

**CITATION:** Adler v. Gregor, 2019 ONSC 3037  
**COURT FILE NO.:** 03-014/18  
**DATE:** 20190524

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
JUDY ANN PATRICIA ADLER ) Benjamin Arkin and Melissa Grover  
) for the Applicant  
Applicant )  
)  
– and – )  
)  
ANDREA GREGOR, AGNES ) David Delagran for the Respondent  
ADLER and THE PUBLIC ) Andrea Gregor  
GUARDIAN AND TRUSTEE )  
) Angela Casey for the Respondent  
Respondents Agnes Adler  
)  
)  
) **HEARD:** April 26, 2019

2019 ONSC 3037 (CanLII)

**PENNY J.**

**Overview**

[1] Agnes Adler is 90 years of age, born January 14, 1929 in Hungary. She married William Adler in 1952 and escaped Hungary following the Soviet invasion in 1954 with her husband and brother. They immigrated to Canada in 1956.

[2] William Adler became a doctor and they lived in Ottawa and then Toronto. Dr. Adler died in 1999. Mrs. Adler sold the matrimonial home and moved into a condominium. In November 2016, she sold the condominium and moved to Sunrise of Thornhill, a senior citizens’ residence, where she continues to live today.

[3] This application concerns the validity of powers of attorney for property and personal care signed by Mrs. Adler on September 14, 2017, whether Mrs. Adler was capable of granting those powers of attorney at the time and whether Mrs. Adler is, in fact, presently incapable of managing her property and personal care such that it is necessary for decisions to be made on her behalf.

[4] Mrs. Adler is the mother of the applicant, Judy Adler (“Judy”), and the respondent, Andrea Gregor (“Andrea”).

[5] There is a long history of acrimonious conflict between Judy and Andrea. Indeed, as I will explain in further detail below, the conduct of these proceedings has made it clear beyond peradventure that while both daughters, I am sure, want the best for their mother, their mother’s interests have absolutely nothing to do with this dispute. This dispute is a power struggle between two siblings with long and abiding resentments toward one another, pure and simple.

[6] Although the application raised many issues, by the hearing of argument the questions for the Court essentially boiled down to three:

- (1) the validity of the September 14, 2017 powers of attorney and various sub-issues arising out of this question;
- (2) whether Andrea should be required to transfer her mother’s bank accounts from their current status, held jointly, to being in her mother’s name alone; and
- (3) whether a February 24, 2017 cheque for \$25,000 issued by Mrs. Adler to Andrea was a valid gift.

### **Background**

[7] Dr. and Mrs. Adler retained Miller Thomson for estate planning matters for many years. In July 2000, after Dr. Adler died, Mrs. Adler executed powers of attorney for property and personal care appointing Judy and Andrea as her joint and several attorneys.

[8] Mrs. Adler lived independently until 2016. It is not seriously challenged that following Dr. Adler’s death, it was Andrea who was more involved in her mother’s day to day support and care. This was particularly the case starting in

2016, when Andrea was laid off from her job as a medical technician. In pointing this out, however, I am in no way suggesting that Judy was in any way estranged from or indifferent to her mother.

[9] In 2015, assisted by Carla Figliomeni of Miller Thomson, Mrs. Adler executed new powers of attorney for property and personal care, appointing Andrea as her sole attorney. Additional powers of attorney appointed Judy in the event of Andrea's death, resignation or incapacity. Importantly, these powers of attorney were not released to Andrea (or to Judy) in 2015. In a direction to Miller Thomson, Mrs. Adler directed that the powers of attorney were to be released only in the event of a finding of Mrs. Adler's incapacity by a physician or a licensed capacity assessor.

[10] In her application, Judy sought a declaration, in the alternative to her main relief seeking to uphold new 2017 powers of attorney (on the basis Mrs. Adler had capacity in 2017), that the 2015 powers of attorney were invalid (as Mrs. Adler lacked capacity in 2015). At the hearing, however, Judy abandoned the alternative argument that the 2015 powers of attorney were invalid. This was a sensible concession as there is little to no evidence to support the contention that Mrs. Adler lacked capacity (or was subject to undue influence for that matter) in connection with the 2015 powers of attorney.

