A Practical Guide to Capacity Assessments

The Who/What/Where/When/Why and How

By Angela Casey[1]

When the central issue in litigation is whether a person is capable or not, a capacity assessment can be an invaluable tool to assist the Court in making that determination. However, such an order is (and should be) difficult to obtain. To adopt the words of Justice Pattillo in *Flynn et al v. Flynn*[2], a capacity assessment is "an intrusive and demeaning process" with profound implications for the individual whose capacity is at issue. Moreover, a finding of incapacity will necessarily result in a loss of liberty for the individual – including, potentially, the loss of freedom to choose where to live, how to spend money, what to eat and what medical treatments to undergo. In *Re: Koch*[3], Justice Quinn compared the "formidable mechanisms" of the *Health Care Consent Act*[4] and the *Substitute Decisions Act*[5] to the tenets of criminal law. A person facing criminal charges will be afforded the full protections of the Charter, including the right to counsel and a trial before facing a loss of liberty. By contrast, a person can lose his or her liberty by virtue of a finding of incapacity following an interview process akin to a trial "for which the family member has no preparation and at which he or she sits alone at the counsel table"[6].

In this paper, I first examine the case law decided under section 79 of the SDA and section 105 of the *Courts of Justice Act*[7] to explore when the court will order a capacity assessment. In the following sections, I will discuss what types of evidence should be adduced in an application to secure a capacity assessment, what information should be addressed in the court order providing for the assessment, some practical tips on retaining a capacity assessor, including what information should be provided to the capacity assessor, and some fertile grounds for challenging capacity assessments, based on the case law that has developed under the SDA and the HCCA.

When will a Court Order a Capacity Assessment?

Section 79 of the SDA

By virtue of section 78 of the SDA, a person has the right to refuse a capacity assessment, and the capacity assessor must, at the outset of the interview, inform the individual of this right. If a capacity

assessment is refused, section 79 of the SDA permits the court to order that a person be assessed over his or her objection. It provides:

> 79(1) If a person's capacity is in issue in a proceeding under this Act ***and*** the court is satisfied that there are reasonable grounds to believe that the person is incapable, the court ***may***, on motion or on its own initiative, order that the person be assessed by one or more assessors named in the order, for the purpose of giving an opinion as to the person's capacity. [emphasis added]

Note that section 79 contains two pre-conditions before a court can order an assessment. First, the person's capacity must be at issue in a proceeding under the SDA. Second, the court must find that there are reasonable grounds to believe that the person is incapable. Moreover, the section is permissive rather than mandatory. A court could find that both pre-conditions exist and still decline to order the capacity assessment.

In the case law developed under section 79 of the SDA, it appears that the court will exercise its discretion to order a capacity assessment only when to do so will further the purpose of the SDA, namely, the protection of vulnerable people. It should not be ordered simply to provide family members and the court with certainty:

> Although the utility of a capacity assessment cannot be understated, it is important to resist the temptation to order an assessment based on the argument, 'it can't hurt'. It can hurt.[8]

It is also inappropriate to order a capacity assessment in order to rebut an allegation of incapacity. To do so would reverse the onus specified in section 79 of the SDA and fail to properly give effect to the presumption of capacity in section 2 of the SDA.[9]

In short, a capacity assessment "should only be ordered where a case has been made out, on reasonable grounds and the court is satisfied that this intrusive measure is necessary to ensure that a potentially vulnerable person is protected."[10]

In *Neill v. Pellolio*[11], the Ontario Court of Appeal considered the court's jurisdiction to order a capacity assessment. In that case, Mrs. Pellolio suffered from Parkinson's disease, and consented to treatment that included the insertion of a permanent feeding tube. Mrs. Pellolio's daughter disagreed with this course of treatment, pointing to Mrs. Pellolio's written power of attorney document, which had

expressed a wish that no artificial means be used to keep her alive. The Court found that there was no jurisdiction to challenge or appeal the mother's treatment decision, since Mrs. Pellolio consented to the treatment and her doctor considered that consent to be informed. In other words, the doctor considered Mrs. Pellolio to be capable, such that the mechanisms of the *Health Care Consent Act* for substitute decision making were not triggered.

The daughter asked for an order (i) requiring her mother to submit to a capacity assessment and (ii) providing her with visitation rights to see her mother. The daughter's application did not seek to become guardian for her mother under the *SDA*. Rather, she simply sought an order under section 79(1) requiring her mother to submit to a capacity assessment. The Court of Appeal confirmed that there is no jurisdiction to order a capacity assessment absent some type of underlying application for guardianship of personal care[12] or property[13], to vary a statutory guardianship,[14] or to review a finding of incapacity[15]. A capacity assessment pursuant to section 79 of the SDA is not available as "stand-alone" relief.

