A PRACTICAL GUIDE TO CAPACITY ASSESSMENTS IN LITIGATION[1]

BASIC STATUTORY FRAMEWORK

The *Substitute Decisions Act* (**SDA**) is the governing legislation with respect to the management of property (i.e., finances) and making personal care decisions (i.e., health, shelter, nutrition, clothing, hygiene, or safety).

The SDA regulates all types of attorneys, statutory guardians, and court appointed guardians of property or personal care. Among other things, it sets out the rules for creating a valid power of attorney document, sets out the procedure for applying to appointed guardian of property/personal care for another, and enumerates some of the duties and obligations of attorneys and guardians.

Power of attorney documents generally specify when they come into effect. Most often, the power of attorney document will state that it is effective immediately upon being signed or as soon as the grantor is incapable of making financial or personal care decisions. In the event that the power of attorney document "springs" into effect when the grantor becomes incapable, the power of attorney document will usually specify the type of evidence needed of incapacity: either a doctor's note or a formal capacity assessment. Where the power of attorney document is silent, a capacity assessment is required.

If a person did not sign a power of attorney document while capable of doing so and is no longer able to make personal or financial decisions, another person may have to be given legal authority to make decisions on their behalf. This authority is called *guardianship*.

RELEVANT SDA PROVISIONS

- **Section 2**: A person is presumed capable.

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- **Section 3**: If the capacity of a person who does not have legal representation is in issue in a proceeding, the court may direct that the Public Guardian and Trustee ("**PGT**") arrange for legal representation to be provided for the person and the person is deemed to have capacity to retain and instruct counsel.

- **Section 6**: A person is incapable of managing property if she is not able to understand information that is relevant to making a decision in the management of her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

- **Section 15**: If a certificate is issued under the *Mental Health Act* certifying that a person who is a patient of a psychiatric facility is incapable of managing property, the PGT will begin acting as the person's statutory guardian of property.

- **Section 16**: A person may request an assessor to perform an assessment of another person's capacity or the person's own capacity for the purpose of determining whether the PGT should become the statutory guardian of property.

- **Section 16.1**: A statutory guardianship of property is terminated if: (1) the incapable person gave a continuing power of attorney before the certificate of incapacity was issued; (2) the power of attorney gives the attorney authority over all of the incapable's person property; (3) the original or a certified copy of the power of attorney is provided to the PGT; (4) the attorney for property provides a written undertaking to the PGT to act in accordance with the power of attorney; and (5) the PGT is provided with satisfactory proof of the identity of the person named as attorney for property.

- **Section 31(1)**: A guardian or property has power to do on the incapable person's behalf anything in respect of property that the person could do if capable, except make a will.

- **Section 32**: A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honest and integrity and in good faith, for the incapable person's benefit. Section 32 also applies, with necessary modifications, to an attorney acting under a continuing power of attorney.

- **Section 66**: The powers and duties of a guardian of the person shall be exercised and performed diligently and in good faith. The guardian shall explain to the incapable person what the guardian's powers and duties are.

- **Section 45**: A person is incapable of personal care if she is not able to understand information that is relevant to making a decision concerning her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

- **Sections 25 and 58 of the SDA**: The court cannot appoint a guardian unless it (1) makes an express finding that the person is incapable of managing her property or personal care and that, as a result, (2) it is necessary for decisions to be made on the person's behalf by an authorized person.

The determination of whether a person is incapable is ultimately a legal one not a medical/clinical one. While a report from a certified capacity assessor is not necessarily required, the convention among lawyers and the court is to rely on a capacity assessment as the best evidence of incapacity where capacity is in dispute.

ASSESSORS

Under the SDA, a capacity assessment is conducted by an "assessor." A capacity assessor is trained and qualified to determine if an individual is mentally capable of making certain types of decisions.

The following health care professionals are eligible to become capacity assessors:

- Doctors
- Registered Nurses or Registered Nurses (Extended Class)
- Psychologists
- Registered social workers
- Occupational therapists

An assessor must:

- Successfully complete a Ministry of the Attorney General training program
- Maintain a minimum of $1,000,000 of professional liability insurance
- Be a member in good standing with her professional college

To maintain their designations, capacity assessors must complete a minimum of five assessments within two years and successfully complete and participate in continuing education activities.[2] A capacity assessor can be found through the Capacity Assessment Office operated by the Ministry of the Attorney General.[3]

Capacity assessors are independent and are not employed by the government. The cost of an assessments is not covered by OHIP. Most capacity assessors have a private professional practice or are employed by a health care service.

