

CASE COMMENTARY

The Capacity Dilemma in *Zagorac v Zagorac*: Balancing a Client's Autonomy with the Duty to Protect



April 2025 | *Zagorac v Zagorac*, 2021 ONSC 4448

In light of demographic change, trust officers and trust professionals will increasingly need to deal with incapacity issues.

An issue arises when a person lacks the mental capacity to manage their affairs and a trust officer is needed to handle their financial affairs: a capacity assessment is a tool that can be used to determine a person's ability to make financial decisions.

Ontario law presumes that adults are capable of making financial decisions until it is proven they are not capable.

Specifically, section 2 of the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 ("SDA"), provides that a person is presumed capable of managing their property at the age of eighteen and capable of giving or refusing consent in connection with his or her own personal care at the age of sixteen.

When a person's capacity is in question under the SDA the court has the power to compel that such person undergo a capacity assessment. However, the court is often hesitant to do so, as it must balance a person's right to autonomy and privacy and the duty to protect vulnerable persons.

The case of [*Zagorac v Zagorac*, 2021 ONSC 4448](#) ("Zagorac"), is an example of the court's analysis of when it is appropriate to order a capacity assessment.

The main point is that capacity assessments may become live issues in a number of scenarios, including if a dispute occurs, concerning making or revoking a power of attorney, or the legal document requires such an assessment. In this

regard, the application of *Zagorac* reinforces the importance of protecting vulnerable individuals and the surrounding legal framework.

PART 1

***Zagorac v Zagorac:* Court Orders a Capacity Assessment**

The significant enforcement powers under the SDA underscore the court's hesitancy to order a capacity assessment without careful consideration as illustrated in *Zagorac*.

In *Zagorac*, the court addressed the issue of assessing the mental capacity of 68-year-old, Mrs. Zagorac.

The dispute between her children, Ivan, and Nina, centered on Nina's management of their mother's property and the validity of her continuing powers of attorney. Ivan contended that Nina exerted undue influence on their mother to obtain a continuing power of attorney for property in her favour, thus the document was not valid, and further that Nina was not acting in their mother's best interests as her attorney for property.

Mrs. Zagorac had been diagnosed with dementia and Alzheimer's and had undergone prior cognitive assessments such as a Mini-Mental Status Exam ("MMSE") and a Montreal Cognitive Assessment ("MoCA"). Mrs. Zagorac scored low on the MMSE and was unable to complete the MoCA—however, neither resulted in a definitive finding of incapacity.

Despite Nina's reluctance to acknowledge her mother's potential incapacity, the court found compelling evidence from credible witnesses, including neighbours who observed changes in Mrs. Zagorac's behavior, memory, and decision-making ability, linking her behaviour to issues of incapacity.

Consequently, the court ordered a capacity assessment to determine her ability to manage property and make personal care decisions.

Importantly, the conflict between the two siblings who each provided their own evidence as well as the fact that the validity of the continuing power of attorney itself was in question likely had a significant impact on the court ordering a capacity assessment.

Grant v Robinson: Court Finds Incapacity Without Assessment

In contrast, in [*Grant v Robinson*, 2024 ONSC 1558](#), there was disagreement between two grandchildren regarding their grandmother's capacity. The applicant granddaughter sought guardianship of their grandmother's property, but the respondent grandson failed to take part or attend the proceedings.

Based on the sufficient medical evidence the granddaughter provided, the court made a finding of incapacity without requiring a capacity assessment.

The Value of Capacity Assessments: to Protect Vulnerable Individuals

Zagorac highlights the critical role that capacity assessments play in protecting individuals, particularly vulnerable ones, from exploitation, undue influence, or making decisions they may not fully understand.

If you are concerned about someone's ability to make decisions, including when it comes to granting a power of attorney, it is essential to ensure that the person has the mental capacity to understand the consequences of such decisions.



Individuals sometimes agree to sign documents or appoint someone as their attorney without fully understanding what they are agreeing to, especially if they are experiencing cognitive decline, memory issues, or are under emotional stress.

Types of Power of Attorney Documents for Incapacity

For those who are to assume the role of attorney for property, the capacity of an individual is especially relevant depending on the type of power of attorney document they have executed.

Generally, in Ontario and other Canadian common law jurisdictions there are two types of power of attorney documents used: “continuing” or less common in Ontario “springing.” As their respective names suggest, a continuing power of attorney is effective on the date of signing and *continues* through incapacity, whereas a springing power of attorney is effective on a triggering event (usually on incapacity).

Often, power of attorney documents outline how incapacity is to be determined, for example: some require an opinion from two physicians making such a determination, or that a capacity assessment be made, including by a capacity assessor.

