Wills & Estates
Fall Term 2022

Lecture Notes No. 1

SUBSTITUTE DECISION-MAKING

- A "substitute decision-maker" is of three types: an "Attorney" under a "Continuing Power of Attorney", a court-appointed Guardian, or a "Statutory Guardian".

- In the case of a power of attorney in respect of property management while the donor remains *capable* of making his or her own decisions, this is a form of agency.

- In the case of a power of attorney in respect of personal care, the powers is *only* exercisable where the donor is mentally incapable of making such decisions for himself or herself.

- The *Substitute Decisions Act 1992* sits alongside the *Mental Health Act* and the *Health Care Consent Act 1996*. All deal, in part, with when one person may make decisions for another who is incapable of doing so.

1. Capacity and Incapacity

Capacity is a legal construct. We presume that a person has capacity.

The *Substitute Decisions Act, 1992* provides:

> 6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> …
>
> 45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or 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 decision.

Calvert (Litigation Guardian of) v. Calvert
(1997), 32 O.R. (3d) 281 (S.C.J.); cb, p.1030

Mr. and Mrs. Calvert were each married prior to their marriage to each other, and each had a child from the first marriage. They entered into a marriage contract before the marriage was solemnized. Mr. Calvert came into considerable funds during the course of the marriage, although the couple continued to live frugally. Mrs. Calvert was later

diagnosed with Alzheimer's Disease. Mrs. Calvert brought an action for divorce through her litigation guardian; Mr. Calvert defended on the basis that his wife lacked capacity to separate and divorce.

Benotto J.:

> 53 T**here are three levels of capacity that are relevant to this action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.**
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> 54 **Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.**
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> 55 The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: Park, supra at 1427. If marriage is simple, divorce must be equally simple. The American Courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage.
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> 56 T**here is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will.** (I note that Mr. Bimbaum felt that, in August 1994, he would have taken instructions for a will but for Dr. Hogan's concern about her ability to instruct counsel.) **While Mrs. Calvert may have lacked the ability to instruct counsel, that did not mean that she could not make the basic personal decision to separate and divorce.**
>
> 57 The courts are slow to take away a person's right to decide. This is reflected in the low threshold the courts have set for the determination of capacity. Persons have been held to have capacity who suffer from schizophrenia; delusions; and other serious mental problems. A person who suffers from a cognitive impairment is competent as long as the act in question takes place during a lucid interval.

- The case illustrates that capacity is contextual and linked to particular types of decisions.

2. Capacity to Grant a Continuing Power of Attorney

The *Substitute Decisions Act, 1992* provides:

> 8. (1) A person is capable of giving a continuing power of attorney if he or she,
>
> (a) knows what kind of property he or she has and its approximate value;
> (b) is aware of obligations owed to his or his or her dependants;
> (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
> (d) knows that the attorney must account for his or her dealings with the person's property;
> (e) knows that he or she may, if capable, revoke the continuing power of attorney;
> (f) appreciates that unless the attorney manages the property prudently its value may decline; and
> (g) appreciates the possibility that the attorney could misuse the authority given to him or her.
>
> …
>
> 47. (1) A person is capable of giving a power of attorney for personal care if the person,
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> (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
> (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

3. Formalities

See SDA, s.10 re execution and attestation requirements.

4. Capacity Assessment

Abrams v. Abrams
2008 CanLII 67884 (Ont. S.C.J.); cb, p.1039

Capacity may determined one of two ways: either by a Designated Capacity Assessor (designated by the Attorney General) or the Court. A capacity assessment by either a Designated Capacity Assessor or a suitable professional (usually a psychiatrist or neurologist with expertise in neuro-degenerative disease) may be ordered by the Court even where the alleged incapable person does not consent.

Strathy J.:

Analysis of the Issues

47 Before examining the issues and the submissions of counsel, some general observations are in order. First, the purpose of the SDA is to protect the vulnerable: See *Stickells Estate v. Fuller*, 24 E.T.R. (2d) 25, [1998] O.J. No. 2940 (Ont. Gen. Div.). **In *Phelan, Re*, 29 E.T.R. (2d) 82, [1999] O.J. No. 2465 (Ont. S.C.J.), Madam Justice Kitely said, at paragraphs 22-23:**

> **The Substitute Decisions Act is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.**
>
> **The alternative to such a legislative framework is that incapable persons and their families might be taken advantage of by unscrupulous persons. The social values of protecting those who cannot protect themselves are of "superordinate importance".**

48 While Justice Kitely was making those observations in the context of a request for a sealing order, they highlight the nature and importance of proceedings of this kind. These proceedings are not a *lis* or private litigation in the traditional sense. The interests that these proceedings seek to balance are not the interest 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.

49 The SDA contains a number of provisions that indicate that the dignity, privacy and legal rights of the individual are to be assiduously protected. For example:

> **(a) there is a presumption of capacity (section 2);**
>
> **(b) a person whose capacity is in issue is entitled to legal representation (section 3);**
>
> **(c) a person alleged to be incapable is entitled to notice of the proceedings (ss. 27(4) and ss. 62(4));**
>
> **(d) the court must not appoint a guardian if it is satisfied that the need for decisions to be made can be met by an alternative course of action that is less restrictive of the person's decision making rights (ss. 22(3) and ss. 55(2));**

(e) in considering the choice of guardian for property or personal care, the court is to consider the wishes of the incapable person (cl. 24(5)(b) and cl. 57(3)(b));

(f) subject to exceptions, a person has a right to refuse an assessment, other than an assessment ordered by the court (section 78).

