Romance and the Elderly Client

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BEIT MIDRASH
זכרון דוב

1. D'Arcy Hiltz, *The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act*

Section 3 of the *Substitute Decisions Act* states:

> Counsel for person whose capacity is in issue
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> 3. (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
>
> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
>
> (b) the person shall be deemed to have capacity to retain and instruct counsel.

…

The lawyer-client relationship presupposes that the client has the requisite mental ability to make decisions and instruct counsel. When this ability is lacking, the *Rules of Professional Conduct* and *Rules of Civil Procedure* require a lawfully authorized representative to be appointed (i.e. a litigation guardian) to make decisions for the client.

The difficulty lies in the fact that in proceedings under the *Substitute Decisions Act*, a litigation guardian is not required for a person whose capacity is in issue. The person whose capacity is in issue is deemed to have capacity to retain and instruct counsel.

How do you represent an individual deemed by law to have capacity to retain and instruct you when, in your opinion: (a) the individual is unable to provide instructions; or (b) the instructions provided are in your opinion not capable instructions; or (c) the instructions provided are contrary to the best interests of the individual?

2. Our Questions

1) What is the definition of capacity for a romantic relationship in Jewish law and in secular law?
2) Solomon is retained as a lawyer to manage the affairs of Julie, who is 90 years old and living in a long-term care facility. Julie is fully capable, but she is frail and vulnerable. The arrangement was made by, and fees are paid by, Julie's son, Sam – who insists on attending all meetings between Solomon and Julie. How should Solomon handle the situation?
3) Wanda, age 78 and widowed, has a single neighbour Ron, age 58. Ron and Wanda have become romantically involved. Wanda wants to give away half of her cottage to Ron; her children object. They have gone to court and argue that their mother does not have the capacity to have romantic relations with Ron or to make such a large gift. Alternatively, they argue that even if she has capacity, her diminution in cognitive ability makes her highly vulnerable to being unduly influenced. They point out that their 78 year old mother is experiencing moderate dementia, including a relaxing of sexual inhibition. Given that Wanda's capacity is in issue the Court, pursuant to section 3 of the SDA, invites the Public Guardian and Trustee to arrange for legal representation for Wanda. Rhoda is appointed section 3 counsel. Rhoda believes that Wanda does not have capacity; Wanda does not know the size of her assets, does not remember who her children are, and believes that Ron is her late husband. Wanda instructs Rhoda to fight for her right to gift half the cottage and to allow her to continue her romance with Ron. It is accepted normative practice that Rhoda has to present her client's wishes to the court. May Rhoda withdraw?

Dementia and capacity to carry on a romantic relationship

3. Kimberly Whaley, *Predatory Marriages* (2017) pg. 14 welpartners.com/resources/WEL-predatory-marriages.pdf

From a historical perspective, it is apparent that there is no single and complete definition of marriage, or, of the capacity to marry. Rather, on one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that. Yet, on the other end of the spectrum, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property in order to enter into a valid marriage, or both.

4. Wagner, Donovan, Pearl, *People of Faith and Substitute Decision-Making* (2018), pp. 16-17 https://bit.ly/2rokDKp

We can all agree that protecting the vulnerable incapable person from a predatory marriage makes sense. But, raising the threshold for marriage creates other problems. For the incapable person of faith, it means living with someone without the approval of the state or religious authorities. For many, that would be a non-starter.

When representing clients who wish to marry, but do not have the capacity under the test articulated in *Hunt v. Worrod,* it is open for counsel to argue that the case is persuasive authority and not binding. We must wait until the Court of Appeal adjudicates on whether the *Banton* test or the *Hunt v. Worrod* test for capacity to marry prevails as the current test in Ontario.

5. R v. Comeau 2017 NSSC 62

[23] On June 29, 2015 Dr. Meehan was requested to conduct a "capacity assessment". Her opinions at the end of that assessment were as follows:

- As to financial capacity: Ms. W. had no idea of what her finances were;
- As to her health: she had a "complete lack of insight to her needs and her cognitive state";
- As to social capacity: Ms. W. was described as somewhat of a loner;
- As to her capacity to enter into a sexual relationship, Dr. Meehan said: "I felt that she lacked capacity there as well, lacked insight and was unable to remember what happened five minutes previously." It was her view that Ms. W's reasoning was impaired and she would have impairment of her ability to understand her actions and the ramifications that those actions might have.

