TAB 9

Part 4: The Legal Framework

The *Substitute Decisions Act* at 15

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Special Lectures 2010

A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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The Substitute Decisions Act:
A Law of Unintended Consequences

Law Society of Upper Canada
Special Lectures 2010

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"In making laws, we should be looking for ways to reduce conflict in people's lives wherever that is possible."[1]

Introduction

The *Substitute Decisions Act, 1992("SDA")*[2], has been in effect for 15 years. The purpose of this paper is to examine some of the more significant trends in the interpretation, application or operation of the *SDA* over the past 15 years.

There are many aspects of the application or operation of the *SDA* that are not measured or for which measurements are not publicly available. For example, since 1994 and to this day, the Ministry of the Attorney General distributes free Power of Attorney kits to the public. If any evaluation has ever been done with respect to outcomes from the use of these Power of Attorney kits, it has not been made publicly available. As another example, it would seem impossible to measure the extent to which substitute decision makers for personal care follow the principles for substitute decision making set out in Sections 66 and 67 of the *SDA*.

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[1] The Honourable Charles Harnick (Attorney General) in moving for second reading of Bill 19, An Act to repeal the Advocacy Act, 1992, revise the Consent to Treatment Act, 1992, amend the Substitute Decisions Act, 1992 and amend other Acts in respect of related matters, Hansard, Issue: L028, November 22, 1995

[2] S.O. 1992, c.30, as amended

This paper will use reported cases as its source for the identification of issues and trends. Reported cases are not necessarily representative of the issues that arise in all court applications or actions in which the *SDA* has been reviewed, applied or considered, but they are readily available and so it is unavoidable that they are the source for analysis.

If there were one trend that is apparent from the reported cases it is that the *SDA* has created forums in and out of the court in which "high conflict families" can pursue disputes among their members. Further, the onset of dementia for an older family member is frequently the catalyst that exacerbates existing discontent, dislikes and rivalries or leads to new disputes.

This is not what our law makers expected.

Framework of the SDA and history of its development

The *Substitute Decisions Act, 1992* ("*SDA*") was proclaimed in force on April 3, 1995 as part of a trio of Acts that were intended by the Ontario government to modernize the laws with respect to consent to treatment, mental capacity, substitute decision-making and advocacy for vulnerable adults. Within one year, after a change in government, the comprehensive legislative scheme created by the *SDA*, the *Consent to Treatment Act*[3] and the *Advocacy Act*[4] was substantially altered by the repeal of the latter two Acts. The *Consent to Treatment Act* was replaced by the *Health Care Consent Act, 1996* [5](the "*HCCA*") on that date. The *Advocacy Act* was not replaced.

While the *SDA* was also substantially amended at that time, its basic structure and concepts remained the same. To review that legal framework, briefly, the *SDA* governs planning for

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[3] S.O. 1992, c. 31
[4] S.O. 1992, c. 26
[5] S.O. 1992, c.2, Sch.A, as amended

mental incapacity and substitute decision-making for incapable adults. The *Act* divides its framework for these into two broad categories: property and the person.

The *Act* provides that capable individuals shall have vehicles for designating their choice of substitute decision maker in advance of incapacity through the making of a continuing power of attorney for property and a power of attorney for personal care. In the event that a person's advance planning is inadequate or non-existent, the *SDA* provides for a court application to be brought for the purpose of appointment of a guardian of property, a guardian of the person, or both.

Unlike under the predecessor legislation, the *Mental Incompetency Act*[6], the *SDA* states the circumstances when a guardian should or should not be appointed. The *SDA* defines capacity to manage property and to make personal care decisions, as well as capacity to make a continuing power of attorney for property or a power of attorney for personal care. It sets out the duties and powers of guardians and attorneys in some detail. The *SDA* also provides a partial procedural code for court applications.

The most unique feature of the *SDA*, when it is compared to similar legislation in this country and indeed elsewhere in the world, is its expansion of a concept termed "statutory guardianship" beyond the realm of mental health law and institutions. Under the *SDA*, a person can voluntarily undergo a capacity assessment in any setting, including his or her private home, for the purpose of determining if he or she is incapable of managing property. If the person is found incapable, a certificate of incapacity is issued by the capacity assessor and the Public Guardian and Trustee (the "PGT") becomes the person's statutory guardian of property. A family member can apply to replace the PGT as statutory guardian through an administrative process that does not involve the court. There is no difference between the resulting powers and duties of a statutory guardian and those of a court-appointed guardian of property.

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[6] R.S.O. 1990, c.M.9

The record shows that the proclamation of the *SDA* marked the completion of over two decades' of development and implementation. In November 1985, the Attorney General for Ontario and the Ministers of Health, Community and Social Services and Responsible for the Office for Senior Citizen's Affairs established an Advisory Committee on Substitute Decision Making for Mentally Incapable Persons "to review all aspects of the law governing and related to substitute decision-making for persons who are mentally incapacitated, including personal guardianship, and to recommend revision of this law where appropriate". The establishment of the Committee itself was the result of more than a decade of requests for revision of the law governing mental incapacity expressed by various stakeholders. The Committee delivered its report, known as the Fram Report, in December 1987. Between late 1987 and proclamation, legislation was developed, a bill introduced and passed as part of a package of laws also addressing advocacy and consent to treatment and preparations were made for the implementation of the laws.