The person requesting the assessment is typically responsible for the assessor's fee. In a proceeding commenced under the SDA, the person who paid for the assessment will usually seek to recover the cost from the other side or from the incapable person's property.

SELECTING AN ASSESSOR

When choosing a capacity assessor, the following should be considered:

- The geographic area in which the assessor works
- The assessor's availability
- The assessor's particular area of expertise and experience
- The assessor's fees

[2] Capacity Assessment, O. Reg. 460/05, s. 2, 5 and 6
[3] Visit the MAG website at https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#list

- The language(s) spoken by the assessor if the assessed person does not speak fluent English

COURT ORDERED ASSESSMENTS

- **Section 79**: The court can order a person to undergo a capacity assessment relating to property or personal care where (1) the person's capacity is an issue in an SDA proceeding **and** (2) the court is satisfied there is reasonable grounds to believe the person is incapable. Note that a person has the right to refuse a capacity assessment unless ordered to undergo one by the court.

- **Section 79(4)**: A court ordered assessment should be performed in the person's home "if possible." However, if the individual lives with family members involved in the litigation, the assessment should likely take place elsewhere.

- **Section 81**: The court can order that the person be apprehended to undergo the assessment.

It is important to keep in mind that an assessment is considered to be a highly intrusive medical procedure. The results of being found incapable are significant: the loss of personal autonomy. Thus, a court will be reluctant to compel a person to undergo a capacity assessment against her will without evidence that it is necessary. In addition, the court will be reluctant to order a person to undergo a second capacity assessment unless there are significant deficits with the first assessment.

OTHER LEGISLATION OF NOTE

The SDA primarily deals with an individual's capacity to make financial and personal care decisions. However, questions about a person's capacity are also dealt with in:

- ***Health Care Consent Act*** – decisions relating to treatment, admission to a care facility

- ***Mental Health Act*** – to mange property when an individual is admitted to a psychiatric facility

- ***Personal Health Information Protection Act*** – the collection, use and disclosure of personal health information about individuals

- ***Courts of Justice Act*** **–** Section 105 states that where the physical or mental condition of a party to a proceeding is in question, the court may order the party to undergo a physical or mental examination. However, the courts have held that this section gives way to the SDA where the essential capacity issue is one that falls under the SDA, as the SDA provides protections to the individual that the *Courts of Justice Act* does not.[4]

EVIDENCE OF INCAPACITY

In conducting an assessment, whether done contemporaneously or retrospectively, an assessor will review relevant medical evidence, care notes, prior assessments, pleadings and affidavits in ongoing litigation, previous wills and POA documents. An assessor will then interview the incapable person or, if preparing a retrospective capacity assessment of a deceased person, may watch videos or listen to audio recordings of the person.

The assessor will usually ask to speak with family members, friends, or neighbours who are able to share their observations and experiences. However, the assessor should be alerted to potentially biased accounts from family members who has a stake in the outcome of the assessment and litigation. In such cases, the capacity assessor should exercise caution: conducting an interview with a biased family member for corroborative information may be more problematic then beneficial.

As Justice Quinn noted in *Re Koch*,[5] assessors are expected to maintain meticulous files. A party can ask for the assessor's files which should contain how the assessor came to be retained, documents received, background information provided, cognitive tests administered by the assessors, draft reports, and correspondence with other parties regarding the draft assessment.

Non-medical evidence may also be an important element of an assessment or evidence of incapacity. For example, the assessor may wish to review banking and investment records, bills

[4] *Abrams v. Abrams*, 2010 ONSC 2703
[5] *Re Koch*, 1997 CanLII 12138, 33 O.R. (3d) 485 (ON Ct Gen Div)

and bill payment, collection notices, and other financial records prior to or during the assessment. A review of the records may also show unexplained and unusual withdrawals or a sudden end to regular bill payments. In will challenges, non-medical evidence normally includes the file of the drafting solicitor(s).