In *Abrams v. Abrams*[16], Justice Strathy considered whether to order capacity assessments of 92 year old Philip Abrams and Philip's wife of 58 years, Ida. Philip and Ida's three children, Stephen, Elizabeth and Judith, were involved in a bitter dispute over who should control their parents' assets. Stephen brought an application to be appointed as Ida's guardian of property. He alleged that Ida's power of attorney for property in favour of Philip and Judith was invalid because Ida lacked the capacity to grant it. Stephen also argued that that both Judith and Philip were unsuitable attorneys for Ida. To support this argument, Stephen made various allegations against Judith and contended that Philip himself was incapable, making him an unsuitable attorney for Ida.

Factors Applicable Under Section 79 of the SDA

As part of his application, Stephen sought to have both of his parents assessed pursuant to either section 79 of the SDA or section 105 of the CJA. Applying section 79 of the SDA, Justice Strathy provided the following helpful summary of factors to be considered when exercising the court's discretion to order an assessment:

(a) The purpose of the SDA;
(b) The terms of section 79, namely:
    a. The person's capacity must be in issue; and
    b. There are reasonable grounds to believe that the person is incapable;

(c) The nature and circumstances of the proceedings in which the issue is raised;

(d) The nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation;

(e) If there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached;

(f) Whether there are flaws in 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;

(g) Whether the assessment will be necessary in order to decide the issue before the court;

(h) Whether any harm will be done if an assessment does not take place;

(i) Whether there is any urgency to the assessment; and

(j) The wishes of the person sought to be examined, taking into account his or her capacity.

Applying these factors, Justice Strathy declined to order an assessment of Ida. He found that there was substantial independent professional evidence that Ida was capable of granting a power of attorney at the relevant time. There was no evidence to suggest that the expert reports were flawed or that the processes followed by the experts were inappropriate. Anecdotal evidence from Stephen and Elizabeth alleging that Ida was incapable was weighed in light of their self-interest in a finding of incapacity. Justice Strathy considered that Ida did not wish to be examined and found that she was not at risk. Finally, the Court was not convinced that a current capacity assessment would be probative of Ida's capacity two years earlier, given the progressive nature of her Alzheimer's disease.

Given that Philip's capacity was not at issue in any SDA proceeding, the Court found that there was no jurisdiction under section 79 of the SDA to order him to be assessed.

Section 105 of the CJA

Section 105 of the Courts of Justice Act provides as follows:

> (2)Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, ***may*** order the party to undergo a physical or mental examination by one or more health practitioners.

Idem

(3)Where the question of a party's physical or mental condition is first raised by another party, an order under this section ***shall not be made unless*** the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation. [emphasis added]

This section distinguishes between litigation in which a party puts *his or her own mental condition* at issue (commonly the case in personal injury claims) and the situation where a litigant puts *another party's mental condition* at issue. The test is appropriately more difficult in the latter situation. It requires the party alleging incapacity to show (a) that the mental condition of the other party is relevant to a material issue AND (b) that there is good reason to believe that there is substance to the allegation. Both pre-conditions must be met before the court has jurisdiction to order an assessment under section 105. Even if both pre-conditions are met, it is within the court's discretion whether to order the assessment.

In *Abrams*, Stephen's counsel argued that section 105 of the CJA should have been available to order an assessment of Philip, who was not the subject of an application under the SDA. On the hearing of the application, Justice Strathy found that it was unnecessary to consider the issue because even if a capacity assessment *was* available under the CJA, he would not have ordered one.

Stephen sought leave to appeal. In reasons dismissing the leave motion[17], the Divisional Court considered Stephen's complaint that section 105 of the CJA should have been available to him to help "level the playing field" by allowing him to have Ida's and Philip's capacity assessed. The Court examined the different policy considerations underlying section 105 of the CJA and the SDA. While the former is aimed at fostering fair trials as between litigants, the latter is aimed at protecting the vulnerable. Section 105 of the CJA replaced section 77 of the *Judicature Act* and was meant to address the unfairness to a defendant when a plaintiff seeking damages against him refused to consent to a medical assessment. By contrast,

> An application under the SDA for a declaration of incapacity, however, is a proceeding of a different species if not a different genus. The person whose capacity is in issue does not seek monetary redress from another. An application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the

> most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.[18]

The Divisional Court therefore concluded that when the legislature enacted section 79 of the SDA, it "occupied the field" and sections 105 (2) and (3) of the CJA do not apply in circumstances where a declaration of incapacity is sought to facilitate substitute decision making.

The court's jurisdiction to order a capacity assessment under section 105 of the CJA was also considered in *Re: Ranieri Estate*[19]. Tony Ranieri brought a motion to have his brother John's capacity assessed. John's nieces were acting as John's attorneys for personal care and property. In litigation between the nieces and Tony, the nieces proffered certain evidence about what they claimed were John's wishes. Tony argued that John was incapable of expressing those wishes and that John was being influenced by the nieces. Tony submitted that it was unfair for the nieces to offer hearsay evidence about John's wishes without evidence that John was incapable of giving evidence himself.

