EVIDENCE OF INCAPACITY IN CONTESTED GUARDIANSHIP APPLICATIONS

By Krystyne Rusek, October 2022[1]

Introduction

Many estate practitioners are familiar with the procedure that is required to obtain the guardianship of an incapable person. Persuasive evidence of incapacity, whether formal or anecdotal, will be required, even where an application is not contested and all interested parties have provided consent. However, when a guardianship application is contested, evidentiary requirements will increase, both in quantity and quality, and conflicting evidence provided by various parties will be scrutinized and weighed by the adjudicator.

In order to appreciate the nature of evidence that will be required, it is important to understand the different types of contested guardianships:

1. challenge of a statutory guardianship (only with respect to property)[2];
    a. by alleged incapable person; or
    b. by an individual on behalf of the alleged incapable person;

2. competing applications to replace the PGT as guardian of property[3];

3. challenge (contesting) of applications for court appointment as guardian of property or of the person[4];
    a. by the alleged incapable person;
    b. by another person;

4. competing applications for guardianship for property or of the person[5].

The *Substitute Decisions Act, 1992*, SO 1992, c 30 ("*SDA*") sets out various procedural and evidentiary requirements for various types of matter, and care should be taken to review applicable sections in advance of commencing an application.

The *SDA* is also the source of various tests of capacity, including the two that must be met for a finding of incapacity in guardianship applications:

> s. 6 Incapacity to Manage Property
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> A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

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[1] Prepared for the Law Society of Ontario's 25th Annual Estates and Trusts Summit, October 2022
[2] Under s. 54 of the *Mental Health Act*, RSO 1990, c M.7 or s. 15 of the *Substitute Decisions Act*, 1992, SO 1992, c 30 ("*SDA*").
[3] Under s. 17 of the *SDA*.
[4] Under s. 22 and 55 of the *SDA*.
[5] *Ibid*.

> s. 45 Incapacity for Personal Care
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> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Determinations of capacity to manage property are "all or nothing", in that the person is either capable of managing any and all property, or is not. Determinations as to capacity to manage personal care are broken down into the various types of personal care referenced in the section: health care, nutrition, shelter, clothing, hygiene and safety, and a person may be found capable with respect to certain types of personal care, and incapable with respect to others.[6]

The *SDA* codifies the presumptions that adult individuals are capable of making decisions regarding their personal care and property.[7] As stated *The Public Guardian and Trustee v. Golyzniak*: "In keeping with the primacy of autonomy, those presumptions can only be displaced on the basis of clear and compelling evidence of incapacity"[8]. As also stated in *Golyzniak*, "Incapacity is a high threshold and appropriately so. It preserves freedom, economy and dignity, and seeks to restrict state attempts to impose value judgements and paternalism"[9]

The types of evidence available in guardianships and what evidence will be considered clear and compelling by an adjudicator, are the focus of this paper.

Principles applicable to all evidence of incapacity (or capacity)

General principles that apply to evidence

All of the general principles that apply to evidence in legal proceedings will apply to proceedings involving capacity, including:

- relevance and materiality
- probative value versus prejudicial effect
- exclusionary rules, including hearsay

Hearsay evidence

In proceedings involving capacity, it is inevitable that hearsay evidence will be tendered. This evidence may come from reports attached to affidavits or from statements about the alleged incapable person by medical professionals, family members and other witnesses or affiants.

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[6] *Elmi v. Hirsi*, 2015 ONSC 6003 (CanLII), (*"Elmi"),* at para. 30.
[7] S. 2, *SDA*.
[8] *The Public Guardian and Trustee v. Golyzniak*, 2021 ONSC 4524 (CanLII), ("*Golyzniak*") at para. 17, citing *Elmi*, at para. 24 and *Koch (Re)*, 1997 CanLII 12138 (ON SC).
[9] *Golyzniak*, at para. 16.

Hearsay evidence is an out-of-court statement that is offered to prove the truth of its contents. The essential, defining features of hearsay are: (1) the fact that an out-of-court statement is adduced to prove the truth of its contents; and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.[10]

Hearsay evidence is presumptively inadmissible, because it cannot be adequately tested.

Generally, admissibility of hearsay evidence will be considered under either the principled approach, which requires that the evidence be both necessary and reliable, or under certain traditional exceptions.

With respect to the exceptions that may be available within the context of guardianship applications, the prior testimony of the alleged incapable person may be admitted[11], as may statements of police officers, case law workers etc., made in the ordinary course of duty[12], as specific exceptions to the rule against hearsay.

