Civil Procedure
Winter Term 2025

Lecture Notes No. 2

II. SUBSTITUTE DECISION-MAKING

1. Capacity and Incapacity

Capacity is a legal construct. We presume that a person has capacity.

The *Substitute Decisions Act, 1992* provides:

> 6. A person is incapable of managing property **if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.**
>
> …
>
> 45. A person is incapable of personal care **if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.**

Calvert (Litigation Guardian of) v. Calvert
(1997), 32 O.R. (3d) 281 (S.C.J.); cb, p.1031

Mr. and Mrs. Calvert were each married prior to their marriage to each other, and each had a child from the first marriage. They entered into a marriage contract before the marriage was solemnized. Mr. Calvert came into considerable funds during the course of the marriage, although the couple continued to live frugally. Mrs. Calvert was later diagnosed with Alzheimer's Disease. Mrs. Calvert brought an action for divorce through her litigation guardian; Mr. Calvert defended on the basis that his wife lacked capacity to separate and divorce.

Benotto J.:

> 53 T**here are three levels of capacity that are relevant to this action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.**
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> 54 **Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no**

> **longer married to one's spouse. It is the undoing of the contract of marriage.**
>
> 55 The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: Park, supra at 1427. If marriage is simple, divorce must be equally simple. The American Courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage.
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> 56 T**here is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will.** (I note that Mr. Bimbaum felt that, in August 1994, he would have taken instructions for a will but for Dr. Hogan's concern about her ability to instruct counsel.) **While Mrs. Calvert may have lacked the ability to instruct counsel, that did not mean that she could not make the basic personal decision to separate and divorce.**
>
> 57 The courts are slow to take away a person's right to decide. This is reflected in the low threshold the courts have set for the determination of capacity. Persons have been held to have capacity who suffer from schizophrenia; delusions; and other serious mental problems. A person who suffers from a cognitive impairment is competent as long as the act in question takes place during a lucid interval.

- The case illustrates that capacity is contextual and linked to particular types of decisions.

- An assessment of capacity should be directed to a specific type of capacity, and, in particular, the decisions that are found in SDA, ss. 6, 45 (above).

- The capacity question might be relevant prospectively and/or retrospectively; i.e. to enable decisions to be made by another, or, to set aside transactions that were entered into by a person who lacked capacity.

2. Capacity to Grant a Continuing Power of Attorney

The *Substitute Decisions Act, 1992* provides:

> 8. (1) A person is capable of giving a continuing power of attorney if he or she,
>
> (a) knows what kind of property he or she has and its approximate value;
> (b) is aware of obligations owed to his or 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.
>
> …
>
> 47. (1) A person is capable of giving a power of attorney for personal care if the person,
>
> (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
> (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

3. Formalities

See SDA, s.10 re execution and attestation requirements.

4. Capacity Assessment

Abrams v. Abrams
2008 CanLII 67884 (Ont. S.C.J.); cb, p.1039

Capacity may determined one of two ways: either by a Designated Capacity Assessor (designated by the Attorney General) or the Court. A capacity assessment by either a Designated Capacity Assessor or a suitable professional (usually a psychiatrist or neurologist with expertise in neuro-degenerative disease) may be ordered by the Court even where the alleged incapable person does not consent.

MAG's roster of capacity assessors is available online, as well as its Guidelines.

Strathy J.:

Analysis of the Issues

47 Before examining the issues and the submissions of counsel, some general observations are in order. First, the purpose of the SDA is to protect the vulnerable: See *Stickells Estate v. Fuller*, 24 E.T.R. (2d) 25, [1998] O.J. No. 2940 (Ont. Gen. Div.). **In *Phelan, Re*, 29 E.T.R. (2d) 82, [1999] O.J. No. 2465 (Ont. S.C.J.), Madam Justice Kitely said, at paragraphs 22-23:**

> **The Substitute Decisions Act is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.**
>
> **The alternative to such a legislative framework is that incapable persons and their families might be taken advantage of by unscrupulous persons. The social values of protecting those who cannot protect themselves are of "superordinate importance".**

48 While Justice Kitely was making those observations in the context of a request for a sealing order, they highlight the nature and importance of proceedings of this kind. These proceedings are not a *lis* or private litigation in the traditional sense. The interests that these proceedings seek to balance are not the interest of litigants, but the interests of the person alleged to be incapable as against the interest and duty of the state to protect the vulnerable.

49 The SDA contains a number of provisions that indicate that the dignity, privacy and legal rights of the individual are to be assiduously protected. For example:

> **(a) there is a presumption of capacity (section 2);**
>
> **(b) a person whose capacity is in issue is entitled to legal representation (section 3);**
>
> **(c) a person alleged to be incapable is entitled to notice of the proceedings (ss. 27(4) and ss. 62(4));**
>
> **(d) the court must not appoint a guardian if it is satisfied that the need for decisions to be made can be met by an alternative course of action**

that is less restrictive of the person's decision making rights (ss. 22(3) and ss. 55(2));

(e) in considering the choice of guardian for property or personal care, the court is to consider the wishes of the incapable person (cl. 24(5)(b) and cl. 57(3)(b));

(f) subject to exceptions, a person has a right to refuse an assessment, other than an assessment ordered by the court (section 78).

50 In considering whether to order an assessment, whether on motion or on its own initiative, a court must balance the affected party's fundamental rights against the court's duty to protect the vulnerable. The appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual. As Mr. Justice Pattillo said in *Flynn v. Flynn* (December 18, 2007), Doc. 03-66/07 (Ont. S.C.J.): "[a] capacity assessment is an intrusive and demeaning process."

51 There is little authority to guide me on the circumstances in which the court should order a further assessment where, as here, the individuals have voluntarily submitted to assessments by a qualified assessor. In *Forgione v. Forgione*, [2007] O.J. No. 2006 (Ont. S.C.J.), a second assessment was ordered where the first assessment had not been carried out by a qualified capacity assessor and the report that had been prepared was not in accordance with the Guidelines for Conducting Assessments of Capacity. There were, as well, serious questions about the capacity and vulnerability of the person to be assessed, none of which had been mentioned in the earlier report.