Lessons Learned

1. Capacity is a legal finding, not a medical one. The law relies on the capacity of an individual to make legal decisions including making a power of attorney and understand its nature and effect.
2. A capacity assessment will provide a formal, professional evaluation of whether the person is capable of making certain decisions for

themselves, but it is not the only way nor is it necessarily the most appropriate way to determine capacity.

3. Using the services of an estate lawyer, especially if the client has previously worked with the estate lawyer, can be helpful. Lawyers have the obligation of taking and keeping comprehensive and detailed notes in the event capacity is formally questioned.

Further, if the drafting lawyer senses a high-conflict scenario where a dispute as to the client’s capacity is likely, he or she may recommend that the client undergo a capacity assessment to protect against litigation, support the validity of the document, and ensure that the client is making decisions freely without undue influence.

4. Importantly, a client should understand the inherent risks in agreeing to submit to a capacity assessment, in the event the client is found incapable and thus cannot execute the relevant legal documents.
5. *Zagorac* reminds us that capacity assessments are vital tools to determine whether individuals are unduly influenced, their capacity to manage property, and make personal care decisions.

Due to the invasive nature of capacity assessments, it is important to consider other ways that capacity or a lack thereof can be determined with consideration to processes outlined in the relevant legal document and medical evidence first.

The guiding principle in these matters echoes a fiduciary responsibility to act in the best interest of an individual.

In the case of capacity this means striking a balance to ensure an individual’s autonomy is respected as much as possible while safeguarding their well-being.



PART 2

Refresher on Capacity Law

Capacity is a legal finding, not a medical one. Ontario law presumes that adults are capable of making a decision until it is proven they are not capable.

Incapacity cannot be presumed on the basis of a person's age, appearance, disability, disorder or condition, or use of alcohol or drugs.

Although, medical assessments and diagnoses (including capacity assessments) can inform the legal and factual finding of capacity or a lack of capacity.

Individuals are free to make what others view as “bad decisions”—the wisdom of the decision must be separated from the ability to decide.

This principle is further evident in the different legal thresholds of capacity applied in various contexts, for example, the capacity to:

- (i) marry or divorce,
- (ii) manage property,
- (iii) make personal care decisions,
- (iv) grant a power of attorney or
- (v) create a valid will each have distinct thresholds.

Further, in the case of property and personal care decision-making, the *SDA* does not set out the nature of the evidence that an applicant must provide to show that an individual is incapable of making decisions.

Capacity assessments are often used to determine whether someone is legally capable of making decisions such as managing their property or making a power of attorney. These assessments can involve interviews, medical tests, and the evaluation of an individual's cognitive function, understanding, and decision-making ability, but there is no standardized assessment.

Substitute Decisions Act – Order for Assessment

Sections 79 to 81 of the SDA provide the following:

Order for assessment

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. 1992, c. 30, s. 79 (1).

(2) The order may require the person,

(a) to submit to the assessment;

(b) to permit entry to his or her home for the purpose of the assessment;

(c) to attend at such other places and at such times as are specified in the order. 1992, c. 30, s. 79 (2).

Place of assessment

(3) The order shall specify the place or places where the assessment is to be performed. 1992, c. 30, s. 79 (3).

(4) If possible, the assessment shall be performed in the person's home. 1992, c. 30, s. 79 (4).



Health facility

(5) An order that specifies a health facility as the place where the assessment is to be performed authorizes the person's admission to the facility for the purpose of the assessment. 1992, c. 30, s. 79 (5).

Restraining order

80 (1) When an order for an assessment has been made, the court may, on motion, make an order restraining a person other than the one whose capacity is in issue from hindering or obstructing the assessment. 1992, c. 30,

Notice to person

(3) The party moving for the restraining order shall serve notice of the motion on the person against whom the order is sought. 1992, c. 30, s. 80 (3).

Order for enforcement of assessment order

81 (1) When an order for an assessment has been made under section 79, the court may, on motion, order the applicant in the proceeding in which the person's capacity is in issue, together with a police officer, to apprehend the person, take him or her into custody and bring him or her to a specified place to be assessed there, if the court is satisfied that,

(a) the assessor named in the order under section 79 has made all efforts that are reasonable in the circumstances to assess the person;

(b) the assessor was prevented from assessing the person by the actions of the person or of others;

(c) a restraining order is not appropriate in the circumstances or has already been used without success; and

(d) there is no less intrusive means of permitting the assessment to be performed than an order under this subsection. 2006, c. 19, Sched. B, s. 22 (9).

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