MEDICAL EVIDENCE

While a contemporaneous capacity assessment is often seen as the best evidence, other medical evidence is relevant and may be used to bolster or undercut a capacity assessment, as required. Medical records are usually seen as neutral and can include the notes, observations, and opinions of family doctors, treating physicians and specialists, as well as the records and notes of physical and occupation therapists. Hospital records, OHIP histories (which list payments made to health care providers for medical services received by a patient), and prescription records are also considered.

When assessing the strength/weight of the medical records, the court will consider the nature and length of the professional relationship, the date of the note, the details and description provided. A simple family doctor's note that says "X no longer has the capacity to manage her property and personal care decisions" will likely not be sufficient for a court to make a determination of incapacity in contested litigation.

It is important to keep in mind that there are two cognitive elements to capacity (1) the *understanding* of relevant facts and (2) the *appreciation* of the reasonably foreseeable consequences of a decision or course of action. Moreover, all capacities are *task-specific* and therefore the criteria of whether a person is capable of performing that task is different in each case. Capacities are also *situation-specific* and the circumstances of each individual's milieu/environment must be taken into account. While guided by these principles, each case is unique thus making it difficult to generalize. For example, a person may be incapable of making simple financial decisions on her own but capable of doing so with support.

CASE LAW

Re Koch[6]

A Consent and Capacity Board's finding of incapacity to manage property under the SDA was set aside on appeal by Justice Quinn, who wrote:

> It is mental capacity and not wisdom that is the subject of the SDA… The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake …
>
> [A]ny procedure by which a person's legal status can be altered must be cloaked with appropriate safeguards and capable of withstanding rigorous review …
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> The assessor/evaluator must be alive to an informant harbouring improper motives.

In *Re Koch*, Justice Quinn warned against confusing "best interests" with "cognitive capacity": assessors must not confuse their view of the best interests of the appellant with the state of the appellant's cognitive capacity. The former, no matter how well intentioned, is irrelevant to determining capacity.

Erlich v. Erlich[7]

Justice Pattillo declined to order a capacity assessment of an elder couple. Robert Erlich was the applicant. The respondents, Srul Erlich and Tamara Erlich, were Robert's parents and were 93 and 95 years old, respectively. Srul and Tamara married in 1972 and raised four children together, including Robert. Srul and Tamara each executed powers of attorney for personal care and property, with each naming the other as attorney with Robert as the alternate. While Srul and Tamara were enjoying their twilight years in a retirement home, Robert began to raise questions about his parents' ability to manage their property. Such property consisted of a house owned by

[6] *Re Koch*, 1997 CanLII 12138 (ONSC)
[7] *Erlich v. Erlich*, 2018 ONSC 2911 (CanLII)

an irrevocable trust, bank deposits worth approximately $250,000.00, and a cottage which Srul and Tamara jointly owned.

Robert sought orders requiring Srul and Tamara to undergo capacity assessments. Robert also sought an order prohibiting Srul and Tamara from dissipating or disposing of their property. Srul and Tamara opposed Robert's application. Srul filed three capacity assessments conducted by a Dr. Silberfeld which dealt with Srul's capacity to instruct counsel, make a will, manage his property and give powers of attorney for personal care and property. Srul underwent these capacity assessments voluntarily after Robert commenced his application.

In his assessment, Dr. Silberfeld concluded that Srul was capable of managing his property and noted that "[Srul] is able to understand information that is relevant to making a decision in the management of his property. He is able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision." In response, Robert filed a medical report from a Dr. Shulman which responded to and strongly criticized Dr. Silberfeld's assessment.

Justice Pattillo noted that section 2 of SDA provides that a person is presumed to have capacity. The court's authority for ordering a capacity assessment is set out in section 79 of the SDA and that section requires that the capacity of the person sought to be assessed must be in issue and that there must be reasonable grounds to believe that the person is incapable.

