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SUPERIOR COURT OF JUSTICE – ONTARIO
(DIVISIONAL COURT)

RE: STEPHEN ABRAMS v. IDA ABRAMS, JUDITH ABRAMS, PHILIP ABRAMS and THE PUBLIC GUARDIAN AND TRUSTEE

BEFORE: Justice Low

COUNSEL: *Murray Teitel*, for the Applicant

Brian Schnurr, for the Respondent Ida Abrams

Archie Rabinowitz, Eric Hoffstein and *David Lobl*, for the respondent Philip Abrams

Justin DeVries, for the respondent Judith Abrams

HEARD AT TORONTO: March 13, 2009

E N D O R S E M E N T

[1] The applicant, Stephen Abrams, seeks leave to appeal from the order of Strathy J. dated December 19, 2008 dismissing a motion for an order requiring Ida Abrams and Philip Abrams to undergo capacity assessments and for and order allowing him to have an examination for discovery of Ida Abrams. On the same date, Strathy J. made an order giving directions setting out the issues for trial and governing the further conduct of this litigation.

[2] This motion involves a consideration of the principles governing the court's exercise of discretion under s. 79(1) of the *Substitute Decisions Act, 1992,* S.O. 1992, c. 30 (the SDA) and the impact, if any, of s. 105 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (CJA) upon the exercise of that discretion.

[3] Section 79(1) of the SDA provides:

> 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.

[4] Sections 105(2) and (3) of the CJA provide:

> (2)Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.
>
> (3) Where the questions of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

[5] The applicant is the son of the respondents Ida and Philip Abrams, aged 86 and 90 respectively. Philip and Ida have significant assets. The applicant is estranged from his parents. Philip and Ida also have two daughters. Judith, who has been named as a respondent, is a physician and lives in New Jersey. Their other daughter, Elizabeth, lives in Toronto and supports the applicant in this litigation.

[6] There is no dispute that as at the date of the decision from which leave to appeal is sought, Ida Abrams was incapable of management of property and incapable in matters of complex personal care. She suffers from Alzheimer's disease. The issues before the court are whether she had capacity to give certain powers of attorney in January 2007, April 2008 and May 2008.

[7] In January 2007, Ida Abrams executed powers of attorney for property and for personal care appointing her husband Philip as her attorney, and her daughter Judith as alternate.

[8] On January 29, 2008, the applicant launched an application for an order for production of any powers of attorney for property granted by Ida to Judith and/or Philip, for the termination of any such power of attorney, for a declaration that Ida is incapable of managing property and for an order appointing the applicant Stephen Abrams as Ida's guardian of property. The applicant also sought parallel relief in respect of powers of attorney granted by Ida for personal care.

[9] The applicant alleges that neither his father Philip nor his sister Judith are fit and proper persons to act as guardian of Ida's property or person. He alleges that it was by reason of fraud on the part of his sister Judith that Ida was induced to give the powers of attorney that she did. The applicant alleges that he (the applicant) has demonstrated honesty and integrity in his personal and professional life and that his sister Judith has repeatedly demonstrated a lack of honesty and integrity.

[10] The applicant alleges that his father Philip is no longer able to properly manage Ida's property and is incapable of acting as guardian of the person.

[11] On April 12, 2008, Ida executed new powers of attorney for personal care and for property. She appointed the Bank of Nova Scotia Trust Company as her attorney for personal care with the Canada Trust Company as alternate. Under s. 12(1)(d) of the SDA, she executed multiple continuing powers of attorney naming the Bank of Nova Scotia Trust Company and the Canada Trust Company as her attorneys for property.

[12] On May 29, 2008, Ida executed a third set of powers of attorney. She appointed Philip and Judith, acting jointly or severally to be her attorneys for personal care with her friend, Dr. Louise Perlin, as alternate. Under s. 12(1)(d) of the SDA she executed multiple powers of attorney for property, naming Philip, Judith and Robert Devenyi as attorneys for property.