52 In *Mesesnel (Attorney of) v. Kumer*, [2000] O.J. No. 1897 (Ont. S.C.J.), Justice Greer ordered a second assessment. In that case, submissions were made by counsel on behalf of the affected individual, that he did not want to endure another assessment. It was argued that the person's autonomy should be respected, given his advanced age of 81 years. Justice Greer ordered the additional assessment on a number of grounds, including the failure of the first physician to do what he had been asked to do; personal criticisms of the attorney which raised suspicions of bias which tainted the doctor's reports; and failure to follow standard tests and procedures in the report. It is noteworthy that in that case the applicant had filed a letter from another physician, who was familiar with the person's health and mental status, setting out issues that were not properly explored in the first report.

53 In my view, in deciding whether to order an assessment in this case, particularly as there are existing assessments of Philip and Ida, I should consider and balance the following factors to determine whether, in all the circumstances, the public interest and the interests of Philip and Ida, require that an assessment take place and justify the intrusion into their privacy:

(a) the purpose of the SDA, as discussed above;

(b) the terms of section 79, namely:

(i) the person's capacity must be in issue; and

(ii) there are reasonable grounds to believe that the person is incapable;

(c) the nature and circumstances of the proceedings in which the issue is raised;

(d) the nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation;

(e) if there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached;

(f) whether there are flaws on the previous report, evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper criteria;

(g) whether the assessment will be necessary in order to decide the issue before the court;

(h) whether any harm will be done if an assessment does not take place;

(i) whether there is any urgency to the assessment; and

(j) the wishes of the person sought to be examined, taking into account his or her capacity.

Undue Influence

"Undue influence" is a legal concept arising in equity and which may be applied presumptively in certain situations. The core concept is coercion such that a person entering into a transaction may be doing so as a result of pressure from another to such a degree that the law will intervene and offer a remedy. In the validity of Wills, undue influence is never presumed but must be proved. What about for a POA? The Ontario and Manitoba Courts of Appeal have recently looked at the question and favourably considered the judgment in *Bank of Scotland v. Etridge (No. 2)*, [2001] UKHL 44 (H.L.), which examined undue influence in the conventional commercial context. The Manitoba Court of Appeal has accepted that undue influence may be subject of an evidential presumption where "(a) the relationship between the person alleged to have exercised undue influence and the donor is one with the potential for domination, and (b) the granting of the enduring power of attorney was immoderate and irrational." The Ontario Court of Appeal has left the question open somewhat but seems to favour the approach taken in the probate context; i.e. no presumption is available.

Vanier v. Vanier
2017 ONCA 561 (Ont. C.A.); cb, p.1045, note 4

This was a contested guardianship case in relation to a 90 year-old lady. The litigants were her two sons and the issues included the validity of a Continuing Power of Attorney made in favour of one son replacing an existing CPOAP naming the two sons jointly and severally. The donor participated in the proceedings to defend the CPOAP.

One son alleged that the CPOAP was procured by undue influence. Thus the question became the standard applicable to the application of the equitable doctrine of undue influence to the making of such documents. That is, whether the *inter vivos* approach (looking to presumptions to shift the burden to the party defending the document in certain cases) or the testamentary approach (requiring the party alleging undue influence to provide it) applied.

After noting that the issue was presented improperly for the first time on appeal, **Epstein J.A. held**:

> [38] Raymond submits that the test relied upon by the motion judge, set out above - the test for "testamentary undue influence" - is not the appropriate test for the granting of a power of attorney. The test the motion judge ought to have used is the test for inter vivos equitable undue influence, either actual or presumed. The effect of the inter vivos test would be to shift the onus to Pierre to prove that Rita signed the 2015 CPOAP, willingly and without undue influence.
>
> [39] **Raymond relies on the decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)*, [2001] UKHL 44, that explains how equity identifies two forms of unacceptable conduct in the context of inter vivos transactions. One involves overt acts of improper pressure or coercion (actual undue influence). The other arises out of a relationship between two people, where one acquires a measure of influence or ascendancy over another, of which the ascendant person takes unfair advantage. The law has long recognized the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct (presumed undue influence).**
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> …
>
> [50] However, I need not decide whether it is in the interests of justice for this issue to be dealt with, as the inter vivos equitable undue influence test has no application on the facts of this case. **As noted by the House of Lords in *Eltridge*, at paras. 21-22, there are two prerequisites to the evidential shift in the burden of proof from the complainant (Raymond, arguing on behalf of Rita) to the other party (Pierre). First, the complainant reposed trust and confidence in the other party. Second, the transaction is not readily explicable by the parties' relationship. This second part of the test has been held by the House of Lords to mean that the evidence must support a finding that the transaction is "immoderate and irrational".**
>
> [51] In oral argument, Pierre candidly conceded the first part of the test, in other words that Rita reposed trust and confidence in him. However, he submits that Raymond cannot meet the second part, in other words show that the 2015 CPOAP was "immoderate and irrational".

> [52] I agree. There is nothing "immoderate or irrational" about the 2015 CPOAP. The record supports a finding that Rita's decision to give the power of attorney to one son over the other was an emotionally difficult but totally rational decision. Rita was very clear in what she said to the police and to Ms. Silverston, none of which evidence was challenged. She knew her money was out of reach. She needed her funds to pay basic expenses such as rent. She understood that Raymond was interfering with her access to the fund and that the solution had to lie with Pierre.
>
> [53] Moreover, far from being "immoderate", the 2015 CPOAP conferred little, if any, benefit on Pierre. He was left with the same power as he had under the 2013 CPOAP. The minor "benefit", if one could call it that, is that the 2015 CPOAP protected Pierre from the stress and inconvenience of Raymond's being in a position to interfere with Rita's finances.
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> [54] For these reasons, I am of the view that the motion judge was fully justified in applying the testamentary undue influence test.
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> [55] I add, that even if the inter vivos equitable undue influence test were applicable, the record does not support a finding of undue influence.

