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# POWERS OF ATTORNEY: A LITIGATION PERSPECTIVE

by Dana Nelko
*Fillmore Riley LLP*

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## A. INTRODUCTION

In a 2006 Manitoba Court of Queen's Bench decision *JL* v. *SLL*[1], the issue before the court was whether attorneys appointed under *The Powers of Attorney Act* should be removed and replaced with The Public Trustee of Manitoba in addition to an order for an accounting.

Justice Clearwater, having reviewed section 24 of *The Powers of Attorney Act* which deals with the jurisdiction of the court, noted:

> I was not referred to any Manitoba authorities (and could not locate any) where section 24 of the Act has been considered although it has been in effect since 1997. [2] (See, however, *Potasky* v. *Potasky*)[3]

Subsequent to the *JL* v. *SLL* decision, there have, in fact, been two further Manitoba cases that along with Justice Clearwater's decision we will be reviewing in this paper. *Dubois* v. *Wilcosh*[4], and *EB* v. *SB and BK*[5].

Notwithstanding the lack of Manitoba case law dealing with power of attorney disputes, a great deal has been written and much discussion has taken place dealing with power of attorney reform and, more particularly, the need to address potential weaknesses in the legislative regime.

Where case law seems to be lacking, Law Reform Commissions have filled the void.

The purpose of this paper is to examine how the courts have and will likely deal with disputes involving the appointment and removal of attorney's capacity, and the attorney's obligation to account.

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[1] *JL* v. *SLL*, 2006 MBQB 170 CanLii.
[2] *Supra*, note 1, at page 7.
[3] *Potasky* v. *Potasky*, 2002 MBQB 146 CanLii.
[4] *Dubois* v. *Wilcosh*, 2007 MBQB 20 CanLii.
[5] *EB* v. *SB and BK*[5], 2010 MBQB 15 CanLii.

## B. STATUTORY CONSIDERATION

The common law recognized that in certain circumstances an agent could be appointed with the authority to carry out a principal's commercial activities.

In 1980, the Manitoba Law Reform Commission recommended a number of changes to the common law that eventually found their way into the *The Powers of Attorney Act*. Subsequently, in 1994, the Manitoba Law Reform Commission provided further recommendations to improve upon what it considered to be certain deficiencies in the then existing *Powers of Attorney Act*, and further amendments were made leading to the legislation we have in place today.

**Tab 3 *The Powers of Attorney Act***
**C.C.S.M. cP97 (assented to November 19, 1996)**

The key change from the common law to the legislative powers provided to a commercial agent relates to enduring powers of attorney in addition to clarifying that area of the law relating to the validity of springing powers of attorney.

It seems that in each province there is an ongoing evaluation process relating to powers of attorney legislation. Most recently, the Western Canadian Law Reform Agencies published a report (July, 2008)[6] setting out a number of recommendations that would go towards harmonizing the power of attorney regimes in the provinces of Manitoba, Saskatchewan, Alberta and British Columbia.

The Manitoba Law Reform Commission issued its own report (September, 2008) recommending certain changes to the current *Powers of Attorney Act* as well as adopting the Western Canadian Law Reform Agencies recommendations.[7]

Powers of attorney, while being legislative creations, and subject to the rules set forth in various pieces of legislation across Canada, still remain arguably the only true "self-help" estate planning tool.

I note with some interest that in 1994, the Manitoba Law Reform Commission made the following observation in the context of an elder abuse discussion:

> We believe that this situation has a great deal of potential for abuse. All citizens who choose to order their affairs by means of an enduring power of attorney are vulnerable to the misuse of this power, but it is the elderly who are most likely to be victimized because they are most likely to need and make enduring powers of

[6] Western Canadian Law Reform Agencies Report (July, 2008), http://www.gov.mb.ca/justice/mlrc/reports/epa_sup_report.pdf

[7] Western Canadian Law Reform Agencies recommendations http://www.gov.mb.ca/justice/mlrc/reports/epa2008.pdf

> attorney. Our concerns are underlined by information concerning elder abuse. Evidence suggests that approximately 4% of elder persons in Canada are victims of abuse and that up to 100,000 seniors are abused in Canada annually … Financial exploitation, including the misuse of powers of attorney is involved in 30% of cases reported to the Elder Abuse Centre of Manitoba. As the numbers in proportion of elderly grow, financial exploitation, including the abuse of powers of attorney, is likely to become even more severe in the future.[8]

It has been 16 years since the Manitoba Law Reform Commission published its report. The Alzheimer's Society of Canada recently published a report entitled "Rising Tide: The Impact of Dementia on Canadian Society".[9]

The report predicts that in Canada we will be seeing one new case of dementia every five minutes and by the year 2038, one new case of dementia every two minutes. Currently 1.5% of the Canadian population has been diagnosed with a form of dementia and by 2038 that figure will almost double.

It is likely that as our population ages, the power of attorney as an estate planning tool will take on a more prominent role. I refer to this as the "in between period". As a large portion of the aging population requires more assistance from caregivers, the unregulated actions of powers of attorney will come under closer scrutiny.

A combination of aging population, fractured family and the predicted passing down of wealth makes arguably for the "perfect storm".

The most fertile area for dispute in this perfect storm will likely relate to the question of capacity.

The law relating to testamentary capacity is well developed. As more and more cases come before the courts dealing with capacity issues in the context of powers of attorney, we will likely see a heavy reliance on the testamentary capacity case law. Both Justice Clearwater in the *JL* v. *SLL* decision and Justice Schulman in the *Dubois* v. *Wilcosh* decision look to the law as it has developed in the context of will disputes as does Justice Burnett in the most recent decision *EB* v. *SB and BK*. While there are similarities between a power of attorney and a will, there are also some very fundamental differences. We ought to be mindful of these differences as we take on power of attorney disputes.

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[8] Manitoba Law Reform Commission Report No. 83, March, 1994 pp 3 and 4, *Enduring and Springing Powers of Attorney*.

[9] Alzheimer's Society of Canada, *Rising Tide: The Impact of Dementia on Canadian Society*, http://www.alzheimer.ca/english/rising_tide/rising_tide_summary.htm

## C. POWER OF ATTORNEY/WILL –CONTRAST AND COMPARE

The law facilitates and recognizes that the wishes of a testator and those of a donor be honoured. The executor, however, has a great deal of support as he or she administers the testator's estate. There may be very specific directions in a will with respect to certain trusts, the payment of debts and ultimately the distribution of the testator's estate. The attorney's role is not to distribute, but to administer the donor's financial affairs. The power of attorney may contain some specific directions but generally speaking, the form adopted is a very general licence with few particulars.