Medical, legal and financial records may also be hearsay, or contain hearsay evidence, which will be discussed later in this paper.

Nature of evidence

Notably, under the *SDA*¸ only certain proceedings will require specific forms of evidence. An application to appoint a guardian of property or the person, which is to be heard by the court, does not require any specific form of evidence as to incapacity. In contrast, motions and applications that will proceed by summary disposition require specific statements of opinion and or formal assessments.[13]

However, as discussed further below, in contested guardianship applications, courts have frequently expected formal assessments and expert reports and/or opinions, notwithstanding that the statute does not require same.

Currency of evidence

Evidence relating to capacity should be current. Where possible, statements regarding capacity, whether formal assessments, affidavit evidence, or unsworn statements, should be contemporaneous with the commencement and/or developments in the proceedings.

Under the *SDA*, statements used in applications to appoint a guardian of property or motions to terminate a guardianship of property, by summary judgement under sections 72 and 73, must have been based on personal contact with the alleged incapable person within the preceding 12 months. Assessments used in these particular proceedings must have been conducted during the six months before the notice of application or motion was issued.

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[10] *R. v. Khelawon*, 2006 SCC 57 (CanLII), [2006] 2 SCR 787.
[11] Under the Ontario *Evidence Act*, RSO 1990, c E.23, ss. 20-21.
[12] *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608 (S.C.C.) ("*Ares*"), at p. 626.
[13] Ss 72, 73, 74, and 75, *SDA*.

Similarly, assessments used in applications to appoint a guardian or to terminate a guardianship of the person, under sections 74 and 75, must also have been conducted during the six months before the notice of application or motion was issued.

Where certain formal evidence, such as medical records or assessments, are out of date, it may be possible to "bridge" the time gap by providing anecdotal evidence that capacity has either deteriorated or remained the same.[14]

Corroboration

Where the proceeding is by or against a person who has been found incapable under the *SDA* or *Mental Health Act*[15], section 14 of the *Evidence Act* requires corroboration of evidence by an opposite or interested party, in order to support a finding of incapacity based on said evidence. Therefore, in proceedings where the alleged incapable person, or a person on his or her behalf, is challenging the finding, corroboration will be required.

Corroboration is not statutorily required in an application for a *de novo* finding of incapacity, although it may be of benefit to the adjudicator in a weighing of evidence.

Medical and other records, if properly admitted, can be used for such corroboration, as can the evidence of independent witnesses.

Types of Evidence in Guardianship Applications

Depending on the nature of the proceeding, the type of evidence that will be persuasive to a court will differ. The following are different categories of evidence that may be presented to the tribunal or to a court, in proceedings involving findings of incapacity:

1. formal capacity assessments;
2. expert reports;
3. medical professional opinions;
4. medical records;
5. lawyer's files and opinions;
6. police records
7. financial records;
8. lay evidence, including:
    a. evidence from the alleged incapable person;
    b. anecdotal evidence of interested parties; and
    c. anecdotal evidence of uninterested witnesses.

Formal Capacity Assessments

There are various assessments available under the *SDA*. Certain of these assessments result in findings that have legal consequences, i.e. a determination of incapacity that is legally binding.

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[14] *Dimitrova v. Dimitrova*, 2021 ONSC 3239 (CanLII) ("*Dimitrova*"), at para. 37 and *Golyzniak*, at paras. 48-50

[15] Or in a psychiatric facility, who because of mental disorder within the meaning of the *Mental Health Act*.

Certain other assessments result in opinions that may be tendered as evidence in different proceedings.

Within the context of guardianship applications, the following assessments of capacity under the *SDA*, with respect to property, are **determinative** and the onus is on the person challenging the assessment to provide evidence to set aside a finding of incapacity, on a balance of probabilities:

a. under section 16(1) [to determine whether a statutory guardian of property is required];
b. under section 20(1)(3)(iii) [to terminate a statutory guardianship of property created under section 15]; and
c. under section 20(1)(4)[to terminate to terminate a statutory guardianship of property, created under section 16].[16]

The following assessments of capacity under the *SDA*, with respect to property, are merely statements of **opinion** that will be tendered as evidence in a proceeding:

a. under section 22 [to provide evidence in a court application for the appointment of a guardian of property, not by summary disposition];
b. under section 27 [to provide evidence in a court application for the appointment of a temporary guardian of property];
c. under section 28 [to provide evidence in a motion to court to terminate the guardianship of property, not by summary disposition];
d. under section 72 [to provide a statement to accompany an application for the appointment of a guardian of property, by summary disposition under section 77];
e. under section 73 [to provide a statement to accompany a motion for the termination of a guardianship of property, by summary disposition under section 77]; and
f. all assessments under section 79 [court ordered].