The Fram Report and its recommendations for legislative change are largely reflected in the structure and content of the *SDA*. In making its recommendations, the Committee cited several shortcomings in the (then) existing law, including its obscurity; patchwork application; lack of coherence and incomprehensibility; the inability of persons to control decision making in their own lives in the event of becoming mentally incapacitated; the lack of recognition of the role in substitute decision making of supportive family members; and the need for a public safety net for those who do not have supportive relatives or friends or are victims of abuse, exploitation or neglect. The Committee set out its recommendations for addressing these deficiencies in the law through comprehensive legislation that included provisions for the appointment by individuals of attorneys for property and personal care and appointment by the court of guardians of property or the person for incapable persons. Nowhere in the Fram Report was it contemplated that such appointments of attorneys or guardians could themselves be the source or forum of conflict.

According to the Fram Report, the potential conflict to be averted by the new law was between the person thought to be incapable and the rest of the world: family, professionals, societal norms about how people live and behave. It was not anticipated that conflict could be between persons affiliated with the person alleged to be incapable, with the alleged incapable person often side-lined from the debate, frequently not participating and unrepresented. These kinds of conflicts were not anticipated in the development and making of the law, and the use of the court processes provided for in the *SDA* in furtherance of these conflicts was not expected, although perhaps they were predictable, in hindsight. To paraphrase the mysterious voice that speaks to the narrator Ray in W. P. Kinsella's novel Shoeless Joe, "if you build it, they will come."

The nature of *SDA* litigation – It's all about the person

> Proceedings under the *SDA* are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only once focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the Legislature and the *SDA*, should not and will not tolerate family factions trying to twist *SDA* proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues.[7]

SDA litigation is like no other type of litigation, in terms of the relationships between the parties. The primary objective of any proceeding brought pursuant to the *SDA* is supposed to be to address the interests and needs of the person who is central to the dispute. However, a proceeding is commenced by way of application and structurally the person alleged to be incapable is a respondent who stands in opposition to the person initiating the application, the applicant.

The applicant is seeking to take away something the alleged incapable person has by rebutting the presumption of capacity and removing the autonomy and control the person has over his or

[7] *Abrams v. Abrams*, 2010 ONSC 1254 (CanLII) at para. 35 (Brown, J.)

her property and/or person. No matter how well-intentioned the court proceeding may be, it is an oppositional situation.

However, in addition to the oppositional nature of *SDA* litigation, there is an overlay of protection being sought for a person who may be incapable and vulnerable as a result of that incapacity, and who may need assistance in order to ensure that his or her interests are recognized and needs met. This is frequently seen by the court as the overriding purpose of *SDA* litigation.

In addition to the centrality of the person who is the subject of the litigation, within the *SDA* litigation framework there are also frequently disputes between other persons in familial relationships with the alleged incapable person. When these kinds of disputes arise, the parties to the litigation appear to sometimes lose sight of its ultimate purpose. In response to this, the court in Ontario has been engaged in emphasizing that addressing the interests of the incapable person is the main issue in all *SDA* litigation. What follows in this section is a discussion of some of the cases in which the court has discussed this unique aspect of *SDA* litigation.

Early on, in *Re Phelan*[8] the court decided to grant a partial sealing order respecting the establishment of a guardianship of the person and property of an incapable person. In doing so, Justice Kiteley stated:

> 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 cost of so doing.

[8] 29 E.T.R. (2d) 82

> 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".

That said, the court recognized the unique nature of an *SDA* application:

> In the civil cases, such as the tort cases, the plaintiff is at some level a "volunteer", either in the activity giving rise to the tort or in the decision to seek redress…But I draw the distinction between such cases and this where there is *no alternative*. Mr. Phelan is before the court, not by choice but by statute. His life circumstances have become part of the court record because he has responsible family and friends who want to do the best for him.[9]

Thus in *Re Phelan* the court recognized that due to the unique nature of an *SDA* proceeding, it was appropriate that some of the personal information about the incapable person that was of necessity disclosed to the court and the other parties should not become part of the public record, for the protection of the incapable person, who did not voluntarily come before the court to seek relief.

Since *Re Phelan* the court has now repeatedly told other parties involved in *SDA* litigation that such proceedings are not about them, their interests and "rights". The proceedings are about the incapable person, his or her needs and interests and how respectively these are best met and protected.