While Epstein J.A. did not rule out the use of the *inter vivos* approach, it would appear that the normal disposition of the issue will be through the proof of actual undue influence. One expects that the issue will return before the Court of Appeal sooner rather than later.

Drewniak v Smith
2024 MBCA 86 (Man. C.A.)

Pfuetzner J.A.:

> [3] As I will explain, the equitable doctrine of undue influence applies to the granting of an enduring power of attorney (which I will also refer to as a power of attorney). As a result, an evidentiary presumption of undue influence can arise if the person attacking the power of attorney establishes that there was a relationship with the potential for domination and that the granting of the power of attorney is immoderate and irrational. The evidentiary presumption does not arise on the facts in the present case. Moreover, the judge made no palpable and overriding errors in finding that the Donor had capacity to grant the 2016 POA and that she was not subjected to undue influence. Accordingly, I would dismiss the appeal.
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> …
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> 53 Katherine argues that this Court should endorse the approach to undue influence developed in the Court of Chancery (which I will refer to as equitable undue influence). As I will explain, in equitable undue influence, an evidentiary presumption of undue influence can arise in certain circumstances.
>
> 54 Undue influence is, at its core, coercion — whether in probate or equity.

A person may have capacity but nonetheless enter into a transaction that they do not approve of because their free will has been overborne by pressure that has been exerted upon them. In other words, "[u]ndue influence involves the domination of the will of one person by another" (Trotter v Trotter, 2014 ONCA 841 at para 58).

55 The judge framed her decision as a choice between applying probate undue influence and adopting equitable undue influence as it applies to inter vivos gifts. She succinctly listed her reasons for adopting probate undue influence (Drewniak at para 72):

> I agree with the courts in Vanier and Rudin-Brown that the testamentary undue influence test should apply in the context of granting a power of attorney, for the following reasons:
>
> a) both a power of attorney and a will are legal directives reduced to writing, which are often (but not always) prepared and executed with the assistance of counsel and in the presence of witnesses. Conversely, an inter vivos gift can be made without any written document or other corroborative context or evidence. For example, an inter vivos gift can be given by handing over physical possession of cash or other personal property;
>
> b) a power of attorney imposes ongoing, fiduciary obligations upon an attorney that are similar to the obligations imposed upon an executor named in a will. That is so because both attorneys and executors are obligated to perform their obligations pursuant to legislation and the common law, and must account for their actions. Conversely, the recipient of an inter vivos gift owes no fiduciary duty and has no ongoing obligations to the donor;
>
> c) a donor may change their power of attorney or their will at any time prior to incapacity, while an inter vivos gift, once given, cannot be revoked; and
>
> d) neither the granting of a power of attorney nor the naming of an executor bestows a benefit upon the attorney or executor, whereas the recipient of an inter vivos gift by definition receives a benefit. [footnote omitted]

Equitable Undue Influence and the Evidentiary Presumption

56 As I have mentioned, equity is the branch of law that was developed and applied in England by the Court of Chancery. Equity has been described as "the body of rules which evolved to mitigate the severity of the rules of the common law" (Harold Greville Hanbury & Ronald Harling Maudsley, Modern Equity, 13th ed (London, UK: Stevens & Sons, 1989) at 4).

57 Before beginning a discussion of the nature of equitable undue influence, it is important to distinguish between the equitable doctrine of undue influence (a substantive legal principle) and the evidentiary presumption of

undue influence (a rule of evidence). For example, in the leading case of Geffen v Goodman Estate, [1991] 2 SCR 353, 1991 CanLII 69 (SCC) [Geffen], Wilson J refers to "the doctrine of undue influence and its evidentiary companion, the presumption of undue influence" (at 367).

58 As is the case with probate undue influence, the party seeking to attack a transaction on the basis of equitable undue influence has the persuasive legal burden to prove undue influence on a balance of probabilities (see Royal Bank of Scotland v Etridge, [2001] UKHL 44 (BAILII) at para 13 [Etridge]). However, if certain facts are established, the evidentiary presumption of undue influence can assist the party alleging equitable undue influence to satisfy their persuasive legal burden (see ibid at para 14). The function of the presumption of undue influence, in other words, is to assist the attacker, in the absence of compelling evidence to the contrary, to satisfy their persuasive legal burden to prove undue influence.

59 The focus of this discussion is on the evidentiary presumption of undue influence. However, the law is clear that a plaintiff can succeed in a claim of undue influence — in respect of an enduring power of attorney or some other transaction — even where the evidentiary presumption is not in play. Viewed in this sense, "presumed undue influence" and "actual undue influence" are no more than different ways of proving the same thing (Thompson v Foy, [2009] EWHC 1076 (Eng. C.A.) (Eng. C.A.) (Ch) (BAILII) at para 100). In the former case, undue influence is proved with the aid of an evidentiary presumption. In the latter, it must be proved without any such presumption and the plaintiff must satisfy their persuasive legal burden to prove undue influence on a balance of probabilities by leading evidence in the normal course as in any civil proceeding.

60 There are some circumstances "in which equity readily presumes undue influence" (Hanbury at 789). This includes in certain defined relationships, such as parent and child, guardian and ward, solicitor and client, trustee and beneficiary or doctor and patient (see Geffen at 370).

61 There is somewhat of a divergence between English and Canadian law as to when the evidentiary presumption of equitable undue influence will arise. Under English law, even within the defined relationships mentioned above, the evidentiary presumption will not be applied to certain transactions — such as those made on commercial terms or with independent legal advice. Even in respect of gifts, the evidentiary presumption will generally "not operate unless the gift is so large or the transaction so improvident" that it cannot reasonably be attributed to other innocent motives (Hanbury at 790).

62 In Etridge, Lord Nicholls described two prerequisites to the evidentiary presumption of undue influence. First, that "the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant" (ibid at para 21). Second, that "the transaction is not readily explicable by the relationship of the

parties" (ibid). The second factor is also described as "a transaction which calls for explanation" (ibid at para 14), "immoderate and irrational" (ibid at para 22) and "explicable only on the basis that undue influence had been exercised to procure it" (ibid at para 25).