Similarly, the following assessments of capacity under the *SDA*, with respect to personal care, are statements of **opinion**, to be tendered as evidence:

g. under section 55 [to provide evidence in a court application for the appointment of a guardian of the person, not by summary disposition];
h. under section 62 [to provide evidence in a court application for the appointment of a temporary guardian of the person];
i. under section 63 [to provide evidence in a motion to a court to terminate the guardianship of the person, not by summary disposition];
j. under section 74 [to provide a statement to accompany an application for the appointment of a guardian of the person, by summary disposition under section 77];
k. under section 75 [to provide a statement to accompany a motion for the termination of a guardianship of the person, by summary disposition under section 77]; and
l. all assessments under section 79 [court ordered].

[16] The following additional assessments under the *SDA*, unrelated to guardianship applications, are also determinative: ss. 9(3) [to provide notice to an attorney for property of the grantor is capable or incapable of managing property] and 49(2) [to provide notice to an attorney for personal care that the grantor is capable or incapable of personal care].

Notwithstanding their formal nature, the above statements of opinion should not be viewed as determinative, but should instead be weighed by the adjudicator against all other evidence available. However, the court has stated that the utility of a capacity assessment to an adjudicator cannot be understated.[17]

Capacity assessments may be ordered by the Court under section 79 of the *SDA*, however, in ordering this relief, the court must balance the rights of the alleged incapable person's fundamental rights against the court's duty to protect the vulnerable.[18] A court assessment may be ordered where there is insufficient, independent evidence on record as to capacity.[19]

A court order assessment is not available if the purpose is to provide certainty to the court or to ease the concerns of guardians or relatives.[20] The court should not take an "it can't hurt attitude"[21]. If an assessment has already been completed, further assessments should not be ordered unless these are significant defects in prior assessments, and/or serious questions or questionable behaviour arising after the date of the assessment.[22]

There are certain best practices for conducting capacity assessments and completing reports, some of which can be found in the Guidelines for Conducting Assessments of Capacity, published by the Ministry of the Attorney General.[23]

The following should be included in an assessment report:

- information about the date(s) and length(s) of the assessment;
- confirmation of formal requirements, including provision of rights' information;
- details regarding the collection of background information from friends, family, professional caregivers and medical practitioners or other professionals;
- description of any review of objective records, including complete list of records reviewed and how received[24]
- description as to alleged incapable person's appearance and demeanour;
- open ended questions, asked in a way that accommodate the alleged incapable person's language ability, level of education and culture;
- specific examples as to answers given and/or discussion with the alleged incapable person;
- description of any prompting by the assessor and/or any reference to notes or records by the person being assessed;
- analysis of both parts of the definition of capacity, being:
    - the ability to "understand", through factual inquiries into financial or medical circumstances and needs, and areas of decision-making; and
    - the ability to "appreciate", through inquiries into available options, as well as reasons and rationale for various decisions made or to be made;

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[17] *Kischer v. Kischer*, 2009 CanLII 495 (ON SC) (*"Kischer"*), para. 10.
[18] *Abrams v. Abrams*, 2008 CanLII 67884 (ON SC ("*Abrams*"), at para. 50.
[19] *Saing v. Saing et al*., 2021 ONSC 4287 (CanLII) at para. 32 to 33 and *Kischer*, at para. 13.
[20] *Ying (Cindy) Zheng v. Long Zheng*, 2012 ONSC 3045 (CanLII) (*"Zheng"*), at para. 37.
[21] *Kischer*, at para. 10 and *Urbisci.v Urbisci*, 2010 ONSC 6130 (CanLII), at para. 27.
[22] *Zheng*, at para. 24.
[23] Capacity Assessment Office, Ministry of the Attorney General, May 2005, which can be downloaded at https://www.publications.gov.on.ca/guidelines-for-conducting-assessments-of-capacity.
[24] The Guidelines indicted that record review should be limited to information required to provide clarification or resolution of issues arising from the interview.

- with respect to an assessment of capacity to manage personal care, assessment of each type of care decision.