The following chart outlines some of the differences between a will and a power of attorney. The key distinction between the two is the degree of certainty and oversight that accompanies the administration of an estate in contrast to the open ended nature of the power of attorney.

| | **Will** | | **Power of Attorney** |
|---|---|---|---|
| | | | |
| **Need** | Considered a "must" have. | | Often an afterthought (may be needed.) |
| | | | |
| **Selection Process** | Executor choice taken seriously (accountant). | | Taken seriously, but convenience factored in. |
| | | | |
| **Existence** | Family told but bequests not set out. | | Not considered significant. |
| | | | |
| **Planning** | May be part of elaborate estate plan/trust, etc. | | Standard form. |
| | | | |
| **Directions Provided** | Trusts may be specific and Will followed.<br>- debts paid, etc.<br>- beneficiaries named | | Open licence to deal with financial affairs. |
| | | | |
| **Start Date** | Death is certain. | | Incapacity unclear<br>(s. 6(4)) |
| | | | |
| **Court or Third Party Oversight** | Probate - file with court/legislation and courts. Beneficiaries notified. Lawyer needed. | | Only if Power of Attorney brings to family's attention and s. 24(1) and s. 22(1) can remain secret. Lawyer often not consulted. |
| | | | |
| **Duration of Administration** | "Executor's Year" | | May go on for many years. |
| | | | |
| **Distribution of Assets** | Full disclosure. Conflict resolution built in to process. | | Assets distributed <u>before</u> family aware. After the fact legislation |

While there is not a lot of case law in the area of power of attorney disputes relative to the wealth of authorities in testamentary disputes, much has been written in the area of power of attorney. Aside from the work of the Law Reform Commissions and agencies noted above, I have attached a sampling of estate and trust references that may be of interest or assistance to you.[10][11][12][13][14][15][16][17][18][19][20][21][22][23][24][25][26][27]

## D. *The Powers of Attorney Act*: A Brief Overview

The operative section with respect to the jurisdiction of the court to deal with power of attorney "disputes" is found in section 24:

> 24(1) **Jurisdiction of the Court**
>
> Upon an application made in respect of an enduring power of attorney the court may, having regard to the power of attorney and donor's intentions, make any order the court considers appropriate [emphasis added] which may include the following:

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[10] *Power of Attorney Litigation*, Estates, Trusts & Pensions Journal Book Review, 2002 Vol. 21, page 170.
[11] *Oosterhoff on Wills and Succession: Text, Commentary and Cases*, Estates, Trusts & Pensions Journal Book Review, 2002 Vol. 21, page 173.
[12] *The Care Agreement: Transfer of Property in Exchange for the Promise of Care and Support*, Estates, Trusts & Pensions Journal, Vol. 21, page 209.
[13] *Susceptibility to Undue Influence in the Mentally Impaired*, Estates, Trusts & Pensions Journal, Vol. 21, page 331.
[14] *Solicitor Liability to Third Party Beneficiaries in Drafting a Will in Ontario: Hall v. Bennett Estate*, Estates, Trusts & Pensions Journal, 2004 Vol. 23, page 101.
[15] *Does the Presumption of Undue Influence Arise in the Testamentary Context?* Estates, Trusts & Pensions Journal, 2005 Vol. 24, page 125.
[16] *Clinical Application of the Least Restrictive Alternative in Competency Assessments*, Estates and Trusts Journal, 1993 Vol. 12, page 282.
[17] *Competency Assessments*, Estates and Trust Journal, 1992 Vol. 11, page 165.
[18] *The Vulnerable Persons Act: A Change for Manitoba*, Estates and Trusts Journal, 1995 Vol. 14, page 80.
[19] Case Comment *William George King Trust (re Pre-taking of Executor's Compensation)* Estates and Trusts Journal, 1994 Vol. 14 No. 2, page 97.
[20] *Costs in Estate Litigation - Case Comment Merry Estate*, Estates, Trusts & Pensions Journal, 2003 Vol. 22 No. 2, page 93.
[21] *Assessing Testamentary Capacity: Is There a New Definition of Solicitor's Negligence*, Advocates Quarterly, 2003 Vol. 27 No. 4, page 349.
[22] Hull, E. and M., *Power of Attorney Litigation*, CCH Canadian Limited, 2000.
[23] Wendy L. Griesdorf, *Crazy in Love: Caregiver Marriages in the Context of Estate Disputes*, Estates, Trusts & Pensions Journal, Vol. 25, page 315.
[24] Kimberley A. Whaley and Helena Likwornik, *Powers of Attorney and Financial Abuse*, Estates, Trusts & Pensions Journal, Vol. 27 2008.
[25] Manitoba Law Reform Commission, *Informal Assessment of Competence*, Report No. 102, September 1999.
[26] Manitoba Law Reform Commission, *Adult Protection and Elder Abuse*, Report No. 103, December 1999.
[27] *Powers of Attorney: Some Fundamental Issues*, Carmen S. Theriault, Vol. 18, Estates, Trusts & Pensions Journal, 1999, page 227

> (a) an order providing advice or directions on any matter respecting the management of the donor's estate;
> (b) a declaration that the donor is mentally incompetent;
>
> (c) a declaration that a power of attorney is invalid or terminated;
>
> (d) an order removing the attorney appointed under the power of attorney;
>
> (e) an order requiring the attorney to provide the court with an accounting;
>
> (f) subject to the provisions of the enduring power of attorney, an order varying the powers of attorney;
>
> (g) subject to the provisions of the enduring power of attorney, an order appointing a person as an attorney in place of the attorney appointed under the enduring power of attorney.

The applicant must give notice of the application to The Public Trustee along with notice to the donor, the attorney and any other persons the court may order (section 24(3)).

The application may be made by an attorney, The Public Trustee, the nearest relative of the donor, a recipient of an accounting under section 22 or with the approval of the court, an interested person, at any time after the execution of the enduring power of attorney (section 24(2)).

It must be remembered that *The Powers of Attorney Act* offers up a framework, arguably a limited framework that seeks to protect the interests of all stakeholders.

In the context of a springing power of attorney, under section 6(4), where the power of attorney provides that it should come into force on the mental incompetence of the donor, two duly qualified medical practitioners may act as a declarant if the donor does not name a declarant in the power of attorney or that the named declarant is unwilling or unable to provide a declaration. It is interesting to note that while the option for a medical assessment re competency is given in the context of a springing power of attorney, it is not made mandatory. Those interested in the estate may make application to court for a determination under section 7.

"Mental incompetence" is defined in the legislation to mean:

> The inability of a person to manage his or her affairs by reason of mental infirmity arising from age or a disease, addiction or other cause.

Section 10(3) of the Act provides:

> **Capacity of donor when power executed**
> An enduring power of attorney is void if at the time of its execution the donor is mentally incapable of understanding the nature and effect of the document.

In the context of enduring powers of attorney, mental incompetence does not terminate the authority given by the donor to the attorney.

The "protection" built into the system is found at a number of different levels.