[24] On July 8, 2015, Dr. Meehan was again asked to provide her opinion as to Ms. W's capacity to give informed consent to sexual activity. Dr. Meehan's view was and is that Ms. W. could not provide informed consent as she lacked insight, judgment and reasoning necessary to make a safe decision to engage in sexual activity. She had no short-term memory and her midterm memory was impaired. These are functions that are necessary to make safe decisions and therefore she believes that Ms. W. would not understand the consequences of engaging in sexual activity. Dr. Meehan's opinion is that Ms. W's lack of capacity to provide informed consent to sexual activity existed in May 2015, being the time of the alleged offence.

[25] Ms. W. exhibits symptoms of dementia with vascular aspects that affect the frontal cortex of the brain. A patient with this condition has a less impaired memory but also is less inhibited in their conduct. As such, she would be unable to inhibit her inappropriate sexual behaviors. Dr. Meehan is aware that Ms. W. was acting in a sexual manner with a male resident at times after May 2015.

6. Salzman v. Salzman 2011 ONSC 3555

8 The undisputed evidence of Mr. Salzman and Ms. Salzman's full time care-givers is that Ms. Salzman cannot see to her own nutrition, and accuses her caregivers of trying to poison her. She has no concept of hygiene. She does not do self-cleaning and will not change her diapers after she relieves herself. She can get lost if she leaves her apartment alone. She does not take her medication without reminders and is unaware of her health conditions, past or present. She has lost orientation to time and place and has no recall. She lacks an awareness of safety. She left an electric heater beside the couch all night and attempts to leave her apartment to take taxis in only a nightgown or housecoat. Taxis no longer answer her calls. She makes dozens of calls every day, often to perfect strangers. She made almost 496 long-distance calls during the month ending April 10, 2011. She asks random men out on dates.

9 Dr. Gryfe, a colon and rectal surgeon who first saw Ms. Saltzman in May of 2008 in connection with her recently diagnosed colon cancer, and has seen her a number of times since, including in December 2010. He confirms that Ms. Salzman has little or no understanding of her medical conditions, including her progressive dementia.

10 …Dr. Gryfe confirms that Ms. Salzman suffers from significant and worsening dementia and is sometimes irrational. He wrote, "…Suzanne Salzman does not possess cognitive abilities to insightfully consent to or refuse sexual activity. She lacks insight to understand potential risks of any sexual behaviour such as infectious diseases or trauma…

11 Section 3 counsel argues that no weight should be given to Dr. Gryfe's opinion because he did not conduct a full capacity assessment. I disagree. Moreover, his opinion is supported by the evidence, generally, as to Ms. Salzman's mental state, and by the nature and circumstances of the conduct at issue, and the character of Mr. Balak.

7. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Choshen Mishpat 235:1

קטן עד שש שנים, אין קנייתו לאחרים כלום. ומשש שנים עד שיגדיל, אם יודע בטיב משא ומתן מקחו וממכרו ממכר ומתנתו קיימת.

Before the age of six, a minor's gift to others is nothing. Between six years and maturity, if he understands commerce then his purchase, sale and gifts are valid.

8. Rabbi Yaakov Yeshayah Blau (20th-21st century Israel), Pitchei Choshen IX 5 (11)

ומסברא נראה דה"ה חולה שאין דעתו מיושבת לטפל בעצמו, דינו כחרש ושוטה לענין זה [טיפול בנכסיו-מ.ט.], וצריכים ב"ד להעמיד להם אפוטרופוס... וכ"ש מי שדעתו נטרפה עליו מחמת זקנה.

Logically, it appears that the same would be true for a patient whose mind was not organized sufficiently to take care of himself; he would have the status of a *cheresh* or insane person for this purpose [care of property]. The court would be obligated to appoint a guardian… And certainly one whose mind is 'torn' due to age.

9. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Testimony 9:10

הפתאים ביותר שאין מכירין דברים שסותרין זה את זה ולא יבינו עניני הדבר כדרך שמבינין שאר עם הארץ, וכן המבוהלים והנחפזים בדעתם והמשתגעים ביותר הרי אלו בכלל השוטים, ודבר זה לפי (מה) שיראה הדיין שאי אפשר לכוין הדעת בכתב.

Those who are especially foolish [*peti*], who do not recognize contradictory statements and do not understand matters as other normal people do. Also, those who are confused and hasty in their minds, and those who are especially foolish, are in the category of *shotim*. It is as the judge sees it; one cannot specify a mindset in writing.

10. Rabbi Yehoshua Falk (16th-17th century Poland), Sma Choshen Mishpat 35:22

המבוהלים והנחפזים בדעתם והמשתגעים ביותר - נראה שכל הני פירושם הוא שאינם מתונים בעניניהם, אלא כל מעשיהן עושין במהירות ולא מבינים לסוף הענין ולתכלית המעשה, מ"ה זה ג"כ בשם שגעון ושטות יחשב:

"Those who are confused and hasty in their minds, and who are especially foolish" – It appears that the meaning of all of these is that they are not patient in their affairs. They perform all of their deeds hastily, not understanding the end of the matter and goal of the act. Therefore, this is also considered foolishness and irrationality.

