DOES ESTATE PLANNING END WITH INCAPACITY?

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I. INTRODUCTION

This paper will consider the historical and current elements of a power of attorney, and in particular, the "enduring" or "lasting" feature of the instrument. It will survey the law in Canada regarding the authority of, and limitations upon, an attorney to undertake estate planning for an incapable person and what court supervision may be involved in that process. It will examine what type of planning is within the realm of possibility and how this interacts with the historical understanding that testamentary planning must be done by the testator alone. The intention of the paper is to raise, but not necessarily resolve, the important question for those in the estate planning professions: can and should estate planning be undertaken by an attorney for an incapable person and, if yes, what should be permitted and how should that authority be governed?

II. SURVEY OF COMMON LAW AND LEGISLATIVE HISTORY OF POWERS OF ATTORNEY

General powers of attorney have a long common law history, dating back hundreds of years. They were recognized in the legislation of the British colonies which later formed Canada in the mid to late 19th century as the colonies adopted British statutes. And yet, despite this early recognition almost a century and a half ago, the creation, effectiveness, and termination of powers of attorney and the duties and authorities of agents acting thereunder were governed almost exclusively by common law until relatively recently.

In recent decades, the concept of an enduring or lasting power of attorney which would survive the incapacity of a donor was introduced by legislation and the existence of this statutory authority has made the power of attorney a vastly more useful tool for estate planning purposes.

When considering the powers and authorities of an attorney to manage the financial affairs of a donor, it is important to recognize this mixed common law and legislative history and to properly identify the source of authority under which the attorney in question may be acting.

A. COMMON LAW PRINCIPLES

1. Powers of Attorney as a Form of Agency

Throughout their history, general powers of attorney have been governed by the law of agency, and it is difficult to identify a basis on which to distinguish these two concepts. The Law Reform Commission of British Columbia considered the question

of whether there was any difference at all between a general power of attorney and an agency relationship in 1975 and noted that:

> An examination of the common law leads one to the somewhat astonishing conclusion that for all practical purposes no distinction seems to exist… It only becomes necessary to draw a distinction when some statute such as the Act purports to alter the law relating to powers of attorney.[1]

Indeed, there appear to be very few definitions of the term "power of attorney" in any Canadian legislation[2] and none which actually attribute any meaning to the term other than in the context of its use within the terms "enduring power of attorney" or "springing power of attorney".[3] In all cases, the legislation uses the term while presumably assuming a common law meaning.

Not surprisingly, the common law rules governing agency apply almost without exception to powers of attorney. In particular, the relationship between agent and principal is generally recognized as giving rise to fiduciary obligations, and powers of attorney form no exception, though the existence of fiduciary obligations ultimately depends on a finding of trust and confidence imposed on the agent by the principal.[4]

2. Form

Under the common law, there are no requirements regarding the form of a power of attorney. As such, there is at common law no requirement that a general power of attorney be witnessed and no requirement that such a power of attorney be in writing. In most Canadian jurisdictions, there is no specific form of document required to create a general power of attorney. Often, a form is provided but is not mandated. Nonetheless, there may be limitations as to form and execution imposed by statutes governing their use in specific situations (eg. land titles legislation) and by the practicalities of dealing with third parties such as financial institutions who are unlikely to accept anything short of a formal witnessed power of attorney.

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[1] Law Reform Commission of British Columbia, *Report on the Law of Agency Part I: The Termination of Agencies*, LRC 21 (1975).

[2] *Powers of Attorney Act*, SNWT 2001, c. 15, s. 1; Nunavut *Powers of Attorney Act*, SNu 2005, c. 9, s. 1.

[3] The term "enduring power of attorney" will be used throughout this paper to refer to any power of attorney which survives a principal's incapacity or arises upon such incapacity. The terms "principal" or "donor" will be used interchangeably to refer to the grantor of such a power and the terms "attorney" or "donee" will be used to refer to the recipient of such a power.

[4] *Halsbury's Laws of Canada*, "Agency", at para HAY-50. It is difficult to imagine a power of attorney situation, other than in a commercial context where consideration is exchanged, where such a relationship of trust could not be implied.

3. Capacity

The common law test for requisite capacity to create a power of attorney is generally thought to be less stringent than the test for testamentary capacity. The case of *Re: K*[5] is frequently cited as setting out the appropriate test, which may be compared to the testamentary test in *Banks v. Goodfellow*,[6] the leading case on testamentary capacity in Canada and the United Kingdom. Interestingly, the lower threshold outlined in *Re: K* is often used to explain, at least in part, the reluctance to allow attorneys to make significant gifts that would, in effect, amount to testamentary planning.

In fact, as John Poyser notes in his *Capacity and Undue Influence*,[7] the test for both *inter vivos* and testamentary transfers is likely the same and it is set out in *Ball v. Mannin.*[8] It is, as Mr. Poyser points out, a highly generalized test necessitated by the fact that gifts may range in size and significance, from a small gift to a friend to all of a person's property. Essentially, the test in *Ball v. Mannin* requires that:

> …to have capacity a gift-maker must enjoy the powers of mind to understand the nature and effect of the transaction if the gift-maker were given a full explanation of its basic terms.[9]

Gifting through a will almost always amounts to the same thing: a transfer of all of the will-maker's property. As such, the appropriate test is usually, though not always, consistent in such cases and is set out in *Banks v. Goodfellow*.

Mr. Poyser summarizes the current state of the law as follows:

> There is a modern movement in the courts, exemplified by *Re Beaney* in the United Kingdom and, arguably, *MacGrotty v. Anderson* in Canada, to customize the test on a category-by-category basis to be more particular. Thus, a gift of an asset late in life that comprises the bulk of a gift-maker's wealth will attract a test for capacity very much the same as the test for testamentary capacity in *Banks v. Goodfellow*. Lesser gifts attract lower threshold tests…
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> …The best view is that the test for capacity is actually unitary, and one test applies to both *inter vivos* and testamentary dispositions.[10]

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[5] [1988] 1 All ER 358 (Ch.D); *Godelie v. Pauli* (1990), 39 ETR 40 (Ont. Dist. Ct.).
[6] (1990), 39 ETR 40 (Ont. Dist. Ct.) as cited in *MacGrotty v. Anderson* (1995), 9 ETR (2d) 179 (BCSC); *Egli v. Egli* 2004 BCSC 529 (CanLII), [2004] BCJ No 796, 28 BCLR (4th) 375 (SC), affd 2005 BCCA 627 (CanLII), [2005] BCJ No. 2741, 262 DLR (4th) 208 (CA) [*Egli*].
[7] John E.S. Poyser, *Capacity and Undue Influence* (Carswell: Toronto, 2014) at p 355 [Poyser].
[8] *Ball v. Mannin* (1829), 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).
[9] Poyser, *supra* note 7, at p 355.
[10] Poyser, *supra* note 7 at p 355-356.

Consider how this unitary test might apply to a situation where a donor, suffering from early stage dementia and concerned about further loss of capacity and a possible wills variation claim by a wayward adult son, sets up an *alter ego* trust. He intends for the trust to capture the bulk of his estate and grants a power of attorney allowing his attorney to settle his assets on the trust over time. He leaves only a small sentimental token, such as his pocket watch, to fall into his will for his son. Applying the test in *Ball v. Mannin*, we might expect a test akin to *Banks v. Goodfellow* to apply to the granting of the power of attorney, and something less stringent to apply to the will.

In a number of Canadian jurisdictions, the common law test for requisite capacity to grant a power of attorney which will be used to settle a donor's entire estate into a trust is now less relevant. British Columbia, Ontario, the Northwest Territories and Nunavut have all codified very specific tests for capacity to create any enduring power of attorney. More general tests are set out in some other provinces.[11]

4. Agent's Authority Not to Exceed Principal's Authority

A fundamental principle of agency is that an agent's authority cannot exceed the authority of the principal. In this light, consider the position of an attorney acting for a minor who does not have the capacity to contract, an attorney acting for a deceased individual who obviously has no capacity whatsoever, and most importantly for our purposes, an attorney acting for an incapacitated individual who may have limited powers.

Under the common law, mental incapacity of the principal will immediately terminate any agency relationship, including a power of attorney. Authority for this proposition rests almost entirely on two decisions of the English Court of Appeal.[12] The first is *Drew v. Nunn.*[13] A husband, with full capacity, had given his wife authority to deal with a tradesman and held her out as his agent and as being entitled to pledge his credit. The husband then lost capacity, and was placed in an institution. While he was incapable, his wife ordered goods from the tradesman, who supplied them, as he was ignorant of the husband's incapacity. The husband then regained capacity and resisted an action to recover the price of the goods supplied to his wife on the ground that the authority which he gave to his wife was terminated by his incapacity. The court held that the supervening incapacity of a principal put an end to the authority of the agent and the husband was entitled to recover the cost of the goods purchased.

In *Younge v. Toynbee*,[14] the defendant, while capable and having been threatened with legal action, engaged a solicitor to act on his behalf. Before the action was

[11] See Alberta, Saskatchewan, Manitoba and the Yukon.

[12] It should be noted that the British Columbia Law Reform Commission, in its *Report on the Law of Agency: Part II – Powers of Attorney and Mental Incapacity*, LRC 22 (1975), concluded that, "the rule that the intervening mental incapacity of a principal terminates the authority of this attorney appears to be firmly entrenched even though its common law roots seem dubious."

[13] (1879), 4 QBD 661; [1874-80] All ER Rep 1144; 48 LJ (QB) 591; 40 LT 671; 27 WR 810, CA.