With respect to the execution of the power of attorney, it must be witnessed by a "professional". The list includes a judge, medical practitioner, justice of the peace, notary public, lawyer, member of the RCMP or member of a municipal force. The donor's signature may not be witnessed by the attorney or the attorney's spouse or common law partner.

There is a curious provision in section 12 of the legislation that permits the donor or the attorney to file a copy of the enduring power of attorney with The Public Trustee.

Upon reviewing the 1999 Law Reform Commission Report (Report No. 83), it would appear that the rationale behind a section 12 filing was to mirror the approach taken in England and other jurisdictions which require that all enduring powers of attorney be filed at a central registry. It was noted that in England an enduring power of attorney was not valid and could not be used by the attorney unless it was registered.

The Manitoba Law Reform Commission, however, came to the conclusion that a registration requirement would be inordinately cumbersome and would place an unnecessary burden on donors, attorneys and The Public Trustee. Instead, the Commission proposed that The Public Trustee be obliged to make a "minimal effort" that would achieve substantially the same result:

> We recommend that any interested party (donors, attorneys and others) be permitted but not obliged to file an enduring power of attorney with the office of The Public Trustee. When receiving an order of supervision or certificate of incompetence The Public Trustee should then be required to check their files to determine whether or not an enduring power of attorney has been filed.[28]

The Western Canadian Law Reform Agency Report goes further and recommends that an attorney appointed under an enduring power of attorney must give notice of attorney acting to specified individuals within a reasonable period of time after the donor is declared to lack the mental capacity to manage his or her own affairs. If the enduring power of attorney does not provide a list of persons to receive notice, the legislation

[28] *Supra*, note 8 at page 27.

ought to require notice to be provided to all the donor's immediate family members and, further, that the registration should not permit the donor to waive the attorney's duty to give notice.

With respect to suspected abuse, there is currently one jurisdiction in Western Canada (perhaps all of Canada) that has a system in place for reporting this abuse. *The Public Guardian and Trustee Act* of Saskatchewan permits an individual, in good faith, to report possible misuse of a power of attorney to the Pubic Guardian. Financial institutions in Saskatchewan may suspend or freeze a bank account for up to five business days when it has reasonable grounds to believe that financial abuse has or will likely take place. Further, the bank has an obligation under the legislation to immediately advise the Public Guardian of its concerns.

In Manitoba, the court or Public Trustee intervention does not occur unless an application is made under section 24 of the Act. It must be remembered that the evidence placed before the court with respect to a section 24 application must comply with the provisions of Rule 39 of our Court of Queen's Bench Rules.

Rule 39.01(5) provides:

> An affidavit for use on an application may contain statements of the deponent's information and belief with respect to the facts that are not contentious, if the source of the information, the fact or the belief are specified in the affidavit.

In addition to the affidavits filed in support of the application or in response to the application, Rule 39.03(1) provides:

> Subject to the sub-rule 39.02(2), a person, other than an expert, may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of the person's evidence available for use at the hearing.

Contested applications are dealt with under Rule 38 of the Court of Queen's Bench Rules.

The jurisdiction under section 24 is quite broad as the court may make any order the court considers appropriate. In some cases, the court will deal with the issue of competency in a summary fashion relying solely on the transcripts and cross-examinations or may direct a trial of an issue if there are substantial facts in dispute (see Rule 38.09). (See *EB* v. *SB and BK*).

## E. CAPACITY

It seems that no paper or article is complete in the area of testamentary capacity or capacity to provide instructions re a power of attorney unless the case of *Boyse* v. *Rossborough*[29], is quoted:

> There is no difficulty in the case of a raving mad man or a drivelling idiot in saying that he is not a person capable of disposing property. Though 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. [emphasis added]

Often, the execution of a Power of Attorney is "twinned" with the execution of a will. As a consequence, the capacity with respect to the execution of a power of attorney is usually not considered independent from the capacity required to give instructions for the drafting of a will. However, there will be times when the execution of a power of attorney will take place not on an individual's "death bed", but in the hospital or a nursing home facility where the issue of capacity will be paramount.

Much has been written about the various standards the law has set with respect to the determination of capacity or competency.[30] [31] [32]

The mental capacity required for executing a power of attorney will be different than the capacity required for marriage, making a will, entering into a financial contract or making medical treatment decisions.

Capacity arguably is fundamental to the exercise of free will. Personal autonomy is one of our most treasured values. To some measure, our judicial system has been structured to protect this fundamental human need. The common law presumes that we are all competent and that everyone is entitled to assume that any adult with whom he or she deals has decision making capacity. As has been pointed out by a number of writers, this presumption has experienced some erosion as the population ages.

It is assumed that the individual who appoints an attorney does so fully aware of what he or she has "given up" re their personal autonomy. The power of attorney designation

[29] *Boyse* v. *Rossborough*, 1857, 6 HL CAS 2 at page 45.
[30] Special Lectures 2010, A Medical-Legal Approach to Estate Planning, Decision Making and Estate Dispute Resolution for the Older Client, April 14 and 15, 2010, Law Society of Upper Canada Special Lecture Series.
[31] Competence and Capacity:New Directions, The 2000 Isaac Pitblado Lectures, November 17 and 18, 2000, Law Society of Manitoba, The Manitoba Bar Association and the University of Manitoba Faculty of Law.
[32] Elder Law:Issues for an Aging Population, 2003 Isaac Pitblado Lectures, November 21 and 22, 2003, Law Society of Manitoba, The Manitoba Bar Association and the University of Manitoba Faculty of Law.

survives incompetence under Manitoba legislation or in the context of a springing power of attorney, will become effective in the event that the donor becomes incompetent.

Capacity is seen as task or "decision specific" (see Manitoba Law Reform Commission, *Informal Assessment of Competence*, page 6):[33]

> In the past, competence was often considered a global construct. Either one possessed absolute mental capacity to make all legal, social and medical decisions or one lacked the capacity to make any such decision at all. However, competence is now widely recognized as being specific to certain types of problems, tasks or decisions. In other words, one may simultaneously be competent to make decisions about one thing and not competent to make decisions about another, incapacity in one area does not necessarily imply incapacity in another area.

The case of *Banton* v. *Banton*[34] illustrates the complexity this area has to offer.

George Banton was 88 years of age when he made a will leaving his estate to his children and his second wife, his first wife having predeceased him. With his second wife's passing, his entire estate was left to his children.

Mr. Banton had been diagnosed with prostrate cancer and had undergone surgery. He was profoundly deaf, required assistance to walk, and was incontinent and delusional.

Mr. Banton was declared incompetent under *The Ontario Mental Health Act* and was placed in a nursing home.

While in the nursing home, Mr. Banton developed a friendship with one of the waitresses in the dining room, a woman by the name of Muna Yassin. Ms Yassin was 31 years of age.

Within one month of their meeting, Mr. Banton and Ms Yassin obtained a marriage licence and were married in her apartment. Mr. Banton's children were not told of the marriage.