[11] I should point out at this juncture that both Judy and Andrea's affidavits in support of their positions in this application are filled with hearsay (from their mother and others), speculation, suspicion, innuendo and argument. I have disregarded all such statements in reaching my conclusions in this judgment. In particular, I have not relied on any uncorroborated statements attributed to Mrs. Adler by either Judy or Andrea. Mrs. Adler filed no affidavit in these proceedings. I will address the likely reasons for this later in these Reasons, but I share the view of Mrs. Adler's section 3 counsel, Ms. Casey, that both sisters are manipulating Mrs. Adler emotionally to get her to say and do the things they, individually, want her to say and do. I simply am not prepared to rely on anything Andrea or Judy say about what they were told by Mrs. Adler or to accept such statements as an accurate representation of Mrs. Adler's true, capable wishes.

[12] In 2016, leading up to her move into Sunrise, Mrs. Adler began to experience difficulty maintaining her own condominium. By August 2016, Mrs.

Adler was receiving support from community care services seven days a week, twice per day.

[13] As an example of the escalating animosity between Andrea and Judy, on February 16, 2017, Judy's husband, Henry Lotin, issued a statement of claim for defamation against Andrea. A few months later, Mr. Lotin issued another statement of claim against Andrea's husband, Tomas, also for defamation.

[14] In April 2017, Mrs. Adler's geriatrician prescribed her Memantine, a drug used to treat moderate to severe dementia. In June of the same year, Mrs. Adler missed a Wheeltrans pickup while volunteering at Baycrest and waited two hours, without asking anyone for help, until a staff person from Baycrest found her. Later that month, Baycrest asked her to stop volunteering as she had become a "safety concern."

[15] Matters came to a head in July 2017, when Mrs. Adler attended a follow up appointment with her geriatrician, Dr. Varlese. Dr. Varlese's clinical note to the family physician, Dr. Myers, indicates that cognitively, Mrs. Adler showed an acute deterioration to the point of not being able to recognize her doctor. He also recommended calling a capacity assessment agency because he felt that Mrs. Adler was "no longer able to make any decisions for herself." In follow up with the family physician, a capacity assessment was again recommended. A certified capacity assessor, Anna Man, conducted capacity assessments of Mrs. Adler's capacity to manage property and to grant a power of attorney for property on August 17 and 18, 2017.

[16] Ms. Man concluded that Mrs. Adler was incapable of managing property and incapable of granting a power of attorney for property, essentially for the same basic reason – her short term memory was so poor she could not remember what her assets and liabilities were, even when reminded of them repeatedly.

[17] Judy challenges the propriety and reliability of these assessments on several grounds which I will address in the following section of these reasons. In any event, immediately following the completion of Ms. Man's assessments, Judy and her husband took her mother to Europe for a three week cruise. While vacationing in Europe, Judy arranged for her mother to see a new lawyer, Behn Conroy, recommended by Judy's husband. This appointment was made for the purpose of drafting and executing new powers of attorney for Mrs. Adler. Judy and Mrs.

Adler returned to Toronto on September 13, 2017. Mrs. Adler stayed overnight at Judy's and was taken, the next day, to see Mr. Conroy.

[18] The new lawyer met Mrs. Adler and apparently obtained her instructions to prepare new powers of attorney for property and personal care. These powers of attorney appointed Judy and Andrea jointly as Mrs. Adler's attorneys. Mrs. Adler executed these new powers of attorney the same day, September 14, 2017. There is no evidence Mr. Conroy was made aware of Dr. Varlese's opinion or the Man capacity assessment.

[19] In a prehearing motion, Andrea sought production of Mr. Conroy's file and production of Mrs. Adler's post-2017 medical records. Mrs. Adler (supported by Judy) opposed the motion on the basis that she did not waive solicitor client privilege or privacy rights in respect of her medical information. I denied the motion on the basis that it had not been established that there was a basis for waiver of Mrs. Adler's solicitor client privilege or privacy rights, it had not yet been shown that Mrs. Adler was incapable and it had not been shown that the protection of Mrs. Adler's vital personal or financial interests required overruling her choice to assert privilege and deeming the waiver of her privacy interests.