[14] [1910] 1 KB 215; [1908-10] All ER Rep 204; 79 LJ (KB) 208; 102 LT 57; 26 TLR 211, CA.

commenced, the defendant became insane. The solicitor, unaware of the defendant's incapacity, entered an appearance and continued to represent the defendant. The plaintiff in the action, on learning of the defendant's incapacity, moved to have the defence struck out and sought to hold the solicitor personally liable for the costs. He succeeded and the solicitor was held liable on the ground that he had impliedly warranted that he had authority which he did not possess.

In Canada, the seminal case on this issue is *Re Parks, Canada Permanent Trust Company v. Parks*,[15] in which the court adopted as a correct statement of the law a passage in 1 Halsbury, 3d edition, at page 244:

> If the principal becomes a person of unsound mind, the agency as between the principal and the agent is terminated, but is not *ipso facto* revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal.

Finally, the principle was more recently stated in Canada in *Goodrich v. British Columbia (Registrar of Land Titles)*,[16] as follows:

> The issue of enduring powers of attorney is spawned by the accepted wisdom that a power of attorney (a form of agency) is terminated upon the mental incapacity of the donor… the rule seems to be firmly entrenched and I think it must be the starting place for this discussion.

B. LEGISLATIVE REFORM

Over the last few decades, the common law of agency governing powers of attorney has been modified significantly by legislative change across Canada. These reforms introduced the concept of a statutory enduring power of attorney to address what was seen as the unsatisfactory situation which arose when a power of attorney terminated as a result of the attorney's incapacity. As the Law Reform Commission of British Columbia stated at the time, the common law rule terminating an attorney's power upon incapacity "impinges upon the donor's freedom of choice by invalidating a power of attorney at exactly the moment the donor, when of sound mind, intended it to operate."[17]

Legislative reforms began in the United States in the 1950s but proceeded independently in the Commonwealth, largely without reference to changes in the United States.[18] In England, the Law Commission noted in a 1967 working paper that

[15] (1957), 8 DLR (2d) 155.
[16] [2004] BCCA 100.
[17] Law Reform Commission of British Columbia, Consultation Paper 12, *Powers of Attorney and Mental Capacity* (1974).
[18] Though the British Columbia Law Reform Commission did reference the American reforms in its *Report on the Law of Agency, Part I – The Termination of Agencies*, *supra* note 1 at 18.

it would be "highly convenient" if it were possible to grant an enduring power of attorney under which the donee would be entitled to continue to handle the affairs of the donor,[19] but in the final result, the new English *Powers of Attorney Act, 1971* did not include an enduring power of attorney and the actual introduction of an enduring power of attorney in the United Kingdom did not come until 1985,[20] after its introduction in Canada.

Law reform in other commonwealth jurisdictions, including Canada, also began in the late 1960s and early 1970s. The Law Reform Commissions of Ontario, Manitoba and British Columbia initiated studies on powers of attorney to consider the introduction of a special power of attorney that would survive mental incapacity,[21] and in 1979, the Uniform Law Conference of Canada published the *Uniform Powers of Attorney Act* introducing the concept of an enduring power of attorney.[22] Section 2 of the *Uniform Act* provided as follows:

> Enduring power of attorney
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> 2.-(1) The authority of an attorney given by a written power of attorney that,
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> (a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and
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> (b) is signed by the donor and a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,
>
> is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

Provisions similar to that found in the Uniform Act creating an enduring power of attorney were brought into force across Canada over the next decade beginning in Ontario and British Columbia in 1979 and ending in Alberta in 1991.[23]

In 2008, the Western Canada Law Reform Agencies published a report[24] recommending uniformity in the areas of recognition of enduring powers of attorney,

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[19] Law Commission, *Working Paper on Powers of Attorney* (1967), at para 21.
[20] *Enduring Powers of Attorney Act 1985* (UK), c. 29.
[21] Ontario Law Reform Commission, *Report on Powers of Attorney* (1972); Law Reform Commission of British Columbia, Consultation Paper 12, *Powers of Attorney and Mental Capacity* (1974).; Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney* (1974); The New South Wales Law Reform Commission, *Working Paper on Powers of Attorney* (1973); Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making for people with decision-making Disability* (1995).
[22] Uniform Law Conference of Canada, *Uniform Powers of Attorney Act* (1978).
[23] *Powers of Attorney Act*, SO 1979, c 107, s 5; *Power of Attorney* Act, RSBC 1979 c 334; *Powers of Attorney* Act, CCSM, c P97; *Powers of Attorney Act,* SS 1982-83, c P-20.1, s 3; *Infirm Persons* Act, NB, 1987, c 44, s 1.; *Powers of Attorney* Act, RSNS, c 352, s 3; *Powers of Attorney* Act, SPEI 1988, c 51, s 5, Quebec 1989, Bill 145, *Enduring Powers of Attorney* Act, SNL 1990 c 15; *Powers of Attorney Act,* SA 1991, c P-13.5.
[24] Western Canada Law Reform Agencies, *Final Report: Enduring Powers of Attorney: Areas for Reform* (1978).

duties of attorneys under enduring powers of attorney, and safeguards against misuse of enduring powers of attorney. The Report led to legislative amendments in some Canadian jurisdictions to provide for the codification of the fiduciary duties of an attorney, prohibitions against gifting, loans and donations, regulations of fees and provisions for accounting.

As is the law in all commonwealth jurisdictions, the ability to create an enduring power of attorney across Canada is purely a statutory power and has no basis whatsoever in the common law. While the authority is quite broad - an adult may generally authorize an attorney to make decisions or do anything that the adult may lawfully do by an agent in relation to the adult's financial affairs - estate planning professionals should never lose sight of the fact that the authority to conduct affairs on behalf of an incapacitated individual rests entirely in statute and is therefore limited by the scope of the power set out in their governing legislation.

C. RESTRICTIONS ON AN AGENT'S OR ATTORNEY'S POWERS

If an attorney is acting pursuant to a general power of attorney (that is, the principal has capacity), the attorney will not need to worry about statutory restrictions on the powers of an enduring power of attorney. The attorney's power is derived from the common law. In contrast, where an attorney is acting pursuant to an enduring power of attorney and the principal or donor has lost capacity, the attorney must rely entirely on statute for his or her powers and may not exceed the power found in statute.

Regardless of the source of an attorney's power, the attorney will face restrictions that may be imposed by the donor, under common law, by statute, and by third parties.

1. Donor-Imposed Restrictions

The scope of potential donor-imposed restrictions is essentially limitless. A donor may limit his or her attorney's powers by restricting the property subject to the power, the purpose of the power, the time during which it may be used, the geography, etc.

When dealing with a general (not enduring) power of attorney, donors should be encouraged to place any restrictions directly in the power of attorney document to avoid confusion. Consider, for example: Whether such limitations could be oral or written? Whether they may be written but ancillary to the power of attorney document? Whether they may pre-date or post-date the power of attorney document?

2. Common Law Restrictions

The greatest restrictions on an attorney's powers are likely their fiduciary duties. The attorney may not exercise the power of attorney for personal benefit unless expressly authorized to do so by the document or unless the attorney acts with the full

knowledge and consent of his or her principal.[25] He or she may also not allow personal interests to conflict with those of the donor,[26] must use the donor's assets for the donor's benefit, must not commingle assets, and must act honestly, in good faith and in the donor's best interests. The attorney must exercise the care and skill that a reasonably prudent person with the attorney's experience and expertise would exercise. The fiduciary duties owed by an attorney to a donor will be further discussed later in this paper.

A testator cannot delegate testamentary powers. The rule is clearly stated, in *obiter*, by Lord McMillan in the House of Lords decision in *Chichester Diocesan Fund and Board of Finance Inc v Simpson*:

> My Lords, the law, in according the right to dispose of property mortis causa by will, is exacting in its requirement that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others.[27]

How this rule affects an attorney's ability to undertake estate planning through the use of an *inter vivos* trust will be discussed later in this paper.

3. Statutory Restrictions

Statutory restrictions on an attorney's powers are found in many jurisdictions. In British Columbia, section 20 of the *Power of Attorney Act* sets out restrictions on gifts, loans and charitable donations. It provides that an attorney may only make a gift or loan, or charitable donation, from the adult's property if the enduring power of attorney expressly permits the attorney to do so or if there is an established pattern of the adult making such gifts, loans or donations while capable and the aggregate value in a year does not exceed a prescribed amount.

The Saskatchewan *Powers of Attorney Act* contains a very similar provision to the British Columbia provision, but also grants the court the power to approve a gift.[28] No other Canadian jurisdiction expressly restricts gifting; however, it may be argued that an attorney's fiduciary obligations prohibit or restrict gifting in any event and that there is no ability whatsoever to gift in jurisdictions which are silent on when it may be done.

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[25] *Baillie v Charman* [1992], BCJ No 1726, 93 DLR (4th) 403 (BCCA) and *Egli v. Egli* (2004), BCSC 529, (2005), BCCA 627).
[26] *Re Nichol Estate,* (1996) 14 ETR (2e) 176.
[27] *Chichester Diocesan Fund and Board of Finance Inc v Simpson*, [1944] AC 341 (HL).
[28] SS 2002, c P-20.3.

Other statutes specifically authorize the attorney to provide for maintenance, education, benefit and advancement of the donor's spouse and dependants,[29] or to "exercise the power to dispose of the donor's estate in order to satisfy a legal obligation of the donor to maintain and support another person, which may include the attorney".[30] It may be argued that these powers would exist in any event as the attorney is simply meeting the adult donor's existing legal obligations.

Statutory restrictions on an attorney's powers may also be found in other legislation, such as land titles and property law legislation.

4. Third Party Restrictions

Perhaps some of the most frustrating restrictions on the powers of an attorney come from dealings with third parties. At common law, third parties cannot be compelled to deal with agents.[31] As most estate planners will know, this problem manifests itself most commonly with financial institutions who are likely to require formal power of attorney documents and often further evidence of valid authority.

