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Drafting issues: Continuing Powers of Attorney for Property and Personal Care

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The focus of this paper is on various issues to be considered by the solicitor who drafts a Continuing Power of Attorney for Property ("CPOAP") or a Continuing Power of Attorney for Personal Care ("CPOAPC") for a client.[1]

The purpose of advising a client to make a CPOAP/C is, of course, deceptively simple: to provide for a substitute decision maker for the client in the event of certain contingencies, the most common of which being the incapacity of the client. While it sounds simple enough, the reality is that solicitors who draft CPOAP/Cs do not always anticipate the challenges presented when the Power of Attorney actually has to be implemented.

1. Reconsidering the Nature of the Relationship between Grantor and Attorney

In drafting a CPOAP, it is useful to reconsider the nature of the relationship between the grantor and the attorney.

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[1] Grateful acknowledgment is made to Arthur Fish who has written two very accomplished and detailed discussions of this topic: "*Practical Considerations in Drafting Powers of Attorney, Part I: Powers of Attorney for Property*" and "*Practical Considerations in Drafting Powers of Attorney, Part II: The Use and Abuse of Powers of Attorney for Personal Care*" both of which are published in Estates and Trusts Forum, 1999, B. Schnurr and E. Hoffstein ed., Law Society of Upper Canada, 1999.

The relationship between the grantor of the CPOAP and the Attorney for Property will vary depending on the grantor's capacity. The CPOAP may provide that the Attorney for Property is to act on behalf of the grantor either before and/or subsequent to any incapacity (of the donor) to manage property. [2]

If the Attorney for Property acts **prior to** any incapacity on the part of the grantor, he is acting as a fiduciary. However, in such capacity, the Attorney for Property is "merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out instructions of the donor as principal."[3]

If the Attorney for Property acts **subsequent** to any incapacity on the part of the grantor, the Attorney for Property has a considerably more onerous fiduciary duty. As Justice Cullity notes: "In such a case, the attorney does not receive instructions from the **donor except to the extent that they are written into the instrument conferring the power** (emphasis added). The attorney for property must [instead] make decisions on behalf of the donor." [4]

Although the relationship, even after incapacity, technically remains one of principal and agent, in practice the relationship is fiduciary (the "principal" having lost the capacity to instruct the "agent"). Although the Attorney for Property does not act subject to the provisions of the *Trustee Act*, the provisions of the *Substitute Decisions Act*

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[2] This section of the paper deals only with CPOAPs as a CPOAPC will, for the most part, always take effect after incapacity.

[3] Cullity, J. Banton v. Banton (1998), 164 D.L.R. (4th)(176).

[4] Banton *supra*.

(SDA) impose the typical obligations of a trustee on the Attorney for Property. And, as Justice Cullity notes, the terms of the actual document may include provisions that will guide the actions of the Attorney and evidence the intentions of the Grantor.

2. Customizing the CPOAP/C

In drafting the CPOAP/C, the solicitor will wish to provide for the needs presented by a client's specific situation. The following are just some examples of the kinds of questions to consider in drafting the specific CPOAP/C:

(i) With respect to CPOAPs:

- Is the CPOAP required to manage some or all of the grantor's property?
- If the property being managed consists solely of a bank account, will a bank's form of CPOAP suffice?
- Does the CPOAP take effect immediately or is it dependent upon a finding of incapacity?
- Alternatively, does the CPOAP take effect on a certain date when the grantor is out of the country?
- Has the grantor conveyed some degree of authority to the attorney for property to initiate the management of the grantor's property?
- Is the grantor incapable of managing his or her property but nonetheless desirous of making a CPOAP/C?.

(ii) With respect to CPOAPCS:

- Does the Attorney have authority to make Health Care Consent Act decisions?
- Does the Grantor wish to incorporate any decisions respecting advanced directives or a living will into the document?

An issue common to both types of documents and which is discussed in further detail below is the matter of who retains custody of the document and under what circumstances they are to be activated.

3. Identifying "candidates" to make a CPOAP/C

Clients will not always initiate the making of a CPOAP/C. Indeed, many are less inclined to make a CPOAP/C than a Will, perhaps (understandably) out of a fear of contemplating their possible incapacity. We are all familiar with the client who finds a lawyer with the intention of making a Will and subsequently makes a CPOAP/C after being alerted to the advantages of making a CPOAP/C. Many lawyers provide a "package deal" if the CPOAP/C is prepared at the same time as the Will.

Solicitors will typically advocate the benefits of making a CPOAP/C to a client who presents no special circumstances. Consider, for example, a client in their 30s or 40s with a young family and in good health. Arthur Fish has described a CPOAP/C in such

circumstances as "a kind of insurance policy against future incapacity by people who have no concrete reason to foresee incapacity in the near or medium-term."[3]

However, certain clients who may be at higher risk of incapacity have a greater need for a CPOAP/C and, if identified in the course of practice, should not only be advised of the benefits of having such a document but, in fact, urged or counselled to make one.

For instance, persons with a medical condition which will almost certainly culminate in incapacity to manage property (Alzheimer's disease, sadly, being the most common example) are at greater risk and therefore have a more pressing need for a CPOAP/C.