[13] In September 2008, the applicant brought a motion for directions and for an order that Ida be assessed and alternatively that she be examined for discovery if found competent to be examined. The applicant also sought an order that Philip be assessed.

[14] In thoughtful and comprehensive reasons, Strathy J. set out, at para. 53 thereof, the factors which should inform the exercise of the court's discretion under s. 79 of the SDA: the purpose of the legislation, whether the person's capacity is in issue; whether there are reasonable grounds to believe that the person is incapable, the nature and circumstances of the proceedings in which the issue is raised, the nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation, whether there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached, whether there are flaws in the previous report, whether an assessment is necessary to decide the issue before the court, whether any harm will be done if an assessment does not take place, whether there is any urgency to the assessment and the wishes of the person sought to be assessed, taking into account his or her capacity.

[15] As is apparent from a comparison with the language of s. 79, some of the above factors are set out in the legislation as pre-conditions of the exercise of the court's discretion and are not only factors that should be considered but factors that must be considered. The relevance of the other factors identified by Strathy J. has not been challenged.

[16] Paragraph 58 of the reasons (which I do not reproduce here) sets out the basis for declining to order that Ida submit to a further assessment.

[17] Significantly, there was existing medical evidence available to the court for use at the trial in that both Ida and Philip had already been assessed. In addition to the report of Dr. McIntyre, Ida's long-standing family doctor, there were several of Dr. Shulman, a qualified expert in the area of capacity assessments. These reports were obtained by the respondents.

[18] Dr. McIntryre, the family physician, opined that Ida was capable, both in January 2007 and in April 2008, the date of her report, of giving instructions for a power of attorney for property and for personal care. Dr. Shulman assessed Ida twice, once in March 2008 and again in August 2008. He opined that despite a number of areas in which he found Ida to be incapable,

she was capable on January 1, 2007 of giving or revoking powers of attorney for personal care and for property. In his August 11, 2008 report, he stated that he still considered Ida to be capable of giving such powers of attorney.

[19] Although entitled to do so, the applicant adduced no medical evidence to suggest that the processes used or the conclusions reached by Dr. Shulman and McIntyre were flawed.

[20] The motions judge was not satisfied that Ida was at risk; nor was he satisfied that an assessment done in 2009 would have significant probative value as to Ida's capacity in January 2007 and April and May of 2008, given the progressive nature of Alzheimer's disease.

[21] With respect to the assessment of Philip Abrams, Strathy J. held that the court had no jurisdiction to order such an assessment, following *Neill v. Pellolio*, [2001] O.J. No. 4639 (C.A.).

[22] The applicant must meet at least one of the two two-pronged tests under Rule 62.02(4) to justify leave being granted to appeal.

[23] The request for an order that Philip Abrams be assessed may be dealt with very briefly. The controlling law is found in *Neill v. Pellolio* which the motions judge applied. The court has no jurisdiction to order an assessment under s. 79 of the SDA unless the capacity of the person of whom an assessment is sought is in issue.

[24] Counsel for the applicant urges that the capacity of Philip Abrams has been put in issue by his client. While the grounds asserted in support of the application allege that Philip is not a fit and proper person to act as Ida's attorney and that he is no longer able to properly manage her property, those allegations do not, in my view, put in issue Philip's capacity in a sense contemplated by the SDA. In any case, what is and what is not in issue is clearly defined in the December 19, 2008 Order Giving Directions, as amended February 3, 2009. The issues are set out fully in para. 1 of the Order. The capacity of Philip Abrams is not an issue.

[25] On this point, there is no conflicting jurisprudence and as the motions judge applied the controlling case law, there is also no reason to doubt the correctness of the decision in this respect.

[26] I turn next to the refusal to order Ida Abrams to submit to a further capacity assessment.