III. THE CURRENT LAW IN CANADA

A. LEGISLATION

Not unexpectedly, given that the issue is provincial in jurisdiction, the Provinces and Territories of Canada are not consistent with respect to whether an attorney, acting after the donor's incapacity, has the ability to engage in estate planning. All Provinces permit, under their relevant legislation, a donor to make the power endure or last after his/her incapacity, such that the attorney can continue to act thereafter. It is accepted that, in that circumstance, the attorney becomes a fiduciary for the donor and must, as a trustee, act in the donor's best interests.[32]

The power granted to attorneys under the relevant legislation is generally to permit the attorney to do whatever the donor could do by attorney, subject to any restrictions that the donor or the law may impose. Even with such broad language and even in jurisdictions where there is no express prohibition on an attorney to make a will for the donor, the question of whether the attorney could make a will (if so expressly authorized under the document by the donor and not expressly prohibited by legislation) or could take other steps that have the effect of making testamentary dispositions for the donor (such as beneficiary designations, *inter vivos* trusts that include immediate gifting or effecting joint tenancies) remains alive.

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[29] See, for example: *Powers of Attorney Act*, RSA 2000, c P-20, s 7; *Enduring Power of Attorney Act*, SY 2002, c 73, s 8.
[30] *Powers of Attorney Act,* CCSM 1992, c P-97, s 23.
[31] British Columbia Law Reform Commission, *Report on the Law of Agency: Part II – Powers of Attorney and Mental Incapacity*, LRC 22 (1975).
[32] *Egli*, *supra* note 5.

In four Provinces/Territories, there are explicit provisions in the power of attorney legislation that preclude an attorney from making, amending or revoking a will for a donor.[33] In most of the remaining Provinces, the legislation is silent on the issue.[34] It is likely that the common belief that certain acts, including the making of a will, are non-delegable exists in those jurisdictions such that an attorney would not have that authority, and certainly not where the instrument conferring the power is silent on the issue.

Even where the legislation precludes an attorney from making a will for the donor, some Provinces have express legislation permitting the attorney to take certain measures which could affect the value of the donor's estate at death. For example, in British Columbia, an attorney may make a gift on behalf of the incapable donor under certain prescribed circumstances to a certain limit. Of course, it remains open for the donor to specifically confer larger powers upon the attorney in the power of attorney document than what is prescribed legislatively. However, in British Columbia, that direction by the donor cannot be "to do anything that is prohibited by law".[35] Therefore, in British Columbia, an authorization by a donor that his attorney could make a will for him would be invalid.

In Saskatchewan, the relevant legislation also expressly prohibits a property attorney from making or changing a will in the name of the grantor. There have been no reported cases that discuss the scope of this provision and whether estate planning, other than a will, could be undertaken for the incapable grantor or whether any such planning would fall within the language of "changing a will in the name of the grantor".

It is only in New Brunswick where the legislation confers to the court the power to make, amend or revoke a will of an incapable person.[36] This power is akin to the statutory will powers that the courts have in other countries, such as the United Kingdom. The power of the New Brunswick court to make, amend or revoke a will on behalf of the mentally incompetent person must only be exercised where the court "believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that [he/she] if competent and making a will at the time the court exercises its power, would not have wanted".[37]

There have been two cases where the New Brunswick court has exercised its power to authorize committees to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person and to execute beneficiary designations for a mentally

[33] *Power of Attorney Act*, RSBC 1996, c 370; *Powers of Attorney Act*, SS 2002, c P-20.3; *Powers of Attorney Act*, SNWT 2001, c 15; *Powers of Attorney Act*, SNu 2005, c 9.
[34] *Powers of Attorney Act*, RSA 2000, c P-20; *Powers of Attorney Act*, CCSM 1992, c. P-97; *Powers of Attorney Act*, RSO 1990, c P-20; *Powers of Attorney Act*, RSNS 1989, c 352; *Powers of Attorney Act*, RSPEI 1988, c P-16; *Enduring Powers of Attorney Act*, RSN 1990, c 15, *Enduring Power of Attorney Act*, RSY 2002, c 73.
[35] *Power of Attorney Act*, RSBC 1996, c 370, s 15.
[36] *Infirm Persons Act*, RSNB 1973, c I-8, ss. 3(4) and 11.1(1).
[37] *Ibid*.

incompetent person, although these orders were made without any written reasons for decision: see *In the matter of Lewis D. Wilson* and *In the Matter of John N. Bujold*.[38] Therefore, there has not been extensive legal discussion of the operation of the statutory power of the New Brunwick court, save for the *Re M* case, discussed below.

Other Provinces have allowed for some estate planning to be undertaken by committees that falls short of permitting an actual will to be made for the incapable person but permits steps which clearly have an effect on the ultimate succession of the incapable person's estate.

B. CASE LAW

There have been a number of cases in Canada addressing the issue of the ability of a representative for an incapable person (whether an attorney appointed by the donor while capable or a committee appointed by the court after incapacity) to engage in steps that would have an impact on the estate of the incapable person at the time of his death and alter the existing plans in place. To add further confusion to the issue of the extent of the power of the representative, the decided cases go in both directions, with some holding that certain estate planning for the incapable adult may be undertaken and others that refuse the proposed planning.

The cases have involved representatives who were both appointed by the court (under a committeeship order) and also privately appointed by the adult (under an enduring power of attorney).

1. Committees

Committees[39] are appointed and supervised by the court. This supervision does not ordinarily exist with the private appointment of an attorney. In that supervisory role, the courts have been asked to approve actions where the committee is effectively undertaking estate planning for the incapable adult.

In *Re M (Committee of)*,[40] the New Brunswick court heard an application under the *Infirm Persons Act* by the estate committees of an incapable person (being the adult's wife and a trust company) to approve a proposed will made for the incapable person which left all of his assets to his wife and to approve an immediate transfer of title to the matrimonial home to his wife. The husband had been rendered incapable in an accident and did not have an existing will. He would otherwise have died intestate. All of the children agreed to the application.

The application was brought under Section 15.1 of the *Infirm Persons Act* which provides:

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[38] *In the matter of Lewis D. Wilson*, January 15, 1998, NBQB Cause Number FDSJ-888/97, and *In the Matter of John N. Bujold*, June 23, 1997, NBQB Cause No. FDSJ – 441/97.

[39] Committees may be referred to by different names (such as trustees) in other jurisdictions.

[40] 1998 NBJ No. 403 (QB) [*Re M*].

> Where the court authorizes or directs the committee of the estate of a mentally incompetent person to make, amend or revoke a will in the name of and on behalf of the person, no will made, no amendment made to a will and no revocation of a will by the committee is valid until it is approved by the court.[41]

This provision is unique to the New Brunswick legislation and does not exist in other Provinces or Territories. Most Provinces have the broad language similar to that contained in section 15 of the *Infirm Persons Act* which provides:

> The court may, by order, authorize and direct the committee of the estate of a mentally incompetent person to do in relation to the estate anything that such person might do if he had remained competent.[42]

The court discussed that the Legislature must have regarded s. 15, although broad, insufficient to permit the court to allow a will to be made for the incapable person and hence, the reason for the addition of s. 15.1.[43]

In applying the test to the court's approval authority under s. 15.1, the court had regard to articles and case law authorities from England, where statutory wills can be made for an incapable person.

The court noted that its discretion should be exercised (to make, amend or revoke a will) when the court believes that a result would otherwise occur that the incompetent person, if competent, would not have wanted. Therefore, the court stated it should not give an approval unless it is satisfied that an unwanted result would otherwise occur. The court expressly adopted the English approach and held:

> I am of the view that if we assume that M had a brief lucid interval and knows what has happened and what the future holds for him, M would execute a will which would benefit and protect his wife and children. I am further of the view that in the circumstances M., acting reasonably and with advice from a competent solicitor, would execute the proposed will".[44]

In the case, the court noted that M was in a kind and loving family and that all intestate heirs have consented to the draft will. Without it, hardship could be caused to the wife on the intestate distribution scheme, particularly if any of the adult children were to predecease leaving minor children who would have an interest in M's estate. The court further noted that it was best for the title to the house to be transferred entirely to the

[41] *Infirm Persons Act*, RSNB 1973, c I-8, s 15.1.
[42] *Ibid*, s 15.
[43] *Re M, supra* note 40.
[44] *Ibid* at para 27.

wife, subject to a promissory note in favour of M's estate that would arise on the death of either M or his wife.[45]

For the above reasons, the court approved the will and the *inter vivos* title transfer. Effectively, the court placed itself into the shoes of the incompetent person and effected an estate plan that the person, if capable, would reasonably have wanted.

In a more recent decision, the Queen's Bench of New Brunswick again permitted a committee for an incapable person to make a change in beneficiary designations for the incompetent person, effectively changing the estate plan that existed for him at the time of his incapacity: *LeBouthillier Estate v. Selosse*.[46]

In *LeBouthillier*, the husband died after over 65 years of marriage. The lengthy but apparently unhappy union produced 8 children of the marriage. The last 5 years of the husband's life was spent in a nursing home, without any visits from the wife. Approximately 6 years before he died, and while capable, the husband had made an enduring power of attorney naming one of his sons as the attorney. He also signed a (limited) power of attorney in favour of another son over an account he solely owned, contributed to and used at a financial institution. The wife had been designated as the beneficiary of this account some 30 years earlier.

The husband died intestate. There had been a contested committeeship proceeding prior to his death, between the wife and 6 of the children. Before the committeeship was concluded, the husband died. Days prior to his death, the son, using the enduring power of attorney, changed the beneficiary designation card for the bank account from the wife in favour of the other son named as the limited attorney on the account, in trust, for the equal benefit of all of the father's children. This had been done without any prior consultation with his father, including prior to the father's loss of capacity. In addition, the son also withdrew the bulk of the funds in the bank account shortly before the father's death and distributed it amongst the family in the manner that he saw fit.