The parties agreed that the factors that the court should consider when determining whether to order a capacity assessment were set out in *Abrams v. Abrams:*[8]

- The nature and circumstances of the proceedings in which the issue is raised
- The nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation
- If there has been any previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached

[8] *Abrams v. Abrams*, 2008 CanLII 67884 (ON SC)

- Whether there are flaws on the previous report, evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper criteria
- Whether the assessment will be necessary in order to decide the issue before the court
- Whether any harm will be done if an assessment does not take place
- Whether there is an urgency to the assessment
- The wishes of the person sought to be examined, considering his or her capacity

In deciding whether to order a person to undergo a capacity assessment, a court must balance the affected person's fundamental rights to dignity and privacy, as well as the potential loss of that person's legal rights, against the court's duty to protect the vulnerable.

Regarding the dueling medical opinions, Justice Pattillo ultimately accepted Dr. Silberfeld's conclusions concerning Srul's capacity. While Justice Pattillo did respect and acknowledge the expertise of Dr. Shulman, he was not prepared to discount Dr. Silberfeld's opinions based on criticisms of the way in which Dr. Silberfeld conducted his assessments.

In considering the evidence and on balancing all of the *Abrams* factors, Justice Pattillo was satisfied that neither Srul nor Tamara should be required to undergo a further capacity assessment or be restrained from dealing with their property. Accordingly, Robert's application was dismissed and Srul and Tamara were free to return to enjoying their retirement.

Adler v. Gregor[9]

Justice Penny's decision should be required reading regarding capacity assessments in power of attorney ("**POA**") disputes. Agnes Adler (age 90) had two daughters, Judy and Andrea. The two were engaged in bitter POA litigation regarding their mother. There were three sets of powers of attorney at issue: the first set was signed in 2000, which named both daughters as co-attorneys of

[9] *Adler v. Gregor*, 2019 ONSC 3037

property and personal care; the second set was signed in 2015, named only Andrea as attorney for property and personal care and did not come into effect until there was a finding of Agnes' incapacity by a physician or a licensed capacity assessor; and lastly, a third set of POA documents was signed in September 2017 in which Agnes again named both daughters as co-attorneys for property and personal care.

It was not in dispute that Andrea had been more involved in Agnes' daily support and care since her father's passing. However, the relationship between the sisters was strained and matters came to a head in early 2017 (before the third set of POA documents was signed) when Judy's husband sued Andrea and her husband for defamation.

At the same time, Agnes' cognition was deteriorating. Andrea arranged for Agnes to undergo a capacity assessment in August 2017. The capacity assessor found that Agnes was incapable of managing property or granting a power of attorney for property.

Judy then took her mother on a cruise. When they returned, Judy took Agnes to see a new lawyer (recommended by Judy's husband) to make the third set of POAs in September 2017. Judy arranged for a new capacity assessment for Agnes in October 2017 at the suggestion of her lawyer. The new capacity assessor found that Agnes could grant POAs for property and for personal care.

Judy commenced litigation to enforce the September 2017 POAs and declare the 2015 POAs invalid. In the course of the proceeding, counsel was appointed to represent Agnes in the litigation pursuant to section 3 of the SDA.

The matter came before Justice Penny who held:

> … while both daughters, I am sure, want the best for their mother, their mother's interests have absolutely nothing to do with this dispute. This dispute is a power struggle between two siblings with long and abiding resentments toward one another, pure and simple.

Justice Penny was dissatisfied with the court material filed by both Judy and Andrea, finding that they were filled with "hearsay (from their mother and others), speculation, suspicion, innuendo and argument." However, Justice Penny saved his sharpest criticism for the two capacity

assessments, in particular with Judy's and Andrea's personal involvement in their respective capacity assessments. Justice Penny found that Andrea provided the assessor with biased or incomplete background and had a hand in drafting the final August 2017 assessment report.

However, the court's concerns with Andrea's interference with the capacity assessment she arranged "pale[d] in comparison" to Judy's involvement with the October 2017 capacity assessment. While the first draft of the capacity assessment report stated that Judy was present throughout the assessment, Judy insisted that this be changed to state that she was not present. Judy made numerous other changes to the draft capacity assessment report, including correcting answers given by Agnes during the assessment ("at which," Justice Penny noted, "Judy claims she was not present"). Additionally, Justice Penny found that while the August 2017 assessment arranged by Andrea was short on analysis, the October assessment was "virtually devoid of any analysis."