[27] Because of the manner in which cases under s. 79 typically arise, there is a dearth of jurisprudence surrounding the factors that are properly considered when the court is asked to exercise its discretion to order an assessment.

[28] Counsel for the applicant has referred me to no statement of the principles and factors to be considered on a s. 79 application that is inconsistent with the factors set out by the motions judge at para. 53 of his reasons. In that respect, the decision of the motions judge appears to give expression to factors which hitherto may have only been implicit.

[29] That the motions judge declined whereas other motions judges have exercised the discretion to grant an order to assess does not raise a situation of conflicting decisions in the absence of a divergence of the principles applied (see *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 at 7). Every exercise of discretion is governed by the total factual context.

[30] The applicant has referred me to three cases which are advanced as conflicting decisions: *Mesesnel (Attorney of) v. Kumer,* [2000] O.J. No. 1897, *Suchan v. Casella*, [2006] O.J. 2467, and *Rysyk v. Booth Fisheries Canada Co. Ltd.*, [1971] 1 O.R. 123 (C.A.).

[31] *Mesesnel* was a s. 79 application where a second assessment was sought and granted. A prior assessment had been ordered to be performed but the assessor did not follow the mandate he was given under the court order. In particular, the assessor ignored the two most crucial aspects of what he was requested to do. As there were numerous serious flaws in the original assessment, the court ordered a new assessment because it was essential to have before it full and fair medical and neurological data notwithstanding that the process would cause the subject some anguish. The result in *Mesesnel* was driven by the presence of very significant defects in the first court ordered assessment that made it necessary for the process to be repeated and carried out properly.

[32] Even if *Mesesnel* can be taken as authority for the proposition that where a court ordered assessment is clearly defective, a reassessment should be ordered to enable the issues to be determined on full medical data, it is, given the facts before the motions judge in the case at bar, not a conflicting decision. Here, there was no issue of a seriously defective first assessment. The motions judge was entitled to assess the quality of the existing medical reports and he found that Dr. Shulman's (main) report, "notwithstanding some minor technical shortcomings, is comprehensive, detailed and addresses the key issues". That was a reasonable assessment of the report and there is no basis for disturbing it.

[33] More to the point, *Mesesnel* does not contain a conflicting statement of principles or factors to be considered on a s. 79 application.

[34] *Suchan v. Casella* was a decision of the master in a tort action arising out of a motor vehicle accident and did not concern the SDA at all. The defendant sought medical examinations of the plaintiff by four additional experts. The motion was brought under s. 105(2) of the CJA.

[35] *Rysyk v. Booth Fisheries Canadian* was a 1970 decision of the Court of Appeal dealing with s. 75 of the *Judicature Act*, R.S.O. 1960, c. 197 which empowered the court to order a person claiming damages or compensation for bodily injury to submit to a medical examination (colloquially, a "defence medical"). That decision long predated the enactment of the SDA. Although the court observed that the purpose of the section was to provide for discovery so that there will be a fair trial and a just result, the comment must be understood in the context in which it was made -- a tort action wherein the plaintiff claimed damages for personal injury arising out of a motor vehicle accident.

[36] Neither *Rysyk* nor *Suchan* touched on s. 79 of the SDA and neither concerned an issue of capacity. In my view, neither of those decisions is a conflicting one.

[37] *Strobridge v. Strobridge*, 10 O.R. (3d) 540 (Gen. Div.), aff'd 18 O.R. (3d) 753 (C.A.) is relied upon in respect of a point of procedure and is also said to be a conflicting decision. Objection is now taken to the fact that counsel appointed for Ida Abrams by the Public Guardian and Trustee advised the court of Ida's wishes and feelings on the motion without filing an affidavit from her. It is said that the motions judge erred in taking those representations into account.

[38] There is no discussion in the motions judge's reasons as to the propriety of permitting counsel for Ida to make known her feelings and her position without filing an affidavit setting out those matters. There is no ruling on the point. Among the reasons for dismissing the motion is, however, Ida's opposition to an assessment. That opposition was forcefully argued by her counsel.

