Cullity preferred one assessment over another, in part, on the following grounds:

> **Neither of the medical experts specifically addressed the significance of George Banton's allegations about his children. In his evidence at the trial, Dr. Silberfeld explained his reference to the absence of delusions as referring to the lack of evidence of any "bizarre" beliefs. He stated that he did not feel it was within his retainer to attempt to verify the allegations against the children. He agreed that if the allegations were wrong, they could amount to delusions. Dr. Chung spoke to each of the children to obtain their side of the story but does not appear to have resolved the contradictions. He did not refer to the existence of delusions in his report or in his evidence.** [75]

7. Assuming that the assessor has been briefed as to the specific issues requiring consideration, the assessment should itself acknowledge and consider those issues. In *Mesesnel (Attorney of) v. Kumer*, Justice Greer ordered a new assessment in part because the original assessor "did not follow the mandate he was given", and because he ignored " the two most crucial aspects of what he was requested to do, namely determine if Mesesnel was capable …."[76]

8. The assessment should incorporate, and clearly describe, the standard tests of capability.[77]

9. Where the issue is capacity to grant a power of attorney, it might be advisable, but not specifically necessary, to address the criteria set out in s. 8(1) of the *Substitute*

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[75] *Supra*. note 5 at para. 41.

[76] *Supra*. note 73 at paras. 10(1) and 10(2).

[77] *Ibid*. at paras. 10(3) and 10(8).

Decisions Act. In *Abrams v. Abrams*[78], an assessment was attacked on the ground, inter alia, that the assessor failed "to clearly address all the requirements of capacity to give a continuing power of attorney for property, as set out in ss. 8(1) of the *SDA."* That notwithstanding, Justice Strathy held the assessment to be valid.

10. Ideally the assessor should cover the relevant issues in a single report, and of course in as timely a manner as possible.[79]

Finally, it is important to note that even where the assessment is prepared in a valid manner, there may be room for disagreement and error. In *Knox v. Burton*, Justice Ratushny accepted expert evidence noting that "capacity assessments are not an exact science".[80]

With these considerations in mind the following red flags should be noted:

1. the assessor has been hired by the donee of a power of attorney;
2. the assessor is not qualified or does not follow prescribed procedure;
3. the assessor does not understand statutory definitions of capacity;
4. the client presents language or communication difficulties;
5. the translator is an interested person or family member;
6. the assessment conflicts with the opinion of the family doctor;

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[78] *Supra* note 28 at para. 54.

[79] *Mesesnel (Attorney of) v. Kumer, supra* note 71 at para. 10(9).

[80] *Supra* note 24 at para. 23.

7. the assessor has breached confidentiality by discussing the assessment with affected family members;

8. the assessor has not consulted with informed persons but relies on one (possibly biased) source of factual background;

9. the assessor has made little effort to verify what he or she is being told;

10. the assessment does not incorporate or explain the standard tests of capacity;

11. the assessment makes overly personal judgments or comments;

12. the assessor does not consider the potential for undue influence.

F. Retrospective versus Contemporaneous Capacity Assessments

In the case of retrospective assessments, the assessor tends tend to rely on indirect evidence, and to extrapolate from the assessment of other clinicians. By contrast, in the case of contemporaneous assessments, the assessor is able to carry out the analysis on the basis of direct examination and evaluation.[81] Where the issue is the validity of a will or power of attorney, contemporaneous assessments have an obvious appeal; and in the words of a leading medical expert, "they almost always carry the day in will disputes."[82] The cases suggest that the courts prefer contemporaneous assessments, and, where possible, assessments conducted as close in time to the event in issue as possible.[83]

That said, it is equally clear that the courts recognize that in certain circumstances it will be necessary to carry out an assessment after the fact. In this connection the decision in *Covello*

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[81] K.I. Shulman et al., *supra* note 1 at 434.

[82] *Ibid.* at p. 434.

[83] As has been noted, in *Mesesnel (Attorney of) v. Kumer* Justice Greer Justice Greer was critical of an assessment that was needlessly delayed: *supra* note 71 at para. 10(9). In their discussion of the assessment of testamentary capacity, Shulman et al. *supra* note 1 at p. 436 note that "[i]deally, the assessment of testamentary capacity should take place in close temporal proximity to the giving of instructions for the will by the testator."

v. Sturino[84] is instructive. Justice Boyko accepted an assessment carried out a year after the event, noting as follows:

> **Although no medical assessment was conducted at the time of the execution of the Power of Attorney, the court can consider the medical evidence submitted after the fact which suggests that Ida Sturino suffered from impaired cognitive ability to appreciate her financial situation and the effect of granting a Power of Attorney in favour of her son.**[85]

Again, in *Abrams v. Abrams*[86] Justice Strathy accepted assessments carried out more than a year after the first of several disputed powers of attorney was given. However, he declined to order a further assessment in part on the ground that the delay was simply too long:

> **I am not satisfied that an assessment done in 2009 would have significant probative value as to Ida's capacity in January, 2007 and April and May, 2008, given the progressive nature of Alzheimer's disease....**[87]

In *Bishop v. Bishop*[88], the assessment was conducted three months after the POA was executed. In reviewing the assessment Justice O'Neill noted that the assessor specifically addressed the gap in time.[89]

The cases thus suggest that delayed assessments are not, for that reason alone, invalid. That said it is equally clear that the delay should be limited (probably months rather than years)

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[84] *Supra* note 33.

[85] *Ibid* at para. 22.

[86] *Supra* note 28.

[87] *Ibid.* at para. 58(d).

[88] [2006] O.J. No. 3540 (S.C.J.).

[89] *Ibid.* at para. 21.

and that the assessor should address the delay in the assessment itself, and should specifically consider the party's competence at the time the power of attorney was given.

G. What Weight to Give an MMSE?

As part of the assessment process, the assessor may utilize cognitive screening instruments such as the Mini-mental State Examination. However, it is important to note that this, and similar tests are screening tests, employed primarily to determine if the party has a major impairment with respect to memory, language and attention. The MMSE would not shed light on such things as insight or judgment.[90] In addition, when employing these tests, the assessor should be able to adjust for such things as age, pre-morbid intelligence, education and language. As Dr. Shulman and his colleagues note, these are potentially confounding factors.[91]

H. Conclusion

Wills and powers of attorney are powerful instruments and may be the most important documents a client signs. The lawyer is of course a central figure in the preparation and execution of these instruments, and in taking instructions the lawyer is duty-bound to ensure that they reflect the client's competent and freely-expressed wishes and intentions. However, the lawyer's obligations go further. The lawyer must ensure that the instrument is insulated from challenge in the future; and the lawyer must of course protect himself or herself in the event that the lawyer's own role is ever attacked. Unfortunately, because of the fluid, even imprecise nature of legal capacity and undue influence as legal concepts, these goals are, at times, not easily

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[90] See for example the comments in *Saunders v. Bridgepoint Hospital* [2005] O.J. No. 5531 (S.C.J.) at para. 23.

[91] K.I. Shulman et al., *supra* note 1 at p. 437.

achieved. In the end, the cases suggest that success requires not only an understanding of the law, but also vigilance and an attention to detail.