The proceedings in *Abrams v. Abrams*, a protracted and rather bitter dispute regarding guardianship of the elderly Ida Abrams, and pitting two of her three children on one side against her very elderly husband and their third child on the other, has resulted in several endorsements

[9] *Supra.*, at para. 20, 21 and 22

from the court over the past few years. In *Abrams v. Abrams*[10], on a motions for directions, Justice Strathy ordered that a dispute with respect to Ida Abrams' capacity to give powers of attorney and whether there were suspicious circumstances surrounding the granting of such powers of attorney needed to proceed expeditiously in the interests of Ida and for her protection. For this reason, Justice Strathy set "an aggressive schedule" for the litigation. The court also declined to order an examination for discovery of Ida, stating that the matters at issue and her protection called for some limits on the normal scope of adversarial proceedings, noting that Ida was "an 85-year-old woman, with early Alzheimer's Disease and word-finding difficulty, for whom these events are a source of anxiety and heartbreak".

Despite this decision, the court was called upon again in the *Abrams* case to address procedural matters. In *Abrams v. Abrams*[11], Justice Brown examined why the aggressive schedule prescribed by Justice Strathy had not been followed. The delay was attributed to bringing of appeals, the bringing of motions, delays in examinations and deliberate delay tactics on the part of some of the parties. The court ordered that the parties prepare a plan to move the matter along to a trial. In doing so, Justice Brown observed that because a guardianship proceeding is about determining whether a person requires a substitute decision maker, it needs to be adjudicated quickly; otherwise, the person and her property is at risk. The use of the court process as a forum in which to air disputes among family members that do not necessarily bear directly upon the current needs and interests of the incapable person will not be tolerated, and the court will control the process to prevent such from occurring.

This approach of the court extends to situations where settlements are proposed by parties other than the incapable person and the court is asked to make orders implementing such settlements. The court has said that such settlements have to be in the incapable person's best interests and practicable.

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[10] 2008 CanLII 67882 (On.S.C.) Please note that there are a few decisions in *Abrams v. Abrams* referred to in this paper, and separate citations provided for each.
[11] 2010 ONSC 1254 (CanLII)

In *Tepper v. Branidis*[12] the court refused to grant an order that would put into effect an arrangement that would result in payments being made from the incapable person's property for expenses that might not have been his and for his funds to then be managed going forward pursuant to a power of attorney that might not be valid. Justice Molloy stated:

> I cannot agree to the proposal advanced. Pantelis (Peter) Branidis (the father) is a party to this proceeding and the subject matter of the proceeding is money that clearly belongs to him. He has not consented to any of the terms proposed. There is conflicting evidence from different doctors as to the extent to which he may or may not be incapable of managing his property. He was not represented by counsel in this matter and I have no way of determining whether he knows about or understands the matters raised in this proceeding, much less how he wishes his property to be handled. There are very troubling allegations made in the affidavit of Zoe Gymnopolous (the daughter) as to misappropriation of funds by her brother while he held a Power of Attorney for their father. These are not vague allegations. Considerable corroborative detail is provided which gives me serious concern about whether the father's estate has been properly administered by his son. No accounting has been provided by the son for the period of his Power of Attorney. The father is clearly in a vulnerable position. He is elderly, not in good health, unsophisticated and not fluent in English. He may also be incapable of managing his own affairs. There is also reason to be concerned that he may be susceptible to pressure and/or manipulation by his children. In these circumstances I cannot simply sit by and allow his property to be managed under what may or may not be a valid Power of Attorney, allow payments to be made out of his funds on credit card debts which may or may not be his personal expenses, and ignore what may or may not be substantial mismanagement of his property and possible misappropriation of his funds over a three year period. I have a responsibility to ensure in this situation that the father's rights are protected. [13]

Among the orders then made was an order directing the Public Guardian and Trustee to arrange for legal representation for the incapable person pursuant to Section 3 of the *SDA*.

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[12] 2001 CarswellOnt 307

[13] *Supra.*, at para. 15

Much more recently, the court took a similar approach in *Bosch v. Bosch*[14]. The case involved two guardianship applications brought by Alan, the son of Michael and Maria. Maria had been acting as guardian of property and attorney for personal care for Michael since 2005. In one of his applications, Alan sought an order declaring his mother Maria incapable and appointing him as her guardian of property and person. In the second application, Alan sought termination of his mother's guardianship of his father Michael's property and a judgment appointing Alan as guardian of property and person.

At mediation, Alan, Maria and Charlotte (the sister/daughter) entered into a settlement agreement that they agreed would be subject to court approval. The proposed settlement involved the dismissal of Alan's guardianship application respecting Maria, an order in the Michael guardianship application appointing both Maria and Alan as joint guardians of Michael's person, as a result of which Alan would not require an accounting from Maria of her guardianship of Michael's property, an order requiring Michael to pay $2,000 of the costs of the mediator and an order for Maria to recover her reasonable costs on the motion for approval of the settlement from Michael on a full indemnity basis.