[20] By September 2017, both parties had litigation counsel who specialized in estate and substitute decision matters. Andrea's litigation counsel, on the basis of the Man capacity assessment, took the position that Mrs. Adler lacked capacity to execute the 2017 powers of attorney.

[21] This led to Judy's litigation counsel recommending that Judy get her own capacity assessment of Mrs. Adler. This was duly arranged for October 12, 2017, when Mrs. Adler was taken by Judy to meet with Elizabeth Milojevic, another certified capacity assessor. In her October 24, 2017 report, Ms. Milojevic concluded that Mrs. Adler was capable of granting a power of attorney for property and for personal care. Andrea takes issue with the propriety and reliability of the Milojevic assessments on several grounds which I will address in the following section of these Reasons.

[22] By the fall of 2018, the two sisters were seeking to book a lengthy trial of this proceeding. I ordered the matter to be heard for one day, without *viva voce* evidence, and made various procedural orders governing the conduct of the matter leading up to the hearing.

[23] It should also be pointed out, as part of the relevant background to this matter, that Mrs. Adler receives pension income of about \$3,500 per month and, as a result of the sale of her condominium, has additional assets of about \$495,000. Her monthly expenses exceed her monthly income, so it is necessary for Mrs. Adler to encroach on her capital to cover monthly living expenses.

## **Analysis**

### ***Validity of 2017 Powers of Attorney***

[24] The central issue in this litigation is whether the September 2017 powers of attorney are valid. This issue turns on two further questions: 1) did Mrs. Adler have capacity to grant a power of attorney in September 2017? or, 2) were the September 2017 powers of attorney suborned by undue influence?

#### 1. Capacity to grant powers of attorney

[25] Capacity is at its core a cognitive function. There are two fundamental components: 1) ability to understand information relevant for making decisions; and 2) ability to appreciate the consequences of a decision. The law recognizes that a capable person may make unwise, risky or even foolish decisions. The decisions of a capable person must, nonetheless, be respected.

[26] Capacity is function specific. Thus, the test for capacity to manage property is different from the test to manage personal care which is again different from the tests for capacity to grant a power of attorney.

[27] Section 8 of the SDA deals with the grant of a power of attorney for property and provides:

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 dependents;
- (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.

[28] Section 47 deals with the grant of a power of attorney for personal care and provides:

A person is capable of giving a power of attorney for personal care if the person,

- (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

(a) The Man Assessment, August 2017

[29] The evidence supports the conclusion that Andrea was heavily involved in the decision to obtain an assessment of Mrs. Adler's capacity to manage property. To this end, she had communications with Dr. Varlese, Dr. Myers and Ms. Figliomeni, her mother's estates lawyer.

[30] The evidence also supports the conclusion that Andrea alone decided to obtain an assessment of Mrs. Adler's capacity to grant a power of attorney for property as well. This was done, I find, because Andrea knew that once she had the ability to exercise the 2015 powers of attorney, Judy would react aggressively.

Andrea foresaw what actually happened – that Judy would seek to obtain new powers of attorney from Mrs. Adler that included Judy in any grant of authority.

[31] That this was part of a wider, litigation-oriented strategy, is apparent from Andrea’s communication with Ms. Figliomeni of September 5, 2017. She asked Ms. Figliomeni whether her status as power of attorney for Mrs. Adler: (a) enabled Andrea or her family to accept gifts from Mrs. Adler; (b) what steps she could take against other family members who “took” things from Mrs. Adler; (c) whether Andrea could continue to pay her own legal fees in the defamation case from Mrs. Adler’s assets; (d) whether she could avoid providing an accounting before the date that the 2015 powers of attorney were released; and finally, (e) whether the capacity assessment would prevent Judy from having Mrs. Adler make a new will.

[32] Ms. Man was cross examined as a witness on a pending application. Mr. Arkin devoted over 15 pages of his 48 page written argument to an attack on the Man assessment of capacity to grant a power of attorney for property. Among other things, the Man assessment is criticized as being deficient in its reasoning and conclusions, failing to apply the correct tests, bias and lack of objectivity, failure to collect sufficient background information, failure to consider relevant evidence and Andrea’s alleged “influence” on the assessment and Ms. Man’s report.