Justice Penny concluded that capacity assessments were not intended to be used as weapons in high conflict litigation. As such, while a capacity assessment would normally fall into the "participant expert" category of opinion evidence, capacity assessments obtained in contemplation of litigation need to meet the test set out in rule 53.03 of the *Rules of Civil Procedure* regarding expert reports. They will also be scrutinized by the court pursuant to the factors set out by the Supreme Court of Canada in *R. v. Mohan*.[10]

Ultimately, Justice Penny refused to place any weight on either the August or October 2017 capacity assessments, finding that they were unreliable due to the bias and interference of Judy and Andrea in their creation. Instead, Justice Penny relied on the opinions of the medical professionals who treated Agnes.

Justice Penny also relied on the submissions of Agnes' section 3 counsel, who advised the court that Agnes frequently changed her mind as to who she wished to act as her attorney, with her wishes appearing "to vary (I suspect based upon which daughter she just spoke to)." Based on section 3 counsel's submissions, Justice Penny also found that Agnes wanted her daughters to get along and to cooperate in the management of her care and property. However, Justice Penny

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10 *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC)

concluded that while this was an understandable wish, it was completely out of touch with reality.

Justice Penny found the September 2017 POAs to be invalid based on incapacity to grant POAs or, in the alternative, on the grounds of undue influence. Justice Penny upheld the 2015 POAs as the governing documents, meaning Andrea had sole authority to manage her mother's property and personal care.

However, it was not an unadulterated success for Andrea. Justice Penny addressed two issues arising from Andrea acting as attorney. First, Justice Penny ordered that Andrea move Agnes' money out of a joint account held with Andrea into an account held by Agnes' alone, finding that there was no benefit and some risk to leaving Agnes's assets in the joint account joint. Second, Justice Penny ordered Andrea to repay a $25,000.00 "gift" Andrea accepted from Agnes in 2017, finding that accepting the gift in these circumstances was "highly inappropriate."

As in all guardianship disputes, costs are highly discretionary. In this case, Justice Penny invited the parties to make cost submissions, but warned that the parties should have no expectation that their legal fees would be paid out of Agnes assets. In fact, the court asked both parties to explain why they should not equally share in the reimbursement of Agnes' full indemnity legal fees. In a subsequent handwritten endorsement, the court did, in fact, order that each daughter pay half of Agnes' full indemnity costs.

Tanti v. Tanti[11]

In this case, the court was tasked with determining whether Paul Tanti was capable of marrying his "much-younger, live-in companion," Sharon Joseph. Paul's son, Raymond, objected to his father's late-in-life marriage due to his father's dementia.

At trial, Raymond sought to adduce evidence from four doctors who assessed Paul after his marriage to Sharon: Dr. Varga, who assessed Paul on August 15, 2019; Dr. Stall, who assessed

[11] *Tanti v. Tanti*, 2020 ONSC 8063

Paul on September 11, 2019; Dr. Marotta, who assessed Paul on December 5, 2019; and Dr. Pallandi, who assessed Paul on May 25, 2020.

While the parties agreed that the doctors were properly qualified, Sharon challenged the admissibility of their evidence. Because Raymond did not file any experts' reports (he sought only to put the doctor's records and examinations before the court), Sharon chose not to cross-examine the doctors prior to the hearing.

As a threshold matter, the court will only admit expert evidence that is relevant, necessary, from a properly qualified expert, and not subject to any exclusionary rule: *R. v. Mohan*.[12] Even after the threshold factors are met, the court can, in its role as gatekeeper, exclude expert evidence if it finds that admitting the evidence will harm the trial process.

The court accepted that, because dementia is a progressive disease, it must be particularly cautious when required to make a determination of capacity to marry at some point in the past (as opposed to a current determination of capacity). On that basis, the court agreed with Sharon that Dr. Pallandi's assessment was not sufficiently connected in time to the marriage to be relevant, and excluded it.

However, the court refused to exclude the evidence of Dr. Varga, Dr. Stall, or Dr. Marotta. Their assessments all took place within six months of the marriage and were *prima facie* relevant to the issue in dispute. The court also rejected Sharon's claim that the experts were biased toward Raymond. They all acknowledged their duties to the court and none of them were "hired guns." Moreover, given that the hearing took place without a jury, the court found that the risk of harm to the trial process was minimal if their evidence was admitted.