[39] The degree to which counsel appointed by the Public Guardian and Trustee may elaborate on the wishes and feelings of his client does not appear to have been a significant legal issue on the motion below and I am not satisfied on a reading of the reasons that the motions judge held, as a matter of principle, that it was permissible for counsel to give evidence as to his client's wishes. That being said, it seems to me inevitable that reasonable inferences may be drawn from the arguments made on behalf of a party what the preferences and position of that party are. This is not, in any case, a situation where, but for the representations of counsel there would be no indication or evidence of Ida's outlook; there was evidence from Philip Abrams which addresses that issue and discloses Ida's feelings.

[40] I am of the view that there are no conflicting decisions and that the test in rule 62.02(4)(a) has not been met.

[41] It is argued that there is good reason to doubt the correctness of the decision below and that the matter is one of public importance relative to the development of the law and the administration of justice.

[42] The motion was brought under s. 79 of the SDA and alternatively, under s. 105 of the CJA. It was decided under s. 79 of the SDA, the motions judge observing, at para. 59, that "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."

[43] The applicant argues that the motions judge erred in ignoring or misinterpreting s. 8(1)(a) of the SDA , that he erred in rejecting or disregarding the evidence of the applicant and of the deponents who support his application, that he erred in not finding that Ida was at risk, that he erred in embarking on a weighing of evidence on an interlocutory motion, and that he erred in

holding that the policy objectives of the SDA entitle the court to abrogate the parties' rights to a "level playing field".

[44] The issue on the motion was a narrow one: whether or not to order a reassessment of Ida Abrams to be carried out by an assessor chosen by the applicant. The factors identified as relevant to the exercise of the court's discretion are not challenged; they are clearly relevant. Notwithstanding that the motion was an interlocutory proceeding, the motions judge was entitled to assess the evidence and make such findings as were necessary to decide the issue before him, namely findings relative to the various factors to be considered on a s. 79 application.

[45] One of the factors was whether any harm would come to Ida if she were not ordered to submit to a reassessment. The motion was brought by the applicant and he had the onus of proof. Based on the evidence before the court, the finding that the applicant had not satisfied the court that Ida was "at risk" was a reasonable one, and supportable on the evidence.

[46] As the motion was not the occasion for a determination of the final issues in the litigation--the presence or absence of capacity and presence or absence of fraudulent inducement-- it was not necessary for the motions judge to make any findings on those issues and he did not do so. The affidavits of the applicant and of the deponents who swore affidavits in his support on the application go to the final issues in the litigation; they were not centrally relevant to the issue to be decided on the motion. It was entirely appropriate for the motions judge to hold in abeyance any findings as to the credibility or reliability of evidence on the final issues, particularly where the evidence comes from persons who have significant financial interests.

[47] As far as the assertion that the motions judge erred by ignoring or misinterpreting s. 8(1)(a) of the SDA is concerned, there is an implicit assertion in the argument that the motions judge engaged in a determination of capacity under that provision. He did not do so. The question of Ida's capacity to give the powers of attorney awaits trial.

[48] The assessor, Dr. Shulman, in carrying out a capacity assessment, was required to have regard to s. 8(1) and the applicant's position appears to be that the motions judge erred in finding Dr. Shulman to have produced a sufficiently adequate report in coming to the conclusion that Ida had capacity despite the fact that, in response to questions as to the value of her assets, Ida gave an estimate of the value of her investment portfolio which differed significantly from the valuation given by Philip, who managed it.

[49] Section 8(1) of the SDA 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 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.

[50] It is argued that the abilities listed in s. 8(1) are all necessary components of capacity to give a continuing power of attorney.