Within one week of the marriage, Mr. Banton and Ms Yassin went to a lawyer to have a new will drawn up, leaving his estate to his new wife and disinheriting his children. Mr. Banton passed away and the issues before the court were testamentary capacity, undue influence and Mr. Banton's capacity to marry.

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[33] *Supra*, note 25 at page 6.

[34] *Banton* v. *Banton* (1988) 1 64 D.L.R. 4th 176 (Ont. Ct. Gen. Div.). The end result in *Banton* is that intestacy was declared as the valid marriage so found by the court revoked all previous wills. Ms Yassin got a portion of the estate of the late Mr. Benton as his wife. It should also be noted that this case has been cited over 65 times in Canada over the last 12 years.

Justice Cullity concluded that Mr. Banton lacked the capacity to make a will and that Ms Yassin exerted undue influence upon him. However, with respect to the issue of marriage, Cullity stated:

> It is well established that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibility it involves … There is virtually nothing in the evidence to suggest that George Banton's mental deterioration had progressed to the extent that he was no longer able to pass this not particularly rigorous test.[35]

## F. UNDUE INFLUENCE/SUSPICIOUS CIRCUMSTANCES

Suspicious circumstances and undue influence usually go hand in hand. We are all subject to influences, some good and some not so good. The degree of persuasion required to influence a vulnerable individual will be significantly less than what may be required to influence those whose capacity has not been impaired.

Suspicious circumstances seldom dwell in "the twilight". It must be remembered that undue influence is a form of fraud. A lawyer taking instructions to draft the power of attorney must be mindful that the donor has, to some measure, been influenced to have the power of attorney prepared.[36]

The question of undue influence was before the court in the *EB* v *SB and BK* case. Justice Burnett was faced with the task of examining what the appropriate test might be for undue influence in relation to the drafting of a power of attorney.

He reviewed the *Vout* v. *Hay*[37] decision of the Supreme Court which considered the issue of undue influence in relation to the execution of a will. The test was described by the court as follows:

> Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express the testator's mind, but which really does not express his mind, but something else which he did not really mean.

[35] *Supra*, note 29 at page 224.
[36] Solicitor's Liability for Failure to Substantiate Testamentary Capacity, 1984 62 Canadian Bar Review 457 (Littman and Robertson).
[37] *Vout* v. *Hay*, 1995 CanLii 105 S.C.C.

Justice Burnett contrasted this test with the test of undue influence for *inter vivos* gifts set out in *Stressfield* v. *Goodman*[38] which the court concluded:

> Influence is the ability of one person to dominate the will of another, whether through manipulation, coercion or outright but subtle use of power. To dominate the will of another is to exercise a persuasive influence over another. To determine whether presumption of undue influence applies requires analysis of the relationship between donor and donee. Certain relationships, such as solicitor and client, parent and child, and guardian and ward have long been recognized as giving rise to the presumption. However, there are other relationships of dependency not easily categorized which, nevertheless, upon examination of facts, give rise to the presumption. Where gifts are involved, the court is concerned they are not tainted. It is enough to establish a fiduciary relationship or dominant relationship to trigger the presumption. Once the presumption is raised, it is for the donee to rebut the presumption by showing the donor made the gift as a result of her own full, free and informed thought. Two ways to rebut the presumption are to show no actual influence or that the donor received independent advice. The size of the advantage or benefit is pertinent to the issue of whether influence was exercised.

With respect to the isolated issue of whether the power of attorney was executed as a result of undue influence, Justice Burnett was satisfied that there was virtually no evidence to suggest that the attorney *BK* exerted undue influence on her mother and further, clearly her mother knew and appreciated what she was doing, had the benefit of independent advice, and executed the power of attorney freely and voluntarily.

## G. RECENT MANITOBA CASE LAW/A REVIEW

Three recent Manitoba Court of Queen's Bench decisions, as noted above, *JL* v. *SLL*, *Dubois* v. *Wilcosh* and *EB* v. *SB and BK*, provide an insight on how the courts view attorneys and their responsibilities in addition to canvassing at some length and in some detail the issue of capacity, all within the context of a section 24 application.

In the *Dubois* v. *Wilcosh* decision, Justice Schulman noted that the circumstances of the case were somewhat unusual. Often the issue of competency is not determined in the context of a power of attorney dispute until after the donor has passed away. Mr. Dubois was very much alive and managing his own financial affairs when the issue of competency was raised before Mr. Justice Schulman.

[38] *Stressfield* v. *Goodman*, (2001) O.J. No. 3314 (Q.L.).

Mr. Dubois initially executed an enduring power of attorney in 2001. Subsequently, in September, 2004 he executed a second power of attorney revoking the first. The attorneys under the first power of attorney made application to the court arguing that Mr. Dubois was not competent and, as a consequence, the second power of attorney be declared void.

Of the five affidavits filed on the motion, neither Mr. Dubois nor Ms Wilcosh, the attorney appointed in the second power of attorney, filed affidavits. No party was cross-examined with respect to any of the affidavits filed.

Justice Schulman pointed out that generally speaking, assessments of capacity are normally heard by the court in the context of a *Mental Health Act* committeeship application. At least two doctors express an opinion relating to the competency of the person in the committeeship context.

Mr. Dubois was described by the court as a man of some means, 95 years of age, suffering from cognitive changes. However, Mr. Dubois continued to visit his broker's office and make investment decisions without using either power of attorney.

Justice Schulman both the definition of mental incompetence under *The Powers of Attorney Act* in section 10(3).

After Mr. Dubois underwent cataract surgery in about 1995, Ms Wilcosh moved in with Mr. Dubois in order to care for him and continued to live with him since that time.

His family became concerned about six years after the surgery when Ms Wilcosh reported to them that she thought members of the Club appeared to be after Mr. Dubois' money.

This led to the first power of attorney being executed whereby Mr. Dubois appointed John Edward, John Leonard Bodner and Ms Wilcosh as his attorneys. At the same time he made significant financial commitments to Ms Wilcosh.

In 2004 Ms Wilcosh had taken Mr. Dubois to a new lawyer, Kelly Land, to prepare a new enduring power of attorney appointing Ms Wilcosh as sole attorney.

Justice Schulman reviewed the medical evidence relating to Mr. Dubois' competency and closely examined the role of Kelly Land as counsel who drafted the power of attorney under review.

With respect to the medical evidence, Justice Schulman noted that Mr. Dubois was assessed by several workers at the Riverview Centre and a report with the Winnipeg Regional Health Authority prepared in 2003 was reviewed.