Tony brought a motion seeking a capacity assessment of John. The nieces argued and the judge accepted that since there was no underlying application under the SDA, a capacity assessment was not available under section 79 of the SDA. The Court then considered whether a capacity assessment should be ordered under section 105 of the CJA. The decision appears to have hinged on how to characterize the real issue before the Court: was it (as Tony submitted) primarily about trial fairness, or was it (as the nieces submitted), primarily about John's health care and living arrangements? The judge concluded that since the issue was essentially one involving John's capacity to make decisions regarding his health care, the issue falls under s. 79 of the SDA and there was no jurisdiction to grant the relief under section 105 of the CJA. The decision seems to imply that if the judge had agreed with Tony's characterization (that his motion was really aimed at achieving trial fairness), an assessment under section 105 may have been available as a remedy.

The decision in *Perino v. Perino*[20] also suggests that the application of section 105 of the CJA is quite narrow. The case involved a custody dispute over Marisa Perino, an adult child in her mid-20s with an intellectual disability. Marisa lived with her father and had become alienated from her mother. The father retained counsel to represent Marisa in the custody proceedings. Through her counsel, Marisa asked to be added as a party and expressed her view that she wished to live with her father. The mother argued that the father was manipulating Marisa and had deliberately poisoned the mother/daughter relationship. As a consequence, the mother brought a motion requesting, *inter alia*,

an assessment of Marisa's capacity pursuant to section 105 of the CJA and the appointment of a litigation guardian for Marisa.

In response to the mother's motion to have her capacity assessed, Marisa sought to remove herself as a party. This, the Court found, would deprive it of the jurisdiction to order an assessment under section 105 of the CJA, which applies only to **parties** to a proceeding. Ironically, the mother herself had brought a motion to remove Marisa as a party, apparently not appreciating that if Marisa were to be removed as a party, an assessment of Marisa would no longer be available. While Marisa's removal as a party rendered the issue moot, Justice Murray nevertheless went on to consider whether an order under section 105 of the CJA could have been made in the circumstances.

The Court found that section 105 had no application in the circumstances of the *Perino* case. To meet the test in section 105(3), the moving party must prove that mental condition of another party is relevant to an issue in the proceedings, but also that there is "good reason to believe" that the person's mental condition is in question. Justice Murray considered Marisa's mental condition not in a general sense, but with reference to the particular issue she wished to weigh in on: namely, which of her parents should have custody of her. Justice Murray highlighted that a person could be capable of making decisions in some areas, and not capable of making other types of decisions. Assuming without deciding that Marisa's mental condition was relevant to a material issue in the proceeding, the Court found that there was insufficient evidence to substantiate the allegation that Marisa was unable to understand the issue of custody. Moreover, she would not be called upon to decide custody, but merely to express her wishes to the Court.

Justice Murray concluded that even if he had found that Marisa was incapable of understanding the issue of custody and its implications, as her mother alleged, he would nevertheless have found it inappropriate to order a capacity assessment under section 105 of the CJA. Marisa was not a party to the proceeding and made no claim against either party. Section 105 of the CJA, the Court held, was not intended to provide the court with jurisdiction to order a medical examination of a child of the marriage in custody proceedings under the *Divorce Act*. Quoting from the commentary in Rule 33 regarding the nature and purpose of section 105 of the CJA as follows, Justice Murray wrote:

> The intent of s. 105 and this Rule is to assure that if a party raises an issue as to his or her medical condition, the allegation can be tested under fair conditions by the opponent. If the issue is raised by one party as to the opponent's mental or physical

> condition the court scrutinizes a request for examination more closely to ensure that the intrusion is justified; the allegation must be relevant to a material issue and it must have substance (see s. 105(3)).[21]

In *Rishi v. Kakaoutis*[22], the Court considered a motion by the plaintiffs to require the defendant to be represented by a litigation guardian, in accordance with Rule 7 of the *Rules of Civil Procedure*. The plaintiffs alleged that the defendant was a party under disability as defined in Rule 1.03 of the *Rules*.[23] As part of the relief sought, the plaintiffs asked for an order requiring the defendant to submit to a capacity assessment for the purpose of determining whether he was a party under disability.

The judge ordered a capacity assessment to determine whether the defendant was a party under disability in the proceeding. Applying the test in section 105(3) of the CJA, the Court found that the defendant's capacity was at issue in the proceeding by virtue of the plaintiffs' motion for a litigation guardian. Furthermore, based not only on the material filed in the application, but also on the defendant's behavior during the hearing, the Court found that there was good reason to believe the substance of the allegation that the defendant was party under disability. As such, the requirements of section 105 (3) of the CJA were met.

Gathering Evidence

Evidence to Support a Court-Ordered Assessment

A litigant who wishes to obtain a court-ordered assessment faces the classic catch 22: it is difficult to prove that someone lacks capacity without a formal capacity assessment, but a capacity assessment will not be ordered without reasonable grounds to suggest that the person is incapable. So what kind of evidence can a litigant put before the court in support of a request for a capacity assessment?