In identifying prime candidates for a CPOAP/C, it is important to note that a person may be incapable to manage property yet capable to make and revoke a CPOAP/C. In such circumstances, a solicitor may be, understandably, less than enthusiastic about preparing a CPOAP/C. Rather than declining to draw the document, the solicitor drafting the CPOAP/C would be well advised to secure a capacity assessment confirming capacity to make a CPOAP/C in order to protect the CPOAP/C from attack. Such an attack is, of course, more likely if the document is made once the grantor is already suffering from an incapacity to manage property.

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[3] See *Practical Considerations in Drafting Continuing Powers of Attorney Part I: Powers of Attorney for Property* by Arthur Fish in Estates Forum

Other less common examples of special needs clients include those who suffer from bipolar disorder, schizophrenia or other such "episodic" mental disorders (to borrow a term from Arthur Fish). Clients with such "episodic" mental disorders create special challenges for the solicitor but, really, every effort should be made to create a CPOAP/C for such persons. A high percentage of persons with episodic mental illness fall under the statutory guardianship of the P.G.T. when, in fact, these are the very people who should have a CPOAP/C and, notwithstanding common perceptions to the contrary, may well be capable to make a CPOAP/C.

4. Advising the Client on the Choice of Attorney

Where capacity to make a CPOAP is in issue, a solicitor is well advised to consider s. 8 of the Substitute Decisions Act ("SDA") which defines the capacity to make a CPOAP. Financial acumen and honesty are naturally the primary considerations to recommend to a client who wishes to appoint an attorney under a CPOAP/C. However, if these attributes do not lie with one individual, the options of either multiple attorneys or a neutral trustee (eg. a trust company) should be explored.

With respect to CPOAPCs, s. 44 of the SDA states that the attorney for personal care must only exercise "power of decision" if the attorney is at least sixteen years of age. Similarly, the attorney (with the exception of spouses or relatives) cannot "act" if they "provide health care to the grantor for compensation or provide residential, social, training, advocacy or support services to the grantor for compensation."

In advising the client of these restrictions, it is important to note that there is no restriction on appointing minors or health care providers as attorneys under a CPOAPC. Rather, the restriction is on their ability to act under the CPOAPC. If the appointed attorney is not expected to act until after he or she would attain the age of sixteen (16) or if the appointed attorney will cease to continue to provide the prohibited services to the grantor once the CPOAPC is invoked, it would appear that there is no restriction on their appointment.

5. Providing a mechanism for establishing incapacity and triggering or "activating" the CPOAP/C

This is arguably the most important issue to consider in drafting the CPOAP/C. If the authority of the attorney takes effect on the grantor's incapacity, who decides when the grantor is incapable? How is the determination made? And how can the solicitor tailor the document to address this issue?

In drafting a CPOAP/C for a client, the solicitor takes on a very onerous responsibility. The CPOAP/C represents a conscious decision on the part of a client to surrender control of his or her affairs, usually in the event of his or her incapacity. While this seems simple enough in concept, the reality, as we are all aware, is that the onset of mental incapacity is rarely a sudden event. Instead, it is increasingly a slow, insidious process which blurs the line between capacity and incapacity. In such circumstances, the client will rarely be the first person to recognize that he or she is becoming incapable to manage his person or property.

This creates a dilemma for the solicitor. If your client is becoming incapable but refuses to acknowledge it (a common scenario) and has insisted, while capable, either that the solicitor retain the CPOAP/C or provide it to the client after the onset of what the solicitor believes is incapacity on the part the client, what is the solicitor to do?

As is often the case, preventative practice can eliminate this outcome or at least provide options to the solicitor in such an eventuality.

The client should be advised when drafting the CPOAP/C that the document is being created to protect the client, quite likely in circumstances in which the client will not recognize that he or she is in need of protection. This is a daunting prospect for a client and may well cause some clients to simple avoid confronting the prospect altogether.

The client should be advised that, in the absence of any guidance provided in the CPOAP/C, the SDA provides for the Attorney for Property to act upon a finding of incapacity by a certified capacity assessor.

The client should be advised that, if he or she refuses to submit to a capacity assessment in circumstances in which there is reason to believe that he or she is incapable, a court order can be obtained by any person compelling the grantor to submit to a capacity assessment.

The client should be advised that, if the CPOAP/C is not available to the named Attorney, the Public Guardian and Trustee shall assume statutory guardianship of the client is he or she becomes incapable.

Upon receiving this advice, the client should then be presented with options respecting who should retain custody of the CPOAP/C and what shall constitute an acceptable determination of incapacity to permit the Attorney to act.

If the client is to avoid the necessity of a capacity assessment, the Grantor should advise his appointed Attorney of the existence of the document. After all, there is no guarantee that the solicitor will even be aware of circumstances suggesting the client has become incapable.

If the client is to avoid the prospect of a statutory guardianship, the document must be released before the Grantor's incapacity either to the Attorney or to the client's solicitor with clear instructions as to the circumstances under which the solicitor is to release the CPOAP/C to the Attorney.

The solicitor must also ensure that the CPOAP/C provides a means of evidencing to third parties that the Attorney truly has authority to act. It is useful to draft into the document a provision that provides what form of capacity assessment shall be sufficient to authorize the Attorney to act. The problem with this approach, however, is that the client may well refuse to any form of capacity assessment. Indeed, the client should be advised when drafting the document that there is a good likelihood that he or she will refuse to submit to a capacity assessment at the appropriate time.