While the court rejected Sharon's argument that the evidence of Dr. Varga, Dr. Stall, and Dr. Marotta should be excluded, it agreed with her submissions that it should not be afforded much weight. Foremost, none of the experts provided a contemporaneous opinion on Paul's capacity to marry. In addition, their assessments of his capacity to manage property were largely irrelevant to the court's determination of capacity to marry (as the tests were different).

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[12] *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9

While Dr. Stall and Dr. Marotta provided retrospective assessments of Paul's capacity to marry during their examinations in September 2020, the court found that their opinions were not sufficiently reliable to be given much weight. Their retrospective capacity assessments took place more than a year after the marriage, were based on a single interaction with Paul, and were fundamentally premised on Raymond's unproven allegation that Sharon was a hired caregiver who had misappropriated Paul's funds.

Moreover, the court held that the experts' retrospective assessments of capacity relied almost exclusively on Paul's stated inability to remember the marriage. This is problematic because Paul's statements to the doctors were not reliable. Raymond was present or close by when Paul spoke to the doctors. As Paul's guardian, Raymond was considering putting him in a long-term care home. This put Raymond in a position of power over Paul. The court found that Raymond likely exerted pressure on Paul to deny the marriage. Indeed, Dr. Stall noted in his report that it seemed as though Paul was torn between wanting to spend his remaining days with Sharon and his family's expectation that he cut her out of his life.

In conclusion, the court found little weight could be given to the doctors' evidence about Paul's capacity to marry: the doctors' opinions were not contemporaneous with the marriage, were too heavily influenced by Raymond's unproven allegations about the relationship and were predicated on Paul's statements made under duress. As a result, the court refused to void the marriage between Paul and Sharon.

Slover v. Rellinger[13]

Gertrude Rellinger was born on May 14, 1922, and died almost 94 years later on April 22, 2016. According to Justice Sanfilippo, she was autocratic, strong-willed, dominant, and controlling. She was also a skilled stock investor. Gertrude generously donated to charity during her lifetime and provided monetary gifts totaling $14,469,870.00 to her children, Joan Slover and James Rellinger, between 1989 to 2013. At her death, her estate was worth around $21,000,000.00.

[13] Slover v. Rellinger, 2019 ONSC 6497 (Can LII)

Within ten days of her passing, James sued Joan for a declaration that would have the effect of entitling him to all of Gertrude's wealth. Joan responded that Gertrude's wealth should be distributed between them in equal shares.

Gertrude executed wills in February and December 2005 and again in July 2008. Each of these wills provided that Gertrude's estate would pass to her children in equal shares. Each will was supported by an alter ego trust that owned the investment account that held Gertrude's assets. No one challenged the validity of these earlier wills.

In May 2013, Gertrude executed a new will favouring James, gifting him 75% of her estate and leaving Joan with 25%.

In August 2013, James arranged for Gertrude to move from Waterloo to Toronto, closer to him. Over the next 13 months, Gertrude executed 19 documents which, if valid, had the effect of entitling James to all of Gertrude's wealth, entirely excluding Joan.

Joan challenged the validity of the May 2013 will and all documents executed after August 2013 on the basis that Gertrude lacked testamentary capacity. In particular, Joan alleged that Gertrude she was affected by delusions that caused her to erroneously believe that Joan was uncaring, unkind, and inattentive toward her. In addition, Joan maintained that James exerted undue influence over Gertrude from May 2013 onward. Joan's position was that Gertrude's 2008 will was her last valid will and that all documents executed thereafter must be set aside. Under this will, Joan and James were each entitled to 50% of Gertrude's estate.

James contended that Gertrude was lucid and capable up to her death and denied that she suffered from any delusions that influenced her testamentary decisions. James maintained that Gertrude's decision to punish Joan through diminished inheritance had its roots in their often-tense relationship, citing long-past incidents and more recent friction to show that Gertrude had a factual basis on which to disinherit her daughter.

James denied that he unduly influenced his mother. He contended that he arranged for Gertrude's re-location to Toronto out of concern for her well-being and to provide her with additional comfort in the last stage of her life. Further, James asserted that he hired a team of three lawyers

and an on-call capacity advisor at Gertrude's direction, having lost touch with her long-standing Waterloo-based lawyer and financial advisor when she moved to Toronto.