Medical Records: A medical diagnosis of a condition affecting mental capacity will be relevant, although not determinative. Litigants often wrongly assume that once someone is diagnosed with dementia, a finding of incapacity will necessarily follow. However, it is possible to be diagnosed with a disease such as Alzheimer's and retain all or some decision making capabilities. With that caveat, medical evidence establishing any kind of dementing process or delirium will be very useful and relevant. Consider as well putting in evidence of the various medications prescribed to the individual. Clinical and nursing notes can also be helpful in establishing anectodal evidence of cognitive decline.

One of the most common tests of cognition is the Mini Mental Status Examination. It requires the person to complete a series of tasks aimed at testing memory, arithmetic, orientation and spatial perception. The test produces a score out of 30. MMSE scores, while relevant, are not determinative, particularly without evidence linking the scores to the applicable legal test. By way of example, in *Urbisci v. Urbisci*[24], the Court refused to order a capacity assessment of Maria Urbisci. Although Maria suffered from a brain tumour and had scored 18/30 on an MMSE (indicating moderate cognitive impairment[25]), the Court was not convinced that there were reasonable grounds to believe that Maria was incapable.[26]

Paper Review: Consider having a certified capacity assessor do a "paper review" of the available medical evidence in order to provide an opinion as to whether there are reasonable grounds to suggest that the person is incapable.

Cross-Examination: Keep in mind that if the person alleged to be incapable has sworn an affidavit attesting to his or her own capacity, an adverse inference could be drawn if you fail to cross-examine on it. In *Park v. Park*[27], Mrs. Park sought a divorce from her husband of 60 years. She was supported by four of her five children. Mr. Park, with the support of their other child, alleged that Mrs. Park was incapable, sought to have himself appointed as her guardian, and sought to have her capacity assessed under section 79 of the SDA. Mrs. Park swore an affidavit in which she claimed to be mentally competent. Justice Turnbull commented on the failure by Mr. Park to cross-examine:

> I have further considered the fact that none of the respondents was cross-examined on his/her affidavit, particularly Mrs. Park. I would have thought that if she did lack capacity, that might have been made fairly evident by asking her concise, simple questions directed at the essential elements of her capacity to instruct counsel, to manage her property, and to attend to matters of personal care.[28]

In *Abrams*, Stephen, who sought to have his father Philip assessed, had his lawyer cross-examine Philip on his affidavit. Although the transcript of Philip's cross-examination debatably revealed certain memory lapses, Justice Strathy was not persuaded by reading the transcript as a whole that there was reason to doubt Philip's capacity[29].

Affidavit Evidence: Affidavit evidence needs to be sufficiently detailed and specific in order to be persuasive. Frequently, affidavits in support of a request for a capacity assessment contain blanket statements such as "I have noticed that Mother is very forgetful." There is a very big difference

between forgetting to turn the stove off once in a while and forgetting the names of one's children. Provide specific examples of what the person has forgotten and why forgetting that information is cause for concern. Back up statements in the affidavit with documents if possible. For example, instead of simply stating that an affiant believes that Father is having difficulty balancing a chequebook, exhibit the chequebook register.

Focus on the harm that the affiant is concerned about protecting the vulnerable person from. The case law suggests that a court will exercise its discretion to order a capacity assessment when its purpose is to protect the vulnerable from harm. The evidence in 'dueling power of attorney' or competing guardianship applications involving a vulnerable parent often descends into a mud-slinging battle between siblings trying to prove to the court who is the better son/daughter. This is unhelpful. The focus needs to be on the harm that could ensue to the parent if the assessment is not ordered.

In *Abrams v. Abrams*[30], Justice Strathy pointed out that guardianship litigation differs from private litigation in that "the interests that [SDA] proceedings seek to balance are not the interests of litigants, but the interests of the person alleged to be incapable as against the interest and duty of the state to protect the vulnerable".[31] This is important. Children warring for control over their vulnerable parents' assets naturally see the issues through their own particular fairness lens. However, it is not the function of the court on guardianship applications to consider what would be fair to prospective guardians, attorneys, or heirs. The duty of the court is to protect the alleged incapable person.

Affidavit evidence is going to carry more weight if it is from disinterested persons who are in frequent contact with the person alleged to be incapable. If the party seeking a capacity assessment has an obvious financial incentive to a finding of incapacity, this will affect the weight to be given to his evidence. Consider adducing evidence from a family physician, accountant, business partner, financial advisor, neighbour, home care worker, spiritual advisor, or extended family member – anyone who is likely to have had meaningful interactions with the individual over a prolonged period of time and who has nothing to lose or gain depending on whether the person is found incapable.