What then is the solicitor to do? It has been suggested that a Continuing Power of Attorney for Property may be tailored such that the grantor instructs in the document that it shall be sufficient for the Attorney to act, not on the basis of a finding of incapacity but, rather, on the basis of a finding by a health care professional of the grantor's choosing that the grantor would "likely benefit from assistance in the management of his property."

Another option is to draft into the document a provision that the Attorney may begin acting under the Power by providing written notice to the grantor and any co-attorneys of his or her intention to begin acting. As we noted earlier, the Grantor may be capable to make a CPOAP/C even if incapable to manage his property. It follows that a grantor in such circumstances would have the capacity to revoke a CPOAP/C as well. Accordingly, a problem with this approach is that there is certainly a risk that the grantor will revoke the CPOAP/C as soon as he or she receives written notice of the Attorney's intention to act, especially if the onset of any mental illness triggering incapacity is accompanied by symptoms of paranoia.

6. What power does the Attorney for Property have upon the "activation" of their authority?

An attorney or guardian of property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will. (s. 31(1) SDA).

It seems settled that an Attorney for Property can similarly not appoint a beneficiary under a life insurance policy or a registered plan as these acts are in the nature of a testamentary disposition.

Consider the situation in which the donor becomes incapable at the age of 65 and holds an RRSP designating his son as beneficiary. At the age of 69, the RRSP is converted into a RRIF. If the financial institution requires a new beneficiary designation to be made at the time that the RRIF is opened, it would appear that the attorney does not have the authority to make this designation on the grantor's behalf because it is in the nature of a testamentary disposition.

7. To whom is the Attorney for Property accountable?

The Attorney for Property is primarily accountable to the grantor of the Power of Attorney. The SDA is clear that the Attorney for Property acts for the benefit of the grantor. As noted earlier, an agent is accountable to the principal.

However, subsequent to incapacity, the incapable grantor is the one person who is not capable of scrutinizing the corporate attorney's actions.

The Public Guardian and Trustee may be entitled to an accounting from an Attorney for Property acting during the grantor's incapacity.

However, on the death of the incapable donor, the Attorney for Property's actions may come under scrutiny from the beneficiaries of the estate. The beneficiaries'

argument will be that the Attorney for Property must be able to demonstrate that his or her actions were prudent in all of the circumstances.

8. Does the Attorney for Property have a duty to preserve the capital of the incapable donor's estate?

The beneficiaries of the estate on death may well answer "yes."

The answer will depend on the amount of income which the incapable person receives from investments and otherwise.

Applicable provisions of the SDA include:

- SDA s. 32(1.1): If the guardian's decision will have an effect on the incapable person's comfort or well-being, **the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit.**

- SDA s. 32(1.2) A guardian shall manage a person's property in a manner **consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions.**

In *Re Vickers Estate*, a 1999 decision of the Ontario Superior Court of Justice, Madam Justice Molloy considered the issue. Her Honour stated:

"I feel it needs to be said that there is absolutely no duty on the attorney here to fully preserve the capital of this estate. Canada Trust owes its duty to Hope Vickers and to nobody else. In particular, there is no duty to restrict her spending to the annual income generated by her assets. She is nearly 98 years old. The cruel reality is that there aren't many years left. I gather that she is still alert and healthy. She is entitled to have her money spent for her benefit, and for her benefit alone, to ensure her comfort and well-being and not at a reduced standard in order to preserve an inheritance for her son. Obviously Canada Trust must be prudent to ensure that a sufficient capital balance is available to meet her needs. If the new budget that has been imposed and the reduced accommodation are directed only towards Ms. Vickers well-being, then I have no concern. However, the threat of a negligence proceeding by a prospective heir intent on preserving his inheritance cannot be permitted to have any influence on Canada Trust's decision-making in this regard. [Emphasis added]

9. To what extent is the discretion of the Attorney for Property restricted?

As noted above, the Attorney for Property cannot make testamentary dispositions.

SDA s. 37(1) A Guardian of Property **shall** make the following expenditures from the incapable person's property:

1. The expenditures that are reasonably necessary for the person's support, education and care;
2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants;
3. The expenditures that are necessary to satisfy the person's other legal obligations

10. Is the Attorney for Property obligated to conduct estate planning on behalf of the incapable donor?

Recall that under the SDA, "A guardian who **receives compensation for managing the property** shall exercise the degree of care, diligence and skill that a person **in the business of managing the property of others is required to exercise.**

The standard of care is the best guide to the obligations imposed upon the Attorney for Property.

Recall also that **the Attorney for Property cannot make testamentary dispositions** on behalf of the donor. This will therefore restrict such estate planning techniques as designation of beneficiaries. (Note that in New Brunswick, among other jurisdictions, legislation provides the court with power to change a Will on behalf of an incapable person)

The Court in B.C. has considered whether settlements should be approved on behalf of incapable persons in *Re Goodman*, *Re Bradley*, and O'H*agan v.* O'H*agan*.

The general approach of the Court in B.C. is to "put itself in the shoes" of the incapable person and, taking all of the circumstances into consideration, decide whether the proposed estate plan is something that the incapable person would have chosen to do if capable.