After the husband's death, the wife took issue with her son's change of the beneficiary designation on the bank account. This was on the basis that such action constituted a change to his estate planning and deprived her of the benefit that she had been given when her husband was competent. She also took issue with his withdrawal of funds but these were returned to the account before the action was decided.

In earlier case law, the New Brunswick Court of Appeal held that the nomination of a beneficiary on a bank account, that then results in the balance on the account holder's death to pass automatically to the designated beneficiary, was more akin to a testamentary disposition than an *inter vivos* gift: *Goguen v. Hachey*.[47] The wife in

[45] *Ibid*.
[46] 2013 NBQB 404; 2014 NBCA 68 [*LeBouthillier*].
[47] 2012 NBCA 56 [*Goguen*].

LeBouthillier argued that the change of designation by the son was akin to making a change to a will and that this could only be done by the husband while capable, and could not be done by anyone for him after his loss of capacity.[48]

In opposition, the son argued that he had the same rights as his father, including the right to withdraw funds from the account for the benefit of his father or to distribute the funds amongst the children prior to the father's death and to nominate a beneficiary for those funds. He argued that, as the unrestricted attorney, acting in a manner that would respect his father's wishes, he had the authority to alter the designation or deal with the funds in the account in a manner that was consistent with his father's wishes.[49]

The trial court in *LeBouthillier* held that the change to the beneficiary card by the attorney after the husband's incapacity was a valid exercise by the attorney, as the change in nomination was done by the attorney respecting his father's wishes and was "consistent with the measures that had been previously taken by the father". However, the court did not set out in the judgment what measures the father had in fact taken, when capable, to evidence that he did not want his wife to receive the benefit of the account. The court simply noted that there was "no evidence before the Court to suggest that [the husband] wanted to ensure his wife's well-being at the time of his death or after".[50]

The wife relied on a British Columbia case, *Desharnais v. Toronto Dominion Bank*,[51] where the court held that an attorney acting under an enduring power of attorney did not have the ability to alter a beneficiary designation that had been made by the capable donor. In *Desharnais*, the court noted that the right to change beneficiary designations had not been explicitly conferred in the general power of attorney document and, without that, such alteration could not be done.[52]

The *LeBouthillier* case appears to stand for the following proposition: An attorney may, following a donor's incapacity, change a beneficiary designation previously made by the adult when capable (even accepting that this may be a testamentary disposition), if the court finds that the change would be "consistent with the donor's wishes" (or what they would have been) at the time of the change.[53]

The New Brunswick Court of Appeal overturned the trial judge's decision in *LeBouthillier* stating that the *Credit Unions Act*[54] is a complete code governing the nomination of beneficiaries and that, as such, the attorney was not permitted to change

[48] *LeBouthillier*, *supra* note 46.
[49] *Ibid*.
[50] *Ibid* at para 33.
[51] 2001 BCSC 1695 and 2002 BCCA 640 [*Desharnais*].
[52] *Desharnais*, *supra* note 51.
[53] *LeBouthillier*, supra, note 46 at paras 32 and 33.
[54] *Credit Unions Act*, SNB 1992, c C-32.2.

or revoke the beneficiary nomination following incapacitation of the adult.[55] The Court of Appeal referenced the earlier case of *Goguen*,[56] and stated that the sections of the Act which govern testamentary gifts begin and end with the following:

> Firstly, s. 47(3) of the Act provides that the interest of the member, on the death of that member, passes and vests in the person nominated. Secondly, s. 47(4) provides that the person who makes a nomination may vary it during his lifetime.[57]

The New Brunswick Court of Appeal previously stated in *Goguen* that a "beneficiary card signed under s. 47 of the *Credit Unions Act* is more akin to a testamentary provision than to an *inter vivos* gift".[58] In concurrence with its earlier decision, the Court of Appeal confirmed again in *LeBouthillier* that an attorney did not have the power to alter the beneficiary nomination.[59]

The *LeBouthillier* decision in New Brunswick is now consistent with the *Desharnais* decision in British Columbia.[60] In *Desharnais*, the common law spouse was the designated beneficiary of the adult's RRSP but was not left anything under the will. In managing the spouse's affairs after his incapacity, the RRSPs were transferred by the attorney to another financial institution within the same banking group. This had the effect of revoking the original designation. No new designation of beneficiary for the RRSP at the new financial institution could be made by the attorney. The result on the spouse's death was that the RRSP proceeds fell into his estate and passed to the beneficiaries under his will, depriving the spouse of the intended benefit. The surviving spouse sued the financial institution for suggesting and allowing the RRSP transfer which had the effect of revoking the original beneficiary designation. The court found that the attorney could not change the designation and therefore, the bank ought not to have permitted the transfer of the RRSP. The court ordered that the financial institution pay the surviving spouse the funds that she would have otherwise received if the designation had been maintained.[61]

The British Columbia courts have dealt with applications brought by committees of the estate of an incapable person seeking to engage in various degrees of estate planning for the person. The Court of Appeal applied an objective test to whether the proposed plan was in the best interests of the incapable person to determine if the plan ought to be approved.[62]

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[55] *LeBouthillier, supra* note 46 at para 17.
[56] *Goguen*, *supra* note 47.
[57] *LeBouthillier, supra* note 46 at para 17.
[58] *Goguen*, *supra* note 47 at para 30.
[59] *LeBouthillier*, *supra* note 46 at para 17.
[60] *Desharnais*, *supra* note 51.
[61] *Ibid*.
[62] *Ibid*.

In *O'Hagan v. O'Hagan,*[63] the committee of the estate (being one of the sons of the incapable father) sought the court's approval for a plan that involved an estate freeze of the shares in a company owned by the father, the sole shareholder. The father suffered from Alzheimer's disease, was then 89 years of age and had significant deterioration without any realistic prospect of recovery. The father had made a will, when competent, leaving his estate to his two sons equally, one of whom was the committee. Both sons supported the proposed plan.

The plan was designed to reduce the taxes otherwise payable on the father's death. It involved a reorganization of the company shares such that another class of shares, to hold the future growth of the company, would be created. The growth shares would be held by an independent trustee for the benefit of the father until his death and, thereafter, they would be divided equally between the two sons.

The Public Guardian and Trustee of British Columbia ("PGT") opposed the plan on the basis that there was a "lack of necessity" to undertake these steps. The necessity principle arose in the context of earlier case law which suggested that the patient's assets should not be changed by a committee of estate unless a clear case of necessity was established.[64] Further, there was reference made to the "subjective" test of what the patient would have done if he revived briefly, particularly where the plan would result in some diminution of the patient's estate for him during his lifetime.

The court approved the plan proposed in *O'Hagan*. The court considered the scope of s. 18 of the *Patients Property Act*,[65] which permits a committee to benefit not only the patient but also the patient's family. The court noted that the plan involved neither an immediate gifting of the patient's assets nor a diminution of the patient's estate for the benefit of the patient. The new shares would be held in a trust, of which the father would be the sole beneficiary during his lifetime and the two sons were to benefit only on the father's death. The plan permitted the tax deferral to be achieved without jeopardizing the patient's estate during his lifetime or his ability to call for his property in the unlikely event he regained capacity (the father could terminate the trust if he regained capacity). On the basis of all of these factors, the court approved the plan and found that requiring "necessity" to be established to be unreasonable.[66]

The court did not endorse a "subjective" test of what the incapable person would have actually wanted had he momentarily been competent, as was the approach taken by the New Brunswick court in *Re M.*[67] The focus was on the "reasonable and prudent person of business" standard that would apply to the committee proposing the plan - in

[63] 2000 BCCA 79 [*O'Hagan*].
[64] *Re H*,(1958) 2 WWR 671 at para 672; *Wood v. British Columbia (Public Trustee)*, 1986 23 ETR 116 (BCCA) at 126-7, citing *Re Zurif,* 1983 46 BCLR 175 (BCSC), and *Re Barron*, 1953 9 WWR (NS) 218 (BCSC); *Rootman Estate v. British Columbia (Public Trustee)*, [1998] BCJ No 2823 (CA).
[65] *Patients Property Act*, RSBC 1996, c 349.
[66] *O'Hagan*, *supra* note 63 at para 23.
[67] *Re M*, *supra* note 40.

other words, would a reasonable and prudent person of business, given the circumstances that are known and the possibilities that might arise, consider the plan to be beneficial to the patient and his family?

The result in the *O'Hagan* case must be contrasted with that in the companion case decided by the British Columbia Court of Appeal in *British Columbia (Public Trustee) v Bradley Estate*,[68] where the committee's plan to reduce taxes for the incapable person was not approved.

Ms. Bradley was rendered incapable and in a comatose state by reason of an aneurysm at the age of 63. She had no will at the time, it having been revoked by her second marriage to a person who subsequently became the committee of her estate. She had a sizeable estate and had made many gifts to her children, from a prior marriage, over her lifetime. She was a US citizen and would be subject to US estate tax on her death.[69]

The proposed plan, approved by the husband (committee of estate) and the sons being all of the intestate heirs, was for there to be annual *inter vivos* gifts made to the husband, the sons and the grandchildren up to certain limits permitted under US legislation so as not to be subject to any tax. The plan proposed a certain minimum that would be held for the incapable person such that no gifting would be permitted thereafter.[70]

Again the PGT opposed this application on the basis that "necessity" as well as the long-standing rule against making gifts unless it was necessary for the patient or her family. Finally, the PGT noted that this would alter the estate distribution set out under the intestacy scheme.