Capacity assessments may be attacked in various ways[25]:

- unreasonable involvement by an interested party in arranging the assessment, including biased instructions;
- review and reliance by the assessor on select medical records, or failure to review any medical records;
- unreasonable reliance by the assessor on background provided by interested parties, or incomplete collection of background information;
- failing to reference the proper tests of capacity and/or failing to address all components of the applicable test;
- suggesting answers or guiding the person being assessed;
- failing to provide specific details; and
- acceding to requests by interested parties for changes to a draft report.

Capacity assessments under the *SDA* are not necessarily expert reports. This is further discussed in the section below.

Expert Reports

Expert reports are obtained by a party for the purposes of litigation. If a medical report has been made for a purpose other than litigation, such as the opinion of a medical practitioner in the course of observation and treatment of the alleged incapable person, this will not be considered an expert report.[26]

In *Doran v. Melhado,* the court held that:

> Rule 53.03 and section 52 of the *Evidence Act* are related but distinct regimes. Rule 53.03 sets out the prerequisites for calling an expert witness to testify within his or her field of expertise at a trial in any case, regardless of subject matter. If the proposed expert is a medical practitioner, section 52 allows for a party to file his or her report as evidence if notice is given at least ten days before trial and with leave of the court, instead of calling that medical practitioner as a witness at trial [hyperlinks added].[27]

The court has held that "capacity assessments under the *SDA* were not designed, nor were they even contemplated, to be used as weapons in high conflict litigation such as this."[28] As a result, in many cases, the parties will seek expert reports to supplement or replace capacity assessments.

If a capacity assessment is to be relied upon as an expert report, it must satisfy the requirements of rule 53.03 and the following criteria for admission, as set out in case law, including:

a. a properly qualified expert;

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[25] *Adler v. Gregor*, 2019 ONSC 3037 (CanLII) ("*Adler*"), paras. 29-54. See also *MS (Re)*, 2019 CanLII 79263 (ON CCB), which contains a comprehensive analysis of flaws in an assessor's evaluation of capacity to manage property.
[26] *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII), generally, and at paras. 6 and 81.
[27] *Doran v. Melhado*, 2015 ONSC 2845 (CanLII), at para 32.
[28] *Adler*, at para. 47.

b. relevance;
c. necessity;
d. reliability;
e. a weighing of prejudices versus probative value; and
f. the absence of any exclusionary rule.[29]

Expert reports should be detailed and provide specific examples of observations based on interaction with the alleged incapable person. Reports should be unbiased and should be reviewed for neutrality in tone and the process used in reaching the opinion. Biased reports that cross the threshold from independent assistance to the court to outright advocacy on the part of a party, may be rejected or given minimal weight.[30]

Medical Professional Opinions

Family physicians, geriatricians and other medical professionals may be asked to provide an opinion as to a person's capacity to make decisions regarding property or personal care. If sought for the purpose of litigation, this could be an expert report, discussed above, or it could be a letter or note provided to a party during the preliminary stages of the proceeding. Medical opinions may also be contained in medical records, discussed below.

Medical professionals may provide information regarding diagnoses relevant to capacity, medications prescribed to the alleged incapable person, and/or anecdotal information based on observation. Frequently, medical practitioners will use cognitive screening tests to assist in forming an opinion.

The Mini-Mental State Examination (MMSE) is one commonly used screening test, which assesses an individual's orientation to time and place, short-term memory, concentration, language and visual-spatial abilities, on a score of 0-30.[31] Th Montréal Cognitive Assessment (MoCA) assesses mild cognitive impairment, including tests of executive and frontal lobe function, and is considered more sensitive than the MMSE.[32] Other tests include the Clock Drawing Test, which despite its simplicity, tests various cognitive functions, and the Mini-Cog, which incorporates the Clock Drawing Test and a short-term memory test.[33]

Medical practitioners may also provide historical information, detailing cognitive functioning and progressive decline of same. Specific details will be essential; vague statements will be given little weight.[34]

It is important to consider who is in the best position to provide evidence and the choice of affiant/witness will depend on the nature of evidence sought. For example, in order to show a progressive decline in cognitive functioning, evidence from a long-term family physician may be persuasive. In contrast, where incapacity is based on a complex medical condition or disease, the evidence of a psychiatrist or geriatrician may be of benefit.

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[29] *Adler*, at paras. 49-51
[30] *Adler*, at paras. 52-54.
[31] *The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective*, K. Whaley, K. Shulman and K. Crawford; The Advocates Quarterly, Volume 45, Number 4 at pg. 399.
[32] *Ibid* at pg. 400.
[33] *Ibid* at pg. 400.
[34] *Brillinger v. Brillinger-Cain*, 2007 CanLII 23331 (ONSC), at para. 40.