Where the proposed estate plan includes the making of *inter vivos* gifts, the Court considered the incapable person's friends and family at the time preceding his incapacity and the nature of those relationships in determining whether the incapable person would have made such gifts.

Bottom Line: (i) The transfers must be for the benefit of the incapable person, and (ii) there must be compelling factors to approve an estate plan such as significant tax avoidance or extreme need on the part of the incapable person's dependants.

However, note that in *Re Bradley*, the Court refused to approve a corporate reorganization involving an estate freeze apparently because the Court was wary of approving a tax avoidance scheme that, in the Court's view, could bring the Court into disrepute.

11. Can an Attorney for Property transfer the grantor's property into joint ownership or into his own name to avoid probate fees?

The Attorney for Property is not prohibited under the terms of the SDA from transferring the donor's property into joint ownership with right of survivorship.

However, the codified statutory duty to act with honesty, integrity and good faith would clearly apply to such a transaction.

Unless the Attorney for Property is the beneficiary of the donor's estate, funds transferred into joint ownership with the Attorney for Property would almost certainly be impressed with a resulting trust for the benefit of the estate.

Nonetheless, legal title would vest in the Attorney for Property on the death of the grantor. In our experience, the financial institution will have a legal obligation to the joint holder who takes by right of survivorship. The equitable entitlement of the beneficiaries of the donor would require judicial determination.

PROTECTING AND DOCUMENTING *INTER VIVOS* GIFTS

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PROTECTING AND DOCUMENTING *INTER VIVOS* GIFTS

In the present social day, people are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on the investments and so on. Usually, the duty of assisting falls to one of the children. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets so that the child can freely manage the assets of the parent.

Similarly, for planning reasons and probate fee avoidance, individuals may decide to gift property to their children or others to remove assets from the estate, or they may arrange their financial affairs through joint accounts with their husband, wife, spouse or child, so that upon either death, the funds automatically pass to the surviving individual by right of survivorship.

There will be some situations where a gift is truly intended by the parent. In other situations, it may be dangerous to presume that the elderly parent is making a gift each time he or she puts the name of a child on an asset. The reality may be that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs.

If the child whose name is on the asset takes the position that the asset was a gift, litigation is likely to result. In such situations, how do we determine whether the transfer of assets truly was a "gift", or meant to be held in trust?

Elements of a Gift

In order for a gift to be valid, there are three elements that must be satisfied: an intention by the donor to make a gift; delivery of the subject matter of the gift from

the donor to the recipient; and an acceptance of the gift by the recipient. Although acceptance will generally be assumed, intention to make a gift must be proven, otherwise, in absence of evidence to the contrary, or unless the transfer is from a parent to a dependent child, the common-law presumes that a gratuitous transfer of property gives rise to a resulting trust in favour of the donor.[1]

a) Property

As a general rule, any enforceable legal or equitable right can be the subject matter of a gift. Such rights will include those which can be enforced by taking physical possession (choses in possession) and those which can only be enforced by an action at law or inequity (choses in action). The rights involved in a fee simple interest in land or in the absolute ownership of chattels will fall into the former category. Debts, shares, interest under a trust or rights under a contact are examples of the latter kind. [2]

The rights must be in existence at the date of the gift. It is not possible to make a gift of rights which the donor expects to acquire at some time in the future.

b) The Donor

As a general rule, every individual of full age and mental capacity is capable of making a gift. At common law, a gift by an infant is voidable until a reasonable time after the infant has attained the age of majority.

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[1] Cullity and Brown, Taxation and Estate Planning, 2nd Edition, (Toronto: Carswell 1984)
[2] Cullity and Brown, Taxation and Estate Planning, 2nd Edition, (Toronto: Carswell 1984)

An individual lacks sufficient mental capacity to make a gift if he or she is incapable of understanding the nature and effect of the transaction. The burden of proving mental capacity is on the donee.

A gift must be made voluntarily and should not have been induced by fraud, coercion or undue influence.

If the donee is in a confidential relationship with the donor or is in a much stronger bargaining position, it will often be prudent for the purpose of ensuring the efficacy of a gift for the donee to receive independent legal advice.[3]

c) Transfer of the Beneficial Interest

In order to accomplish a transfer of the beneficial interest in property at a particular time, the donor must have an intention to do so at that time. As well, the intention must be accompanied by certain acts performed by the donor. A man does not cease to own property simply by saying "I don't want it". If he tries to give it away, the question must always be, has he succeeded in doing so or not? [4] These requirements provide the most frequently recurring issues in cases in which the validity of gifts is disputed.

i. Intention

Problems of intention usually arise when one person has transferred the legal title to property to another and the latter is claiming that a gift was intended. The established general rule in Canada in such cases is that in the absence of evidence to the contrary, there will be a presumption that a gift was not intended.

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[3] Cullity and Brown, Taxation and Estate Planning, 2nd Edition, (Toronto: Carswell 1984)
[4] *Vandervell* v. I.R.C., [1966] ch. 261 at 275, affirmed [1967] 2 AC 291 (HL)

Where there is not sufficient evidence to rebut the presumption against a gift, the transferee will hold the property on a resulting trust for the transferor or purchaser.[5]

The presumption in favour of a resulting trust applies whether the property is personalty or realty.

ii. Completing the Transfer

Where the necessary intention to make a gift is present, the additional requirements for a transfer of the beneficial interest will depend on the position of the legal title to the property. If the legal as well as the beneficial title is held by the donor, the requirements for completing the gift will be more stringent then they would be if the donor held only the beneficial title.

