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STEP Inside

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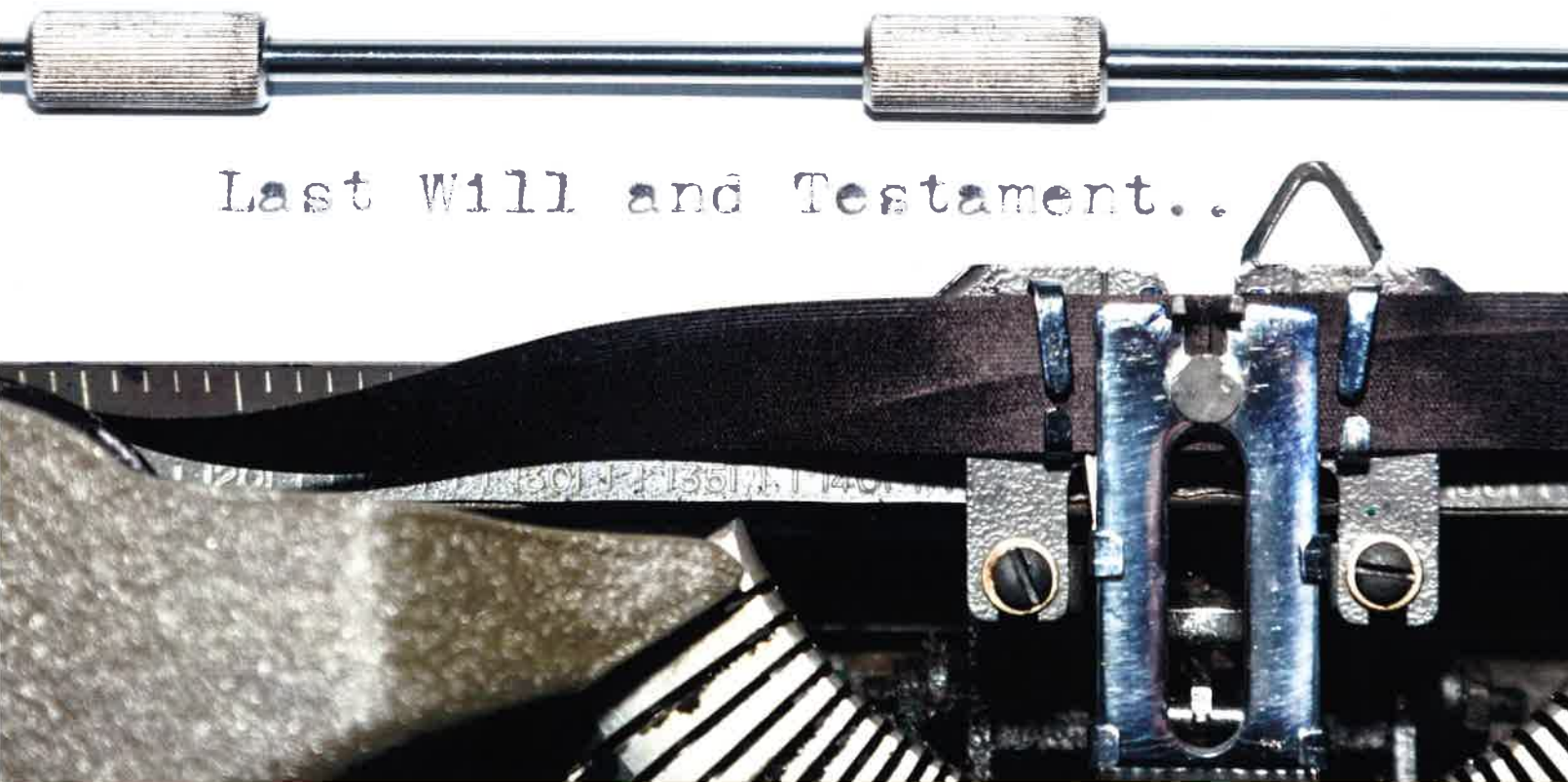

Powers of Attorney for Property and Personal Care: The Good, the Bad, and the Ugly

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The presentation at STEP Canada's 2018 National Conference entitled "Powers of Attorney for Property and Personal Care: The Good, the Bad, and the Ugly" took the form of a panel discussion involving John Poyser, Albert Oosterhoff, Charles Wagner, and Nancy Golding.

The purpose of the panel was threefold. First, the panel provided an overview of the nature and limitations of powers of attorney for property, a topic addressed by John Poyser and Nancy Golding. Second, the panel addressed two unique challenges that attorneys for property and personal care face with an aging population – concerns related to the risks and impact of predatory marriages and the challenges encountered by substitute decision makers in the context of an incapable person of faith. The former topic was addressed by Albert Oosterhoff and the latter by Charles Wagner. Third, the panel provided some guidance to ensure that end-of-life wishes are complied with by attorneys for personal care. The following article summarizes only certain topics addressed in the presentation.