What is not clear from Mr. Justice Schulman's review is precisely what experience the workers who assessed Mr. Dubois had and for what purpose the assessment was prepared. As has been pointed out by I. Judith Wahl, an Ontario lawyer and the author of a paper entitled *Capacity and Capacity Assessment in Ontario*:[39]

> If the physician does not know the tests of capacity in the legal context, the report should not be given much weight. Likewise, the report that states the client is "capable for all purposes" is of little assistance when the lawyer needs to take instructions for litigation.[40]

She goes on to state:

> It is unlikely that the health professional knows the specific legal criteria for capacity for that particular purpose unless the lawyer details the definition of the decisional capacity before seeking the assessment. A report that a client "lacks testamentary capacity" or has "testamentary capacity" is not going to be helpful to the lawyer if the physician that did this assessment did not know the statutory definition of capacity or a criteria from the case law about the specific type of capacity.[41]

Justice Schulman points out that in this time frame Mr. Dubois was under the care of Dr. David Young and:

> There was nothing in the notes to suggest that Dr. Young concluded that Mr. Dubois was incapable of managing his affairs. The reports on file conclude that Mr. Dubois was alert and oriented but cognitive impairment was noted as was poor recall. The health care worker assessed Mr. Dubois as moderately impaired – decisions consistently poor or unsafe, cues/supervision required at all times.[42]

The last quote reported on file was from a home care co-ordinator in January of 2005 which determined that Mr. Dubois was alert, oriented to person and place but does not know the number for 911, not able to remember phone numbers, is at a risk for wandering and getting lost and does not know names of streets in the area.

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[39] *Capacity and Capacity Assessment in Ontario*, (www.advocacycentreelderly.org). A note of caution when reviewing Ontario cases. *The Substitute Decisions Act* (SDA) provides for the use of capacity assessors with respect to the appointment of guardians in certain circumstances in Ontario. These capacity assessors are not necessarily doctors. In fact, Ontario Regulation 460-05 provides that capacity assessors may be physicians, psychologists, social workers, occupational therapists and nurses and must complete a qualifying course in order to be certified.

[40] *Supra*, note 31 at page 5.

[41] *Supra*, note 31 at page 5.

[42] *Supra*, note 4 at page 4.

Dr. Young had prescribed Aricept, a medication often prescribed for those suffering from the early stages of Alzheimer's. The evidence of Kelly Land, the lawyer who prepared the power of attorney under review, was considered closely by Justice Schulman. Mr. Land deposed that Mr. Dubois indicated he wished to appoint Ms Wilcosh (Adele) as his sole power of attorney, citing "The ease by which he could give her instructions." (see page 5) Mr. Land also prepared a will.

When the applicants challenged the validity of the second power of attorney, Mr. Land referred Mr. Dubois for a psychiatric examination.

Mr. Dubois saw Dr. Lowther who the court described as an experienced practitioner who examined him first in November of 2005 (approximately one year after Mr. Land first met Mr. Dubois in September of 2004). Dr. Lowther concluded:

> I found Mr. Dubois to be clear of any symptoms of psychosis or mood disorder, anxiety or dementia. He knew precisely the value of his assets, and he identified where these assets lay. On asking Mr. Dubois about his intentions with regard to his estate upon his death, he indicated clearly that he wished to bequeath his estate to Adele Wilcosh in is entirety. Adele Wilcosh was identified as his common law spouse for several years.[43]

Evidence was also before the court from Mr. Nolan, Mr. Dubois' financial consultant with Investors Syndicate. The evidence from Mr. Nolan was that Mr. Dubois had no difficulty in providing instructions with respect to his investments without making use of the power of attorney.

Mr. Justice Schulman, having reviewed the evidence, begins his analysis of the law with respect to the issue of competency. He writes:

> The test for competency to make a power of attorney is less than that required to make a valid will. Unlike the legislation in the United Kingdom 1985 (UK), C.29 and British Columbia, R.S.B.C. 1996 c.370, the Manitoba statute expressly states the level of competence required that the maker of a power of attorney that the donor is mentally capable of understanding the nature and effect of the document although section 10(3) is expressed in negative terms. The test is a codification of the common law test which was discussed in *Re K* (1988) 1 CH.310 Hoffman J. explained the common law test and his explanation has been concisely summarized in Manitoba.[44]

[43] *Supra*, note 4 at page 5.
[44] *Supra*, note 4 at page 6.

The Law Reform Commission Report *Informal Assessment of Competence*[45] states as follows:

> The donor must understand that the attorney is being appointed to act on his or her behalf in all financial property matters, and that the power,
>
> - is the complete authority to act in all financial matters;
> - is similar to allowing the attorney to step into the financial shoes of the donor;
> - will survive the donor's incompetence; and
> - is irrevocable on incompetence.

Justice Schulman then goes on to highlight the significant role the lawyer plays with respect to the taking of instructions for a will and the preparation of an enduring power of attorney:

> The duty imposed on a lawyer taking instructions for a will is onerous. He or she must be satisfied, by way of personal inquiry, not only that true testamentary capacity exists, but that the instructions are freely given and that the client understands the effect of the will. A solicitor cannot discharge this duty by asking perfunctory questions, receiving apparently rational answers and simply recording the words expressed by the client in legal form. Instructions for a will have to be taken from the maker of the will, and full inquiry made as to his or her personal financial position and that of the family, the objects of his or her bounty, and the nature and extent of the property involved.
>
> The lawyer's duty to substantiate competence is particularly important if there are suspicious circumstances, such as doubt being cast on the client's capacity to either make a will or understand and improve the will's contents. For example, when dealing with a client whose competence may be in question, it is essential that the lawyer investigate any former wills to discover the reasons for any contemplated variation or changes.[46]

Justice Schulman concludes:

> The obligation to make adequate inquiries and meaningful notes applies equally in the preparation of an enduring power of attorney as in the case of preparation of a will. The extent of the inquiries

[45] *Supra*, note 14 at page 18.
[46] *Supra*, note 4 at page 6.

> will vary depending on the circumstances. As stated here, Mr. Dubois was in his 90s.[47]

As noted by the court, the standard for testamentary capacity is much higher. In *Banks* v. *Goodfellow*[4849] the test is stated as follows:

> 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, 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 have been made.

Our courts in Canada have "layered" on to this standard by also directing the court to ensure that the disposition in a will was the free act of the testator (disposing mind and memory), i.e. the testator was able to comprehend the elements of will making, property disposition and consider the impact of revoking existing wills.

Counsel for the applicants sought to challenge both the evidence of Mr. Land and Dr. Lowther. With respect to Mr. Land, it was argued that he had failed to explain to Mr. Dubois what a power of attorney and a will were, nor did he ask Mr. Dubois to explain what he understood a power of attorney and will to be. Dr. Lowther's evidence was challenged primarily on the basis that he only saw Mr. Dubois briefly on two occasions and not prior to the execution of the power of attorney but rather over a year afterwards.

Justice Schulman concluded that while Mr. Dubois was suffering from some cognitive impairment when he consulted with Mr. Land and his physical ailments were such that one would expect of a man of his age, he was capable, with assistance, of managing his significant assets and further, he accepted Mr. Land's evidence on what transpired when the power of attorney document was executed. Mr. Land had deposed that Mr. Dubois was aware of the fact that the document in question appointed Adele [Wilcosh] to act in all financial matters and with complete authority, and that she was standing in his financial shoes.