[33] Andrea’s influence is said to have included the fact that Ms. Man relied solely on Andrea for background, Andrea made comments denigrating Judy and Andrea attempted to steer the content and conclusions of Ms. Man’s report. This included reviewing a Word version of the report before it was finalized and sending proposed revisions, which Ms. Man agreed to incorporate into her report.

(b) The Milojevic Assessment, October 2017

[34] Whatever concerns may be raised about Andrea’s involvement in the preparation of the 2015 powers of attorney and the 2017 capacity assessment, and the reliability of the Man assessment itself, they pale in comparison to Judy’s involvement in obtaining the 2017 powers of attorney and the Milojevic capacity assessment and concerns about the reliability of the Milojevic assessment.

[35] As noted earlier, Judy arranged for Mrs. Adler to see, not Mrs. Adler’s longstanding estates lawyer but a new lawyer, unknown to Mrs. Adler, with some



association to Judy's husband. This appointment was arranged immediately upon their return from the European holiday. Likewise, Judy and her litigation counsel chose Ms. Milojevic and arranged for her to conduct a capacity assessment of Mrs. Adler only after Andrea challenged the validity of the 2017 powers of attorney.

[36] Judy repeatedly demanded Ms. Milojevic provide her with the questions she intended to ask Mrs. Adler in advance. This was done the day before the assessment. Ms. Milojevic's first draft of her report stated that Judy was present throughout the assessment. Judy insisted that this be changed to provide that she was not present.

[37] Judy was, in fact, provided with a draft of the Milojevic assessment and demanded that numerous revisions be made to the draft. These included changes which Judy claimed "my mother" wanted to stress. There is absolutely no evidence that Mrs. Adler read or understood this report in draft or any other form. The points Judy wanted attributed to Mrs. Adler were:

Agnes wanted the capacity assessment, and Judy's role was only to find a capacity assessor.

Agnes is upset that she feels that Andrea forced her to prove she has capacity, and she is not in her words 'gaga'.

That the report is clear that she has capacity for both Personal Care and Property.

[38] Unlike the changes proposed by Andrea to the Man assessment, which involved corrections to background matters, Judy changed Ms. Milojevic's draft to correct answers given by Mrs. Adler during Ms. Milojevic's assessment (at which Judy claims she was not present). This included changes to information provided by Mrs. Adler concerning her net worth – a critical fact in the assessment of capacity to grant a power of attorney for property.

[39] The basis for any assessment of Mrs. Adler's capacity to grant a power of attorney for personal care is completely obscure. Ms. Milojevic's notes make no reference to any retainer for such a report. The first draft of her assessment was solely on Mrs. Adler's capacity to grant a power of attorney for property; there is simply no mention of any assessment of capacity to grant a power of attorney for personal care. It was only after Judy's subsequent urging that Ms. Milojevic

prepared a brief report on this issue as well. Ms. Milojevic's opinion, that Mrs. Adler had capacity to grant a power of attorney for personal care, lacks a proper evidentiary and analytical foundation.

[40] Ms. Milojevic's assessment refers repeatedly to Mrs. Adler's wish that her daughters have a better relationship, that she needed both of her daughters and wanted them both equally involved in making personal care and financial decisions for her.

[41] Little if any independent information, however, was provided to Ms. Milojevic. She did not review any medical documents nor did she make inquiries into Mrs. Adler's medical condition. Nor is there any evidence that Ms. Milojevic was made aware of the deep hostility existing between Judy and Andrea, or that Judy's husband had sued Andrea and her husband.

[42] Ms. Milojevic was therefore not provided with any information which might lead her to question Mrs. Adler's appreciation of the consequences of an appointment of Judy and Andrea as joint attorneys.

[43] Similarly, there is no evidence Ms. Milojevic was made aware that Mrs. Adler had been assessed eight weeks earlier by another capacity assessor. She was not provided with a copy of the Man assessment and was not aware Mrs. Adler had been found incapable of granting a power of attorney for property.

[44] And, while the Man assessment may be short on analysis, I found the Milojevic assessment virtually devoid of any analysis. Furthermore, the record of the questions asked during the Milojevic assessment shows that they tended to suggest the answers, to which Mrs. Adler largely replied "Yes" or "No."