Applying the same "reasonable and prudent person of business test" to the facts, the court found that the reduction of the patient's estate, through the amounts that would be gifted outright to the spouse, children and grandchildren, was not in the best interest of the patient, who must be placed first in the consideration.[71] The denial appeared to be based on a number of factors related to the plan. First, the proposed plan involved a sizeable actual diminution of her assets over the course of the next several years.[72] Given the patient was only 65 years old, it was not clear what she might require in the future. Second, the proposed gifting scheme was a significant departure from the distribution that would occur on an intestacy. [73]

The court was not persuaded that a "reasonable and prudent business person, considering all of the circumstances and placing the interests of the patient first"

[68] *British Columbia (Public Trustee) v Bradley Estate*, 2000 BCCA 78 [*Bradley*].
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.

would proceed with the proposed gifts.[74] Interestingly, if the court applied the test of what Mrs. Bradley might have wanted, had she revived momentarily, she may well have wanted the gifts to be made, given her prior pattern of gifting.

The reluctance to approve estate plans that involve a pre-death distribution of the inheritance and a diminution of the value of the incapable person's assets available to her for her use is reflected in the *Bradley* case, as well as in an earlier British Columbia Supreme Court decision of *Re Goodman.*[75]

2. Attorneys

Committees may be able to engage in some estate planning under the auspices of court supervision. However, what is the scope of estate planning that an attorney can undertake, without prior court approval and if the plan is later challenged, what standard will the court apply to the attorney's actions?

Two Provinces and two Territories expressly prohibit the making of a will for an incapable person. Others are silent. Only New Brunswick permits the courts to make or approve a will. However, it is clear that estate planning can be done by a number of mechanisms, other than a will. *Inter vivos* transactions, such as the settlement of a trust and the transfer of the incapable person's assets to the trust, can deal with the disposition of assets after the death of the incapable donor. It is not a will but can effectively serve as one after the donor's death.

This issue was addressed in 1998 by the Ontario Court of Appeal in *Banton v. Banton.*[76] Ontario's *Powers of Attorney Act* permits the attorney to "do on behalf of the donor anything that the donor can lawfully do by an attorney, subject to such conditions and restrictions, if any, as are contained therein".[77] The Act does not expressly address the powers of the attorney after the incapacity of the donor.

In *Banton*, a father granted to his two sons a power of attorney that was unrestricted in nature and that continued to have effect after any incapacity of the father. The father started to lose capacity and entered into a relationship with a caregiver which was of concern to the sons. Two days prior to their father's marriage to the caregiver, the sons settled an irrevocable *inter vivos* trust for their father, as his attorneys, and transferred his assets to the trust. The trust provided that the father alone would have the benefit of the assets during his lifetime and, after his death, the assets fell in accordance with the will that then existed. The two sons and a bank were made trustees of the trust.

After the marriage, the father then purported to make a number of other wills and powers of attorney benefitting his new wife.

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[74] *Ibid*.
[75] *Re Goodman*, 1998, BCJ No 1626 [*Goodman*].
[76] *Banton v Banton*, 1998 OJ no 3528, 164 DLR (4th) 176 aff'd 2001 CanLII 24014 (ON CA) [*Banton*].
[77] *Powers of Attorney Act*, RSO 1990, c P-20, s 2.

After the father's death, the validity of the marriage, the creation of the trust by the attorneys and also the making of the subsequent wills by the father after the marriage were all under challenge.

The court said:

> [183] An attorney for a donor who has mental capacity to deal with 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 the instructions of the donor's principal. As an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing [enduring] power when the donor has lost capacity to manage property. 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. The attorney must make decisions on behalf of the donor and, pursuant to sections 32 and 38 of the *Substitute Decisions Act*, he or she is a "… fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit". The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the *Powers of Attorney Act* was amended in 1979 to permit the creation of such powers. It is now made explicit in the provisions of the *Substitute Decisions Act* I have mentioned and others including those dealing with the standard of care, the ability to seek the directions of the court, the court's power to remove the attorney, the right to compensation and the rules relating to the passing of accounts.
>
> [184] At the time of the execution of the power of attorney granted by [the father] to [the sons], the provisions of the *Substitute Decisions Act* had not been proclaimed in force. The significant change in their status that occurred when their father lost capacity to manage property should, I believe, be held to be implicit in the provisions of the *Powers of Attorney Act* in force at the time. Their status as fiduciaries and the nature of their fiduciary obligations were, in my view, no different than those since spelled out in the provisions of the *Substitute Decisions Act*. They owed, in my view, the same, or similar, duties of loyalty, prudence, and good faith as trustees and, in the event of their breach of such obligations, they should have been subject to the control and supervision of the court."[78]

[78] *Banton, supra* note 76.

The court found that the father had the capacity to marry. The result of this finding is that the marriage revoked the existing will. The court found that the wills made after marriage were done without testamentary capacity.[79] The result of this finding is that the father died intestate, having revoked by his marriage a will made while capable but not having capacity to make a new will following his marriage. Under the applicable intestacy scheme, the new wife and the sons were all heirs.

The court held that the power of attorney itself, which gave the standard unrestricted powers to the attorneys to do anything that the donor could lawfully do by an attorney following his incapacity, is wide enough to permit the attorneys to create an irrevocable *inter vivos* trust and to settle the donor's assets into it.[80] The court held that the issue was whether the trust should be set aside on the basis that, in creating the trust, the attorneys failed to adhere to their fiduciary responsibilities to the donor.[81]

The court did not focus on the motives of the attorneys in determining whether a fiduciary breach had occurred. The court considered whether the trust would improve the donor's material situation and/or deprive him of his property rights to an extent more than reasonably required to protect his interests. The court's focus was on the particular circumstances and what would be appropriate in the particular situation.

The court held that the terms of the *inter vivos* trust were not in the father's best interest because the remainder interest in the trust, following the father's death, was given to the attorneys and their issue, rather than to the donor's estate.[82] The court found that this, in effect, deprived the father of the "power to change his testamentary plans" which the father did by entering into the marriage.[83] The court also noted that the terms of the trust related to the disposition of the property after the father's death would deprive the wife of her potential family law claims and succession rights. Further, the court noted that the transfer of the father's assets to the trust also deprived the donor from replacing his trustees (which the court found he had the capacity to do) to manage his property.[84]

The court in *Banton* found that the trust terms for the remainder interest went beyond the interests of protecting the father's assets for the father during his lifetime.[85] The court suggested that, if the remainder of the trust property was to be paid to the father's representatives in trust for his heirs (be they the intestate heirs or the beneficiaries under his will), the trust would have been valid and the actions of the attorneys in compliance with their fiduciary obligations.

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[79] *Ibid*.
[80] *Ibid.*
[81] *Easingwood v Cockroft*, 2013 BCCA 182 [*Easingwood*].
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] *Banton, supra* note 76.

In 2013, the British Columbia Court of Appeal in *Easingwood v Cockroft* squarely addressed the issue of the right of an attorney to make an *inter vivos* trust for an incapable donor and considered the *Banton* decision in its reasons.[86]

In *Easingwood*, the husband had four children from a first marriage and entered into a second marriage with a woman who had two children from a former marriage. The parties each brought significant assets into the relationship and they entered into a marriage agreement which provided that: (a) their individual estates acquired prior to marriage would remain as separate property; (b) each would relinquish any claim to the other's estate; and (c) their finances would be kept separate.[87]

The husband appointed two of his children as his attorneys under an enduring power of attorney, with the two of them to act together for the power to be effective and without providing for one to act alone or naming any replacement attorneys. The wife knew of this power of attorney appointment made by her husband and had not contested it. The wife asked and was appointed by the husband as the health care representative of her husband as she wanted to ensure she had input into his personal and health care.[88]

The husband made a will which appointed his two named attorneys as executors. The will provided the wife with an income stream from a spousal trust and with a life estate in the matrimonial home. The rest of the estate was left to his children and grandchildren. The estate was significant.

The husband became incapable. One of his attorneys (who was himself a lawyer by profession) became ill and the attorneys were concerned that the attorney could die before his father leaving no effective enduring power of attorney for managing his father's affairs.[89]

The two attorneys, with independent tax and legal advice, settled an *inter vivos* alter ego trust for their father and transferred substantially all of his assets into the trust.[90] The trust provided that the trust property was held for the sole benefit of their father and, on his death, the disposition of the remainder was in accordance with the provisions in the will made by their father.[91]

Following the husband's death, the wife challenged the trust alleging, *inter alia*, that the trust was a fraudulent conveyance by the attorneys and not within their powers to undertake for their father.[92] The purpose of the challenge would be to bring the assets

[86] *Easingwood, supra* note 81.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid* at para 14.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

back into the estate to fall under the husband's will, to which then the wife could bring a wills variation claim for a greater share than she was given under the will.

The Court of Appeal found that the enduring power of attorney permitted the creation of an *inter vivos* trust which was not testamentary in nature.