Instructions provided to the practitioner may also come under scrutiny; a request with leading or biased instructions will taint that evidence.

Medical reports may be admitted under section 52 of the Ontario *Evidence Act*, or as an exhibit to a parties' affidavit, however, in the latter case, the report is hearsay and will be subject to the considerations described above.

The admission of medical records under section 52 does not shield the writer from cross-examination. Once the report is filed under section 52, the writer of the report/note becomes a witness for the party, and may be required to appear for cross-examination at trial, or out-of-court cross-examination on the report. As indicated above, expert reports are different from reports contained in medical records.

Medical Records

Disclosure of an alleged incapable person's medical records may be sought in contested guardianship proceedings. Where the alleged incapable person is challenging the guardianship and does not consent to disclosure of medical records, or where there are competing applications for guardianship, the alleged incapable person's right to privacy must be considered and protected.[35] Where there is insufficient evidence presented to provide a basis on which to waive privacy rights, this relief may be refused.[36]

In the leading case of *Ares v. Venner*, the Supreme Court of Canada held that:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein.[37]

As stated above, medical records are admissible evidence, either under section 35 or section 52 of the *Evidence Act*. Where the contents of the record are based on the personal observations of the writer, they will be admitted for the truth of their statements. Where the record consists of statements of other people, the statements are hearsay[38] and should only be admitted under the principled approach, and/or under a specific exception to hearsay. However, where the evidentiary record is incomplete, or the statements contained within the reports are corroborated elsewhere, an adjudicator may exercise discretion and rely upon them for the truth of their contents.[39]

Lawyer's opinion or records

Lawyers may occasionally provide either a written statement or *viva voce* evidence as to a client's capacity. Observations on capacity may occur in the context of, or following, a transaction that is being called into question. For example, where a lawyer has prepared a power of attorney on the

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[35] Issues relating to the protection of records under the P*ersonal Health Information Protection and Privacy Act* will not be discussed in this paper, however, these may be live issues in proceedings involving alleged incapable persons.
[36] *Adler*, at para. 19.
[37] *Supra (Ares)* at pg. 626.
[38] *Dimitrova*, at para. 24.
[39] See various examples of this in *Golyzniak*. Even statements within medical records, i.e. statements allegedly made by family members to the recording medical practitioner, which are considered to be triple hearsay, may be admitted in limited cases. See *Parliament et al v. Conley and Park*, 2019 ONSC 2951 (CanLII), at para 36.

client's instructions and has attended on the execution of same, that lawyer may have relevant evidence as to client's capacity to grant a power of attorney, which in turn is relevant to a guardianship application.

As with letters from medical practitioners, specifics are persuasive. In some cases, a lawyer may have actually tested the client's capacity, by seeking confirmation of factual information (date of birth, value of property), or conducting some form of cognitive assessment, such as the Clock Drawing Test. The lawyer ought to have also made inquiry into whether the client understood and appreciated the nature of a particular transaction.

A lawyer may also be requested to provide his or her files in a contested guardianship. Admission of lawyers' files falls under section 35 of the *Evidence Act*, dealing with business records. The alleged incapable person is entitled to assert privilege over these records, and a sufficient basis for a court order must be provided by the party seeking disclosure.[40]

Police records

Occasionally, police records will be available to provide evidence relevant to a determination of incapacity. Disclosure of the records requires the written consent the subject(s) of the police report. Information of uninvolved third parties will be redacted.

Notwithstanding that the statements contained within the reports may be hearsay, they may be admitted for the truth of their contents as having come from a disinterested nonparty.[41]

Financial records

Financial records of the alleged incapable person may provide evidence that indicates capacity or incapacity. For example, improvident transactions could support an allegation that the alleged incapable person does not have capacity to manage property. Conversely, notes of a financial advisor, recording detailed discussions with respect to transactions, may be considered evidence of capacity.

Financial records may be admitted under section 33 of the *Evidence Act*. As with medical records, the alleged incapable person's right to privacy cannot be ignored and disclosure may be refused.

Statements as to perceived capacity, contained within the records, will be considered hearsay. However, similarly to the statements contained within police records, they may be admitted for the truth of their contents, under the principled approach, as statements from a disinterested party.