[45] Finally, Andrea's counsel sought to cross examine Ms. Milojevic as a witness on a pending application. When served with a summons, however, Ms. Milojevic declined to attend on the basis of age and infirmity. It was Mr. Arkin, however, who drafted Ms. Milojevic's affidavit in support of her wish not to be required to submit to cross examination. In the end, there was no cross-examination, so the Court is left with many unanswered questions about Ms. Milojevic's interactions both with Mrs. Adler and with Judy, as well as the analytical processes which lead to Ms. Milojevic's conclusions.

(c) Conclusion on the Capacity Assessments

[46] The capacity assessment regime under the SDA was instituted in 1992 for the protection of vulnerable persons. The Ministry of the Attorney General produced “Guidelines for Conducting Assessments of Capacity” in May 2005. Under Part I: Ethical and Legal Considerations, the Guidelines state (p. I.1):

Assessments of legal capacity are undertaken under the SDA in those situations where it may be appropriate to change the legal status or restrict the legal rights of the individual in order to protect him or her from personal or financial harm. In a sense, guardianship legislation is about risk management for incapable people. When an assessment of legal capacity is undertaken, the fundamental issue under consideration is the person’s right to decide. If judged incapable, the person may be assigned a substitute decision-maker or a guardian whose role is to make the decisions necessary to protect his or her personal and/or financial health.

[47] It is abundantly clear from a review of the Guidelines and the relevant provisions of the SDA itself that capacity assessments were not designed, nor were they ever contemplated, to be used as weapons in high conflict litigation such as this. Yet, this is exactly what both assessments regarding capacity to grant powers of attorney were obtained for in this case.

[48] In the normal course, a capacity assessment would tend to fall within the “participant expert” category of opinion evidence. However, in a case like this, where both assessments were obtained in contemplation of litigation, this is not the right approach.

[49] Nothing in the SDA or the Guidelines detracts from the purpose and effect of Rule 53.03 of the *Rules of Civil Procedure* or the common law of expert testimony generally. In circumstances where litigation is reasonably likely or actually contemplated, it seems to me that, at the very least, Rule 53.03, with any necessary modifications, should apply to the preparation, disclosure and admission of capacity assessments.

[50] Rule 53.03 provides:

**Experts’ Reports**

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
  - i. a description of the factual assumptions on which the opinion is based,
  - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
  - iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

### **Schedule for Service of Reports**

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.

### **Sanction for Failure to Address Issue in Report or Supplementary Report**

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

- (a) a report served under this rule;
- (b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or
- (c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.

### **Extension or Abridgment of Time**

- (4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,
  - (a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or
  - (b) by the court, on motion.

[51] Similarly, in the context of contested litigation, the court, in exercising its gatekeeper role, must also scrutinize expert evidence to ensure it meets the modern

criteria for the admission of expert evidence established in *R. v. Mohan*, [1994] 2 S.C.R. 9 and further developed in subsequent jurisprudence. Those criteria are:

- (a) a properly qualified expert;
- (b) relevance;
- (c) necessity;
- (d) reliability;
- (e) prejudice/probative analysis; and
- (f) the absence of an exclusionary rule.

[52] Both parties sought capacity assessments of Mrs. Adler for the purpose of attacking or defending powers of attorney the obtaining of which they were each involved in as well. Both parties prevailed upon their mother to submit to these assessments for the purpose of obtaining ammunition to use in their fight with one another, not for their mother's benefit. Both parties were guilty of providing biased or incomplete histories and background to the assessors. Neither assessor undertook any material investigation of other sources of information. Both parties interfered with, and had a hand in drafting, the final assessment reports. This kind of use of capacity assessments by parties or their lawyers is improper and should be discouraged in the strongest possible terms by counsel and the Court.

[53] Although I find that Andrea's misuse of and interference with the capacity assessment process was somewhat less egregious than Judy's, this is a difference in degree, not kind.

[54] In the end, therefore, I reject both capacity assessments as unreliable due to the bias and interference of Andrea and Judy in providing background information and with respect to the preparation of the assessor's final reports, as well as various shortcomings in the assessments themselves.

[55] Accordingly, I must turn to other factors to determine Mrs. Adler's capacity in September 2017 to grant powers of attorney.

