

Lear Redux: Capacity Litigation in the Twenty-First Century

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LEAR REDUX: CAPACITY LITIGATION IN THE TWENTY-FIRST CENTURY

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Which scarcely keeps three warm, But for true need –
You heavens, give me the patience, patience I need!
You see me here, you gods, a poor old man,
As full of grief as age, wretched in both;
If it be you that stirs these daughters' hearts
Against their father, fool me not so much
To bear it tamely; touch me with noble anger,
And let not women's weapons, water-drops
Stain my man's cheeks. No, you unnatural hags,
I will have such revenges on you both
That all the world shall – I will do such things –
What they are yet I know not, but they shall be
The terrors of the earth! You think I'll weep,
No, I'll not weep. *Storm and tempest.*
I have full cause of weeping, but this heart
Shall break into a hundred thousand flaws
Or e'er I'll weep. O fool, I shall go mad.²

This paper was inspired by a performance of King Lear at the Shakespeare Festival in Stratford, Ontario in 2014. Shakespeare first published the play in 1607³. Four hundred and seven years later, and despite the incomparable performance of Colm Feore as Lear, the factual matrix of the play seemed more like a capacity litigation file gone horribly wrong than anything else. That perception caused one of us to wonder, at the intermission, what would have happened if King Lear had been the subject of an application for guardianship by one or more of Goneril, Regan or Cordelia before he was permitted to divide the kingdom. The most obvious questions that came to mind were:

- (a) could King Lear be compelled to have a capacity assessment;
- (b) whose evidence would be admissible (Goneril, Regan, Cordelia, the Fool, Gloucester, etc.); and
- (c) if the assessment was delivered before the end of the play could it be retrospective so as to allow for the revocation of Lear's gifts of half of his kingdom to each of Goneril and Regan while disinheriting Cordelia?

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² William Shakespeare, *King Lear*, Act 2, Scene 2, 459-475.

³ RA Foakes, *The Arden Shakespeare: King Lear* (London: Bloomsbury, 1997) [*"The Arden Shakespeare"*] at 110-119.

Unable to resolve those musings in the sunshine outside the theatre during intermission, the result is this paper. Below, therefore, we consider, in the context of 2015, not 1607:

- (a) when can a capacity assessment be compelled;
- (b) what is the proper scope of the evidentiary record in a capacity litigation matter; and
- (c) whether retrospective capacity assessments are of any value.

COMPELLING ASSESSMENTS: WHEN IS IT POSSIBLE?

In guardianship applications, as in *King Lear*, disputes arise about the essential question of whether or not the person who is the subject of the application is, in fact, incapable. This has led to some consideration across the country of the issue of when a Court will compel a person to undergo a capacity assessment.

The Statutory Regimes

Interestingly, the statutory regimes across Canada are not consistent with respect to the jurisdiction of the Superior Courts to order such assessments or the statutory thresholds that must be met before such assessments are ordered. By way of example:

- (a) British Columbia in 2007 passed the *Adult Guardianship and Planning Statutes Amendment Act* which provides statutory authority to order such an assessment, but that section has not yet been proclaimed in force. The *Patients Property Act*, RSBC 1996, c 349, currently in force, provides for a Court-ordered examination under s 5(1) of the Act but only after two affidavits of medical practitioners are produced pursuant to s 3(1) of the Act⁴;
- (b) Manitoba does not have a statutory regime that provides for a Court ordered mechanism for assessment;
- (c) Saskatchewan provides the authority to its Courts to order a capacity assessment in relation to an application to be appointed as a property co-decision-maker or personal

⁴ British Columbia, Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007. See *Temoin v. Martin*, 2012 BCCA 250, 2012 CarswellBC 1694 (WL), aff'g 2011 BCSC 1727 [“*Temoin*”] at para 30.

guardian as well as an assessment in relation to an application to be appointed as property co-decision maker and personal guardian⁵;

(d) Ontario provides at section 79 of the *Substitute Decisions Act, 1992* (“**SDA**”)⁶:

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).*

Same

(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).*

Same

(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).*

(e) Alberta provides at section 104 (1) of the *Adult Guardianship and Trusteeship Act*:

If an adult’s capacity to make decisions is in issue in a proceeding under this Act, the Court may order a capacity assessment of the adult⁷.

In each of Alberta, Ontario, and Saskatchewan, the first requirement for the ordering of a capacity assessment is a demonstration that there is a proceeding outstanding in relation to the person with

⁵ *Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, ss 30 and 38.

⁶ SO 1992, c 30, as amended.

⁷ SA 2008, c A-4.2.

respect to the statute which gives the authority to the Court to make the order. There do not appear to be any reported cases in Alberta nor Saskatchewan with respect to this element of the test. There is, however, case law in Ontario which considers the issue of what this statutory language means.

Unsurprisingly, in 2001, the Ontario Court of Appeal in *Neill v. Pellolio*⁸, concluded that the Court could not make an order compelling a respondent to undergo an assessment in an attempt to determine the respondent's capacity to understand information relevant to making decisions concerning her healthcare where the applicant had not sought a guardianship order pursuant to the SDA.

In 2004, in *Butler v. Brown*⁹, the applicant requested an order pursuant to section 79 (1) of the SDA compelling Mrs. Butler to submit to an assessment, by a physician, for the purpose of offering an opinion as to Mrs. Brown's capacity to marry. The Court dismissed the application on the basis that an assessment of the respondent's capacity to marry was not determinable pursuant to the statute since the purpose of the statute was simply to decide how to deal with the property and personal care issues of persons found to be incapable¹⁰.

More recently, in *Beretta v. Beretta*¹¹, two children sought an order compelling their mother to attend for a capacity assessment for the purposes of assessing her:

- (a) capacity to manage property;
- (b) capacity to manage personal care;
- (c) capacity to consent to intimate relationships;
- (d) capacity to marry;
- (e) capacity to grant powers of attorney for personal care and property;
- (f) retrospectively, capacity to grant powers of attorney for personal care and property at a particular date; and
- (g) capacity to instruct legal counsel.

⁸ (2001) 151 OAC 343, 2001 CarswellOnt 4158 (CA)(WL).

⁹ 2004 CarswellOnt 1413 (Sup Ct J).

¹⁰ Implicit in this decision is a recognition that substitute decision makers cannot decide whether or not a person will marry. Query whether or not this is correct given the role the substitute decision-makers sometimes take on issues of separation and divorce.

¹¹ 2014 ONSC 7178.