The court stated:

> In general terms, unless there is an external impediment to the creation of a trust, it was within the attorney's power to create an *inter vivos* trust because it was within Reg's power to do so.[93]

The court found no general prohibition against the creation of a trust by an attorney on the basis that this removes assets from the donor and held that an attorney may do so provided that the trust does not otherwise "step into territory prohibited by other general principles of law or statutory prohibitions."[94]

The trial court took the approach (also applied by the Ontario court in *Banton*) of determining if the actions of the attorneys breached a fiduciary duty owed to the donor as his attorneys. The Court of Appeal confirmed that the attorneys had acted in the donor's best interests, given: they a valid reason for establishing the trust (to ensure that there was continuity in managing the father's affairs in the event that the power of attorney became ineffective with the death of one attorney); and the trust itself was in keeping with the donor's intentions as its terms did not diverge from the donor's known intentions as reflected in his will and the marriage agreement with the wife.[95]

The court distinguished the case of *Banton*,[96] in which the judge observed that a general power of attorney is sufficiently broad to allow the settling of an *inter vivos* trust but found the trust in question to be invalid because the gifts of the remainder interests did not track the events that would otherwise occur on the donor's death. In *Banton*, the court noted that the terms of the trust would have been appropriate had the funds been payable on the donor's death to the personal representative in trust for the deceased's heirs.[97]

The fact that the trust provisions mirrored the donor's will was of significance in the court's finding in *Easingwood* that the creation of the trust by the attorneys was valid. This fact was not the case in *Banton* nor in the committee cases of *Re Goodman* and *Re Bradley,*[98] where the court refused to approve the plan proposed by the committees.

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[93] *Ibid* at para 37.
[94] *Ibid*.
[95] *Ibid*.
[96] *Banton, supra* note 76.
[97] *Banton, supra* note 76.
[98] *Goodman, supra* note 75; *Bradley*, *supra* note 69.

Interestingly, in *Easingwood*, the trust arrangement did deprive the wife of her right to seek a variation of the donor's will under the *Wills Variation Act*,[99] which she would otherwise have had if his estate had remained in his name at his death (rather than transferred out to the trust during his lifetime). The court did not accept this as a derivation to the donor's intentions. Note that the Ontario court in *Banton*[100] took into account the possible claims that the caregiver could have made, under family and succession law, had the trust not been created and disallowed the trust on the basis that those claims were taken away by the trust.

The argument that the attorneys were, in effect, making a will for the incapable person was not accepted by the Court of Appeal, which re-stated the rule that, "a testamentary disposition is one that is dependent on death for its vigour and effect," and found that, in fact, the trust in this case was not dependent on the husband's death for its efficacy. The trust had been fully established during his lifetime, the three certainties for a valid trust were met, and the trust was irrevocable.[101]

The *Easingwood* decision therefore stands for the proposition that the settlement by an attorney of a donor's property into a fully and properly formed trust during the donor's lifetime is an *inter vivos* disposition, even where the trust property is not payable to the donor's personal representative in trust for the deceased donor's heirs on his death.[102]

The court left open, however, that such a trust settlement may constitute a breach of an attorney's fiduciary duty, depending on the circumstances in any case, and that it would remain open for an interested person to challenge a trust on this basis. [103]

The *Easingwood* decision was recently cited with approval in *Testa v Testa* where the Ontario Supreme Court held:

> I prefer the reasoning in *Easingwood v Easingwood Estate*, 2013 BCCA 182 (CanLII), 85 E.T.R. (3d) 225, of the British Columbia Court of Appeal to that of *Bank of Nova Scotia Trust Co. v Lawson* (2005), 22 E.T.R. (3d) 198, [2005] O.J. No. 5356, (ONSC), and conclude that a continuing attorney for property can create an *inter vivos* trust that takes immediate effect, and is not dependent on the death of the settlor for its vigor and effect.[104]

Following the trial court's decision in *Easingwood*, the British Columbia Supreme Court approved the settlement of an *inter vivos* trust by attorneys/representatives appointed under a private document for an incapable person, where the terms of the

[99] *Wills Variation Act*, RSBC 1996, c 490.
[100] *Banton, supra* note 88.
[101] *Easingwood, supra* note 81.
[102] *Ibid*.
[103] *Ibid* at para 54.
[104] *Testa v Testa*, 2015 ONSC 2381 at para 92.

trust, after the death of the incapable person, did not adhere to the terms of the last, or in fact, any of the incapable person's various wills: *Hollander v. Mooney*.[105]

In *Hollander*, one daughter and granddaughter of the adult were granted an enduring power of attorney and also appointed representatives for the adult under the *Representation Agreement Act*.[106] They acted on his behalf in litigation that involved a contested committeeship application between siblings of the father. In the course of the dispute, the attorneys also sought the return of jointly held assets to the father that he had transferred to the other siblings pursuant to estate planning he had undertaken previously.

The parties (effectively, his three children) entered into a settlement, after the father's incapacity, of the litigation concerning committeeship and asset recovery to the father. The terms of the trust were that all of the assets in issue would be transferred to a trust company and used for the father during his lifetime. On the father's death, the remaining assets would be equally divided amongst his three children. In the last will made by the deceased, the beneficiaries were his one child and the grandchildren of the other two children, bypassing two of his children.[107]

The father died before the settlement was implemented and the parties who were not the father's attorneys/representatives, plus a minor grandchild who would otherwise have taken under the last will, argued that the settlement was not binding because, *inter alia*, there was no authority for the attorneys/representatives to effectively change the adult's post-death planning.[108] The representatives argued that they had the authority to settle the father's assets into an *inter vivos* trust and, as such, no assets would fall into his estate on his death to pass under any prior wills that the father had made.[109]

The Public Guardian and Trustee, on behalf of the minor grandchild, opposed the authority of the attorneys/representatives to make a trust that would alter the father's post-death distributions in his last will and that would cut a grandchild from receiving any benefit. Nonetheless, the court approved the actions of the representatives in effecting such an arrangement on the basis that it was done in the best interest of the father.[110]

The ability of attorneys to settle an *inter vivos* trust for an incapable person that does not require the remaining trust property on the donor's death to fall into his/her estate can effectively alter an adult's previous estate plans. The question is whether that

[105] *Hollander v Mooney*, 2012 BCSC 1972, [2012] BCJ No 2762, 2012 BCSC 1972 (under appeal) [*Hollander*].
[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid*.
[110] *Hollander*, *supra* note 106. Subsequently, the court approved the settlement as being in the adult's best interest on July 23, 2013 but reasons for the decision have not yet issued.

should be permitted when the right to make a will by an attorney is expressly prohibited in legislation.

IV. A PATH FORWARD

A. RESTRICTIONS ON EASINGWOOD-STYLE PLANNING

1. Statutory Restrictions on Gifting

It should be noted that the *Easingwood*[111] case was decided without reference to provisions in the new British Columbia *Power of Attorney Act*.[112] Section 20 of that Act contains express restrictions on gifting and precludes any gifts unless they are either expressly allowed under the Power of Attorney document, or they follow an established pattern of giving and do not exceed a prescribed value per year (currently $5,000).

Would the statutory restrictions on gifting in BC's *Power of Attorney Act* have restricted the ability of the attorneys to settle the trust in question in *Easingwood?* The answer will turn on whether the settlement is considered to be a "gift". The definition of a "gift" is fairly settled under common law. It is "a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money."[113]

Query whether the settlement of property on an alter ego trust could be construed as a gift where, by its very nature, the settlor must receive all income during his or her lifetime and no one else may have access to the capital, and where through its terms, the settlor may have unfettered access to capital. At most, there can be a gift of the residual interest, which would otherwise have passed pursuant to the individual's will but which will now pass pursuant to the terms of the trust.

The court has already approved of such an arrangement where the terms of the trust mirror the terms of the will, but what of a situation where the terms of the trust differ from the will? Must concern be given to the rights of the beneficiaries under the will? There are a number of cases which indicate that the interests of such beneficiaries may, in fact, have crystallized upon the donor's incapacity, and that they should at least be given notice of any change to the planning.

Practitioners should consider the inclusion of gifting powers in their powers of attorney which would expressly allow for this type of planning.

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[111] *Easingwood, supra* note 81.
[112] *Power of Attorney Act*, RSBC 1996, c 370.
[113] *Black's Law Dictionary*, 10th ed, sub verbo "gift".

2. Vested Interests

If indeed a beneficiary's interest under the will of a donor may be seen to have crystallized on the incapacity of the donor, this is certainly a consideration for an attorney hoping to carry out estate planning for the donor which might affect those rights. So what is the nature of a beneficiary's interest under the will of an incapacitated donor?

As the Alberta court noted in *Kostrub v. Stuparyk*,[114] "the law regarding the extent to which a beneficiary has an interest in property belonging to the testator while the testator is still alive is clear and has been settled for about half a millennium." The court cited *William on Wills* for the legal proposition that:

> A will is a document which is of no effect until the testator's death and until then, is a mere declaration of his intention and is at all time, until such death, subject to revocation or variation. The execution of the will leaves the testator free during his life to dispose of the property as he pleases and operates subject to any such disposition *inter vivos*; and, on the other hand, a person named as a beneficiary in a will takes no interest whatever under it until the death of the testator and he will not then take any interest unless he is alive at the time.[115]

The case of *Weinstein v. Weinstein*[116] dealt with a possible exception to this rule. Betty Weinstein had been married for a number of years. During her marriage and while capable, Betty settled a trust for her own benefit. The trust agreement explicitly provided that, upon Betty's death, the trust assets were to go to her estate. She also signed a will under which she bequeathed the residue of her estate to her five grandchildren.

Betty Weinstein later lost capacity. Subsequently, and without notice to the five grandchildren, Betty's husband applied for an order equalizing the net family assets. The application was granted and a judgment was given transferring $2.5 million from Betty's trust to the husband. After Betty's death, and upon learning of the judgment, the grandchildren moved to have it set aside on the ground that they were "persons affected by a judgment on an application made without notice". Sheard J. set aside the judgment and found that the grandchildren were "manifestly" persons affected by the judgment and that they should have received notice of the application. The court noted:

> Here, however, the fact that Betty Weinstein did not have the mental competence to change her will meant that the second (and

[114] *Kostrub v Stuparyk*, 2015 ABQB 175 [*Kostrub*].
[115] *Ibid* at para 10.
[116] *Weinstein v Weinstein (Litigation Guardian of)*, [1997] OJ No 3445, 35 OR (3d) 229.