Where the donor holds both the legal and beneficial titles to the property, he must comply with the formalities and substantive requirements for a transfer of the legal title before the beneficial interest will pass to the donee.[6]

If the property is capable of being delivered, there must be actual delivery to the donee or some person to be held for him. Where manual delivery of the property is impracticable or impossible, a symbolic or constructive delivery will suffice, if the donor clearly designates the property and relinquishes possession of it to the donee.[7]

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[5] *Johnston* v. *Johnston* (1913), 12 D.L.R. 537 (Ont. C. A.)
[6] Cullity and Brown, Taxation and Estate Planning, 2nd Edition, (Toronto: Carswell 1984)
[7] MacGregor, J.K., O'Brien's Encyclopedia of Forms, 1991 chapter 28 (Aurora: Canada Law Book 1991)

d) Acceptance

No gift will be complete until it has been accepted by the donee. Any person can refuse a gift. If such a disclaimer is not made within a reasonable time after the donee obtains knowledge of the gift, or after he becomes of full age if that is the later time, his acceptance will be presumed.

Technically, the gift vests in the donee as soon as the donor has done everything necessary to transfer the legal and beneficial interest to the donee. After these acts have been done, a donor is incapable of revoking the gift unless he has reserved a power to do so. This rule applies whether or not the donee is aware that the transfer of legal and beneficial interest to him has occurred.[8]

Proving a Gift

Gifts may be set aside on the grounds of fraud, duress, undue influence, mistake, and capacity or because they are made with the intent to give preference to creditors or to defraud creditors or subsequent purchasers.

In proving an *inter vivos* gift, who bears the onus of proof? Do those who contest the "gift" bear the burden of proving that the benefits conferred on the recipient were not gifts? Or do the recipients have the burden of proving that these benefits were gifts?

Resulting Trusts

Where a person transfers his property gratuitously into another persons name, or into the names of himself and another, a resulting trust arises whereby the

[8] Cullity and Brown, Taxation and Estate Planning, 2nd Edition, (Toronto: Carswell 1984)

gratuitous transferee is deemed to hold his interest in trust for the transferor. The reason for this presumption is explained in D.W.M. Waters, Law of Trust in Canada (2nd ed.) at page 308: "Since equity assumes bargains, and not gifts, he who has title gratuitously put into his name must prove that a gift was intended."

The presumption arising upon a voluntary transfer of property is that of a resulting trust to the donor. The onus is on the donee to provide that there is an intention on the part of the donor to transfer the beneficial ownership as well as legal title. The donee must prove valid gift *inter vivos*.

However, when the transfer is from husband to wife or from father to child, this presumption does not apply. Instead, a presumption of advancement applies, whereby there is a rebuttable presumption that a gift was intended.

Where a father confers a benefit upon his child which is alleged to be a gift, there is a presumption in law that a gift was intended, and the onus of proof falls upon the party who contests the gift, to prove that a gift was not intended. The presumption of advancement applies, and those opposing the gift have the burden of proving that the deceased did not intend to make the gift to the recipient.[9]

When it is a mother making a gift, there is authority which states that the presumption of advancement does not arise, the rationale for the distinction between mother and father being that there is no obligation upon a mother, as there is upon a father, to provide for her child. [10]

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[9] *Pasko* v. *Pasko* (2002), 44 E.T.R. (2d) 266 (BCSC)
[10] *Edwards* v. *Bradley* (1957), 9 D.L.R. (2d) 673 (SCC); *McLear* v. *McLear Estate*, [2000] O.J. No. 2570 (OSC)

However, there is also caselaw which indicates that any distinction made between fathers and mothers should now be abandoned, and hence the presumption of advancement applies in either case.[11]

In *Johnston* v. *Johnston* (1913), 12 D.L.R. 537 (Ont. C. A.), the Ontario Court of Appeal dealt with the question of onus and *inter vivos* gifts. The Court of Appeal held that the onus is on the recipient to show that the transaction was a gift, and that must be established by proving a clear and unmistakable intention on the part of the donor to make a gift of money to the recipient.

An *inter vivos* disposition of property may give rise to the presumption of undue influence in cases of gifts *inter vivos* to persons standing in a fiduciary relationship or some other relationship whereby the donee was in a position to overbear the donor. Such persons must show that he did not influence the donor in making the gift.[12]

In such a case, there is a presumption of undue influence and the onus on a beneficiary who attempts to discharge the presumption of undue influence is a heavy one.[13]

Joint Bank Accounts

If a parent places a bank account or an investment account in the names of himself and his child "on joint account", as "joint tenants" or "jointly with right of survivorship", then the financial institution may pay the balance on deposit in the account to the child after the parent's death.

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[11] *Pasko* v. *Pasko* (2002) 44 E.T.R. (2d) 266 (BCSC)
[12] J. MacKenzie, Feeney's Canadian Law of Wills, 4th Edition (Toronto: Butterworths, 2000) at 3.6
[13] *Goodman Estate* v. *Geffen* (1991), 42 E.T.R. 97 (SCC)

If the purpose of the transfer is solely to allow the child to assist the parent with their financial affairs, and the parent intends that the contents of the account would flow through the will, this intention should be documented to minimize the risk of dispute among the children after death.