63 The reason for requiring that the nature of the transaction be examined is to ensure that de minimis, routine or unexceptional transactions do not raise the evidentiary presumption of undue influence. Lord Nicholls wrote: "It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved" (ibid at para 24).

64 However, in Canada, the evidentiary presumption of equitable undue influence is more easily triggered. After considering the pre-Etridge English jurisprudence and academic writing on the topic, Wilson J explained, in Geffen, that the inquiry into whether the evidentiary presumption is raised begins with an examination of the relationship between the parties to the impugned transaction. In doing so, the court must ask "whether the potential for domination inheres in the nature of the relationship itself" (ibid at 355). This embraces the traditional defined categories, "as well as other relationships of dependency which defy easy categorization" (ibid).

65 The second stage of the inquiry into whether the evidentiary presumption is triggered is to examine the nature of the transaction. Justice Wilson noted that the substantive doctrine of equitable undue influence applies to "a wide variety of transactions from pure gifts to classic contracts" (ibid at 354).

66 For gifts, the courts will scrutinize the process leading up to the gifting for "coerced or fraudulently induced generosity" (ibid). Justice Wilson concluded that the English requirement of manifest disadvantage from National Westminster Bank Plc v Morgan, [1985] 1 UKHL 2 (BAILII), "is a wholly unrealistic test to apply to a gift" (Geffen at 377), although she conceded that it is "perhaps appropriate in a purely commercial setting" (ibid). Ultimately, Geffen held that, in situations "where consideration is not an issue, e.g., gifts" (at 378), a plaintiff does not need to show that they were unduly disadvantaged or that the defendant was unduly benefitted. Justice Wilson wrote: "In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship" (ibid).

67 Accordingly, under Canadian law, the establishment of undue disadvantage or its inverse, undue benefit, is not required for the evidentiary presumption of undue influence to arise in respect of a gift or an analogous act of "beneficence" where there is a dominant relationship. Importantly, however, Wilson J noted, "that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised" (ibid at 379). In other words, while

disadvantage or benefit does not need to be established to raise the evidentiary presumption of undue influence in respect of a gift, it is nonetheless relevant evidence in the ultimate determination of whether the plaintiff has satisfied their persuasive legal burden to prove equitable undue influence.

68 With respect to contracts, something more than a tainted process must be shown (see ibid at 376). In a commercial transaction, the plaintiff must show both the required relationship with potential for influence and "that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it" (ibid at 378).

69 A recent case of the Ontario Court of Appeal touched on the question of whether probate undue influence or equitable undue influence should apply to powers of attorney. In Vanier v Vanier 2017 ONCA 561 [Vanier], the appellant challenged the validity of a continuing power of attorney for property (given to one of the donor's sons to the exclusion of the other) on the basis that it was procured by undue influence. The appellant argued that the analysis should be undertaken within the framework of equitable undue influence, while the respondent submitted that the correct approach was probate undue influence. The motion judge applied the probate undue influence regime, where no evidentiary presumption can arise.

70 On appeal, the Ontario Court of Appeal agreed that no evidentiary presumption of undue influence arose in that case for two reasons. The first was that the argument that equitable undue influence applies had not been made before, or considered by, the motion judge. Second, Epstein JA found that the evidentiary presumption of equitable undue influence in any event did not arise on the facts. In doing so, she applied the two-part test articulated in Etridge. The parties conceded that the first part of the test was met — the donor reposed trust and confidence in her son, the attorney. Justice Epstein found that the second part was not met as the appellant could not establish that the granting of the impugned power of attorney was "immoderate or irrational" (Vanier at para 52). Moreover, Epstein JA described it as "far from being 'immoderate'" and conferring "little, if any, benefit" on the named attorney (ibid at para 53). Curiously, Epstein JA made no reference in her analysis to Geffen.

…

79 In my view, for the evidentiary presumption of undue influence to apply to the granting of an enduring power of attorney, there must first be a relationship with the potential for domination (see ibid at 355). In addition, something more must be shown. That something more does not need to be as much as the "manifest disadvantage" (ibid,) that Geffen considered appropriate to be demonstrated for the evidentiary presumption to arise in respect of a contract. Rather, I would adopt the test from Etridge, referred to in Vanier, that in addition to the relationship

with a potential for domination, the plaintiff must demonstrate that the granting of the power of attorney was "immoderate and irrational" (at para 50).

80 Wills and powers of attorney are often executed together as part of an estate plan, with the power of attorney sometimes treated as an afterthought. I am aware that the result of the adoption of this test may mean that an evidentiary presumption of undue influence could arise with respect to a power of attorney but not with respect to a Will that was executed at the same time. However, the adoption of equitable undue influence as the proper test respects the origin and nature of powers of attorney and their distinct nature and function as compared to Wills.

81 At the end of the day, most contested power of attorney litigation will not rise or fall on the basis of the evidentiary presumption of undue influence. The evidentiary presumption will only win the day in the absence of evidence to the contrary. It will be a rare case where the evidence led by both parties is so evenly balanced that the evidentiary presumption will determine the result.

82 In the vast majority of cases, issues surrounding powers of attorney will be resolved by courts as part of their supervisory function over the actions of attorneys, rather than by inquiring into the validity of the power of attorney itself. It will obviously be the very rare case where a person procures a power of attorney through undue influence but then exercises their powers in strict compliance with their statutory and fiduciary duties. While uncommon, it is possible that the person who exerted the undue influence was nevertheless acting perfectly honestly and without any intention of taking advantage of the donor of the power of attorney (see Niersmans v Pesticcio, [2004] EWCA Civ 372 (BAILII) at para 20).

83 In summary, the person seeking to attack an enduring power of attorney on the basis of undue influence has the persuasive legal burden to prove undue influence on a balance of probabilities. That person can, if certain facts are established, rely on an evidentiary presumption of undue influence to satisfy their persuasive legal burden, in the absence of evidence to the contrary. The evidentiary presumption of undue influence will arise in respect of the granting of an enduring power of attorney if (a) the relationship between the person alleged to have exercised undue influence and the donor is one with the potential for domination, and (b) the granting of the enduring power of attorney was immoderate and irrational. If the person seeking to uphold the enduring power of attorney leads evidence tending to refute the existence of undue influence, it will be for the trier of fact to determine if the party attacking the enduring power of attorney has satisfied their persuasive legal burden to prove undue influence on a balance of probabilities.