> last) codicil to her will, in which she divided the residue among her five grandchildren, in practical terms conferred on them what amounted to a vested interest. The grandchildren's entitlement was not a mere hope of succession. The result of Betty becoming afflicted by Alzheimer's disease was that the entitlement of her grandchildren was the same as if they were entitled to a remainder interest after life interests.[117]

Sheard J. held that the beneficiaries under an incapable person's will must therefore be given notice of actions that may adversely affect their interests.

This principle was later applied, again by the Ontario court, in *Nystrom v. Nystrom*,[118] where an applicant was granted standing to bring an action to protect her vested interest under the permanent will of an incapable person.

In the recent case of *Kostrub v. Stuparyk*, Master Schlosser of the Alberta Court of Queen's Bench reviewed the authorities and noted that where a testator is unable to make another will, this can have a similar effect to turning a mere expectancy into an interest, "at least to the extent that it would give an intended beneficiary standing to challenge a transfer."[119]

Query whether such a right would arise where:

(a) the donor no longer had testamentary capacity but had the requisite capacity to marry or separate?

(b) the donor had previously executed an enduring power of attorney under which his or her attorney had the ability to gift or reorganize affairs?

3. Breach of Fiduciary Duty

The Court of Appeal in *Easingwood* did leave open the possibility that certain *inter vivos* trusts created by attorneys could be subject to challenge based on a breach of fiduciary duty, as follows:

> [54] In reaching this conclusion, I do not put an *inter vivos* trust, fully created, as one beyond challenge by those who consider themselves aggrieved by its creation. Where, for example, a trust created by an attorney has the effect of adding beneficiaries not named in a will, or avoiding a gift established by a will, or disposing of assets where the principal has chosen not to make a will and the estate would be divided as provided in an intestacy, the trust may well be challenged, e.g., under the rubric of the

[117] *Ibid*.
[118] *Nystrom v Nystrom*, 2006 CanLII 23940.
[119] *Kostrub, supra* note 27 at para 19.

> attorney's duty to conform to the intentions of the principal. That is, *the issue of breach of fiduciary duty would loom large*. All of these questions are live questions, requiring the determination of facts in a particular case.[120]

Clearly the settlement of an *alter ego* trust through the use of a power of attorney can amount to a breach of fiduciary duty where the attorney has not acted in the best interests of the donor. But what exactly does it mean to act in someone's "best interests"?

(a) Conforming with Donor Wishes

Does acting in a donor's best interests mean that we must always act in accordance with their stated wishes? It is easy to think of situations where acting in what most people would see as the best interests of an individual does not conform to their own stated wishes. One need only consider the wishes of an individual with a drug addiction.

In the context of estate planning, the court stated in *Easingwood* that in assessing compliance with the requirement to act in a principal's best interests, "an understanding of the principal's demonstrated intentions is relevant and material."[121] But does acting in a donor's best interests always require compliance with the donor's demonstrated intentions? Does it always require a replication of the donor's last-known estate plan? Consider the following situations:

1. A donor's last documented estate plan does not reflect his or her last-known clearly-stated wishes. For example, a donor may have clearly stated his estate planning wishes but never made a will. If an application of the intestacy rules would result in a distribution which did not conform to the donor's expressly stated wishes, would it not be acting in the donor's best interests to implement his express wishes? Or must we accept that the donor's last estate plan is necessarily a statement of his or her last wishes?

2. There has been a change of circumstance since the donor's loss of capacity which the attorney believes would have led the donor to change his or her estate plan. Could an attorney not update an estate plan to address changing circumstances? Or must we accept that the last estate plan is a statement of the donor's wishes for the rest of his or her lifetime?

Clearly the courts will have to provide further guidance in these areas.

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[120] *Easingwood, supra* note 81.
[121] *Ibid* at para 70.

(b) Subjective or Objective Standard?

Furthermore, when considering what is in the best interests of the donor, are we to apply a subjective standard and place ourselves in the position of the donor to determine what he or she would consider to be in their best interests? Or are we to apply an objective standard?

The courts in Canada appear to have vacillated between using a subjective and an objective test to determine a donor's best wishes based on the fact situation of each case.

(c) Whose Best Interests?

In considering a possible breach of fiduciary duty for failure to act in the donor's best interests, one must also consider the scope of the donor's best interests. Does it include the best interests of the donor's estate or the donor's family? It appears that it must, at least to some extent. There have now been several cases in which the court has found that an estate freeze, which would clearly benefit the donor's estate and be of no further benefit to the donor during his or her lifetime, would be in the best interests of the donor. As Saunders J. stated in *Easingwood*, "tax planning including 'estate freezes' may be prudent and, in the large sense, in the best interests of the principal."[122]

The court in *O'Hagan* similarly approved an estate plan involving an estate freeze:

> In short, the plan seems to be one that a prudent businessman of advanced years would see fit to undertake in order to minimize tax on his death and maximize the value passing to his heirs.
>
> Equally important, the plan poses no real disadvantage to Mr. O'Hagan during his lifetime...[123]

It seems clear that an estate plan which optimizes the value of a donor's estate would be in the best interests of the donor provided that it does not harm the position of the donor.

The Supreme Court of British Columbia considered the scope of "best interests" in *Sommerville* v. *Sommerville*.[124] The parties to the petition, being a donor's second wife and daughter from a prior marriage, each held a power of attorney granted by the donor who was then mentally infirm. They sought directions from the court under the British Columbia *Power of Attorney Act*[125] regarding the scope of their

[122] *Ibid* at para 55.
[123] *O'Hagan, supra* note 63 at paras 9 and 10.
[124] 2014 BCSC 1848.
[125] RSBC 1996, c 370, s 36.

powers and duties as attorneys. The court summarized its conclusion on the scope of "best interests" as follows:

> [45] In my view, s. 19 does not alter the attorney's common law duty to act only for the benefit of the donor. However, the best interests of the donor are not to be considered in a vacuum. His "current wishes, known beliefs and values" may permit the attorney to continue to provide for a spouse or family member if there is clear and convincing evidence of an intention to do so, and it can be done without compromising the donor's interests.

Notwithstanding a now significant number of court decisions, "best interests" remains a very elusive and difficult concept to apply and the weight to be attributed to the various elements of "best interests" remains largely fact specific.

(d) Avoiding a Fraudulent Conveyance

An attorney considering settling an *inter vivos* trust on behalf of a donor must always be mindful that such a settlement does not constitute a fraudulent conveyance. This issue was addressed in the case of *Mawdsley v. Meshen*.[126]

Ms. Meshen was a wealthy woman who, shortly before her death, had implemented a series of transactions by which she transferred certain assets into joint tenancy and divested herself of her remaining assets by way of outright gifts and the settlement of an *inter vivos* trust, leaving her estate with very little. Through this planning, Ms. Meshen left nothing to Mr. Mawdsley, her common-law spouse of 18 years.

Mr. Mawdsley alleged that these transfers were carried out as part of a deliberate scheme to deprive him of his lawful remedies contrary to the *Fraudulent Conveyances Act*,[127] He sought to have these assets brought back into Ms. Meshen's estate so that they would be subject to his wills variation claim.

The court made two significant rulings. Firstly, it found that even if a transfer of assets has the effect of defeating a wills variation claim, that fact does not mean that there has been a fraudulent conveyance; the question is whether the transferor had the intention to defeat a claim and no such actual intention was found on the facts of this case.[128] For a transaction to be a fraudulent conveyance, the transferor must have the intent to delay, hinder or defraud someone who is a "creditor or other" as defined in the legislation.

Secondly, the court upheld a number of earlier Supreme Court of British Columbia decisions[129] standing for the principle that a person who does not have a claim during

[126] 1012 BCCA 91 [*Mawdsley*].
[127] RSBC 1996, c 163.
[128] *Mawdsley*, *supra* note 126 at para 71.
[129] *Hossay v. Newman* (1998), 22 ETR (2d) 150 (BCSC) and *Mordo v. Nitting*, 2006 BCSC 1761 [*Mordo*].

the deceased's lifetime, and whose only claim arises on the death of the deceased under the *Wills Variation Act*, is not a "creditor or other" with standing to challenge a transfer by the deceased pursuant to the *Fraudulent Conveyance Act*.[130]

The *Mawdsley* case clarified that trusts may be used to avoid wills variation actions that only arise after death;[131] however, it is important to note the fact that, in this case, the court found that Ms. Meshen did not have any legal obligations to Mr. Mawdsley during her lifetime. Transactions may still be set aside under the *Fraudulent Conveyance Act* by wills variation claimants who can demonstrate that the transaction was intended to defeat a legal obligation that the will-maker had to them during the will-maker's lifetime.

B. STATUTORY WILLS

All common law legal systems have a test for testamentary capacity, whether it be common law, statutory, or both. In any such system, many people will fall below this requisite capacity required by the test. In some cases, they may never have had the necessary capacity; in others, it will have been lost. In all such cases, the potential for hardship to the family exists where a will cannot be made. For example, where an incapacitated young adult with divorced parents is entirely cared for and financially supported by one parent and the other is absent, there is no simple means to ensure that any wealth that passes from the supporting parent to the incapacitated adult child will not end up with the absentee parent by way of the rules of intestacy. Unless sophisticated planning is arranged in advance, this would likely be the result.

Certain commonwealth jurisdictions have in recent years created a statutory power to make a will in such circumstances. This is called a "statutory will". The United Kingdom, Australia and New Zealand have introduced this concept with a high degree of success.

Many of the issues outlined above have had to be addressed by the courts in jurisdictions where statutory wills are permitted. The idea of statutory wills becoming part of the legal framework in Canada appears to be gaining some traction. The commonwealth courts' reasoning in grappling with statutory wills and the appropriate test to apply in determining whether a will should be approved for an incapable person may provide significant guidance for Canadian courts and legislatures in determining how far a privately-chosen attorney can engage in estate planning and whether, when and the degree to which that planning must be approved by the court.