Attorneys for Property

An attorney for property is the agent of the grantor. If the grantor lacks capacity when the agent is appointed, the power of attorney under which the agent is appointed is void, and all actions taken by the agent thereunder are void. This can pose a challenge to third parties to whom a power of attorney is presented by the named attorney: how can they be sure that the grantor was capable when the power of attorney was executed? As a result, both jurisprudence and the applicable statutory regimes have adopted a presumption of capacity on the part of the grantor, thereby alleviating the risk to third parties. (The presumption ceases to operate when the third party has actual knowledge of a grantor's incapacity or ought to have this knowledge.)

STEP members undoubtedly appreciate that the authority of an attorney for property extends to being able to do anything that the grantor can do in respect of property, except make a will. They may even appreciate that they need to understand what making a will entails before they advise attorneys about estate-planning actions respect of the grantor's property. What they may not, however, appreciate is that overlaid onto the statutory scope of authority of an attorney for property is the common law of agency.

The common law stipulates that there are certain functions, which may appear to relate to property, that are considered too personal to delegate to an agent. Being too personal to delegate, these functions are not within the authority of an attorney. They are directorships, trusteeships, attorneyships, swearing an affidavit, and rearing children.

Like much in the law, there is the general principle – an attorney is an agent – but there is an exception when an attorney becomes a fiduciary. Why is this relevant, and when does it happen? The nature of the attorney's role is relevant to what obligations the attorney may owe to his or her grantor. For example, an attorney who is acting as, to use John Poyser's word, a "helper" during the grantor's capacity has no obligation to account to the grantor, and there is no prohibition against agents gifting funds to themselves.

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In fact, in the absence of a statutory regime that provides for continuing or enduring powers of attorney, the common law provides that an agent's authority ends on the incapacity of the grantor. What happens to the obligations owed by attorneys when their authority continues during a grantor's incapacity? When that shift occurs, and its timing can be imprecise, the liability of the agent changes. He or she then takes on fiduciary obligations to act in

the best interests and for the benefit of the grantor.

To address some of the concerns with the scope of an attorney's authority, Nancy Golding considered what to include when drafting or reviewing drafts of powers of attorney for property. As noted above, clarity concerning what it means to "make a will" is necessary when advising attorneys about the extent to which they can engage in estate planning for their grantor. As with many planning matters, the devil is in the detail. The more detailed practitioners can be in specifying an attorney's authority to engage in planning, the less risk there will be that the attorney lacks the authority to plan in a fulsome manner. Accordingly, it may be helpful to draft a power of attorney to allow the attorney to transfer assets by including a power to create joint property interests, transfer property to a trust, and engage in corporate actions such as mergers and estate freezes.

Predatory Marriages

The differing legal tests for capacity can have profound implications for a vulnerable client. Specifically, the test for being capable of entering into a contract of marriage has a relatively low threshold compared with the test for capacity to manage property. However, the act of marriage has implications for property rights. First, marriage revokes a will in most provinces and territories of Canada, which may mean that a person can die intestate because he or she lacks the capacity to rewrite a will. A married spouse is entitled to a certain portion of an estate under all provincial and territorial regimes for the distribution of property on an intestacy. Second, a married spouse has property and support entitlements under most matrimonial law regimes across the country. As a result, it is not surprising that there are unscrupulous individuals who prey on older adults with diminished capacity for their own financial gain.

In addition to the foregoing property implications, there is a legal and practical regime that makes it very difficult to challenge and set aside a marriage. Issues that must be surmounted include standing to challenge the status of the marriage. Does an attorney for property, an attorney for personal care, or neither attorney have the authority to mount such a challenge? Even if this problem is addressed, can the attorney do anything in the context of a legal regime that presumes an individual has capacity and is structured to foster independent and autonomous decision making?

Apart from these legal questions is the policy question that arises if we elevate the test for capacity to marry to more closely align with the test for capacity to manage property. Elevating the test may prevent people who understand the simple contract of marriage and the commitment it entails from getting married because they do not meet the test for managing property. People who would be disqualified under an elevated test may include, for example, those with neurodevelopmental disorders, such as mild intellectual disability, autism spectrum disorders, and specific learning disorders. From a policy perspective, is this where we want the law to go?

Ultimately, challenging the status of a marriage owing to a lack of capacity is almost impossible. As a result, advisers may need to look at other equitable and common-law remedies, such as unjust enrichment, the tort of deceit, undue influence, and the doctrine of unconscionability. Until factors to determine requisite capacity to marry are refined (to take into consideration the financial implications that flow from marriage), those with diminished capacity will remain vulnerable to exploitation by predators who appreciate the legal effect of marriage on the property rights of vulnerable people. ■