5. Court-Appointed Guardians and POA Litigation

Chu v. Chang
2010 ONSC 294 (Ont. S.C.J.); cb, p.1051

Read this case for the depth of the factual analysis by which the Court determines whether a guardianship should be terminated and the need for an accounting.

6. Personal Care

The ***Health Care Consent Act, 1996, S.O. 1996, c. 2***, provides:

> **10** (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,
>
> (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
>
> (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act
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> —
>
> **Principles for giving or refusing consent**
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> **21 (1) A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:**
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> **1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.**
>
> **2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.**
>
> **Best interests**
>
> (2) In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,
>
> (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;
>
> (b) any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and
>
> (c) the following factors:

1. Whether the treatment is likely to,
    i. improve the incapable person's condition or well-being,
    ii. prevent the incapable person's condition or well-being from deteriorating, or
    iii. reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate.
2. Whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment.
3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.
4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

Rasouli (Litigation Guardian Of) v. Sunnybrook Health Sciences Centre [2013] 3 SCR 341 (S.C.C.); cb, p.1062

[The bottom line:
"Withdrawal of treatment" = "treatment" under the HCCA. Para 82: "... where an incapable patient has expressed a prior wish... the intended meaning and scope of the wish must be carefully considered... The question is whether, when the wish was expressed, the patient intended its application in the circumstances that the patient now faces... Changes in the patient's condition, prognosis, and treatment options may all bear on the applicability of a prior wish."]

McLachlin C.J.C.

G. Resolving Disagreements Over Withdrawal of Life Support

77 Having rejected the physicians' arguments, it follows that the consent regime imposed by the HCCA applies in this case. I earlier outlined that regime. At this point, it may be useful to discuss in greater depth the role of the substitute decision-maker, health practitioners and the Board in cases like this.

78 To recap, the HCCA [Health Care Consent Act] **is a carefully tailored statute. It deals with patients capable of consent and patients who no longer have the power to consent. It seeks to maintain the value of patient autonomy — the right to decide for oneself — insofar as this is possible. This is reflected in the consent-based structure of the Act. If the patient is capable, she has the right to consent or refuse consent to medical treatment: s. 10(1)(a). If the patient is incapable, the HCCA transfers the right of consent to a substitute decision-maker, often next of kin (s. 10(1)(b)), who is required to act in accordance with the patient's declared applicable wishes or failing that, the patient's best interests: s. 21. Finally, it provides that a physician may challenge a substitute decision-maker's consent decision by application to the Board: ss. 35 to 37. The physician may make submissions to the Board regarding the**

medical condition and interests of the patient. If the Board finds that the substitute decision-maker did not comply with the HCCA, it may overrule the substitute decision-maker and substitute its own opinion in accordance with the statute: s. 37(3). To be clear, this means that, even in life-ending situations, the Board may require that consent to withdrawal of life support be granted.

79 Under the HCCA, the substitute decision-maker does not have carte blanche to give or refuse consent. He or she must comply with the requirements of s. 21 of the Act, which contemplates two situations. The first is where the substitute decision-maker knows of a prior expressed wish by the patient which is applicable to the circumstances. The second is where there is no such wish, in which case the substitute decision-maker "shall act in the incapable person's best interests".

(1) Prior Expressed Wishes

80 If the substitute decision-maker knows of a prior wish regarding treatment that the patient expressed when capable and over 16 years old, and that is applicable in the circumstances, the wish must be followed: s. 21(1). This reflects the patient's autonomy interest, insofar as it is possible.

81 While the HCCA gives primacy to the prior wishes of the patient, such wishes are only binding if they are applicable to the patient's current circumstances. This qualification is no mere technicality. As the Ontario Court of Appeal held in *Conway v. Jacques* (2002), 59 O.R. (3d) 737 (Ont. C.A.), at para. 31:

> **... prior capable wishes are not to be applied mechanically or literally without regard to relevant changes in circumstances. Even wishes expressed in categorical or absolute terms must be interpreted in light of the circumstances prevailing at the time the wish was expressed.**

82 Needless to say, where an incapable patient has expressed a prior wish that life support not be withdrawn, the intended meaning and scope of the wish must be carefully considered: see Fleming, at p. 94. The question is whether, when the wish was expressed, the patient intended its application in the circumstances that the patient now faces: see *Conway*, at para. 33; *Scardoni*, at para. 74. Changes in the patient's condition, prognosis, and treatment options may all bear on the applicability of a prior wish: Conway, at paras. 37-38. For example, had Mr. Rasouli expressed a prior wish regarding life support, his substitute decision-maker would have to consider whether, when the wish was expressed, Mr. Rasouli intended the wish to apply if he were in a permanent vegetative state, with recovery extremely improbable according to medical evidence, and facing the health complications associated with long-term provision of life support.

83 A prior wish need not identify every possible future development in order to be applicable: Scardoni, at para. 74; S. (K.M.), Re [2007 CarswellOnt 4883

(Ont. Cons. & Capacity Bd.)], 2007 CanLII 29956. However, a wish that is unclear, vague, or lacks precision may be held inapplicable to the circumstances. On this basis, the Board has found there were no prior wishes relating to life supportP applicable to the existing circumstances in numerous cases: D. (D.), Re [2013 CarswellOnt 4211 (Ont. Cons. & Capacity Bd.)], 2013 CanLII 18799; P. (D.), Re [2010 CarswellOnt 7848 (Ont. Cons. & Capacity Bd.)]; B. (E.), Re [2007 CarswellOnt 745 (Ont. Cons. & Capacity Bd.)], 2006 CanLII 46624; G, Re; E., Re [2009 CarswellOnt 3258 (Ont. Cons. & Capacity Bd.)], 2009 CanLII 28625; J. (H.), Re [2003 CarswellOnt 8244 (Ont. Cons. & Capacity Bd.)], 2003 CanLII 49837. I have been unable to locate any case in which there was a prior expressed wish opposing withdrawal of life support that was held to be applicable and therefore binding in the circumstances.