The court declined to approve the settlement on the basis of the evidence filed. In addition to requiring evidence of Michael's incapacity with respect to personal care, evidence about the costs for which Maria was seeking payment from Michael and reasons why Michael should pay for the costs of their dispute at all, the court questioned whether an order for co-guardianship would be in Michael's best interests:

> I have significant reservations about appointing two competing litigants as joint guardians for Michael's personal care. How, might I ask, will Michael's best interests be served by appointing as his joint guardians two persons who have engaged in litigation against each other? If there is a history of lack of co-operation between son and mother, I do not see how appointing them as joint guardians will suddenly change their relationship into one of harmony and co-operation. Absent clear evidence of the unalterable willingness of two disputing

[14] 2010 CarswellOnt 1204

> persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person, joint guardianship can become a minefield, with the incapable person the loser.[15]

One may wonder what might be sufficient clear evidence of "the unalterable willingness of two disputing persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person." Further, the implication for the scope of settlement options at mediation of a guardianship dispute is clear: a settlement cannot be the product of wishful thinking by the parties or create a situation where further conflict seems inevitable.

Capacity assessment

> The assessment process is an important tool for the court in the discharge of its responsibility to protect the vulnerable. It enables the court to obtain an objective, independent and expert assessment of the individual's capacity, free from the partisan and subjective perceptions of the parties. Its utility cannot be understated. That having been said, it is important to resist the temptation to order an assessment based on the argument "it can't hurt". It can hurt. Privacy and freedom from coercive interference with one's physical and mental autonomy are core values of Canadian society. In light of these values, and the presumption of capacity in the *SDA*, an 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.[16]

Capacity is the threshold issue in *SDA* proceedings. A capable person makes his or her own decisions. A person who is incapable needs a substitute decision maker. Thus, if an *SDA* proceeding is brought, the capacity or lack of capacity of the person who is the subject of the dispute will be an issue. Also an issue, in many cases, will be the question of whether the court should order the person alleged to be incapable to undergo a capacity assessment.

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[15] *Supra.*, at para. 4(i)
[16] *Kischer v. Kischer*, 2009 CarswellOnt 81 at para. 10 (Strathy J.)

Subsection 79(1) of the *SDA* provides that if a person's capacity is an issue in a proceeding under the *SDA* 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.[17]

Insufficient attention has been sometimes paid by parties to the requirement that capacity be an issue in a proceeding under the *SDA* before the court will order a capacity assessment. Thus in *Neill v. Pellolio*[18] the Court of Appeal dismissed the appeal of a daughter who had been turned down by the Superior Court when she sought an order for a capacity assessment under the *SDA* without seeking an order for guardianship of the property or person of her mother or any other recognizable relief provided for by the *SDA*.

It is not by merely bringing an application for guardianship that the court will consider a person's capacity to be in issue in a proceeding under the *SDA*. As noted in *Flynn v. Flynn*[19] a capacity assessment is an intrusive and demeaning process. Therefore there must be a serious issue to be tried in the proceeding, and in order to determine whether that standard has been met, the court must look at the merits of the proceeding.

In *Flynn*, the alleged incapable person had already granted powers of attorney for property and personal care and the evidence did not support any assertion that she was incapable at the time she had done so. Justice Patillo noted that there is a strong presumption in favour of an existing and valid power of attorney, both in the *SDA* itself and in case law[20]. And, in *Flynn*, the evidence failed to disclose any improper or neglectful care of the alleged incapable person's property. The court also found that there was not any evidence that the alleged incapable person had not and was not getting proper medical attention or receiving excellent personal care.

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[17] SDA, subs. 79(1)
[18] (2001), 43 E.T.R. (2d) 99
[19] December 18, 2007, unreported, Pattilo, J. (Ont.S.C.J.)
[20] See *Glen v. Brennan*, 2006 CarswellOnt 93 at para. 9

Therefore the court found that there was "no evidence of substance" to support a guardianship application and the applicant had failed to meet the first requirement for a court-ordered capacity assessment, that of capacity being an issue in a proceeding under the *SDA*.

The court also examined the question of whether there were reasonable grounds to believe that Mrs. Flynn was incapable. There was evidence on the record of hallucinations, delusions and disorientation from time to time. The court held that this evidence was not sufficient to establish reasonable grounds that Mrs. Flynn was incapable. After referencing the definitions of incapacity found in Sections 6 and 45 of the *SDA*, the court found that there must be some direct connection between the behaviour described and capacity, and there was no such connection in Mrs. Flynn's case.

Finally, the court found that even if the two requirements set out in subs. 79(1) of the *SDA* were met, the court may exercise discretion not to grant an order for capacity assessment. In this case, the court held that even if it were wrong in concluding that the applicants for guardianship had not met the two requirements, it would exercise its discretion not to order the capacity assessment because Mrs. Flynn had already granted powers of attorney when she was capable of doing so and her decision-making needs could be met through the use of those powers of attorney, when and if necessary.