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[47] *Supra*, note 4 at page 7.
[48] *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 549 (1861-73) All E.R.R.E.P. 47.
[49] See also *Key* v. *Key*, 2010 EWHC 408 CHBAIL 2. It has been suggested that this case has, in fact, "updated" the classic test for testamentary capacity introducing depression caused by bereavement impacting on the decision making process of the testator (Hillary Laidlaw "Setting the Stage Interviewing the Older Client", Law Society of Upper Canada, Special Lectures 2010). It must be remembered, as well, that in *Banks* v. *Goodfellow*, the testator was delusional and believed he was being chased by devils and spirits. Notwithstanding these delusions, the will was upheld as valid as the delusions did not affect the testator's ability to understand the nature of the testamentary disposition.

As in the context of testamentary capacity disputes, the evidence of counsel responsible for taking instructions will often be pivotal as the court reviews evidence of capacity. Lawyers lack formal training with respect to capacity assessments. Further, there is no universal test that lawyers can rely upon to give them some comfort that their own intuition or instincts re competency can be validated.

Similarly, the role of counsel when engaging medical support on the issue of competency will be placed under the microscope by the court. Has the lawyer not only asked the physician the right question, but has, in fact, the right physician been retained for the job?

> It is the responsibility of the lawyer to make a good request for an assessment. That would include detailing to the assessor the type of assessment required, the legal test of capacity, the information from case law as to the criteria in respect to capacity and the process of assessment. Include information on the requirement to "probe and verify" whether the requirement that the assessor must follow the guidelines for capacity assessment if the assessment is being done by a capacity assessor and the assessment is one in which the statute requires capacity assessors to be used.[50]

While there is no gold standard test that counsel must administer to a client who wishes to make a will or power of attorney, the more comprehensive the review, the less likely the lawyer's evidence can be successfully challenged.[51]

## H. *EB* v. *SB and BK*

The importance of counsel, amongst other issues, is highlighted in the most recent Manitoba case dealing with power of attorney issues, *EB* v. *SB and BK*[52] [53]

In this case, two sisters *BK* and *EB* were at odds with respect to their mother's affairs.

The applicant *EB* sought to remove her sister as her mother's attorney in addition to seeking an accounting. A trial of an action was directed and was heard by Justice Burnett.

The issue of capacity to revoke a power of attorney along with allegations of undue influence were before the court in addition to an accounting.

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[50] "Capacity assessment in Ontario is a much more structured enterprise under the *Substitute Decisions Act*. See *Re Koch* 33 O.R. 3rd 485.

[51] Ian Hull in his book *Power of Attorney Litigation* provides a list of questions for solicitors re capacity assessments at page 101 of the text.

[52] *Supra*, note 5.

[53] See also *Scott* v. *Cousins*, 2001 O.J. No. 19 Carswell Ontario 50 Ont. S.C.J., *Death Bed Wills:Estate Planning Where Capacity Is At Issue*, John Poyser, Dec. 8, 2009 Law Society of Manitoba.

The mother was 84 years of age and had the equivalent of a Grade 9 education. She was described as a "traditional old country" mother.

There had been some tension in the family that led to the applicant leaving home at an early age but eventually settling in Winnipeg. Her sister, *BK*, had left Winnipeg and was living in New York. They had very little communication over the last 20 years but as Justice Burnett commented whatever communication they did have "did not appear to be pleasant".

After their father/husband passed away, the mother's health declined and she became extremely depressed. In addition, her memory seemed to be worsening along with her general health.

The mother had initially executed a power of attorney appointing her daughter, *BK*, as her attorney on April 5, 2002. *SB* sought to set aside the power of attorney on the grounds that her mother was not competent or alternatively executed the power of attorney as a result of undue influence from her sister.

Justice Burnett reviewed Justice Schulman's decision in *Dubois* v. *Wilcosh* in regards to the test of competency with respect to making a power of attorney.

Evidence from both a geriatric psychiatrist (Dr. Diane Ducas) coupled with the evidence of Irv Simmonds, the lawyer who prepared the power of attorney, was reviewed.

With respect to the psychiatric evidence, Dr. Ducas' main area of interest was described as "the mental capacity and ability of the elderly and as part of her work she assesses patients to determine their competency to sign powers of attorney". Dr. Ducas' assessment of the mother was prepared over two years (September, 2004) after the power of attorney was executed. Dr. Ducas concluded that in April of 2002, the mother was capable of making a decision to execute a power of attorney and when assessed in September of 2004, she was capable and competent to terminate a power of attorney and make appropriate changes if she so wished.

Mr. Simmonds, it was noted, had known the family for many years. His general practice with respect to the execution of a power of attorney was to:

(a) meet with the client and review a standard form of power of attorney;

(b) provide a general description of what a power of attorney "was" and what it was used for; and

(c) explain that the power of attorney was irrevocable upon mental infirmity.

He would then send out a draft of the document for his client to read and review with a request to call him if they had any questions. Mr. Simmonds testified that he had no reason to believe that he had deviated from this usual practice with *SB*.

Mr. Simmonds went on to testify that he took instructions from *SB*, provided a draft power of attorney and five weeks later, it was signed at *SB*'s home. Mr. Simmonds and *SB* were present at the time it was executed and nobody else.

Mr. Simmonds testified that he was not aware that *SB* was depressed or taking medication for depression and he did not consider getting a doctor's report. He noted there was nothing unusual in terms of *SB*'s behaviour, appearance or communicative ability that would have prompted him to have any concerns whatsoever to obtain professional advice from a doctor in advance of *SB*'s signing the power of attorney. He testified that *SB* executed the power of attorney freely and voluntarily and that he was satisfied that *SB* was competent and that she understood the nature and effect of the power of attorney.

Justice Burnett noted that Mr. Simmonds' evidence was consistent with that of Dr. Ducas' opinion. In addition, it appears that *SB*'s bank manager who had known her for 22 years testified as well, and that in her dealings with *SB* she had no concerns with respect to *SB*'s competency.

Justice Burnett concluded that when *SB* executed the power of attorney, she was "not mentally incapable of understanding the nature and effect of the document." (Section 10(3) of the Act).

The question the court was still left with, after determining the power of attorney should not be set aside, was whether *BK* had failed to account for or made improper payments and whether her power of attorney should be terminated.