84 If it is unclear whether a prior wish is applicable, the substitute decision-maker or physician may seek directions from the Board: s. 35. Alternately, if the substitute decision-maker acts on a prior wish that the physician believes is not applicable, the physician may challenge the consent decision before the Board: s. 37. The physician's submissions on the patient's condition, prognosis, and any adverse effects of maintaining life support will be relevant to the Board's assessment of applicability.

85 In addition, either the substitute decision-maker or physician may apply to the Board for permission to depart from prior wishes to refuse treatment: s. 36. The Board may grant permission where it is satisfied that the incapable person, if capable, would probably give consent because of improvement in the likely result of the treatment since the wish was expressed: s. 36(3).

86 I note that the HCCA also provides that the substitute decision-maker is not required to comply with an expressed prior wish if "it is impossible to comply with the wish": s. 21(1)2. This is not raised on the facts of this appeal, and I consider it no further.

(2) The Best Interests of the Patient

87 If the substitute decision-maker is not aware of an expressed prior wish of the patient or if the wish is not applicable to the circumstances, the substitute decision-maker must make her consent decision based on the best interests of the patient, according to the criteria set out in s. 21(2). These criteria include the medical implications of treatment for the patient, the patient's well-being, the patient's values, and any prior expressed wishes that were not binding on the substitute decision-maker. This legislative articulation of the best interests of the patient aims at advancing the values that underpin the HCCA: enhancing patient autonomy and ensuring appropriate medical treatment.

88 The substitute decision-maker is not at liberty to ignore any of the factors within the best interests analysis, or substitute her own view as to what is in the best interests of the patient. She must take an objective view of the matter, having regard to all the factors set out, and decide accordingly. This is clear from the mandatory wording of the opening portion

of s. 21(2): the decision-maker "shall take into consideration" the listed factors. The need for an objective inquiry based on the listed factors is reinforced by s. 37, which allows the decision of the substitute decision-maker to be challenged by the attending physician and set aside by the Board, if the decision-maker did not comply with s. 21. The intent of the statute is to obtain a decision that, viewed objectively, is in the best interests of the incapable person.

89 The first consideration under s. 21(2), heavily relied on by Ms. Salasel in this case, concerns the values and beliefs of the incapable person. Section 21(2)(a) provides that the substitute decision-maker must consider the values and beliefs that the incapable person held when capable and that the substitute decision-maker believes that the incapable person would still act on if capable. Here, Ms. Salasel argues that sustaining life as long as possible accords with the religious beliefs of Mr. Rasouli, and that as a result he would not have consented to the removal of life support.

90 The second consideration relates to known wishes of the incapable person that were not binding on the substitute decision-maker under s. 21(1)1. For example, wishes expressed when a person was under the age of 16 or when incapable do not bind a substitute decision-maker, but must be taken into consideration in this stage of the best interests analysis.

91 Third, in addition to considering the values and beliefs of the patient and any relevant wishes, s. 21(2)(c) requires that the substitute decision-maker consider four factors that relate to the impact of the treatment on the patient's condition, well-being, and health. This stage of the best interests analysis focuses on the medical implications of the proposed treatment for the patient. The attending physician's view of what would medically benefit the patient must be taken into account.

92 The first factor asks whether receiving the treatment is likely to improve the patient's condition or well-being, prevent deterioration of the person's condition or well-being, or reduce the extent or rate of the deterioration of the person's condition or well-being: s. 21(2)(c)1. In this case, the inquiry must determine whether removing life support would improve, prevent deterioration of, or reduce the extent or rate of deterioration of, Mr. Rasouli's condition or well-being. The physicians argue that artificially prolonging Mr. Rasouli's life will lead to health complications such as bedsores, respiratory infections, and organ failure — a scenario that can be avoided if life support is removed. On the other hand, Ms. Salasel argues that new evidence and evaluation suggest that Mr. Rasouli's condition may improve in the future, militating against removal of life support.

93 The second factor requires the substitute decision-maker to consider whether, in the absence of the proposed treatment, the incapable person's condition or well-being is likely to improve, remain the same or deteriorate: s. 21(2)(c)2. In this case, the inquiry is into the likely medical outcomes for Mr. Rasouli if life support is not withdrawn. The decision-

maker must cast her mind into the future and ask what the patient's condition will be in one year, five years, or ten years.

94 The third factor requires the substitute decision-maker to consider risks of harm associated with the treatment and weigh whether the benefits from the treatment will outweigh those risks: s. 21(2)(c)3. This factor is particularly important in cases where the substitute decision-maker must decide whether to go ahead with a risky procedure, like high-risk surgery, that while offering some hope, could worsen the patient's situation. In this case, the substitute decision-maker must consider the benefits of removing life support, such as avoidance of protracted physical deterioration from bedsores, infections and organ deterioration ultimately leading to death, against the risks, which quite plainly are the hastening of death and the loss of whatever chance of recovery Mr. Rasouli has according to medical evidence.

95 The fourth factor requires the substitute decision-maker to consider alternative courses of treatment — whether less intrusive or restrictive treatment would be as beneficial as the treatment proposed: s. 21(2)(c)4. In a case such as this, the question is whether maintaining life support would be less intrusive or restrictive than its withdrawal, and if so, whether maintaining life support would be more beneficial to the patient than withdrawal.

96 As I see it, this review of s. 21(2) reveals that although a patient's beliefs and prior expressed wishes are mandatory considerations, there is no doubt that the medical implications of a proposed treatment will bear significant weight in the analysis.

97 Where physicians and substitute decision-makers disagree about whether withdrawal of life support would be in the best interests of the patient, the HCCA provides the procedure for resolving this conflict. Under s. 37, the health care practitioner may apply to the Board to have the decision of the substitute decision-maker set aside on the ground that it is not in the best interests of the incapable person, having regard to the factors set out in s. 21(2) of the Act. This is an important avenue of recourse for physicians who believe that life support can no longer be ethically administered because it is not in the best interests of the patient to do so. The Board must duly consider the physician's professional opinion and submissions on what would be of medical benefit to the patient.