Evidence To Resist a Capacity Assessment

The same types of evidence will be useful to the party seeking to resist a court-ordered capacity assessment. You will want to show that there would not be any harm in foregoing a capacity assessment (for example, because the person's finances are already being managed by someone under a fiduciary obligation to protect that person's interests).

Typically, a capacity assessment will focus on the person's capacity to execute a particular document at a particular time. In the case of a progressive disease, a current capacity assessment will be of little or no utility in establishing the person's capacity years or months earlier. You will want to try to lead any evidence you have that a further capacity assessment would be of little or no probative value. You should also consider submitting evidence from the lawyer who drafted the document at issue. Typically, evidence from the drafting solicitor about how and why she satisfied herself as to capacity, particularly when supported by detailed notes, will be accorded a great deal of weight.

One important strategic decision when faced with a motion or application for a court-ordered capacity assessment is whether the person should submit to one on his or her own. If so, document very carefully your discussions with the client and ensure that he or she understands the nature and consequences of submitting to a capacity assessment. Another difficult and important strategic consideration is whether to have the alleged incapable person swear an affidavit. Such an affidavit can be very powerful evidence, but there are risks that certain memory or other deficits could be revealed on cross-examination.

Scrutinizing a Capacity Assessment

If you are acting for someone who wishes to appeal a finding of incapacity, or a party who seeks a new capacity assessment, you will want to demonstrate that the existing capacity assessment contains a fundamental flaw.

In *Re: Koch*[32], one of the earliest decisions to consider capacity assessments under the SDA, Justice Quinn underscored the importance of explaining to the individual being assessed the significance and consequences of a finding of incapacity – namely, the immediate loss of liberty and freedom to live how one chooses. Section 78 (2)(b) of the SDA requires a capacity assessor to provide this information to the person at the outset of the interview and to inform the person of her right to refuse the assessment. In *Re: Koch*, the Court found that the assessor bears the burden of demonstrating that this was done and therefore must take meticulous notes regarding the warning. Although strictly *obiter*, Justice Quinn found that the failure to provide this warning will render the assessment a nullity.[33]

In *Re: Koch*, Justice Quinn found serious flaws in a capacity assessment of a woman suffering from Multiple Sclerosis. The Court allowed Ms. Koch's appeal from a finding of incapacity by the Consent and Capacity Board and, in separate reasons, ordered costs against the capacity assessor.

The assessment took place at the request of the woman's estranged husband during a period when the two of them were undergoing divorce proceedings. The Court was critical of the assessor's apparent willingness to act on information from the estranged husband, stating that "an assessor must be alive to an informant harbouring improper motives."[34]

Justice Quinn also found fault with the fact that the assessor seemingly dismissed certain statements by Linda Koch as delusional without taking any steps to corroborate her answers from independent sources. A capacity assessor should seek out corroborating information to confirm the accuracy of statements made by the individual during the assessment.

Another principle that emerged from the *Re: Koch* decision is the need for a capacity assessor to probe the reasons behind decision making, rather than simply making value judgments about whether someone's decisions are appropriate.[35] The assessor seemed to believe that Ms. Koch's spending was inappropriate, but he failed to fully explore her thought process behind her spending. For example, in the context of divorce proceedings where she could reasonably expect to be entitled to an equalization and support, there may have been good reason for her to believe that her spending was, in fact, appropriate. Moreover, even if Linda Koch's spending habits could fairly be described as foolish, "the right to be foolish is an incident of living in a free and democratic society."[36] An assessor must not subjectively assess a person's capacity by measuring the person's decisions against the subjective values and personal beliefs of the capacity assessor.

In *Forgione v. Forgione*[37], Justice Ferguson ordered a second capacity assessment where the first assessment did not comply with the Guidelines for Capacity Assessments[38] and lacked appropriate detail:

> I am concerned about the adequacy of the assessment by Dr. Dief. The court does not know what background information the doctor had or what, if any, influence anyone other than Marcel Forgione [the person being assessed] may have had on the process. The report is very brief and for the most part consists of conclusions without any analysis. There is no mention of the troubling feature of the evidence I shall discuss below. There is no mention of the fact that Marcel Forgione is unable to read or write. Dr. Dief is not a qualified capacity assessor and his report does not follow the Guidelines[39]

A common flaw in evidence led to prove incapacity is that while it details, in narrative form, certain aspects of the individual's behaviour, the evidence fails to make the connection between the behaviour and the applicable legal test for capacity. In *Flynn*, for example, Justice Pattillo underscored the importance of connecting the impugned behaviour to the applicable legal test. In Flynn, he found that although Mrs. Flynn had been diagnosed with dementia, hallucinations and possible stroke, this did not establish reasonable grounds on which to conclude that she was incapable of managing property. [40]

The Court Order

It is a good idea to address the following in the court order providing for the assessment:

- Who will conduct the capacity assessment?
- Where and when will the capacity assessment take place?
- What specific capacity will the assessor test for?
- To whom will the capacity assessor's findings be addressed and who will the findings be delivered to and shared with?
- In cases where the vulnerable individual has come under the control and influence of another, it may be appropriate to seek an order requiring that the assessment take place without the presence of the 'influencer' and to limit the influencer's communications with the capacity assessor. However, most experienced capacity assessors will be alive to the issue of undue influence and take steps to probe for it.
- Who will pay the assessor's fees? I would suggest that since a capacity assessment will only be ordered if it is necessary to protect the interests of the alleged incapable person, it will most often be appropriate to order that the costs be paid from the incapable person's assets.
- The court has the ability to order certain ancillary relief to ensure that the person complies with the assessment, including an order that the person be apprehended by a police officer and taken into custody to be assessed. However, this will only be ordered when there is no less intrusive means to accomplish the assessment[41], so it would rarely be appropriate to seek this relief at first instance.

Retaining the Capacity Assessor

Type of Capacity Assessment Required

The first thing to consider before retaining a capacity assessor is the type of capacity assessment that will be required. One is not either 'capable' for all purposes or 'incapable' for all purposes. A person can be capable of making some decisions and incapable of making other types of decisions. Each decision-making capability has its own test. In some cases, the test is set out in legislation. In others, the test has been developed in the common law. Only ask for an assessment of the capacity that is at issue in the circumstances. Summarized below are some of the more common spheres of capacity, along with where to locate the applicable test.

- Capacity to appoint an attorney for property: section 8(1) of the SDA
- Capacity to appoint an attorney for personal care: section 47 of the SDA
- Capacity to revoke a power of attorney for property: section 8(2) of the SDA
- Capacity to Manage Property: section 6 of the SDA
- Capacity to Make Personal Care Decisions: section 45 of the SDA
- Capacity to Instruct Counsel: see, for example, *Osadet v. Pauciuc*, 60 C.P.C. (6th) 52, at paragraphs 13 to 15.
- Capacity to Make a Gift: see, for example, *Robertson v. Hayton*, 4 E.T.R. (3d) 115 (S.C.J.)
- Capacity to Make a Will: see, for example, *Banks v. Goodfellow* (1870)LR 5 QB 549
- Capacity to Swear an Oath: see, for example, *Vokes Estate v. Palmer* (Litigation Guardian of), 87 C.P.C. (6th) 354 at paragraph 20.

Keep in mind that a guardianship for personal care can be full or partial. The court must decide whether the individual can make some or all of his or her own decisions regarding health care, nutrition, shelter, clothing, hygiene or safety. Section 58(3) of the SDA requires every guardianship order for personal care to specify whether the guardianship is full or partial. Consequently, if you are obtaining a capacity assessment for the purpose of having a guardian for personal care appointed, make sure that your capacity assessor addresses each of the specific areas listed in section 45 of the SDA. Commonly, a person may be capable of making her own hygiene and nutrition decisions, for example, but not capable of making a medically complex decision. A functional assessment of daily living activities may be a helpful tool to the court in such circumstances.[42]

Capacity Assessor

First, ensure that your proposed assessor is a certified capacity assessor pursuant to the SDA regulations. In *Forgione*, the Court ordered an assessment of Marcel Forgione over his objections that

he had already been examined by a psychiatrist for two days. Marcel had produced the psychiatrist's report in support of his position that he was capable. The Court, however, expressed concerns over the psychiatrist's report, noting that the doctor was not a qualified capacity assessor and his report did not follow the Guidelines.

The Court also expressed concern that the capacity assessor did not address certain troubling facts, including Marcel's isolation from certain family members and the exclusive nature of his relationship with one of his daughters, his pattern of making a succession of different wills and powers of attorney, his inconsistent statements about his wishes, and some suspicious dealings with his property.

If at all possible, try to use a capacity assessor who speaks the same language as the person being assessed.

Place for Assessment

Give some consideration as to where the capacity assessment should take place. The location should be somewhere that is familiar and comfortable to the person being assessed. Section 79(4) of the SDA provides that if possible, the assessment should take place in the person's home.

In *Ontario (Public Guardian and Trustee) v. Somberg*[43], the Public Guardian and Trustee applied for guardianship in order to assist a man suffering from mental illness to access the employment benefits to which he was entitled. The man was living in a homeless shelter. His employer, the Canadian Security Intelligence Service, contacted the PGT's office and advised that if he were to undergo an Occupational Health Assessment Report, he would qualify for a disability pension from CSIS. Mr. Somberg had refused to undergo either the Occupational Health Assessment Report or a capacity assessment. The PGT therefore asked for an order requiring Mr. Somberg to submit to a capacity assessment. Notably, the Court ordered that the capacity assessment take place at the homeless shelter where Mr. Somberg resided from time to time. The PGT later sought guardianship and an order, *inter alia*, requiring Mr. Somberg to attend a hospital for the necessary occupational assessment. The Court declined to make the order requested, and instead ordered the occupational assessment to take place at the same homeless shelter where the capacity assessment had been performed.