One *Abrams v. Abrams* decision concerns the seeking of orders for capacity assessment.[21] The purpose of a proposed assessment of Ida was to determine her capacity to manage her property and personal care and to grant powers of attorney as of January 1, 2007 and subsequently. The purpose of a proposed assessment of her husband Philip was to determine whether he was competent to manage Ida's property under a continuing power of attorney for property dated January 1, 2007. The court was asked to consider ordering assessments pursuant not only to Section 79 of the *SDA*, but also Section 105 of the *Courts of Justice Act*[22], which provides that

[21] 2008 CanLII 67884 (ON S.C.)
[22] R.S.O. 1990, c.C.43, as amended

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 by one or more health practitioners.

In analyzing the issues raised by the seeking of capacity assessments, the Justice Strathy first observed the role of the *SDA* in protecting the vulnerable. The passage cited above from *Re Phelan* was referred to, with the court going on to state:

> These proceedings are not a *lis* or private litigation in the traditional sense. The interests that these 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.[23]

His Honour went on to note that the *SDA* contains a number of provisions that indicate that the dignity, privacy and legal rights of the individual are to be "assiduously protected", listing as examples:

(a) The presumption of capacity;
(b) The entitlement to legal representation pursuant to Section 3;
(c) The incapable person's entitlement to notice of the proceeding;
(d) The requirement that the court shall 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;
(e) The requirement that the court consider the wishes of the incapable person in choosing a guardian for property or personal care; and
(f) The person's right to refuse an assessment, other than one ordered by the court.[24]

He described a capacity assessment as "essentially a psychiatric examination" and "a substantial intervention into the privacy and security of the individual." He found that the court must

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[23] *Supra.*, at para. 48
[24] *Supra.*, at para. 49

balance the affected person's fundamental rights against the court's duty to protect the vulnerable.

Justice Strathy stated that the following factors should be considered in deciding whether to order an assessment:

> (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 had 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.[25]

Considering all of these factors, His Honour refused to order an assessment of Ida pursuant to Section 79. There was no dispute as to Ida's incapacity now, so an assessment was not required to assist in a determination of that issue. However, the assessment was also sought with respect to the issue of Ida's capacity when she granted the January 1, 2007 powers of attorney and subsequently. About this aspect of the assessment, the court decided:

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[25] *Supra.*, at para. 53

The real issue, which will be the subject of the trial, [is] whether she had capacity to appoint Philip and Judith as her attorneys in 2007 and 2008. This is an issue that will be determined on a full evidentiary record in which the parties will be given the opportunity to adduce evidence concerning Ida's capacity, including whether the powers of attorney are the result of undue influence. The request for the assessment of Ida is simply to provide evidence in that proceeding and to "level the playing field", to use Mr. Teitel's expression. It is a reasonable inference that the assessment would also be relevant to the issue of Ida's capacity to make a will in 2007.

Considering all the circumstances, I have decided not to order a further assessment of Ida, for the following reasons:

> (i) There is substantial, independent, professional evidence confirming Ida's capacity to make the powers of attorney at the relevant times...
>
> (b) There is no medical evidence from the applicant to suggest that the conclusions of these experts are flawed or that the processes they followed were inappropriate;
>
> (c) The applicant's case is based primarily on the evidence of Stephen and Elizabeth and their spouses who have substantial financial interests in this matter and whose objectivity, on the issue of Ida's capacity to grant a power of attorney, may be compromised;
>
> (d) I am not satisfied that an assessment done in 2009 would have significant probative value as to Ida's capacity in January, 2007 and April and May, 2008, given the progressive nature of Alzheimer's Disease;
>
> (e) I am not satisfied that Ida is at risk. If I had any concerns in that regard, I would make the order sought. She is, however, under the personal care of her husband of almost 60 years and the evidence satisfies me that Philip has the capacity to ensure that Ida's financial and personal interests are protected; and
>
> (f) Ida's opposition to an assessment has been clearly stated and her position has been forcefully argued by her counsel. Considering her age, her mental condition, and the distress she has endured as a result of the loss of her relationships, two of her children and her grandchildren, not to mention these proceedings, it would be an unreasonable intrusion into her privacy to order an assessment.[26]

[26] *Supra.*, at para. 57 and 58

As referred to in the passage cited, a submission had been made on behalf of the son Stephen, who was seeking the assessment, that the purpose of Section 105 of the *Courts of Justice Act* was to enable the court to reach a just result and provide for fairness in litigation by allowing a party to challenge the opposite party's medical evidence. It was submitted that the further assessment sought pursuant to Section 105 would "level the playing field" between the parties. However, the court noted that there was no dispute as to Ida's current incapacity, and that the request for the assessment was simply to provide evidence with respect to her capacity in 2007 when she granted her power of attorney. It was also noted that it was a reasonable inference that the assessment sought would also be relevant to the issue of Ida's capacity to make a Will in 2007. In rejecting the submission that a Section 105 assessment should be available in fairness to the parties disputing Ida's capacity to grant the power of attorney, the court stated:

> In my view, ordering an assessment of Ida would not strike an appropriate balance between the autonomy of the individual and the duty of the state to protect the vulnerable. The "level playing field" argument should not be a consideration in a proceeding of this nature.[27]

As for the requested assessment of Philip, there were two main reasons why the court declined to do so. First, following *Neill v. Pellolio*, the court did not accept that there is jurisdiction under Section 79 to order an assessment of the attorney of the person whose capacity is in issue in the proceeding. Second, there was substantial expert evidence that Philip had capacity to manage his own property and Ida's, and therefore there were no grounds to order an assessment under Section 105 of the *Courts of Justice Act*.