When dealing with the ownership of money deposited in a joint bank account, when the money is deposited by one of the account holders only, there is a *prima facie* resulting trust for the transferor. This presumption of law is rebuttable by oral or written evidence tending to show there was an intention of giving beneficially to the transferee.[14]

The words "shall be the joint property of the undersigned" or "right of survivorship" and "all monies in the account to be joint property of the undersigned" are proper words to convey a legal title to the fund, but not to convey the whole fund beneficially. Something more than mere transfer is required to destroy the presumption of a resulting trust and intimation of such an intent must appear on the document itself, or as a result of evidence which reveals the intention to benefit the transferee.[15]

A bank's joint account agreement may not be determinative as the agreement determines the rights and obligations *vis-a-vis* the bank only.[16]

In Justice Cullity's decision of *Cho Ki Yau Trust* v. *Yau Estate*,[17] the first wife of the deceased and their adopted son held a term deposit jointly, without express right of survivorship. Upon the death of the first wife, the husband directed the bank to transfer the funds into his personal account. The adopted son claimed that the mother had intended the funds to go to him upon her death.

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[14] *Niles* v. *Lake* (1947), 2 D.L.R. 248 (SCC)
[15] *Niles* v. *Lake* (1947), 2 D.L.R. 248 (SCC)
[16] *Cho Ki Yau Trust* v. *Yau Estate* (1999) 29 E.T.R. (2d) 204 (OSCJ) Justice Cullity
[17] *Cho Ki Yau Trust* v. *Yau Estate* (1999) 29 E.T.R. (2d) 204 (OSCJ) Justice Cullity

Justice Cullity made it clear that in such circumstances, the question of whether the adopted son would obtain the beneficial right to the funds on deposit depended upon the intention of his mother, and for this purpose, the terms of the document provided by the bank for their signatures are of secondary importance, as those documents really just determine the rights and obligations in respect of the bank.

The language of the bank's joint account agreement did not express a right of survivorship, and as such was not determinative as the agreement determined the rights and obligations *vis-a-vis* the bank only.

Evidentiary Issues

The presumption of a resulting in trust can only be met by providing convincing and unimpeachable evidence for an *inter vivos* gift.

Evidence in support of the presumption is admissible if tendered. Evidence which tends to rebut may be written or oral. The evidence on each side may consist of acts and statements made before or substantially at the same time as the transfer or purchase.

Often times, the oral evidence of the donee alone is not sufficient to show that the property was transferred with the intention of making a gift of the beneficial interest in that property to that donee.[18]

The *Ontario Evidence Act*, R.S.O. 1990 c E.23 makes it clear that corroborative evidence is required when dealing with actions by or against the heirs of an estate. Section 13 of the *Evidence Act*, provides that an interested party shall not obtain a verdict on his or her own evidence in respect of any matter occurring

[18] *McLear v. McLear Estate*, [2000] O.J. No. 2570 (OSCJ)

before the death of the deceased person unless such evidence is corroborated by some other material evidence.

When an individual fails to rebut the presumption of undue influence, the other party is entitled to a recision or, when that is not possible, damages.[19]

a) A Declaration of Gift

A written document signed by the transferor is an effective way of showing the intent of the transferor to make an *inter vivos* gift. Should the gift be challenged after the death of the transferor, the written document or "declaration of gift" can be put into evidence as to the deceased's intent at the time of the transfer.

When drafting a gift instrument, thought should always be given to the tax aspects to the donor and to the donee, and the effect the gift may have on spousal or family statutes in the jurisdiction. In most provinces, land registry legislation usually requires gifts of real property to be on prescribed forms or to contain certain information.

A declaration of gift should contain the following information:

- A description of the subject matter of the gift.
- The current fair market value of the property and the basis on which that value was determined.
- Confirmation that no consideration was paid for the property.
- The date on which the gift is made.

[19] *Treadwell* v. *Martin* (1976), 67 D.L.R. (3d) 493 (NBAD)

- If the recipient is married at the time the gift is made, a declaration that any income from the gifted property is to be excluded from the recipients' net family property.

- The signature of the donor. In this regard, the declaration need not be witnessed, but the presence of a witness, who can later attest to the competence in free will of the donor, would strengthen the evidence of intention.

- The signature of the recipient. Again, this is not strictly necessary, but when dealing with a property that cannot be physically transferred, a signature of the recipient would confirm acceptance.

b) Solicitors' Notes

The solicitor effecting the transaction can also be helpful in terms of the evidentiary burden of proving the intent to make the gift.

A solicitor meeting with an individual who intends to make an *inter vivos* gift of his or her property should take detailed notes during his or her meeting with the transferor, including the reason behind the desire to transfer the property. Notes as to capacity of the individual making the transfer are also helpful.

It the transferor is transferring assets to one of his or her children, it might be suggested to the client that they put all family members on notice of the transfer at the time same takes place. A letter could be written to all family members advising of the transfer. That way, any issues with respect to the transfer could be dealt with immediately rather than having the donee be forced to deal with evidentiary matters in rebutting any presumptions after the death of the parent.