98 If the Board agrees that the substitute decision-maker did not act in the best interests of the patient, it may substitute its own opinion for that of the substitute decision-maker: s. 37(3). Alternatively, if the Board concludes that the substitute decision-maker did act in the best interests of the patient, it can affirm the decision of the substitute decision-maker. In making these determinations, the Board must objectively apply the same criteria that substitute decision-makers are required to consider under s. 21. The Board is well placed to make a determination of whether treatment is in the best interests of the patient, in light of the statutory objectives of enhancing patient

autonomy and ensuring appropriate medical care. This was observed by the Ontario Court of Appeal in M. (A.) v. Benes (1999), 46 O.R. (3d) 271 (Ont. C.A.):

A case will come before the Board only when the health practitioner disagrees with the S.D.M.'s application of the best interests test under s. 21(2). The Board will then have before it two parties who disagree about the application of s. 21: the S.D.M., who may have better knowledge than the health practitioner about the incapable person's values, beliefs and non-binding wishes; and the health practitioner, who is the expert on the likely medical outcomes of the proposed treatment. The disagreement between the S.D.M. and the health practitioner potentially creates tension and the Act recognizes this by providing for a neutral expert board to resolve the disagreement. Indeed, after hearing submissions from all parties, the Board is likely better placed than either the S.D.M. or the health practitioner to decide what is in the incapable person's best interests. [para. 46]

99 The Board must apply a standard of correctness in reviewing the decision of the substitute decision-maker: Benes, at para. 36; Scardoni, at para. 36. The wording of s. 37, which provides for full representation and gives the Board the right to substitute its decision for that of the substitute decision-maker, indicates that the Board must consider the matter de novo. The critical nature of the interests at stake support the Board's obligation to review the decision of the substitute decision-maker on a correctness standard.

100 The legislature has given the Board the final responsibility to decide these matters. This is not to say that the courts have no role to play. Board decisions are subject to judicial review. This mechanism for court oversight ensures that the Board acts within its mandate and in accordance with the Constitution.

101 Over the past 17 years, the Board has developed a strong track record in handling precisely the issue raised in this case.

102 In some cases, the Board has upheld the decisions of substitute decision-makers to refuse withdrawal of life support as being in the best interests of the patient: W. (D.), Re [2011 CarswellOnt 2312 (Ont. Cons. & Capacity Bd.)], 2011 CanLII 18217; S. (S.), Re [2011 CarswellOnt 816 (Ont. Cons. & Capacity Bd.)], 2011 CanLII 5000; P. (D.), Re. In others, it has reversed the decision of the substitute decision-maker and required consent to be given for the withdrawal of life support: K. (A.), Re; G. (E.J.), Re; N., Re, 2009 CarswellOnt 4748 (Ont. Cons. & Capacity Bd.). The particular facts of each case determine whether withdrawal of life support is in the best interests of the patient.

103 Bringing its expertise to the issue, the Board's decisions may be expected to bring consistency and certainty to the application of the statute, thereby providing essential guidance to both substitute decision-makers and health care providers in this difficult area of the law.

…

I. Summary

116 I conclude that the following steps apply under the HCCA in a case such as this, where the substitute decision-maker and the medical health care providers disagree on whether life support should be discontinued.

1. The health practitioner determines whether in his view continuance of life support is medically indicated for the patient;

2. If the health practitioner determines that continuance of life support is no longer medically indicated for the patient, he advises the patient's substitute decision-maker and seeks her consent to withdraw the treatment;

3. The substitute decision-maker gives or refuses consent in accordance with the applicable prior wishes of the incapable person, or in the absence of such wishes on the basis of the best interests of the patient, having regard to the specified factors in s. 21(2) of the HCCA;

4. If the substitute decision-maker consents, the health practitioner withdraws life support;

5. If the substitute decision-maker refuses consent to withdrawal of life support, the health practitioner may challenge the substitute decision-maker's refusal by applying to the Consent and Capacity Board: s. 37;

6. If the Board finds that the refusal to provide consent to the withdrawal of life support was not in accordance with the requirements of the HCCA, it may substitute its own decision for that of the substitute decision-maker, and permit withdrawal of life support.

III. Conclusion

117 Applying the HCCA in the manner just discussed, we arrive at the following conclusions.

118 The appellant physicians, having determined that in their view Mr. Rasouli should be removed from life support, were obliged to seek Ms. Salasel's consent to the withdrawal. Since Mr. Rasouli had not expressed a wish within the meaning of s. 21(1)1, Ms. Salasel was required to determine whether removal of life support was in Mr. Rasouli's best interests, having regard to the factors set out in s. 21(2) of the Act.

119 If the appellant physicians do not agree that maintaining life support for Mr. Rasouli is in his best interests, their recourse is to apply to the Board for a determination as provided by s. 37(1) of the HCCA.

120 When the application is brought, it will be for the Board to determine whether Ms. Salasel's refusal to provide consent to the withdrawal of life

support was in Mr. Rasouli's best interests, within the meaning of s. 21(2) of the HCCA. If the Board is of the opinion it was not, it may substitute its decision for that of Ms. Salasel, and clear the way for removal of Mr. Rasouli's life support.

121 It follows that I would dismiss the appeal. I would also dismiss the motions to adduce fresh evidence on the appeal to this Court, without prejudice to the Board receiving any evidence it deems relevant on the hearing before it.

122 This being a matter of public interest, I would not award costs.

Discussion Questions re religious beliefs and end of life decision-making:

1. A patient has appointed her daughter as the SDM. The doctors review the patient's situation and conclude she is in extremis, in a lot of pain, and does not have long to live. They suggest a DNR; the daughter refuses "Mum always believed 'where there is life there is hope.' How to resolve the situation?

2. A patient is on ventilator. The doctors say no chance to recover, and that the patient is brain dead. The doctors advise that the patient is in extreme pain and will be taken off the ventilator. The SDM contends the patient's faith dictates that death must be based on cardiac criteria only – the heart has stopped beating with cessation of circulatory and respiratory function.