In addition to the dispute over the validity of the estate planning documents, Joan also questioned the validity of the transfer of Gertrude's BMO investment account to James. Joan alleged those assets were held on a resulting trust in favour of Gertrude's estate. James took the position that he inherited the funds pursuant to a right of survivorship that he says he purchased from his mother in an arm's length contract for consideration.

James contended that Gertrude's beliefs about Joan had a basis in fact, even if they were an "unreasonable and capricious conclusion with some very tenuous, illogical or illusory basis." Like Joan, James also relied principally on his own experiences as evidence. However, he also put forward assessments of Gertrude's testamentary capacity made by Messrs. McCarter and Weir in May 2013; evidence of Gertrude's lawyers, Barry Corbin and Ella Mary Agnew; and a testamentary capacity assessment conducted by Dr. You.

In support of her allegation that Gertrude suffered from a delusional disorder, Joan relied mainly on her own experiences. She also put forward evidence medical evidence: from Gertrude' doctor, Dr. Kennel; a contemporaneous capacity assessment performed by Janice Woynarski in May 2013; and a retrospective capacity assessment conducted by Dr. Shulman.

James contended that a retrospective assessment less reliable than a contemporaneous one. James emphasized that Dr. Shulman had not met and assessed Gertrude but rather offered an opinion based on a "paper review" of the records. James went so far as to claim that retrospective assessments constituted "novel science" and should not be admitted. However, in an earlier ruling, Justice Sanfilippo held that the retrospective capacity assessment could be admitted, as it considered "the same issue from a different perspective." Furthermore, retrospective capacity assessments were "far from novel in our courts."

In considering the expert testimony, the court accept Dr. Shulman's eminent qualifications and insightful testimony in principles of geriatric psychiatry. However, the court did not accept his conclusion regarding Gertrude's testamentary capacity. In particular, the court found that Dr. Shulman's conclusion was based on presumed facts that the court did not accept.

At the conclusion of the 22-day trial, Justice Sanfilippo determined that Gertrude had testamentary capacity throughout her life, including when she signed the May 2013 will. The court held that Gertrude gave instructions for the May 2013 will without undue influence. Justice Sanfilippo concluded that the May 2013 will and its related amendment to the alter ego trust were the last valid testamentary documents executed by Gertrude.

However, the court concluded that the post-August 2013 documents that impacted Gertrude's distribution of her wealth were signed while Gertrude was subject to undue influence and were therefore invalid. Justice Sanfilippo also concluded that James held the assets transferred to him by Gertrude, including the BMO investment account, subject to a trust in favour of Gertrude's estate. As a result, James\was required, as estate trustee under the May 2013 will, to distribute those assets 75% to James and 25% to Joan.

PRACTICAL TIPS

Prior to the Assessment

- Incapacity is not solely a result of age, appearance, condition or behaviour: consider all "red flags" that underly the suspicion that the person is incapable
- If a person's capacity is in dispute in the litigation, consider whether SDA section 3 counsel needs to be appointed:
    - Who should seek the appointment of section 3 counsel and at what stage of the proceeding
    - How to best engage with section 3 counsel
    - What preliminary information to share with section 3 counsel
- Before arranging an assessment, consider:
    - The purpose of the assessment

  - How the assessment fits into the theory of the case
  - Whether an assessment is actually necessary
  - How an assessment can be best used in the litigation
  - How the opposing side will react when the assessment is disclosed
  - When to get as assessment
  - Who should be your assessor. The choice will depend on the complexity and nature of the litigation: choose the right assessor
  - Whether you should ask for a verbal report before committing to a formal, written report

- While the SDA defines certain types of capacity assessments, it is now a term of art that extends beyond the SDA. For example, counsel can also get letters of opinion about capacity to instruct legal counsel or to marry, which is not dealt with in the SDA
- Retrospective capacity assessments are usually conducted by a qualified geriatric psychiatrist and require a greater amount of supporting documents, time, and cost to prepare
- Counsel, and not the client, should directly retain and pay the assessor to maintain privilege
- Where a prior assessment exists, unless there are significant deficits with the assessment itself, the court will be reluctant to order another capacity assessment given the intrusive nature of the process. In such cases, counsel may decide to be proactive and control the narrative by organizing an assessment before litigation is commenced (which will depend on the cooperation of the alleged incapable, who maintains a right to refused to be assessed until/unless ordered to undergo the assessment)
- If arranging a contemporaneous assessment, identify language, communication, or disability accommodations that the assessor should be aware of