[51] The fact that there was a divergence between Ida's estimate of the value of her investment portfolio and Philip's answer as to the value of those assets may or may not be significant and may or may not be an indication of lack of capacity. Dr. Shulman did not consider it to have been demonstrative of lack of capacity. Dr. Shulman was aware of the divergence, just as he was aware, from having read the affidavits filed in the litigation, that the applicant himself had placed an approximate value upon those same assets at a figure close to that expressed by Ida and not close to that expressed by Philip.

[52] Even if s. 8(1) is construed as a list of necessary abilities and not as a list of abilities which, if all are present, are sufficient for a finding of capacity, the level of knowledge that s. 8(1)(a) of the SDA speaks to must be determined on a case by case basis depending on the past habits and practices of the individual. The motions judge did not decide and was not called upon to decide whether Ida's knowledge of the approximate value of her property was sufficient to satisfy s. 8(1). As the determination of the motion did not require a finding under s. 8(1) and as no such finding was made, there is in my view no good reason to believe that the motions judge erred in this respect.

[53] The argument that the motions judge erred in rejecting the "level playing field" is one which pits the policy of fostering fair trials that underlies ss. 105 (2) and (3) of the CJA against the purposes of the SDA. In my view, the motions judge was correct in deciding the motion solely under s. 79 of the SDA and in informing the exercise of his discretion with the policies and purposes underlying the SDA.

[54] Section 105(2) of the CJA replaced s. 77(1) of the *Judicature Act* which made it possible for a party other than the one asserting that he had a bodily injury or impairment to have a medical examination of the person said to have such injury or impairment. It enabled defence

medicals and its use was primarily in actions in which a plaintiff claimed damages from a defendant for personal injury.

[55] The plaintiff, having dominion over his person, was in a position to submit to medical examinations and to adduce the evidence generated therefrom. Absent s. 77 of the *Judicature Act* and its predecessors and a court order thereunder, a defendant had no ability to marshal evidence on the same footing to meet the case against him. Trial fairness and a just result was therefore the interest underlying the provision (see *Rysyk v. Booth Fisheries Canadian Co. Ltd.*, *ibid* at pp. 125-7).

[56] An application under the SDA for a declaration of incapacity, however, is a proceeding of a different species if not a different genus. The person whose capacity is in issue does not seek monetary redress from another. An application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.

[57] That these rights should not be lightly interfered with and that the individual should not be visited with the intrusion into her privacy that an assessment entails simply by virtue of an allegation having been made – even if there is "good reason to believe that there is substance to the allegation" – is reflected in the statutory presumption of capacity and, in respect of the particular issue before the court, in the onus built into s. 79 for the moving party to show that there are reasonable grounds to believe that the person is incapable.

[58] Section 105(2) and (3) of the CJA speak to physical or mental condition, which conceivably encompasses all aspects of the body and mind. Section 79 of the SDA speaks specifically and only to capacity, a small segment of the long line that is "mental condition". In my view, when the legislature enacted s. 79 of the SDA empowering the court to order an assessment where the preconditions in that section are met, it occupied that field and s. 105(2) and (3) of the CJA and the policy underlying them have no application.

[59] The final issue is whether there is good reason to doubt the correctness of the refusal to order that Ida be examined for discovery. There is no *prima facie* right to an examination for discovery of Ida Abrams in the context of the proceeding. The motions judge, in fashioning the order for directions, granted the applicant examination of certain individuals who are not parties and who would reasonably be in possession of information of central relevance to the issues to be tried. In light of Ida's present state of health, the directions strike a reasonable balance in the interests of permitting adequate pre-trial disclosure and I am not persuaded that there is reason to doubt the correctness of that exercise of discretion.

[60] I am of the view that there does not appear to be good reason to doubt the correctness of the Order and, as neither of the two-pronged tests in rule 62.02(4) have been met, the motion is dismissed.

[61] If the parties are unable to agree as to costs, written submissions of no more than 4 pages may be made as follows: by the respondents no later than April 15 and by the applicant no later than April 30, 2009.

Low J.

DATE: March 25, 2009