CHECKLIST

The following is a checklist of matters that should be considered when drafting a gift instrument.

1. Name and address of the donor and his competency to make a gift.

2. Name and address of donee.

3. Tax consequences to donor and donee.

4. Whether delivery of the property is to be actual or symbolic.

5. Donative intent.

6. Subject of gift:

    a) If applicable, status of the property as family or spousal property or separate property of donor.

    b) Effective any dower or courtesy rights on the property, if applicable.

7. Description of property sufficient for identification.

8. Notification of the donee that the gift has been made, a physical delivery is not required.

9. Conditions to gift or reservation of rights by the donor.

10. Date of the gift.

11. Acceptance or refusal by donee.

12. Signatures.

*O'Brien's Encyclopaedia of Forms

DECLARATION OF GIFT

I, _____ (the "Donor") of _____ own _____ (the "Property"), more specifically described in Schedule "A" attached to this declaration.

I desire to give the Property to _____ (the "Donee") of _____ .

To carry out my purpose, I deliver to [Donee or person to whom property delivered] the Property.

I acknowledge that it is my intent to vest absolute ownership and title in the Property in the Donee from the date of this declaration.

I expressly state that:

1. the income from such sum;

2. any property, other than a matrimonial home, into which sum can be traced ("substituted property");

3. the income from the substituted property;

4. any property, other than a matrimonial home, into which the income from the substituted property, can be traced;

5. the increase in value, after the date hereof, of the substituted property;

6. the increase in value, after the date hereof, of any property, other than a matrimonial home, into which the income from the substituted can be traced;

shall be excluded from _____ 's net family property as determined pursuant to the *Family Law Act*, R.S.O. 1990 c F.3 (hereinafter called the "Act") and any successor or related or similar legislation, in accordance with the provisions set out in section 5 of the Act.

DATED the day of January, 2004

_____ Witness

_____ Name

ACCEPTANCE OF GIFT (CLAUSE)

The Donee accepts the gift of the Property and all benefits attaching to it by the Donor.

DATED the day of , 2004

_____

(Signature of Donee)

ACCEPTANCE OF GIFT (INSTRUMENT)

I, _____ (the "Donee") of _____ accept the gift and all benefits attaching to it made to me by _____, on the _____ day of _____, 2004, such gift being more particularly described in Schedule "A" attached to this declaration (the "Property").

DATED the day of , 2004

_____
(Signature of Donee)

[*Attach Schedule* "A"]

Incentive/Purpose/Productivity Trusts

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INTRODUCTION

One of the obvious consequences of the considerable transfer of wealth, from the baby boom generation to their children and grandchildren, is the individual impact on those beneficiaries.

Furthermore, in my experience, the "problems of wealth" are experienced at all levels even when relatively modest inheritances are passed onto the next generation(s.).

The extent of this problem is illustrated by the fact that new terminology has surfaced in the United States to describe the baby boomer children as "trust babies" and the enjoyment of the new wealth as the epidemic of "affluenza".

This paper will explore the concept of how one can deal with the potentially unmotivated child that has received the financial protection being named as a beneficiary in a substantial trust. The paper explores the concepts of how to incentivize that beneficiary.

Essentially, by using the traditional trust mechanism, some suggestions have been made to revise that existing structure to help encourage or discourage certain types of behavior of the particular beneficiaries.

Having said that, no matter what legal arrangements are created, the fundamental question is: What does it take to motivate people and what is the best way to facilitate the development of a productive individual?

THE CURRENT SYSTEM

To date, estate planners have generally focused their attention on creating an estate plan that is fundamentally based on avoiding tax and typically, if there is a need to either protect the surviving spouse during his or her lifetime or the children of that relationship, a life interest arrangement is created. In this situation an individual (i.e. executor/trustee) is charged with the management of the capital and , at all times, balancing the interests of the life tenant and the income beneficiary.

A recent trend coming out of the United States is to add a twist to the traditional estate planning process by trying to draft into the trust documents language that will control the behavior of the beneficiaries.[1]

Essentially, the suggestion of those who propound the incentive trust approach is that estate planners need to move away from the traditional approaches of drafting an estate plan, with the goal of tax savings, creditor protection and estranged spouse protection, and begin to draft trust documents that will assist to modify the behavior of the beneficiaries.

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[1] For a comprehensive review of the incentive trust concept see Marjorie J.D. Stephens, "Incentive Trusts: Considerations, Uses, and Alternatives", (2003) ACTEC Journal 5.

TRUSTS FOR CHILDREN

In considering adding a new layer into the whole trust drafting process, some thought must be given to the fundamentals behind the creation of a trust and why the trusts themselves are created for the protection of children.

The obvious goals of a settlor/testator are to protect the financial interests of minor beneficiaries and while many clients do not like to admit it, an obvious result of any trust arrangement is the fact that the settlor and/or testator is given the privilege of, in some measure, ruling from the grave".

In her article Incentive Trusts: Considerations, Uses and Alternatives"[2] the author Marjorie Stephens considers those the traditional reasons for creating a trust for children and notes that there are obvious problems that come from this traditional estate planning technique, which include the fact that the money received by the children/beneficiaries may act as a disincentive to future education and those children may begin to depend on the trust money and not rely solely on their own personal resources. The author goes on to say that the most important consideration in respect of distributing the wealth, in the context of a trust environment, is a determination as to when the particular child becomes mature enough to handle both the income and the capital.