50 In considering whether to order an assessment, whether on motion or on its own initiative, a court must balance the affected party's fundamental rights against the court's duty to protect the vulnerable. The appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual. As Mr. Justice Pattillo said in *Flynn v. Flynn* (December 18, 2007), Doc. 03-66/07 (Ont. S.C.J.): "[a] capacity assessment is an intrusive and demeaning process."

51 There is little authority to guide me on the circumstances in which the court should order a further assessment where, as here, the individuals have voluntarily submitted to assessments by a qualified assessor. In *Forgione v. Forgione*, [2007] O.J. No. 2006 (Ont. S.C.J.), a second assessment was ordered where the first assessment had not been carried out by a qualified capacity assessor and the report that had been prepared was not in accordance with the Guidelines for Conducting Assessments of Capacity. There were, as well, serious questions about the capacity and vulnerability of the person to be assessed, none of which had been mentioned in the earlier report.

52 In *Mesesnel (Attorney of) v. Kumer*, [2000] O.J. No. 1897 (Ont. S.C.J.), Justice Greer ordered a second assessment. In that case, submissions were made by counsel on behalf of the affected individual, that he did not want to endure another assessment. It was argued that the person's autonomy should be respected, given his advanced age of 81 years. Justice Greer ordered the additional assessment on a number of grounds, including the failure of the first physician to do what he had been asked to do; personal criticisms of the attorney which raised suspicions of bias which tainted the doctor's reports; and failure to follow standard tests and procedures in the report. It is noteworthy that in that case the applicant had filed a letter from another physician, who was familiar with the person's health and mental status, setting out issues that were not properly explored in the first report.

53 In my view, in deciding whether to order an assessment in this case, particularly as there are existing assessments of Philip and Ida, I should consider and balance the following factors to determine whether, in all the circumstances, the public interest and the interests of Philip and Ida, require that an assessment take place and justify the intrusion into their privacy:

(a) the purpose of the SDA, as discussed above;

(b) the terms of section 79, namely:

(i) the person's capacity must be in issue; and

(ii) 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 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;

(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.

Vanier v. Vanier
2017 ONCA 561 (Ont. C.A.); cb, p.1045, note 3

This was a contested guardianship case in relation to a 90 year-old lady. The litigants were her two sons and the issues included the validity of a Continuing Power of Attorney made in favour of one son replacing an existing CPOAP naming the two sons jointly and severally. The donor participated in the proceedings to defend the CPOAP. One son alleged that the CPOAP was procured by undue influence. Thus the question became the standard applicable to the application of undue influence to the making of such documents. That is, whether the *inter vivos* approach (looking to presumptions to shift the burden to the party defending the document in certain cases) or the testamentary approach (requiring the party alleging undue influence to provide it) applied. After noting that the issue was presented improperly for the first time on appeal, Epstein J.A. held:

> [38] Raymond submits that the test relied upon by the motion judge, set out above - the test for “testamentary undue influence” - is not the appropriate test for the granting of a power of attorney. The test the motion judge ought to have used is the test for inter vivos equitable undue influence, either actual or presumed. The effect of the inter vivos test would be to shift the onus to Pierre to prove that Rita signed the 2015 CPOAP, willingly and without undue influence.

[39] **Raymond relies on the decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)*, [2001] UKHL 44, that explains how equity identifies two forms of unacceptable conduct in the context of inter vivos transactions. One involves overt acts of improper pressure or coercion (actual undue influence). The other arises out of a relationship between two people, where one acquires a measure of influence or ascendancy over another, of which the ascendant person takes unfair advantage. The law has long recognized the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct (presumed undue influence).**

…

[50] However, I need not decide whether it is in the interests of justice for this issue to be dealt with, as the inter vivos equitable undue influence test has no application on the facts of this case. **As noted by the House of Lords in *Eltridge*, at paras. 21-22, there are two prerequisites to the evidential shift in the burden of proof from the complainant (Raymond, arguing on behalf of Rita) to the other party (Pierre). First, the complainant reposed trust and confidence in the other party. Second, the transaction is not readily explicable by the parties' relationship. This second part of the test has been held by the House of Lords to mean that the evidence must support a finding that the transaction is "immoderate and irrational".**

[51] In oral argument, Pierre candidly conceded the first part of the test, in other words that Rita reposed trust and confidence in him. However, he submits that Raymond cannot meet the second part, in other words show that the 2015 CPOAP was "immoderate and irrational".

[52] I agree. There is nothing "immoderate or irrational" about the 2015 CPOAP. The record supports a finding that Rita's decision to give the power of attorney to one son over the other was an emotionally difficult but totally rational decision. Rita was very clear in what she said to the police and to Ms. Silverston, none of which evidence was challenged. She knew her money was out of reach. She needed her funds to pay basic expenses such as rent. She understood that Raymond was interfering with her access to the fund and that the solution had to lie with Pierre.

[53] Moreover, far from being "immoderate", the 2015 CPOAP conferred little, if any, benefit on Pierre. He was left with the same power as he had under the 2013 CPOAP. The minor "benefit", if one could call it that, is that the 2015 CPOAP protected Pierre from the stress and inconvenience of Raymond's being in a position to interfere with Rita's finances.

[54] For these reasons, I am of the view that the motion judge was fully justified in applying the testamentary undue influence test.

[55] I add, that even if the inter vivos equitable undue influence test were applicable, the record does not support a finding of undue influence.

[Emphasis added.]

While Epstein J.A. did not rule out the use of the *inter vivos* approach, it would appear that the normal disposition of the issue will be through the proof of actual undue influence. One expects that the issue will return before the Court of Appeal sooner rather than later.