11. Talmud, Yevamot 33b

פיתוי קטנה אונס נינהו

Seducing a minor is rape.

12. Rabbi Avraham Zvi Hirsch Eisenstadt (19th century Lithuania), Pitchei Teshuvah Even haEzer 178:7

ועיין בתשו' מקום שמואל סי' כ"ה באשה אחת שיצאה מדעתה ונשתגעה ר"ל והלכה פרוע ראש ושכבה על אשפתות בלי לבוש ממש וכותי א' מצאה ועשה מעשה זימה עמה לרצונה ואח"כ נתרפאת וחזרה לדעתה אם מותרת לבעלה. והאריך מאד בזה ודעתו לאיסור דלא דמי לקטנה כיון שאנו רואים שיש לה תאוה חיישינן שמא יש לה רצון ג"כ ומחשבה ניכרת מתוך מעשיה. ע"ש ועיין בס' בינת אדם שער כ"ה סי' ל"ה על מעשה כזה רק דבעובדא דידי' לא הי' ודאי שנטמאה רק שהיתה הולכת עם אנשי חיילים וקרוב הדבר שנטמאה. וכתב דדברי בעל מקום שמואל בזה דחויים כי תאוה אינו ענין לרצון כלל, ובאמת שוטה דמי לקטנה כמ"ש המל"מ פ' י"א מהל' אישות הלכה ח', ואפשר י"ל דשוטה גרע מקטנה... וע' בתשו' רבינו עקיבא איגר ז"ל ס"ס רי"ח שהביא דהמל"מ כתב בפשיטות דחרשת ושוטה דמיא לקטנה לומר דפיתוי הוא אונס...

See Responsa *Mekom Shemuel* 25, regarding a woman who left her senses and became insane, r"l. She went about with her hair wild, lay literally unclothed in the dump, and a non-Jew found her and lay with her, with her consent. She was later healed and she returned to her senses; may she return to her husband? And he wrote about this at length, prohibiting, saying that she was not like a minor since we saw that she desired this; we must be concerned that perhaps this was willing as well, and her thoughts can be discerned from her deeds. And see *Binat Adam* regarding a story like this, but in his case it was not certain that there had been sexual relations, only that she went about with soldiers, and it was near-certain that sexual relations had taken place. He wrote that the *Mekom Shemuel*'s position was rejected, for desire is not the same as will at all. In truth, one who is insane is like a minor, as written in *Mishneh l'Melech* (Ishut 11:8), and perhaps one who is insane is of even less capacity than a minor… And Rabbi Akiva Eiger (218) cited *Mishneh l'Melech* and wrote simply that a *chereshet* or incompetent person would be like a minor, and seduction would be viewed as rape…

13. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Sotah 2:4

קטנה שהשיאה אביה אם זינתה ברצונה נאסרה על בעלה...

If a minor who was married off by her father commits *z'nut*, she is prohibited to her husband…

14. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Even haEzer 178:3

קטנה שהשיאה אביה וזינתה לרצונה, יש מי שאומר שאסורה לבעלה... ויש מי שאומר שאינו נאסרת על בעלה...

If a minor who was married off by her father commits *z'nut* willingly, some say she is prohibited to her husband… And some say she is not prohibited to her husband…

Dealing with Julie's son Sam

15. Professionalism issues involved (https://lso.ca/lawyers/enhancing-competence/cpd-accreditation-for-licensees/accreditation-criteria)
    - 2.2 - Determining who the client is (institutional clients, lawful representatives of clients under disabilities, avoiding "phantom" clients)
    - 2.4 - Recognizing and being sensitive to clients' circumstances, special needs, and intellectual capacity (e.g., multi-cultural, language, gender, socioeconomic status, demeanour)
    - 2:5 - Managing difficult clients

16. LSUC Licensing Process Examination Study Materials 2012, Chapter 3 (pg. 35)
Once a lawyer agrees to act for a prospective client, the prospective client becomes a *client*. A retainer or an agreement for legal services may be created either formally or informally. Once the lawyer has agreed to provide legal services, the *lawyer-client retainer* has been established, and the lawyer has the additional duty to provide legal services competently, as discussed later in these materials.

