(d) Did Dr. Parmar have the capacity to make a gift?

[145] The plaintiff next argues that, as of January 6, 2011, Dr. Parmar lacked the capacity to make a valid gift. He relies on Dr. Parmar's attempt on December 29, 2010 to get out of the car on the freeway, the perseverative error in the Home Services Admission Form and the opinion evidence of Dr. Myronuk to support this argument.

[146] Mr. Huntsman submits that, in this case, given the circumstances in which the Form A Transfer was signed (just before Dr. Parmar died), the relevant test for capacity is that applied to testamentary dispositions, rather than *inter vivos* gifts. This point is discussed by Barrow J. in ***Miller v. Turney***, 2010 BCSC 101, at para. 32 [underlining added]:

> [32] Counsel for the estate argues that the capacity necessary to make an *inter vivos* gift is the same as that needed to make a valid testamentary disposition. . . .I accept that the capacity necessary for these two forms of giving may be the same in some situations. In particular, the more that an *inter vivos* gift resembles a testamentary disposition, the greater the similarity in the required capacity. For example, when a gift involves a transfer from the donor into the joint names of the donor and others, the required capacity is more likely to be akin to that necessary to make a valid Will. That is so because the gift will take full effect only on the death of the donor, assuming the donor survives the other joint owners. That was the situation in *Brydon* and in the authorities that support of the proposition that the required capacity in the two situations is the same. In circumstances where the *inter vivos* gift is entirely divorced from the donor's death and otherwise unlike a testamentary disposition, the capacity necessary to validly gift property may be less than that required to make a testamentary disposition. This point was made by McKenzie J. in *Dacyshyn v. Dacyshyn Estate*, [1996] B.C.J. No. 626 (S.C.) where, in dealing with an *inter vivos* transfer, he wrote at para. 25 that:
>
> > ...Many of the leading cases on...a lack of capacity involve testamentary instruments. The standards for *inter vivos* transactions on questions of...capacity are, if anything, less stringent than those for testamentary instruments...
>
> More precisely, the content of that which must be understood by the donor is, or may be, less extensive and less complicated than that to which a testator must address his or her mind, and in that sense, the required capacity is less in the case of *inter vivos* gifts.

[147] Thus, if a gift only takes effect on death of the donor (the example given by Barrow J. is when there is a transfer into joint names, with a right of survivorship), then it may well be appropriate to look to the capacity required to make a testamentary disposition, since the gift closely resembles a testamentary disposition.

[148] Testamentary capacity is discussed in ***Elder Estate v. Bradshaw***, 2015 BCSC 1266 (cited by Mr. Huntsman), where Meiklem J. wrote (at paras. 29-30):

> [29] The seminal case defining the meaning of testamentary capacity is *Banks v. Goodfellow* [1861-73] All E.R. Rep 47 at 56:
>
> > It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise.
>
> [30] In assessing the evidence bearing on the issue of testamentary capacity, I observe and adopt the comments of Harvey J. in *Danchuk v. Calderwood*, [1997] B.C.W.L.D. 087 at para. 113:
>
> > [113] Whether the testator's mind was sound is a practical question. It does not depend on scientific or medical definition. Medical evidence is not required nor necessarily conclusive when given. The question may be answered as well by laymen of good sense.

[149] Mr. Huntsman argues that, applying the test for testamentary capacity as described by Meiklem J. to the evidence, particularly in the light of Dr. Myronuk's opinion evidence, Dr. Parmar lacked the capacity as of January 6 to make a valid gift.

[150] I do not agree with Mr. Huntsman that the standard for testamentary capacity is the appropriate standard here. There is no evidence that the transfer of Comox from Dr. Parmar to Ms. Tiwari was only to take effect on Dr. Parmar's death.