Evidence from the alleged incapable person

Where the alleged incapable person is the person challenging a finding of incapacity and/or a guardianship, whether statutory or by court appointment, that person's evidence will generally be

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[40] *Adler*, at para. 19. Note that solicitor-client privilege is not overridden by the permissive provisions of s. 83 of the *SDA*, which permit the PGT to access records relevant to an investigation into a parson's capacity.
[41] *Palichuk v.Palichuk*, 2021 ONSC 7393 (CanLII) ("*Palichuk*"), at para. 71.

of great value to the adjudicator. Evidence may be presented by affidavit or by *viva voce* evidence, where appropriate.

Evidence should be specific; for example, the alleged incapable person may offer information as to financial transactions conducted and/or personal care tasks undertaken, reasons behind certain decisions, conflict with involved parties, etc. If an alleged incapable person is challenging a finding of incapacity with respect to personal care, the specific types of personal care decisions referenced in section 45 of the *SDA* should be addressed.

Counsel must be aware that an opposing party has a right to cross-examine on the evidence and that certain limitations with respect to communication and/or attendance (i.e. inability to read, advanced age and frailty, physical limitations) will not override this right. Evidence from the cross-examination of the alleged incapable person will be highly compelling. Where an alleged incapable person has answered most questions cogently, this evidence will be persuasive notwithstanding some errors or misstatements of facts.[42] Explanations and justifications as to decision-making need not be reasonable, based on an objective standard, they merely need to be rational within the specific context.[43]

Where an alleged incapable person chooses not to swear affidavit evidence in an application or motion, he or she may still be required to provide evidence as a witness before the hearing of a motion or application under rule 39.03, subject to the test set out therein. With leave of the presiding judge, the alleged incapable person may be examined at the hearing of a motion or application in the same manner as at trial.[44]

Surreptitious recordings of the alleged incapable person should be discouraged.[45] While they may be admitted as evidence if their probative value outweighs their prejudicial effect, and/or if the contents address an incomplete record[46], these types of recordings can be used against the recorder, to show bias and manipulation of the incapable person.[47]

Evidence from interested parties

Lay evidence (i.e. non-expert evidence), which is generally anecdotal in nature, may be available from various people, including family members, friends, and community contacts of the alleged incapable person. Witnesses, as a general rule, may provide evidence only as to observed facts and it is then up to the trier of fact to draw inferences from those facts, e.g. a lay witness should not provide evidence that the alleged incapable person has dementia-related confusion, but rather, should only identify being witness to episodes of confusion.[48]

Opinion evidence of an opposing party will be given little or no weight.[49]

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[42] *Palichuk*, at paras. 48 and 50.
[43] *Ibid*, paras. 57, 65.
[44] Rule 39.03(4), *Rules of Civil Procedure*, RRO 1990, Reg 194.
[45] *Rudin-Brown et al. v. Brown AND Brown v. Rudin-Brown et al.*, 2021 ONSC 3366 (CanLII) (*"Rudin"*), at para 30.
[46] *Rudin*, at para 28.
[47] *Rudin*, at para 35.
[48] There are exceptions to this rule that lay witnesses should not provide opinion evidence, however these exceptions will be rare in guardianship proceedings, where other evidence is available.
[49] *Elias v. Hawa*, 2018 ONSC 5703 (CanLII), at paras. 30 and 41.

Where involved parties provide evidence, care must be taken not to allow the evidence to focus on conflict and competing interests, whether between the incapable person and the other party, or between competing applicants for guardianship. In the words of the Honourable Justice Brown, as he was then:

> Proceedings under the *SDA* are not designed to enable disputing family members to litigate their mutual hostility in a public court.[…]This court 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".[50]

Evidence from uninterested witnesses

Where possible, evidence should be sought from neutral and/or disinterested third parties, such as caseworkers, friends and neighbours, and other people in the community. This may not always be possible, as uninvolved people may not wish to enter into the dispute and be exposed to cross-examination. Furthermore, individuals who work for institutions, such as hospitals, long-term care centers and banks, are often prohibited by their employer from providing statements to be used in court cases. Notwithstanding this, efforts should be made to canvass opportunities for this type of evidence, as it will be persuasive to adjudicators.[51]

Conclusion

As indicated, adult persons are presumed to have capacity to manage the property and personal care. These presumptions will not be set aside by an adjudicator if the evidence of incapacity is not clear and compelling.

It is up to the parties and their lawyers to examine all forms of evidence available and to put forward a clear and persuasive record that is untainted by bias or personal interests.

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[50] *Abrams*, at para 35.
[51] *Kischer*, at para. 11.