[2] Marjorie J.D. Stephens, "Incentive Trusts: Considerations, Uses, and Alternatives". (2003) ACTEC Journal 5

Obviously, it is up to the estate planners and lawyers to create a protection system that typically results in the income and capital being given to the beneficiaries with a view to eventually receiving the money without any "strings attached".

In fact, ideally, most settlers and/or testators would prefer that the income, and capital if necessary, of the trust be used for support of the children up to the age of 20 and then focusing the spending, in their 20's, solely on education. The prospect that the child will enjoy the income for any other purpose, during their 20's, is not as desirable for many clients.

However, it is difficult to control the use of the income, and capital if necessary.

DRAFTING CHALLENGES

Historically, motivating the child beneficiary is not usually addressed in the structure of the trust document.

The concept of an incentive trust is that the trustee will reward certain behaviour. For example, the trust could be drafted in such a way that the more productive the child is financially, the more money she will receive from the trust. The purpose is obvious namely, encouraging the child to live a productive life.

The concept of the incentive trust was in part, first developed in a Wall Street Journal article on November 17, 1999, entitled "Trust Me, Baby". Some suggestions made in

that Wall Street Journal article included the idea of matching earned income and creating a specific fund to set up a business or professional practice. Another suggestion was that the monthly income could be paid to a stay-at-home mother or father and specific language could be included to deny distributions if the child does not enter into a premarital agreement when he or she marries. More dramatic suggestions included drafting trust clauses which provided that the child would be denied any money from the trust if he or she failed a drug test and in an effort to incentivize the child, the trust could include a clause that provided for more money to the child if he or she was receiving therapy.

Obviously, these types of clauses create their own problems and consideration has to be given as to whether or not they are capable of being administered. This is presumably the lawyer's challenge.

As with any trust document, broad language usually needs to be incorporated so that unknown future events can fall within the confines of the drafting language. Therefore, it is difficult to draft in, all of the desirable behavior, in the context of an incentive trust.

From an administration standpoint if the specific benefit is tied to specific behavior then it is not that difficult for the trustee to attend to the administration of the assets. However, given the necessity for broad and vague language in the drafting, encouraging a productive child can be much more difficult to administer.

At the outset, it is suggested that the following steps be considered:

(1) The objects and purpose of the trust be defined;

(2) Consideration be given to broad and specific behaviors that need to be encouraged;

(3) Consideration must be given to whether or not the provisions of the trust, as drafted, can indeed be administered.

PSYCHOLOGICAL CONSIDERATIONS

In her article, Marjorie Stephens[3] sets out some of the psychological considerations that are relevant to the structure of a trust designed to incentivize behavior.

The starting point for any incentive trust is the idea that the settlor/testator is trying to motivate an individual. The two presumptions are that (a) money can motivate that particular individual; and (b) the settlor/testator will use his or her power wisely and that the individual appointed to administer those powers will do so judiciously.

Marjorie Stephens notes[4] that in her view one should not try to use the reward method to control the individual as that does not motivate the beneficiary. In fact, the key to success is that the child takes control over his or her own life and that the use of the exercise of control enables or encourages the child to do such.

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[3] Supra Note 1 at page 14.
[4] Supra Note 1 at page 12-13.

The foundation to any incentivizing behaviour is confidence that the child believes he or she can get things done.

In the process of motivating the child and creating a confident child/beneficiary, there must be economic independence for that individual.

Marjorie Stephens[5] suggests that one should not draft a "bail out" provisions in the trust and that every effort should be made to foster a feeling that the child must take responsibility for his or her own conduct. Encouraging independent decisions, accepting responsibility for the consequences of one's actions and establishing the relationship with the parents as a legal adult are the foundations to creating economically independent and competent beneficiaries.

PRACTICAL CONSIDERATIONS

In an effort to reach the goal of a financially independent confident child/beneficiary, the following practical considerations need to be considered when drafting the trust provisions.

Obviously, the greatest need for economic assistance for the child is usually between the ages of 20-40 and therefore a careful distribution scheme needs to be set out during this period of the child's life.

[5] Ibid at page 13.

Marjorie Stephens[6] notes that:

> Money is not the "problem". Individuals are not "de-incentivized" by money, but rather by the dynamics around the money. Money means control *over* the individual, not by the individual ....The solution to this problem, as is suggested[7] is proper, comprehensive communication.

For example, it is suggested that you start, at an early stage, discussing the financial arrangements and the emotional issues surrounding financial support. Sometimes it is useful to involve the child in the decision-making process including investments and distribution.

Knowledge is a form of control and releasing that information is an important part of the shift in control. Essentially, as the beneficiary matures, so does your trust in that beneficiary and therefore a pro-active approach to involving the beneficiary in the process is important.

CONCLUSION

In summary, while the concept of incentivizing beneficiaries and influencing behavior through the trust mechanism is novel, it seems to me that small steps can be taken to develop an estate plan that moves toward creating confident, and financially independent children. This process involves both creative drafting and important psychological considerations in the confines of the family unit.

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[6] Ibid at page 14.
[7] Ibid at page 14.

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