With respect to the issue of improper gifts, and consistent with his ruling on the issue of undue influence in the context of the execution of the power of attorney, Justice Burnett concluded that any of the gifts made by the mother were as a result of her own free will and informed thought. That being said, the court once more adopted Justice Clearwater's approach to the duties and responsibilities of an attorney as set forth in the *JL* v. *SLL et al.*[54]

In that case, Justice Clearwater, following the principles described in *Re Hammond Estate*[55] in concluding that a power of attorney is clearly fiduciary and a fiduciary relationship requires the highest commitment of good faith, loyalty and trust. (See also *Todosichuk* v. *Daviduik.*[56]

The issue of an accounting and the appropriate court order will be dealt with in more detail below.

[54] *Supra*, note 1.
[55] *Re Hammond Estate*, (1999) M.J. No. 28 (Q.L.).
[56] *Todosichuk* v. *Daviduik*, (2004) Man.a C.A. 191 (CanLii)

Ultimately, Justice Burnett concluded that it was in the best interest of the mother that The Public Trustee take over the administration of her affairs. As a result, The Public Trustee was appointed as committee.

As noted above, the role of the lawyer who takes instructions and prepares the power of attorney will often be pivotal with respect to the issue of capacity.

## I. *JL* v. *SLL*

In or about November of 2000, the father named two of his daughters as powers of attorney. By July, 2003 the father had become incompetent as a result of the effects of Alzheimer's disease.

Prior to his becoming incompetent, the father had acquired and disposed of a significant amount of property, investments, etc. over his lifetime as he saw fit but with poor record keeping. That being said, whatever the wife and children may have wanted, the father gifted or sold property to them as he saw fit but not necessarily at fair market value and not necessarily by way of equal treatment among his four daughters.

At the date of the hearing, the father and mother continued to reside together in the family home and the mother continued to provide for his physical care with some assistance from others.

The applicant, one of the daughters, not named as power of attorney, sought an order removing her sisters and further, sought the appointment of The Public Trustee in their place in addition to seeking an accounting.

The case is significant with respect to the accounting issue as the court suggests that an attorney must account "as closely as possible" in the form and content contemplated and provided for in Court of Queen's Bench Rule 72 (Committeeship).

As well, Justice Clearwater, relying heavily on the law with respect to when the court ought to remove an executor, concluded that an attorney acting under a power of attorney is, in fact, in law acting as a trustee of the donor's property and has, subject to any legislation to the contrary, the usual obligations and duties of a trustee.[57]

Justice Clearwater reviewed the evidence and while not prepared to find that the daughters/attorneys acted dishonestly with respect to certain transactions, they failed to provide proper accounting and, overall, failed to meet the standard of care required of an attorney. The Public Trustee was appointed as attorney replacing the daughters and ordered to provide proper accounts as noted above.

[57] See *Bartell* v. *Bartell*, (2005) M.J. No. 367 at page 8.

## J. THE LAWYER AS WITNESS

It must be remembered that the lawyer who prepares the power of attorney will likely be the "star" witness in any capacity challenge that is part of a section 24 application.

There appears to be little guidance in the case law on the issue of privilege specifically with powers of attorney although much has been written on the subject in the context of taking instructions for the preparation of a will.

The donor's expectation is that what he or she tells counsel will be held in confidence not be released to third parties unless the privilege is waived.

The solicitor client privilege survives death and must be honoured by counsel.[58]

The Supreme Court in *Geffen* goes as far as to state that the court has a duty to stop a lawyer who is about to disclose confidential matters.

The "will's exception", as it is referred to, also called the "testamentary exception", provides that where a testator's intention is in issue, such communications as are otherwise privileged may be disclosed:

> So, in a will's case where the court is seeking to implement the testator's intention, and has thereby become important to know what instructions were given to his or her solicitor, the question of privilege does not even arise …. It is the duty of the court to ascertain the true intention and capacity of the deceased and it is in both the interests of the client and the interest of justice that the relevant evidence of the solicitor be admitted into evidence.[59]

In the *Geffen* decision, the question before the court was whether the "will's exception" should be extended to an *inter vivos* trust.

At the risk of simplifying a fairly complex decision, the court concluded that the older "pigeon hole" approach to the rules of evidence should no longer be the case and a trend towards a more principled approach to admissibility questions ought to be followed.

From a practical standpoint, the question arises as to what position counsel should take when requested by the attorney "when the donor is incapacitated" not to release the file or provide any information to interested family members concerning his or her taking instructions to prepare the power of attorney.

Clearly an executor can in certain circumstances waive privilege and arguably, an attorney for an impaired donor can also waive privilege.

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[58] See *Geffen* v. *Goodman Estate*, (1991) CanLii 69.
[59] *The Law of Evidence in Canada*, Supinka and Letterman (Toronto:Butterworths 1992) at page 662.

Relying on the *Geffen* decision, if, in fact, the true intent of the "deceased"/"donor" is at issue, then the solicitor who prepared the will/power of attorney ought to be able to testify as it is for the deceased/donor's own benefit that evidence would be provided.

Often, the lawyer who prepared the power of attorney is left to his own devices to determine in any particular circumstances what he or she ought to do when requested to disclose his or her notes or other file documents generated while taking instructions to prepare the power of attorney. It is important that the lawyer retain counsel and that if disclosure of his file is required, it be done with the consent of the stakeholders or out of an abundance of caution under the protection of court order[60].

The lawyer must be mindful of the conflicting influences that have likely come into play that have culminated in the client's request that a power of attorney be prepared. The lawyer ought to examine his prior involvement with members of a donor's family, or perhaps lack of involvement. If he or she has concerns about the donor's competency or notes suspicious circumstances, he or she should recommend a medical assessment and if so, it's vital that the lawyer provides the physician with specific questions that directs the physician's attention to the law in regards to the issue of capacity in the context of the power of attorney request. As both Justice Schulman and Justice Burnett have noted, the lawyer must tell the physician that the "client" must understand that he is appointing someone to act on his or her behalf in all financial property matters. While the lawyer's job has been described to "probe and verify", the physician's job is to address specifically and not generally whether the client has capacity.

Section 8(1) of *The Substitute Decisions Act* of Ontario specifically provides that a person is capable of giving or evoking a property power of attorney if he or she:

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

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

(c) knows that the attorney will be able to do on the person's behalf anything in respect of the property that a 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.

[60] *See also Re Ballard Estate, (1994) (CanLii 7307) On. S.C.*

The lawyer at trial will be challenged not only on his informal assessment of the donor's capacity, but also whether he or she has asked the physician the appropriate questions or provided the physician with what the law expects re the issue of capacity of a donor who is providing instructions for a power of attorney.

## K. THE DOCTOR(S) AS WITNESS

Physicians may become involved directly as capacity assessors at two stages of the proceedings. One, as noted above, a physician may be retained by the lawyer who has been asked to prepare the power of attorney. As well, the physician may not be retained until a number of years after the power of attorney has been prepared. This physician may, in fact, be burdened with the unhappy task of reconstructing whether the donor likely had capacity or, arguably, likely did not have capacity when the power of attorney was prepared.[61]

The physician who is asked to reconstruct the mental state of a donor some time after the power of attorney is prepared should be provided with as much information as possible to assist him or her in this exercise. This information would potentially include the notes of the lawyer who interviewed the donor at the time, the family physician's clinical notes, copies of any assessments done by other health care workers such as care givers at a nursing home and information from family members.