The experiences of these jurisdictions have illustrated that any statutory-will procedure must involve significantly more than simply a legislative framework. Legislation can only go so far in providing direction to a decision-maker, and the courts have been

[130] *Mawdsley, supra* note 126 at para 90.
[131] See also *Mordo*, *supra* note 129.

frequently called upon in these jurisdictions to fill in gaps and formulate more detailed principles to guide later applications.

1. The British Experience

A statutory wills regime has been in force in England and Wales since 1969.[132]

In adopting a statutory wills regime, it should be noted that the English legislature did not rely on the law of agency. Rather, the legislature relied upon the inherent jurisdiction of the court to make decisions on behalf of individuals who cannot make them for themselves.

The initial British legislation simply authorized the Court of Protection to order "the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered.[133] Not surprisingly, considerable jurisprudence filled in the criteria upon which the court is to base its decisions.

The courts have established these criteria by drawing on a series of cases dealing with court-ordered *inter vivos* gifts made from the surplus income of persons under the court's protection where they lacked the capacity to manage their own affairs. This concept of "substituted judgment" involves the court considering the facts from the point of view of the incapacitated individual rather than from an external point of view, effectively relinquishing its position of judicial objectivity and entering the incapacitated individual's mind. In the seminal decision of *Re. D.(J.),*[134] the court articulated the following principles for applying the statutory wills legislation:

(1) It is to be assumed that the patient is having a brief lucid interval at the time when the will is made;

(2) It is to be assumed that during the lucid interval the patient has full knowledge both of the past and of the future;

(3) It is always the actual patient who has to be considered and not a hypothetical one. Before losing testamentary capacity the patient may have been a person with strong antipathies or deep affections for particular persons or causes, or with vigorous religious or political views;

(4) The patient is to be envisaged as being advised by competent solicitors during the hypothetical lucid interval;

[132] *Administration of Justice Act 1969* (UK), c 58, s 17.
[133] *Mental Health Act 1983*, c 20, s 96(1)(e).
[134] *Re. D. (*J), [1982] 1 Ch 237 (UK Court of Protection).

(5) It is to be assumed that the incapacitated person would take a broad brush rather than an 'accountant's pen' to the provisions of his will.[135]

The British legislative framework for statutory wills was modernized in 2007 with the introduction of the *Mental Capacity Act 2005*,[136] which carried forward the Court of Protection's powers to order the creation of a statutory will. Under the new regime, certain classes of individual are authorized to apply to the court asking the court to make a statutory will, or modify or revoke an existing will, for an individual who is under the court's protection and who is shown to lack testamentary capacity.[137]

The applicant submits a prescribed form together with supporting evidence including a draft will or codicil, copies of existing wills or codicils, details regarding the patient's family, a schedule of assets, any registered lasting or enduring power of attorney, confirmation of residency, and a report on the patient's medical condition, life expectancy and capacity.

The applicant must name beneficiaries of existing wills likely to be materially or adversely affected, beneficiaries of the proposed will likely to be materially or adversely affected and, where the patient has no existing will, any intestate beneficiaries likely to be materially or adversely affected. The court must also consider whether to join the patient as a party and, if the determination is made that it should, whether a "litigation friend" should also be invited.

Where the application is successful, the order will be for a named individual to execute the statutory will on behalf of the patient and the will is then sealed by the court and sent to the person authorized to hold it (often a solicitor). Such a statutory will has exactly the same force and effect as any other will.

Interestingly, in considering the new legislation, the court has declined to follow the previous substituted judgment approach as a basis for making decisions regarding statutory wills. Instead, the Court of Protection has followed the "best-interests" standard of care enshrined in the statute, even though that standard was developed as a general guide to apply to all decisions under the legislation, without specific reference to the statutory wills regime. In what the court itself has described as a "radical change" to the jurisprudence governing statutory wills,[138] the substituted-judgment test has been abandoned, replaced instead by an objective test of what would be in the protected person's best interests.[139] While a patient's expressed interests "should not be lightly overridden", in deciding what is in his or her best interests,[140] those views are not determinative. Rather, the court is to "draw up a balance sheet"[141] of the

[135] *Ibid* at paras 242 – 243.
[136] *Mental Capacity Act 2005* (UK), c 9, s 45.
[137] *Ibid* at s 50; *Court of Protection Rules 2007*, SI 2007/1744, rr 51-52.
[138] *Re P (Statutory Will)*, [2009] EWHC 163, [2010] 1 Ch 33, at para 43, Lewison J.
[139] *Re D (Statutory Will)*, [2010] EWHC 2159, [2012] 1 Ch 57 at para 63.
[140] *Ibid* at para 63.
[141] *Re P, supra* at note 138 at para 40.

advantages and disadvantages of the proposed statutory will. As the court stated in *Re P*:

> Plainly, this exercise [is] not directed at what the vulnerable person would have done if he or she had had mental capacity…[142]

As the British Columbia Law Reform Commission recently noted in its *Report on Common Law Tests of Capacity*, the British courts "appear to have forcefully rejected the substituted-judgment approach at least in part out of a frustration with the 'mental gymnastics' the courts felt forced to perform in applying this approach…. It's likely that the courts fastened on to a change in the legislative framework to chart a new course, one which was more direct and less artificial."[143]

2. The Australian and New Zealand Experience

The Australian states each adopted a statutory wills regime between the late 1990s and the early 2000s.

The Australian model differs significantly from the British model. Firstly, the regime is located in succession legislation rather than in mental health legislation, resulting in a somewhat broader scope. Like the British regime, the Australian regime applies only to individuals who lack testamentary capacity, but it is not necessary for it to be shown that the individual is also incapable of managing his or her own affairs.

Another difference is that statutory wills applications are typically heard by an Australian state's superior court of general jurisdiction, rather than the Court of Protection in England, being a tribunal established under mental health legislation.

The Australian statutory wills regimes generally allow the court to make an order if it is satisfied that "the proposed will, alteration or revocation is or might be one that would have been made by the proposed testator if he or she had testamentary capacity."[144] None of the Australian states incorporate language directing the court to consider the best interests of the individual, and a number of judgments have applied the five principles from *Re D. (J.)* and the substituted judgment concept as the basis for their decisions.[145] A recent significant judgment, however, has raised doubts about this approach and calls for the application of an objective standard,[146] and it is unclear which direction the Australian jurisprudence will turn.

As in Britain, after a successful application, the will is sealed by the court and is valid and effective like any other will.

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[142] *Ibid*.
[143] British Columbia Law Reform Commission, *Report on Common Law Tests of Capacity*, at 56.
[144] *Draft Wills Bill 1997*, *Ibid*, s 21(b).
[145] See Rosalind F Croucher, "An Interventionist, Paternalistic Jurisdiction? The Place of Statutory Wills in Australian Succession Law" (2009) 32 UNWLJ 674 at 681 – 689 for a review of the leading Australian cases.
[146] *Re Fenwick*, [2009] NSWSC 530 at para 5, Palmer J.

New Zealand has also had a statutory wills regime for several decades now and applies a subjective, substituted-decision test.

3. The Experience in Canada

The only Canadian jurisdiction to have aspects of a statutory will regime is New Brunswick, where the following provisions were added to the province's adult guardianship statute in 1994:[147]

> 3(4) The jurisdiction and authority of the court under this Act includes the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person.
>
> 11.1(1) The power of the court to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person shall be exercisable in the discretion of the court where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.[148]

There appears to be just one reported case to have considered the legislation. In *Re M (Committee of)*[149] the court adopted Megarry VC's five principles.

C. THOUGHTS ON HOW CANADIAN LAW COULD DEVELOP

There appears to be a trend in Canada towards granting third parties increased powers to conduct estate planning on behalf of incapacitated persons. In the opinion of the authors, this trend will continue. In our view, the courts will continue to allow attorneys acting under enduring powers of attorney to settle assets into *inter vivos* trusts where it can be shown that such settlements are in the donors' best interests. They will no doubt be faced with situations where what is clearly in the best interests of the donor (either from a subjective or an objective point of view) will not be what is in the existing estate plan, and we hope that at that point, the courts will refine the law to clarify that an understanding of a donor's demonstrated intentions is relevant and material, but is not determinative in all cases.

As the authority of powers of attorney broaden in scope, we have also seen increased monitoring of powers of attorney, and we now see specific monitoring provisions in power of attorney legislation across much of the country. We believe this is appropriate.

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[147] *An Act to Amend the Infirm Persons Act*, SNB 1994, c 40, s 3.
[148] *Infirm Persons Act*, RSNB 1973, c I-8.
[149] *Re M, supra* note 40.

V. CONCLUDING THOUGHTS

At present, an attorney in Canada may be able to undertake some amount of estate planning for an incapable donor, which may or may not identically mirror how the donor's assets would otherwise pass on death. There are a number of key issues that have yet to be fully addressed by the court. These include: to what extent may the attorney's plan depart from a donor's will or other existing estate plan; how do statutory and common law restrictions on the attorney's power to gift affect the authority to undertake estate planning; what restrictions should there be on the power and its use; what test should be applied to determine the appropriate distribution plan to be substituted for the donor's pre-existing plan; and how does the conferral of this right to the attorney ensure that rights of other parties are not abrogated.

The advantages of allowing an attorney to undertake planning for a donor following incapacity outweigh the many challenges that the conferral of this power presents. It will be for the courts and the legislatures to develop clear, consistent and rational guidelines to assist attorneys in the task and to guide the courts when the plan is scrutinized. We can look forward to very interesting law to come.