A different set of facts produced a different result from the court shortly thereafter in *Kischer*. The *Kischer* case involved a daughter, Kristine, acting as attorney for property and personal care for her mother, Daisy, and a son, Rudolf, seeking to be appointed as guardian of Daisy's person and property. Rudolf sought an assessment of Daisy's capacity, which Daisy resisted, pointing to the existing powers of attorney as being sufficient to protect her interests. Although Kristine

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[27] *Supra.*, at para. 59

did not oppose the capacity assessment, her counsel pointed out that subsections 22(3) and 55(2) of the *SDA* provide that the court shall not appoint a guardian where there is an alternative course of action available that does not require a finding of incapacity and is less restrictive of the person's decision-making rights. She suggested that by analogy it might be more appropriate for the court to order the release of Daisy's existing medical records for the parties' consideration prior to asking the court to adjudicate on the issue of an assessment.

However, in *Kischer*[28] the court decided to order the capacity assessment. Unlike in *Abrams*, in *Kischer* there were no existing assessments regarding Daisy's situation, the allegations were serious, including allegations that her personal care had deteriorated and her living conditions were unhealthy, she had become isolated from her adult children other than Kristine and from her extended family and that two of her properties had been transferred to Kristine and substantially encumbered. The evidence of her mental state came only from Rudolf. Therefore in *Kischer*, with the evidence provided by Rudolf considered to have established reasonable grounds, and in the absence of any previous assessment or evidence from another or independent person, the court ordered the assessment of Daisy pursuant to Section 79.

Costs

> An incapable parent should not have to pay for the desire of some of her children to continue battling their siblings.[29]
>
> I must emphasize that it would be a serious mistake for members of the Bar to presume that all parties to contested capacity litigation will have their costs paid by the estate of the incapable person. Such an attitude would misapprehend the principles which must guide the court's exercise of its discretion on costs. [30]

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[28] *Supra.*
[29] *Fiacco. V. Lombardi*, 2009 CarswellOnt 5188 at para. 43 (Brown J)
[30] *Supra.*, at para 36

There has been an entrenched assumption that the conduct of guardianship or power of attorney litigation will be at the expense of the incapable person. This makes sense, within reasonable limits, if the purpose of the litigation is indeed to directly meet the needs and serve the interests of the incapable person. For example, if the person has failed to make power of attorney arrangements when capable or has appointed an attorney who is unavailable to act, it seems reasonable that the person who volunteers to step forward and ask the court to be appointed as guardian of the property and/or person of the incapable person should be indemnified for costs.

However, the court has recognized, and with increasing frequency, that many of the disputes that give rise to litigation under the *SDA* are for purposes other than meeting the needs of the incapable person. The disputes reflect family rivalries, bids for control and foundation-building for future will fights. In such circumstances, is it appropriate for the incapable person to pay the other parties' costs?

An early case, *Zhang v. Wu*[31] involved a dispute between Henry, the husband of Rebecca, and Rebecca's mother, Mrs. Chen, with Henry and Mrs. Chen initially bringing competing applications for guardianship of Rebecca's property and person. Henry's application was thwarted by immigration charges that led him to be detained for 2 years before being released without a deportation order, during which time Mrs. Chen had obtained a guardianship of Rebecca's person and property. When Henry was released from detention, Mrs. Chen sought to deny his access to Rebecca and prevent him from obtaining custody of their child. In the end, Henry was unsuccessful and Mrs. Chen's appointments as guardian of the person and property were confirmed, subject to conditions. However, Justice Haley denied the parties their costs, stating that Henry and Mrs. Chen have created these costs because of the animosity between them.

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[31] (1999), 33 E.T.R. (2d) 320

In *Ziskos v. Miksche*[32], Justice Spies recognized that even a contested guardianship proceeding can be intended for and can in fact deliver benefit to the incapable person. It is possible for the contesting parties in such circumstances to recover costs from the property of the incapable person. However, the costs incurred must be reasonable. In *Ziskos*, a case far too detailed and lengthy to discuss in great detail here, the court focused on the reasonableness of the parties' conduct in the litigation and the degree to which such conduct increased the costs of other parties. This led to a series of orders for some costs to be paid from the property of the incapable person, but other costs of the parties to be paid by the parties who were unreasonable in their conduct of the proceedings, which parties were also left to bear substantial responsibility for their own costs personally.