17. BC Centre for Elder Advocacy and Support, citing the American Bar Association
The client is the person whose interests are most at stake in the legal planning or legal problem. The client is the one — the only one — to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality. It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common with married couples. However, in most of our cases, we will identify the elder or disabled person as our client. We will do this regardless of who first contacted us.

18. LSUC Licensing Process Examination Study Materials 2012, Chapter 3 (pg. 37)
To avoid the problem of phantom clients, lawyers should clearly establish when they have or have not been retained to provide legal services. Lawyers should clearly communicate what role they will fulfill for the client and should confirm in writing whether they will act for a client who has consulted with them and refer to any limitation periods (i.e., in a retainer agreement and engagement or non-engagement letter); inform third parties who attend meetings with a client that they do not represent them and represent the client only; discourage clients from requesting legal advice for third parties or from relaying information that the lawyer has provided to the client; and avoid discussing legal matters outside the working environment or any working relationships.

19. Kimberly Whaley, *Nature and Origin of the Law of Undue Influence: Attacking Wealth Transfers* (2017)
The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, as well as planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.
Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney and to *inter vivos* gifts and wealth transfers.

20. LSUC Licensing Process Examination Study Materials 2012, Chapter 3 (pg. 35)
Even when it is apparent what organization, individual, or group of individuals is the client, situations may arise during the retainer that create confusion as to who has proper authority to provide the lawyer with instructions on the client's matter. This may occur when the client brings a friend or family member who is not involved in the matter to meetings with the lawyer, when a third party pays for the lawyer's services, or when the lawyer represents more than one client in the same matter. The friend, family member, or third party may try to instruct or ask the lawyer to reveal information about the client. To ensure no misunderstanding about the involvement or authority of the third party as it relates to the

client's matter, the lawyer should meet with the client privately to obtain direction as to how the lawyer should deal with the third party. The lawyer should also confirm in writing the client's directions concerning the third party and any subsequent changes to those directions.
If the third party is also a client (i.e., a joint retainer client) or if the third party is authorized to give instructions on behalf of the client, the lawyer may take instructions or reveal information. If not, the lawyer must confirm with the client whom the lawyer may speak with regarding the client's matter.

21. WEL Partners, Undue Influence Checklist – http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf

22. Rabbi Dov Berish Rappaport (19th century Poland), Derech haMelech to Hilchot Sotah 2:4
ועי' בישועות יעקב סי' קע"ח שכ' ליישב דברי רבינו שפסק דקטנה יש לה רצון ליאסר והעלה דבאמת קטן יש לו מחשבה במחשבתו ניכרת מתוך מעשיו ומעתה קטנה שנבעלה מרצונה לאיש בלי פיתוי של בועל רק שהיא מעצמה נתרצית לזנות בזה כיון שמחשבתה ניכר שברצונה נבעלה לו נאסרה על בעלה. אמנם כשהבועל פיתה אותה עד שנבעלת לו מאחר דכן דרך הקטנים להיות נשמעין לדברי זולתם בזה אין לנו ראי' שברצונה לזנות... וחלקי אמרה נפשי, דבאמת אף גבי גדול בן דעת מצינו דדבר שאדם עושה ע"י פיתוי אחרים ל"ח רצון גמור...
And see *Yeshuot Yaakov* (178) who justified Maimonides' ruling that a minor has will and so becomes prohibited, and he concluded that a minor has 'thought' when the thought is recognized from his deeds. Therefore, where a minor cohabits willingly, without the adult's seduction but only her desire for this *z'nut*, then since her thought is recognizable, that she is willingly cohabiting with him, she is prohibited to her husband. But where the adult persuades her to the point of cohabitation, for this is what happens with minors, that they listen to others, then her action does not prove her desire to commit *z'nut*... And for my part, I would say that in truth, even regarding an adult with capacity, we find that that which a person does due to the persuasion of others is not considered entirely willing…

23. Talmud, Sanhedrin 73a
מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו תלמוד לומר לא תעמד על דם רעך
How do we know that one who sees another drowning in a river or being dragged by a beast or being beset by bandits must act to save him? Leviticus 19:16 says: You shall not stand by as the blood of your peer is shed.

24. Talmud, Bava Metzia 71a
תני רב יוסף... ענייך ועניי עירך - ענייך קודמין, עניי עירך ועניי עיר אחרת - עניי עירך קודמין.
Rav Yosef taught…If you have a choice between your own poor and those of your city, choose your own poor first. If you have a choice between the poor of your city and the poor of another city, choose the poor of your city first.

25. Talmud, Kiddushin 31b
איזהו מורא ואיזהו כיבוד? מורא לא עומד במקומו ולא יושב במקומו ולא סותר את דבריו ולא מכריעו. כיבוד מאכיל ומשקה מלביש ומכסה מכניס ומוציא.

26. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Mamrim 6:10
מי שנטרפה דעתו של אביו או של אמו משתדל לנהוג עמהם כפי דעתם עד שירוחם עליהן, ואם אי אפשר לו לעמוד מפני שנשתטו ביותר יניחם וילך לו ויצוה אחרים להנהיגם כראוי להם.
If one's father or mother develops dementia, he should try to act according to their wishes until Gd has mercy upon them. If he cannot bear it because they have become extremely irrational, he should leave and instruct others to manage them in the manner befitting them.

27. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Mamrim 6:12
מי שאמר לו אביו לעבור על דברי תורה, בין שאמר לו לעבור על מצות לא תעשה או לבטל מצות עשה, אפילו של דבריהם, הרי זה לא ישמע לו, שנאמר...
If one's father tells him to violate the Torah – whether to violate a prohibition or fail to fulfill a commandment, even a rabbinic one – he shall not listen, as it is written…

28. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Mamrim 5:7
המקיז דם לאביו או שהיה רופא וחתך לו בשר או אבר פטור, אע"פ שהוא פטור לכתחילה לא יעשה או להוציא סלון מבשר אביו או אמו לא יוציא שמא יעשה חבורה, במה דברים אמורים כשיש שם אחר לעשות, אבל אם אין שם מי שיעשה אלא הוא והרי הן מצטערין הרי זה מקיז וחותך כפי מה שירשהו לעשות.
One who lets blood for his father, or who amputates his flesh or a limb as a doctor, is not liable. However, ideally he should not do this, or remove a thorn from his father or mother's flesh, lest he create a bruise. This assumes there is another who can do it; where no one else will do it, and they are in pain, he should let blood and cut as they permit.

The Reluctant Lawyer

29. Professionalism issues involved (https://lso.ca/lawyers/enhancing-competence/cpd-accreditation-for-licensees/accreditation-criteria)
    - 1.12 - Optional and mandatory withdrawal from representation

30. LSO, Rules of Professional Conduct (2014), Rule 3.7-1
A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.
Commentary [1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

31. Re. A.L., 2003 ABQB 905 (CanLII), <http://canlii.ca/t/4phc>, retrieved on 2017-12-07, para. 37
The authors of the *Law of Lawyering* make the following comments about the differences between the ABA's *Model Rules of Professional Conduct* and the *Restatement of the Law Governing Lawyers:*
Other listed reasons for permissive withdrawal are more controversial and should be employed with correspondingly more caution precisely because the breakup of the client-lawyer relationship can less clearly be laid at the client's door. Indeed, for withdrawals based on these grounds, Restatement §32(4) specifically requires recalibration of the competing harms: if the harm to the client "significantly exceeds" the harm to the lawyer or others that prompted the impulse to withdraw, withdrawal is no longer permissible.
A chief example is withdrawal in the face of client choices that the lawyer finds "repugnant or imprudent"; see Model Rule 1.16(b)(3) and Restatement of the Law Governing Lawyers §32(3)(f). Read too broadly, these provisions would permit lawyers to abandon clients at the first sign of disagreement or unpleasantness, which is antithetical to what a proper client-lawyer relationship should be. Clearly, lawyers ought to give clients the benefit of the doubt, and not withdraw unless the disagreement is fundamental, and the client's position so extreme as to be nearly impossible for most reasonable lawyers to countenance. See Restatement §32, Comment *j*.

32. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Nizkei Mammon 14:7
ליבה וליבתו הרוח, חייב, שהרי הוא גרם...
השגת הראב"ד: ואיך לא הפליג כמו שמפליג בברייתא אם יש בלבויו כדי ללבותה חייב ואם לאו פטור.
If he fans it and the wind fans it, he is liable, for he caused it…
Raavad: How did he not expand as the talmudic text did, that he is liable if his fanning alone could have done this, but otherwise he is exempt?

33. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Choshen Mishpat 34:1
ואפילו עד כשר, שיודע בחבירו שהוא רשע, ואין הדיינים מכירים רשעו, אסור לו להעיד עמו, אף על פי שהוא עדות אמת (ל' הרמב"ם פ"י מעדות). ואצ"ל עד כשר שהוא יודע בעדות לחבירו, וידע שהעד השני שעמו עד שקר, שאסור לו להעיד.
Even a kosher witness who knows that his fellow witness is wicked, but the judges do not recognize his wickedness, he may not testify with him – even though he knows the testimony is true. And it goes without saying regarding a kosher witness who knows testimony for someone, and knows that the second witness with him is lying, may not testify.