Sometimes this information is readily available, but initially there may be claims of privacy, confidentiality, privilege, etc. that may stand in counsel's way. It is important to remember that section 24 of the Act permits the court to make whatever order is appropriate or necessary under the circumstances. Although there have not been any reported cases that we have been able to locate on this issue, I would think the court would be "eager" to ensure that the interests of the donor as well as other stakeholders are properly protected and that full disclosure be made of all relevant documents at the earliest possible stage of the proceedings.

## L. DIGNITY, SELF-DETERMINATION AND AUTONOMY VS. PROTECTION

The power of attorney, like a will, permits an individual to control his estate and affairs free of the state's direct intervention. The wishes of the individual, as expressed in a will or power of attorney, are to be respected. Inevitably, where conflict arises, the "battleground" will include the issue of capacity.

The facts scenario in *Dubois* v. *Wilcosh* and *EB* v. *SB and BK*, at the risk of appearing anxious to find comfort in uniformity may be described as "typical". An elderly gentleman, for example, perhaps recently widowed or in a new relationship, distances himself from his children. His behaviour is interpreted by the family as unusual and a

[61] *Supra*, note 4.

sign of, in their view, incompetency. It is likely that "dad" has had other medical issues and has been seeing doctors for some time. Dad may also appear to be spending his children's inheritance on items they consider to be unnecessary and frivolous. His judgment being questioned, a sense of desperation creeps into the family dynamic which results in steps being taken to "protect" dad from himself.

A recent British Columbia Supreme Court decision *McMullen* v. *Weber*[62] illustrates the difficulty both the family and the court may encounter when actions of the donor may appear to be irrational but crossing of the line between competent and incompetent must be crystal clear before the court will interfere in that individual's right to "not act his age".

George McMullen was 86 years of age. His wife of 60 years had recently passed away. Mr. McMullen had a number of health problems including respiratory problems, prostrate cancer, urinary tract complications and an arthritic hip. He required a hearing aid and had been hospitalized several times over the years although he had been assessed by several doctors and considered competent to manage his own affairs.

In 2001, he named his children as powers of attorney.

After his wife's passing, Mr. McMullen travelled to Hawaii to visit a friend and while there, he met a woman by the name of Marie Spiritos. Ms Spiritos was 42 years of age and struck up a friendship with Mr. McMullen.

Upon his return home, Mr. McMullen talked obsessively about Ms Spiritos to his family and expressed feelings of affection for her. He began a long distance relationship, contacting Ms Spiritos by telephone and e-mail. Mr. McMullen's daughter, Cindy, while helping her father one day with a computer problem, came across e-mails which seemed to suggest that her father was sending money to Ms Spiritos and the family became suspicious that their dad was being taken advantage of.

Mr. McMullen returned to Hawaii in 2002 and did not return to B.C. until March of 2003 and only to attend his daughter's wedding. He missed Christmas with his family and a number of family gatherings which was considered unusual behaviour.

In the spring of 2003, Mr. McMullen began to take a different approach to money. His family noticed that $15,000.00 of investments was depleted and he had accumulated considerable credit cad debt. As well, he increased his mortgage. Mr. McMullen asked his daughter to stop accessing his bank accounts by computer and he indicated that he would now take control of paying his bills.

Mr. McMullen continued to send money to Ms Spiritos. His daughter continued to monitor his spending and concluded that dad was contributing large amounts to Ms Spiritos' rent, living expenses and medical expenses.

[62] *McMullen* v. *Weber*, (2006) B.C.S.C. 1656 (CanLii 2).

The family made every effort to intervene and sought professional assistance for their father. They contacted Mr. McMullen's family doctor, the Boundary Bay Health Unit Elder Care, the Public Guardian and the Public Trustee's Office, an elder abuse hotline, a caregiver support group and Mr. McMullen's bank. As well, the daughter contacted the RCMP and the Florida State Police (where Ms Spiritos was living at the time) and attempted to report elder abuse.

In the summer of 2003, they decided to utilize the power of attorney their father had given them to transfer title to his condominium (for its and his protection) into the names of their spouses (his sons-in-law).

Mr. McMullen continued to communicate with Ms Spiritos by telephone and e-mail and in the spring of 2004, he asked for a loan from his children to invest in some property which was partially owned by Ms Spiritos in the U.S. The children, not surprisingly, declined. Mr. McMullen asked his children to invest $30,000.00 in a Reggae band in which Ms Spiritos was a part. Mr. McMullen was told that he would be the band's manager. Once more, the family declined to endorse such an investment.

Mr. McMullen learned of the transfer of the condominium into the names of his sons-in-law and instituted proceedings to reverse the transfer. He also alleged that the power of attorney had been misused.

A psychiatric assessment was sought. Mr. McMullen's psychiatrist concluded:

> At the present time, I would not consider this man to be ill and/or in a state where he needs to be deemed incompetent to manage his affairs, financial or otherwise. Most importantly, I did not find anything on presentation to treat. Beyond this, he deserves a little empathy given his life long partner has passed away and he did some things to adapt that might appear to be somewhat unusual. Most importantly, he connected to others in a way that brought him back to his sense of himself and the value of living.[63]

The court pointed out that the law does not require individuals to make decisions in their own best interests:

> Mr. McMullen may be making improvident decisions according to his family, but the law entitles him to do so provided he is capable of making financial decisions it does not harm others …I will conclude by acknowledging the dilemma of the defendants. I echo the words of Mr. Justice MacFarlane in *McNeil* v. *Few*: I should like to add that I accept for the purposes of this appeal that the respondent Mrs. Few has acted in complete good faith. It is natural enough that anyone should wish to try to help a person whom one believes is about to do something very foolish or improvident but

[63] *Supra*, note 55 at page 9.

> when a court is asked to intervene to the extent of making provisions so that person may not handle his or her own affairs, it must in my opinion be done according to the law and strictly in accordance with the provisions of *The Patients' Estates Act*.[64]

## J. CONCLUSION

The key in determining whether a challenge with respect to the donor's capacity will be successful rests in a careful analysis of both the medical records of the donor and the evidence of counsel who took instructions and prepared the power of attorney.

Evidence from financial advisors, homecare workers, family and friends may also come into play.

The law, as it has developed in the context of testamentary dispositions, will be very helpful, but it is the writer's view that we will likely begin to see more and more cases dealing specifically with capacity issues in the context of powers of attorney.

*The Powers of Attorney Act* is simply one piece of a legislative safety net that has been put in place to protect the vulnerable. I think it is likely that we will see more applications under section 24 of the Act as the "perfect storm" develops.

[64] *Supra*, note 55 at page 13.