In *Woolner v. D'Abreau*[33] the parties appeared to become involved in a genuinely confusing situation as to who held a valid continuing power of attorney for property for one Mrs. D'Abreau. The dispute was resolved when one party satisfied the other party that Mrs. D'Abreau had the capacity to grant a new continuing power of attorney for property and therefore had properly done so. Justice Brown indicated that had the matter ended there, all parties might have reasonably been entitled to recover their costs, as all appeared to have been acting out of concern for Mrs. D'Abreau. However, the parties continued to run up substantial costs on the issue of recovery of their costs. Accordingly, and applying the principle of proportionality, the factors in Rule 57.01 and the principles of *Bowcher v. Public Accountants Council (Ontario)*[34], His Honour made no order as to costs between the parties.

Further, His Honour expressed concern about the situation of Ms. D'Abreau who was purportedly represented successively by two lawyers who had incurred significant legal fees on her behalf, particularly in the period after the substantive issues had been settled and costs remained an issue. As her lawyers, they would expect their fees to be paid from her property. However, Justice Brown stated:

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[32] 2007 CarswellOnt. 7162
[33] (2008), 74 C.P.C. (6th) 260
[34] (2004), 71 O.R. (3d) 291 (Ont. C.A.)

> I harbour serious concerns about the legal fees incurred on her behalf in this application. I have noted the absence of any affidavit from her. She is 82 years old. From the evidence before me, she does not have any immediate family or friends with whom she can consult. I think some obligation rests on the court, when, as here, it has strong concerns about the incurrence of disproportionate costs, to see that the interests of the vulnerable in our society are protected. Consequently, I am exercising my powers under Rule 57.07(2) of the *Rules of Civil Procedure* to inquire whether I should make an order under Rule 57.07(1)(a) disallowing any costs as between Messrs. Marcovitch and Koven, on the one hand, and Ms. D'Ambreau, on the other.[35]

His Honour went on to provide that the Public Guardian and Trustee appoint independent counsel for Ms. D'Abreau for submissions to be made regarding the fees billed to her.[36]

Similarly, in the *Ziskos* case cited above, Justice Spies held that where a lawyer acted upon a general retainer with a person alleged to be incapable and incurred enormous legal costs, the court has a responsibility to ensure that such costs are necessary and reasonable and for the person's benefit, before ordering that such costs be paid by the property of the person.[37]

In two recent cases, siblings in disagreement about substitute decision-making for a parent have found themselves denied costs or with costs awarded against them rather than receiving an award of costs from the parent's estate, as has been traditionally expected. In *Fiacco v. Lombardi*[38] the parties were returning to court after a guardianship had already been established. The guardianship had provided for the appointment of two of Maria Lombardi's four children, Carmela and Antonio, as guardians of her property and person. In doing so, the court had ordered her other two children, Giovanni and Giusepina to co-operate with Carmela and Antonio by accounting for their dealings with Maria's property and delivering the keys to her home. However, Giovanni and Giusepina did not co-operate, resulting in Carmela and Antonio bringing

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[35] *Supra.*, at para 46.
[36] See also subsequent endorsements regarding costs as between Ms. D'Abreau and her lawyers, including 2009 CarswellOnt 2264
[37] *Ziskos v. Miksche, supra,* at para. 75
[38] *Supra.*

a motion seeking directions on several matters including the delivery by Giovanni and Giusepina of Maria's original will and delivery by them to the guardians of any of Maria's assets in their possession. Justice Brown found that Giovanni and Giusepina had deliberately failed to comply with the previous court order and that their conduct had affected their mother's ability to pay for her ongoing needs.

After straightening out the respective responsibilities of the guardians and the respondents so that the guardians could move forward in their administration of Maria's property, His Honour turned to the question of costs. He denied a claim for costs from the respondents, Giovanni and Giusepina, noting that it was their misconduct that made the motion necessary. Respecting the costs of the applicants in their capacities as guardians, their costs, as fixed by the court, were awarded against the respondents, Giovanni and Giusepina. To do otherwise, the court found, would force Maria to pay the costs and this be unjust.

Following *Fiacco v. Lombardi*, in *Bailey v. Bailey*[39] the court had to consider a request for legal fees on a substantial indemnity basis to be paid to a brother and sister from their mother's property, which fees were incurred in order to preserve the property, ensure that their mother received adequate monthly payments to cover her living expenses and the carrying costs of the property and, eventually, arrange for the sale of the property. Much of the lawyers' time involved appeared to be for negotiations between counsel over the issues enumerated above, as well as making an arrangement under which a trust company would manage the mother's property on an ongoing basis. Justice Brown observed:

> In most families, the legal costs associated with such issues would be zero because brother and sister would agree, without resorting to lawyers, to putting in place arrangements to ensure that their mother's needs were met. The reality of this family is that the state of the relationship between brother and sister was such that they had to engage in litigation to make decisions which others do as a matter of ordinary course.[40]

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[39] Unreported, December 23, 2009, D. M. Brown, J. (Ont. S.C.)
[40] *Supra.*, at para. 17

Although costs were awarded, the conclusion was that they were not to be on a substantial indemnity basis, as to do so would be disproportionate to the routine nature of the issues and the consent basis upon which the orders eventually issued.