7. Property Management

Palichuk v. Palichuk
2023 ONCA 116 (Ont. C.A.).

As set out in Section 32 of the *Substitute Decisions Act,* an Attorney for Property has a *fiduciary duty* to the donor of such a legal instrument who is incapable of making such decisions.

There are a number of fundamental principles to follow in managing an incapable person's property. These include:

- The attorney must keep accurate statements of account in respect of your dealings with the incapable's property and retain all receipts, bank and investment statements, and all other relevant documentation. It may be that the Attorney must "pass his/her accounts" in court at some point including the ability of the Ontario Public Guardian and Trustee to participate in such proceedings as well as ask questions of you with respect to the management of the incapable's assets.

- The attorney is entitled to hire professional advisers, as is reasonable, such as lawyers, accountants, and investments advisors to provide specialized services.

- The attorney must manage the incapable's property in his/her best interests. This means that the Attorney may not use her assets for any other purpose, and certainly not for the attorney's own benefit.

- The attorney must invest the incapable's property prudently.

- **The attorney not make, or defeat, the incapable's Will. This means the attorney must locate and review her existing Will, and preserve specific property that is to pass under her Will unless it is necessary to sell such property to make available cash to be used in the incapable's best interests.**

- The attorney not change beneficiary designations respecting policies of life insurance owned by the incapable on his/her life, or in relation to his/her RRSPs/RRIFs, or any other such financial product which will pass to a designated beneficiary after her death.

- There is a limited power to make gifts using the incapable's property.

Trotter J.A.:

> **[68] In the case of Duke of Marlborough v. Lord Godlophin (1750), Ves. Sen. 61, 28 E.R. 41 (H.C. of Ch.), Lord Hardwicke L.C. remarked that the testamentary document of a living person is nothing more than a piece of waste paper, at p. 50: "…[T]he law says, that a testamentary act is only inchoate during the life of the testator, from whose death only it receives perfection: being till then ambulatory and mutable, vesting nothing, like a piece of waste paper." This decision has been cited in other cases for the proposition that a will only speaks from the moment of death: see Y.P. v. M.L.S., 2006 MBCA 32, 205 Man R (2d) 20, at para. 19; S.A. (Trustee of) v. M.S., 2005 ABQB 549, 18 E.T.R. (3d) 1 at para. 28.**
>
> [69] There are a couple of Superior Court of Justice decisions that involve a review of the validity of a trust or will during the grantor or testator's lifetime. See, e.g. Brandon v. Brandon, [2001] O.J. No. 2986, which was upheld by this court in brief reasons, see Brandon v. Brandon, [2003] O.J. No. 4593, and Rubner v. Bistricer, 2018 ONSC 1934, 36 E.T.R. (4th) 79. Neither case involved a direct challenge to the trust or to the will. Instead, the question of the validity of these instruments was incidental to another dispute. The Brandon case was primarily an action to enforce a mortgage, with a counterclaim to discharge the mortgage and declare an inter vivos trust invalid due to undue influence. In Rubner, the validity of a will was directly relevant to the current management of property by joint attorneys for property for the incapable person.
>
> **[70] Another Superior Court of Justice decision, Dempster v. Dempster, 2008 CanLII 2747 (Ont. S.C), cites Brandon in suggesting at para. 9. that the law in Ontario "may well be moving towards" permitting claims of undue influence where a testator remains alive. Given the incidental nature of the validity issue in Brandon, I disagree**

with this portent. I also disagree with the suggestion that Cullity J.'s comment at para. 28 of Stern v. Stern, (2003) 49 E.T.R. (2d) 129 (Ont. S.C), is intended to open the door to will challenges during the testator's life:

The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.

I read this quote consistently with the two cases discussed above: litigation among expectant heirs may occur before death when a present dispute comes before the court. Practically, there will be some cases in which the validity of a will, trust or transfer incidentally comes into play. This does not mean that it is either necessary or desirable for the law to permit direct challenges to these instruments during the grantor or testator's life.

[71] To the contrary, there are strong public policy reasons not to permit a challenge to a will prior to the death of a testator. A testator may change their will as often as they like. It is entirely unknown how much, if any, money or property there will be left to dispute until the testator dies. It cannot be known if any of the beneficiaries will have predeceased the testator. Thus, the common law insists upon the death of the testator before litigation. Otherwise, the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for re-litigation after their death.

[72] The application judge was aware of the problems associated with considering the validity of the will and the property transfer in the circumstances. As he said at para. 126 of his reasons:

It is less obvious that I need to assess Nina's testamentary capacity or her capacity to transfer the Acton property to Susan, when Nina is alive and these instruments are executory. However, if Nina did not have the requisite capacity, and if she was not expected to regain capacity, it might be open to Linda to challenge the validity of the Will at this time. In that case, the issue of the validity of the Will and property transfer might not be premature or hypothetical.

Nonetheless, although the application judge refused to consider undue influence in relation to these instruments, he did determine Nina's capacity.

[73] The application judge should not have provided his "opinion, advice or direction" on either basis because there is every possibility that Nina may decide to reorganize her affairs. As Dr. Shulman reported in his assessment report, Nina said that her will was not "written in stone". Nina said she might change it if Linda treats her better.

[74] As for the transfer of the Acton property, Susan has no beneficial interest in the property. She simply holds it in trust for Nina. Even absent the trust agreement, since the transfer was gratuitous, the law presumes that Susan holds the property in trust for Nina. In Foley v. McIntyre, 2015 ONCA 382, 125 O.R. (3d) 721, Juriansz J.A. said, at para. 26: "Equity presumes bargains, not gifts. Thus, when a parent gratuitously transfers property to an adult child, the law presumes that the child holds the property in a resulting trust for the parent: Pecore v. Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 36".

[75] For all these reasons, the application judge should not have provided his "opinion, advice, and direction" on the validity of the transfer and settlement of the trust as part of Nina's estate planning. As the application judge said, at para. 161: "…the transfer of the Acton property might properly be treated as testamentary. Because