

## CAPACITY ASSESSMENTS – PRACTICAL TIPS<sup>1</sup>

### 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

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- 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*,<sup>2</sup> 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 the expert. This will be a heavy burden in most cases. 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

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<sup>2</sup> *Moore v. Getahun*, 2015 ONCA 55

- 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