Access to an incapable person and the duty to consult

> If the conditions of appointment crafted in the best interests of an incapable person result in minimizing the degree of involvement of one faction of a family in the affairs of the incapable person, so be it…I exhorted the parties to "act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life." Within a week of the release of that endorsement, Dr. Chu, in effect, kidnapped his grandmother. It therefore should come as absolutely no surprise to him, or his mother, that I have decided to limit their access to Mrs. Chang. The interests a court must protect under the *SDA* are not viewed through the lenses of amorality. Acts attract consequences. Dr. Chu acted by engaging in misconduct, so there are consequences.[41]

The conflicts that arise with respect to an incapable person may most frequently arise with respect to management of the person's property, but not exclusively so. In adjudicating on disputes regarding personal care, the court has taken the same approach of considering first the needs and interests of the incapable person.

In *Schleifer v. Schleifer*[42] the court considered a request by a father to terminate visitation by a mother to a 31 year old son who had suffered a traumatic brain injury eight years earlier and who lived with the father. Although the parents were separated, and had at one point in time engaged in divorce proceedings, the divorce petition had long been dismissed. Justice Nolan rejected the mother Louise's assertion that the son, Jeffrey, was a "child of the marriage" and still subject to the principles of the *Divorce Act*, as they relate to access.

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[41] *Chu v. Chang*, 2010 ONSC 294 (CanLII) at para. 32 (Brown, J.)
[42] 2009 CarswellOnt 7157 (Ont. S.C.J.)

In rejecting this assertion, Justice Nolan noted that Jeffrey had been an independent adult, attending school and competing as an athlete, prior to his accident, and although he had been living part-time with both parents, could no longer be considered a child of their marriage. He did not revert to being so as a result of the accident that caused his traumatic brain injury. Justice Nolan applied instead the *Substitute Decisions Act* to the question of Louise's access to Jeffrey. Her Honour focused on the obligation of a guardian to seek to foster regular personal contact between the incapable person and *supportive* (Her Honour's emphasis) family members and friends of the incapable person. She found that the mother's feelings of love for her son Jeffrey did not translate into acknowledging his needs and wishes as an adult and appreciating the boundaries that she must respect.[43] Visits were terminated for a period of six months, during which Louise was encouraged to develop a plan for the resumption of visitation on terms that would better meet Jeffrey's needs.

Similarly, in *Chu v. Chang,* Justice Brown had to consider the degree to which a guardian of the person was required to consult family members regarding the personal care decision making for the elderly Mrs. Chang, as required by subsection 66(7) of the *SDA* and how the guardian of the person was to meet her obligation to foster contact between Mrs. Chang and supportive family members, as required by subsection 66(6) of the *SDA*.

Regarding consultation, given that there had been ongoing conflict between one sibling, Lily, and the other siblings, including Peggy, who was going to be appointed as guardian of the person, the court held that there was no need for Peggy to consult Lily, although she was ordered to provide fresh information about Mrs. Chang's medical condition in the event of significant developments.

The court also held that given the history of high conflict in the family, restrictions on access by Lily and her son were required in Mrs. Chang's best interests, and stipulated both the times and the conditions under which visits would occur.

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[43] *Supra,* at para. 109

Conclusion

The drafting of the *SDA* contemplated that family members are supportive of incapable persons and will act in their best interests. However, conflicts of interest are inherent within family relationships, and not all family members are willing or able to put the interests of the incapable person ahead of their own.

The court in Ontario is saying, with increasing vigour and frequency, that whenever there is a conflict between the interests and needs of an (alleged) incapable person and the interests of family members and other potential substitute decision makers, the interests of the incapable person will be the prevalent concern of the court. The cases discussed in this paper show how this is manifest when the court adjudicates on issues such as procedure, capacity assessment, costs and access to an incapable person. It has been also present in the court's consideration of issues such as whether an attorney will be removed, who will be a guardian, whether and by how much a guardian or attorney will be compensated, what is a reasonable plan for making substitute decisions for the incapable person and what are appropriate dealings with an incapable person's property.

It is not only in litigation, but in all aspects of the operation of the *SDA* that tensions exist between the interests of an incapable person on the one hand and family members and friends on the other. A court proceeding may bring these tensions into sharp relief, and may also serve as a focal point for conflict between family members and others. However, they also exist or have the

potential to exist in the absence of litigation. Therefore these conflicts must be borne in mind of by any lawyer advising on matters arising from the operation of the *SDA*, including the making of powers of attorney, acting as an attorney or guardian, scrutinizing the actions of an attorney or guardian and seeking the appointment of a guardian.