- If the individual lives with family members involved in the litigation, see if the assess can take place elsewhere or, in the alternative, at a time when the family members are not present

- Consider if there is a particular time of day that is better for the incapable person 's level of energy and alertness (e.g., where the alleged incapable person suffers from "sundowning")

- Efforts should be made to ensure that the incapable person is physically and emotionally comfortable to speak frankly with the assessor in private

Role of the Client/Family Members in the Assessment

- Consider carefully what role, if any, your client will have in preparing the alleged incapable person for the assessment

    - Step back and consider whether the alleged incapable is under, or will be seen as under, the dominion of your client

    - What steps you can take to minimize interference from your client that will likely taint any assessment

- Parties must *not* be involved in any meaningful way in capacity assessments

- Family members involved in the litigation should be not able to coach the individual before the assessment or be present immediately before or during the assessment. Care should be taken to insulate the incapable person from the influence of family/third parties. Where possible, family/third parties should be told to stay away for several days in advance of the assessment

Medical and Non-Medical Records Supporting an Assessment

- A simple family doctor's note that "X no longer has the capacity to manage their property and personal care decisions" will likely not be sufficient in a contested application regarding capacity. In those cases, additional evidence will be needed:

  - Be prepared to reach out to the family doctor to offer some guidance as to what is required in a report. Refer the doctor to the specific tests set out in the SDA

- When gathering medical or non-medical evidence, do not overlook how long, and how best, to gather the following:
  - Personal financial information, including banking and investments records
  - The files of the drafting solicitor(s)
  - Health or medical records
  - Prior assessments

- Do not cherry pick which medical records you send to the assessor or fail to provide the alleged incapable's entire medical files: doing so will likely result in the court ordering a second assessment

- Every document sent to the assessor should be listed in the assessor's report and will be ultimately disclosed to the other side

Scrutinizing the Assessment Report

- A party can ask for the assessor's files. The files should contain how the assessor came to be retained, what documents were received and reviewed, what background information was provided and by whom, whether any cognitive tests were administered by the assessors, any draft reports, and the correspondence with the parties regarding the draft assessment

- In *Moore v. Getahun*,[14] the Ontario Court of Appeal confirmed that draft reports and other communication between counsel and experts are presumptively litigation privileged and shielded from production unless the party requesting disclosure can demonstrate a factual foundation to support a reasonable suspicion that counsel improperly influenced

[14] *Moore v. Getahun*, 2015 ONCA 55

the expert. This will be a heavy burden in most case. Nevertheless, counsel should keep their paper file "thin"

- If obtained during the course of litigation or in the contemplation of litigation, capacity assessments must comply with rule 53 of the *Rules of Civil Procedure* i.e., the requirements for an expert report. Rule 53 does not apply to assessment reports obtained under the auspices of the SDA to declare a person incapable

- When reviewing an assessment report, consider whether the assessor sufficiently probed into the individual's thought process. It is not enough for an assessor to merely record questions asked and answers given

- As far as possible, an assessment should be fair, balanced and well reasoned so as to withstand scrutiny. Among other reasons, this will diminish the likelihood that a second assessment is ordered by the court

- While retrospective capacity assessments are admissible in court, the court will carefully scrutinize such reports before deciding how much weight to put on the report

Costs

- In the course of the court proceeding, the person who initially paid for the assessment will usually seek to recover the cost from the other side or from the incapable person's property. Keep track of all invoices

- In power of attorney disputes, caution should be exercised to ensure that the interests of the person whose capacity is at issue remain paramount

- Where the court finds that the dispute has nothing to do with the incapable person's best interests, the court will not award costs to be paid out of that person's assets. In such cases, not only will the parties be unable to recover their fees from the incapable person's assets, they may also be directed to pay the costs of SDA section 3 counsel