

# Elder Law

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Legal Aid BC 

**Elder Law**

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**Thompson Rivers University  
Community Legal Clinic  
("TRU CLC")**

# Introduction

# TRU CLC

TRU CLC is located in downtown Kamloops:

204 – 246 2nd Avenue  
Kamloops, BC V2C 2C9  
(778) 471 - 8490

Current services are being conducted on the phone or by Zoom  
due to COVID-19

# About Us

The Thompson Rivers University Community Legal Clinic (TRU CLC) is the first student-staffed free legal clinic in the BC Interior. The students work under the guidance of a team of supervising lawyers to provide legal assistance and advice in a range of areas to those who would otherwise be unable to afford legal assistance.

# Our Purpose

The program enables students to use the law as a tool for social justice by working with agencies and local non-profit organizations to improve citizens' access to the justice system, while the students develop skills that will make them better lawyers in the future.

## Who Can Use Our Services?

The service is free and to be accepted for ongoing representation, clients must meet low-income financial eligibility requirements. As well, a law student will conduct an initial interview to determine eligibility based on the nature and scope of the client's issue.

We are restricted to the geographical area of Kamloops and surrounding area. Clients must be able to attend at our office for full representation files.

## What Kinds of Issues Can the TRU CLC Help With?

- Full Representation in Litigation:
  - Residential Tenancy;
  - Employment Standards;
  - Small Claims (civil claims under \$35,000 only);
  - Human Rights Claims; and
  - Some Criminal Charges in Provincial Court.

## What Kinds of Issues Can the TRU CLC Help With?

- Full Representation and Limited Assistance in DRAFTING:
  - Simple Wills – estate gross value under \$25,000 and no real property;
  - Powers of Attorney (not if the client owns real property) and Section 9 Representation Agreements;
  - Advance Directives;
  - Notices of Claim and Replies to Claim in Small Claims or the Civil Resolution Tribunal;
  - Financial Statements for both Supreme and Provincial Court; and
  - Forms for uncontested Desk Order Divorces.

## What Kinds of Issues Can the TRU CLC Help With?

- Summary Advice, Limited Summary Advice, Summary Information, or Immediate Close:
  - Family Law Litigation;
  - Probate or Estate Administration;
  - Most matters within the jurisdiction of a superior level court;
  - Business and Commercial Law;
  - Real Estate and Strata Matters;
  - Personal Injury Claims;
  - Issues Arising from Unionized Employment;
  - Impaired Driving or Traffic Offences; and
  - Complaints Against Dentists, Doctors, or Lawyers.

# Elder Law: What is it?

# Intersections of Law

- Not just about wills and power of attorneys!
- Elder law is an intersection of various areas of law
- There are elements of family law, advance planning, health law, residential tenancy law, and even criminal law.
  - We are looking at factors of health, social, and mental contexts that are specific to aging clients and how that specific clients context affects their legal issue when developing a plan to assist them.
- The overarching question throughout much of an elder law practice is whether the client has capacity to instruct and what the background noise is.

# Capacity

- Anytime we are to act for a client on ANY matter, you must always ask yourself whether you believe the client has the capacity to instruct you
- When we are talking about capacity, this is a legal assessment of capacity

Does this person have the mental capacity to make the decision?



12

- This is determined by the lawyer.
- It may be that one day we are able to take the signature, and the next we cannot.
- We may call the Adult's doctor to inquire as to the Adult's condition and any impediment that they may be under, such as medications or an illness.
  - It is not just conditions such as dementia that will impact their capacity
  - It may be temporary or permanent.
- At the end of the day, we, the lawyers, have to be certain that this individual is capable to sign and that can make people angry at us when we have to say no.

<https://www.bccourts.ca/jdb-txt/sc/21/02/2021BCSC0278.htm>

## Will Test

- The test requires that a testator understand the implications of making a will, the assets to be divested, who the beneficiaries are and what they are to receive, and the method of divestment.
  - This standard has stood the test of time since first being established in the UK in *Banks v Goodfellow* in 1870.

## POA Test

- Do they have capacity?
  - Aware of:
    - a. of the property I have and its approximate value;
    - b. of the obligations I owe to my dependents;
    - c. that my Attorney will be able to do on my behalf, anything in respect of

my financial affairs that I could do if capable except make a Will, subject to any conditions or restrictions set out in this Power of Attorney;

d. that unless my Attorney manages my business and property prudently, this value may decline;

e. that there is a possibility my Attorney could misuse the authority given to my Attorney by this Power of Attorney; and

f. that I may, while capable, revoke this Power of Attorney.

**RA Test** (Section 9) (s 8 and 10)

- whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
- whether the adult has a relationship with the representative that is characterized by trust.
- an adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature and consequences of the proposed agreement.

# Background Noise

- New spouse?
- Children fighting over care or home situation? Or, more importantly, fighting over the parents stuff?
- Health or social impacts?
- Is the client on any medications?
- What is the context or nature of the issue that is bringing the client to you?

## Elder Law

# Common Issues to be live to

## Blended Families

- As our population has changed, divorce and re-partnering has become very common.
- Duties are owed to our spouse and our children when estate planning.
  - Children are defined as our biological children or children we have legally adopted. NOT STEP-CHILDREN
- This means that blended families can mistakenly disinherit one spouse's children if not planned properly.
- On top of wills variation claims, the dynamics of blended families can create havoc at times of health care decision making and incapacity.

## Undue Influence

- What is bringing this person in and, more importantly, WHO is bringing in this person?
- The interview MUST be conducted alone
- The questions to ask are:
  - Does the client have capacity?
  - Is the client aware of the content of the will, POA or contract? What about the consequences of the decision?
  - Is the client acting on their own free will? Is this what they want or what they are being told they should want?

16

What we are looking for is some form of coercion or a relationship in which influence is being exerted over the decision maker. Certain relationships create influence and we must determine if there is an inappropriate exertion of that influence.

Very common to have adult children bring their parents to an appointment.

## Duress or Unconscionability

- Is the person being appointed a caregiver for the adult?
- *“If I do not do this, the caregiver will not be able to care for me.”*
- Does this transaction, marriage, contract, or change to the advance planning document make sense for the client or provide an unfair benefit to someone else?

## Bad Decision?

- It is not our role to police a client's decisions – personal autonomy is at the heart of our law.
- Clients make bad decisions all the time, this does not mean it is an invalid or illegal decision.
- An invalid or illegal decision is one that does not accord with the law.
  - Example: I am going to “sell” my home to my kids so it is not considered my asset anymore.
- Our role is to advise the clients to the pros and cons of a decision and then let them decide what to do, even if we do not agree with their decision.

18

For example, joint ownership or transfer into joint ownership.

Blended families = BAD IDEA!

To a child = Could be a bad idea, maybe not. What is the context?

## Things to Consider When Serving an Aging Population

- Does this person have a support network?
  - Family?
  - Care Aide?
  - Social Worker?
- Do they have any substitute decision makers?
- What is the issue they are coming to you with?
  - Issue with housing?
  - They want to change their advance planning documents?
  - One of their family members is telling them to do something?
- Do they have any conditions that impact how you serve them?
  - Hearing impairments?
  - Cognitive impairments?
  - Mobility issues?

## Things to Consider When Serving an Aging Population

- Is your office set up in a senior friendly manner?
- Do you rely heavily on technology?
- Are you able to book appointments with enough time?
- Do you train staff on how to interact with senior clients?
- PATIENCE is key
- Understanding traditional ways of thinking and how they differ from the law is important – how things USED to be versus how things are now.

# Questions?

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