Explore What Accommodations May be Necessary for the Assessment

Try to make sure that the conditions for the assessment are optimal. An individual's abilities, concentration and energy may vary depending on the time of day and other conditions. In *Penny v.*

Bolen[44], the Court considered a capacity assessment performed at the behest of Mrs. Bolen's children right after the respondent had travelled five hours without eating or resting. Mrs. Bolen attested that at the time of the assessment, which found her incapable of managing her property, she was "completely frazzled and exhausted". The mother submitted herself to a second capacity assessment for which she was well rested and fed. The second capacity assessor found that the mother was capable of managing her property and capable of granting a power of attorney.

Explore whether accommodations will be required for the assessment. Inform the assessor in advance of any speech, vision or hearing impairments and how they should be accommodated (ie hearing aids, glasses, large type, etc).

Keep in mind that a capacity assessment should not become a test of an individual's memory. Depending on the decisional ability being probed, a person with memory deficits could still be capable. In *Bon Hillier v. Milojevic*[45], the Court allowed an appeal of the Consent and Capacity Board's finding that Mr. Bon Hillier was incapable of managing property. Considering the underlying capacity assessment, the Court commented:

> One further aspect of the assessment and hearing requires elaboration. As noted above, when Mr. Bon Hillier met with Ms. Milojevic [the capacity assessor], he had no glasses and his computer had been stolen while he was a resident at a homeless shelter. He still did not have a new computer by the time of his hearing before the Board. These were both significant matters. Ms. Milojevic did her best to accommodate Mr. Bon Hillier's visual problems. However, Mr. Bon Hillier uses his computer as an aid to compensate for some of the repercussions from his injury, especially as it relates to memory problems…..when Mr. Bon Hillier appeared before me, he used an IPad, which seemed to help him better organize his thoughts and his presentation.[46]

The case suggests that it may be appropriate to provide tools to the person being assessed in order accommodate a memory problem.

In *Urbisci,* Maria Urbisci, who suffered from a brain tumour, sought a divorce from her husband of several decades. Her husband, supported by one of her daughters, brought an application for a court-ordered capacity assessment. Due to her medical condition, Maria suffered from expressive aphasia, or the loss of ability to understand or express speech owing to brain damage. She had difficulties in her verbal expression, including agrammatic speech and an inability to repeat sentences longer than four

words each. However, when asked a series of yes/no questions, she was found to be highly reliable and able to express her wishes and preferences.

Maria arranged to be assessed by a capacity assessor who found that she was capable of making property decisions, granting a power of attorney, and capable of making a will. In conducting her interview of Maria, the capacity assessor used a technique called "supportive conversation" to accommodate Maria's speech difficulties.

Despite a report by Dr. Silberfeld critiquing the findings of Maria's capacity assessor, Justice Brown declined to order that Maria be assessed, finding that there were no reasonable grounds to believe that Maria was incapable. Accordingly, section 79 of the SDA was not satisfied.

What to Provide the Capacity Assessor

You should provide written instructions to the capacity assessor identifying the capacity to be tested and the date for which capacity is to be assessed.

If the test for capacity is not one that is set out in the SDA, you should consider whether to provide the capacity assessor with the applicable legal test. Ask your assessor if he or she has experience testing for the particular decisional ability. In some cases, the assessor will be familiar with the applicable law (most would be familiar with the test from *Banks v. Goodfellow* for capacity to make a will, for example), but other common law tests may be less widely known (capacity to swear an oath, capacity to instruct counsel, capacity to make a gift, for example). You should consider providing the applicable case law to the capacity assessor along with your retainer letter.

You should provide some basic information about the person's age, health, background, marital status and preferred language of communication and anything else that could impact the individual's cognition or behaviour during the assessment. You should also explain the purpose of the assessment and the factual background that led to the request or order for the capacity assessment. If the capacity assessment occurs in the context of existing litigation, you should provide the capacity assessor with a copy of all pleadings and/or affidavit material filed.

If there are particular transactions or incidents that led to questions of capacity, these should be described in detail to the assessor and should be explored during the assessment. For example, it is not uncommon for a capacity assessment to be prompted by a transfer of title to the family home from an

elderly parent to one of his/her children. In that case, it would be helpful to provide the assessor with the documentation surrounding the transfer to be explored with the person being assessed.

Particularly if testing for the capacity to manage property, the assessor should be provided with the relevant financial information – asset summaries, bank statements, mortgage and expense information, for example, to review with the individual being tested.

You should detail whether any accommodations will be required and highlight any medical or psychological conditions that could impact on the assessment. You should provide the capacity assessor with any available medical records which are relevant.

The capacity assessor should also be invited to meet separately with family members or someone else who is close to the individual in order to obtain information to corroborate answers provided by the individual during the assessment.

