



## Case Comment – *Zheng v Zheng*, 2012 ONSC 3045: Terminating Guardianship

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The court has previously looked at the issue of when it should order a person alleged to be incapable to undergo a capacity assessment under section 79 of the *Substitute Decisions Act, 1992*<sup>12</sup> but never where the person under guardianship is seeking to be declared capable and the guardian opposes such a finding. *Zheng v Zheng* is just such a case.

The applicant in the original application, Ying (“Cindy”) Zheng, sought a declaration that she was capable of managing her personal care and property, as well as an order terminating the guardianship of her person and property established five years prior in favour of her brother, Long Zheng (“Long”). In support of both terminations, Cindy presented the court with assessment reports of a qualified assessor under the *SDA* and an in-home occupational therapy functional assessment. In support of the termination of the guardianship of her person, Cindy also provided a report of a psychiatrist at the Centre for Addiction and Mental Health. Each assessment found Cindy to be capable.

The court granted an adjournment, at Long’s request, to permit these assessments to be reviewed by Dr. Kaminska, the same neuro-psychologist who had declared Cindy incapable of managing her personal care and property in 2007. Dr. Kaminska’s paper review identified some concerns. Cindy had the assessments reviewed by another neuropsychologist who confirmed the findings of capacity.

Upon the return of the application, an order was made requiring Cindy to undergo a further assessment by an assessor selected by Long, without reasons from the motion judge. It was from this order that Cindy sought leave to appeal before Justice Wilton-Siegel in Divisional Court. Although the focus of the motion was when leave to appeal may be granted, the absence of reasons from the motion judge warranted a review of

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<sup>1</sup> SO 1992 , C 30 [*SDA*].

<sup>2</sup> *Abrams v Abrams*, [2008] OJ No 5207 (Sup Ct J) [*Abrams*]; *Urbisci v Urbisci*, 2010 ONSC 6130 [*Urbisci*].

whether the facts in the instant case met the test for granting an assessment pursuant to subsection 79(1) of the *SDA*, set out by Justice Strathy in *Abrams*.<sup>3</sup> The court's conclusions are outlined below.

The purpose of the *SDA* is to balance the interests of the alleged incapable person against the protection of the vulnerable. The fact that a party has previously been found incapable does not lessen the court's concern for the autonomy of the individual.

Pursuant to section 79 of the *SDA*, when making an order requiring an individual to undergo a capacity assessment, the person's capacity must be in issue and there must be reasonable grounds to believe that person is incapable. Cindy's capacity was certainly in issue; however, this case raised a novel legal issue in that Long's motion for assessment could not serve as a substitute for Cindy's application to terminate her guardianship. The threshold of what constituted reasonable grounds to believe Cindy was incapable appeared to be low given that she was already under guardianship; however, Justice Wilton-Siegel stated that "there can be no presumption of incapacity. Nor can the court approach the issue on a basis that effectively reverses the onus in respect of the plaintiff."<sup>4</sup> The court declined to determine whether this condition had been satisfied in light of the other considerations weighing against an order for assessment. Thus, the most complex issue was left to be decided another day.

The nature and circumstances of the proceedings were also novel and weighed against the assessment order. As Cindy would have the onus of satisfying the requirements for terminating her guardianship and wished to proceed without further assessment, notwithstanding the criticism of Dr. Kaminska's paper review, the court should have respect for her autonomy. Furthermore, Long would be given the opportunity to raise his concerns at the hearing.

Justice Wilton-Siegel reviewed the nature and quality of both the medical and non-medical evidence before the court as to, *inter alia*, Cindy's capacity and vulnerability to exploitation. On the one hand, Cindy provided the court with significant medical evidence in support of her termination application. Additionally, the court identified difficulties with Dr. Kaminska's paper review of this evidence. The court found that she had performed the assessment on the basis of which Cindy's guardianship was ordered in 2007 and had not interviewed Cindy recently. This presented a significant possibility of bias. Furthermore, Dr. Kaminska did not suggest that the assessments were invalid. Further assessments should only be ordered in the face of positive capacity

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<sup>3</sup> *Supra*, note 2 at para 53.

<sup>4</sup> *Zheng v Zheng* at para 16.

assessments where there are significant defects in the assessments, where serious questions exist about the individual's capacity or where questionable behaviour is demonstrated after the date of the assessments. Dr. Kaminska's paper review could not support either of these grounds for a further assessment and therefore, a further order for assessment did not reflect a concern for Cindy's autonomy or the intrusive and demeaning nature of an assessment.

On the other hand, Long swore an affidavit setting out those circumstances which caused him to doubt that Cindy's mental state had resolved sufficiently to terminate the guardianship orders. Justice Wilton-Siegel determined that because Long had presented this evidence to Dr. Kaminska and she had failed to support that conclusion, the consideration weighed against further assessment.

Cindy was strongly opposed to further assessment and ultimately the court determined that no harm would be done if the assessment did not take place. Long argued that without the benefit of another assessment the court would not have all the information before it and a further assessment would provide objective evidence to the court; however, Dr. Kaminska's review never suggested that the assessments were invalid, flawed or incomplete and no doubt was cast on the objectivity of the evidence provided by Cindy. As such, there was no legitimate concern that harm would be caused without further information about Cindy's capacity.

The court determined that the only grounds for the assessment order would have been based on a reverse onus or an attempt to provide certainty to the court, which was stated to be an improper purpose in *Urbisci*.<sup>5</sup> Thus, there was good reason to doubt the correctness of the motion judge's order. Ultimately, the effect of the order requiring an assessment was to discriminate against a person under a disability, relative to a person not under a disability, which was a matter of such importance that it supported the court granting leave to appeal.

We await further commentary on orders for assessment in the context of termination of guardianship applications on the hearing of the appeal.

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<sup>5</sup> *Supra* note 3.