Who Should Be There

An individual being assessed has the right to have counsel or a friend or family member present with her during an assessment.[47] However, if the assessment arises in the context of litigation, the presence of one of the litigants at the capacity assessment is almost certain to draw criticism. In some cases, the court may preclude one or more of the parties from communicating with the assessor or attending the assessment. If you are unable to find a qualified capacity assessor who speaks the same language as the person to be assessed, arrange for a qualified translator, who will be in a position to state that (s)he provided verbatim translations of the person's answers and did not help coach the individual during the assessment.

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[2] *Flynn et al. v. Flynn* December 18, 2007, unreported, Ont. S.C.J. Court file no. 03-66/07 ("*Flynn*")
[3] Re: Koch (unreported) 1997 CanLII 12138 (ONSC) (Ont. Gen. Div.) ("*Re: Koch*")
[4] *Health Care Consent Act,* 1996, S.O. 1996, c. 2 ("HCCA")
[5] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 ("SDA")
[6] *Re: Koch* at paragraph 89, point 2(j)
[7] *Courts of Justice Act,* R.S.O. 1990, c. C. 43 ("CJA")
[8] *Kischer v. Kischer*, unreported, 2009 CarswellONt. 81 (Ont. S.C.J.) ("*Kischer*") at paragraph 10.
[9] *Zheng v. Zheng*, 2012 ONSC 3045 at paragraph 34, 37 (Ont. Div. Ct.)
[10] *Kischer*, at paragraph 10.
[11] *Neill v. Pellolio*, 43 E.T.R. (2d) 99, 110 A.C.W.S. (3d) 185

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[12] See sections 55 and 62(3.1)of the SDA
[13] See sections 17, 22 and 27 (3.1) of the SDA
[14] See sections 20.3, 26, 27(9.1), 28 61, 62(11) and 63 of the SDA
[15] See section 20.2 of the SDA.
[16] *Abrams v. Abrams*, unreported, 2008 CanLii 67884 (S.C.J.) ("*Abrams*")
[17]*Abrams v. Abrams*, 2009 CarswellOnt 1580, 247 O.A.C. 380 (Ont. Div. Ct.)
[18] *Ibid.* at paragraph 56.
[19] *Re: Ranieri Estate*, unreported, 2009 CarswellOnt 6658 (Ont. S.C.J.)
[20] *Perino v. Perino*, unreported, 2008 CanLII 11048 (ON SC) ("*Perino*").
[21] *Perino,* at paragraph 41.
[22] *Rishi v. Kakaoutis*, 210 A.C.W.S. (3d) 610, 76 E.T.R. (3d) 39
[23] Rule 1.03 of the *Rules of Civil Procedure* defines "disability" as follows:
'disability', where used in respect of a person, means that the person is (a) a minor, (b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not, or (c) an absentee within the meaning of the *Absentees Act*
[24] *Urbisci v. Urbisci*, 2010 ONSC 6130, 67 E.T.R. (3d) 43 ("*Ubrisci*").
[25] *Urbisci,* at paragraph 34.
[26] *Urbisci*, at paragraph 83.
[27] *Park v. Park,* unreported, 2010 ONSC 2627 (S.C.J.) ("*Park*")
[28] *Park,* at paragraph 46.
[29] *Abrams*, at paragraph 62.
[30] *Abrams*
[31] *Abrams,* at paragraph 48.
[32] *Re: Koch*, at paragraph 89, point 6.
[33] *Re: Koch*, at paragraph 89, point 6
[34] *Re: Koch*, at paragraph 89, point 5.
[35] *Re: Koch* at paragraph 89, point 9.
[36] *Re: Koch,* at paragraph 58.
[37] *Forgione v. Forgione,* 2007 CarswellOnt 3197 (S.C.J.) ("*Forgione*")
[38] See the Guidelines for Conducting Assessments of Capacity, Capacity Assessment Office: Ontario Ministry of the Attorney General, May 2005 (available on the Ministry's website at http://www.attorneygeneral.jus.gov.on.ca)
[39] *Forgione*, at paragraph 3.
[40] *Flynn*, at p. 3
[41] SDA, s. 81
[42] In *Kischer v. Kischer*, unreported, 2009 CarswellOnt 81, Justice Strathy ordered that Daisy Kischer attend both an assessment by a doctor of her capacity to manage her property and her capacity to make personal care decisions and a functional capacity assessment by a social worker as regards Ms. Kischer's ability to perform the activities of daily living.
[43] *Ontario (Public Guardian and Trustee v. Somberg*, 2012 ONSC 3078, 215 A.C.W.S. (3d) 995
[44] *Penny v. Bolen*, unreported, 2008 CarswellOnt 5644 (S.C.J.)
[45] *Bon Hillier v. Milojevic* (unreported), 2010 ONSC 4514
[46] *Ibid.* at paragraph 51
[47] *Re Koch*, 1997 CanlII 12138 (ONSC) at paragraph 89 (point 12)