(d) Other Factors

[56] The most important, independent and reliable evidence of Mrs. Adler's cognitive state and her ability to understand and appreciate is Dr. Varlese's July 14, 2017 clinical note in which he found Mrs. Adler's cognition had deteriorated acutely and that she was no longer capable of making *any* decisions for herself.

[57] Mr. Arkin relies heavily on a follow-up clinical note from Dr. Varlese of August 14, 2017 which indicated that Mrs. Adler "seems clinically somewhat better after the treatment" (for a urinary tract infection). In particular, Mr. Arkin focuses on the sentence, "Cognitively, she is much more stabilized compared to last time, and I think most of it is related to the treatment of urinary tract infection." Dr. Varlese goes on, however, to express concerns about Mrs. Adler's pending travel to Europe, mentioning risks of dehydration and disorientation requiring "a lot of supervision" and the importance of Mrs. Adler's adherence to her medication schedule. I am not able to agree with counsel's suggestion that this note indicates Dr. Varlese was in any way resiling from his earlier clinical assessment and recommendations. To the contrary, this note reveals an ongoing concern over Mrs. Adler's failing cognitive functions.

[58] There is no evidence Mr. Conroy was made aware that Mrs. Adler's daughters could not get along. Unlike the powers of attorney from 2000, which were joint and several, the 2017 powers of attorney require Andrea and Judy to act jointly. Neither of these documents contains a dispute resolution clause or any mechanism to make decisions in the event of deadlock or disagreement between the joint attorneys. This suggests to me either that the consequences of appointing Andrea and Judy as joint attorneys was not discussed with Mrs. Adler at all or that she failed to appreciate the consequences of appointing two people with this level of animosity (and whose families were currently at hammer and tong in bitter defamation litigation) as her joint attorneys.

[59] Shortly after Judy delivered the September powers of attorney to Sunrise, they were brought to the attention of Susan Gallagher, Resident Care Director. Ms. Gallagher was made aware of a conflict between Judy and Andrea over the validity of the 2017 and the 2015 powers of attorney. Ms. Gallagher discussed these issues with Mrs. Adler who is alleged to have acknowledged that her children were not getting along, that both should have access to her information, but if there

was an emergency, the residence was to contact Andrea, as “she is the emergency contact.”

[60] The Man assessment included a finding that Mrs. Adler was incapable of managing property. There is no challenge to that assessment. Ms. Milojevic did not assess Mrs. Adler’s capacity to manage property. Indeed, both parties seem to have accepted, and proceeded on the basis, that Mrs. Adler was in fact incapable of managing her property by August 2017. While the test for capacity to grant a power of attorney is obviously different from the test for capacity to manage property, the finding of incapacity to manage property is not irrelevant to the power of attorney for property question because the assessment of both capacities requires an inquiry into the subject’s knowledge of what kind of property he or she has and its approximate value.

[61] As noted earlier, Ms. Man relied on essentially the same factor in both assessments – Mrs. Adler’s short term memory was such that she could not, even when reminded repeatedly, accurately explain her property or its value.

[62] On September 28, 2017, the Community Care Access Centre conducted a status review of Mrs. Adler. The CCAC report concluded that Mrs. Adler was “moderately impaired,” scored only 3 out of 6 on the cognitive performance scale and that she “required supervision at all times.” Her ability to manage her medications had deteriorated to the point that she could not follow written instructions but required the pills to be physically handed to her. She was becoming dehydrated because she would only drink when a glass of water was handed to her. She also lacked insight into her own condition, incorrectly denying that she was incontinent, or that she needed help with daily routines such as showering.

[63] On the same day, Regional Nursing Services completed a report on Mrs. Adler indicating her history of dementia, that her memory “seems poor/declining” and that she needed to be cued to attend appointments, go down for meals and take a shower.

[64] There is also anecdotal evidence from a number of Mrs. Adler’s friends and family which, although not function specific, supports a pattern of failing memory and increasing confusion about her location and the identity of her friends and family.



[65] In October 2017, Judy’s counsel referred Mrs. Adler to Angela Casey, apparently with the intention that Mrs. Adler receive independent legal advice. Ms. Casey attempted to provide Mrs. Adler with advice and receive instructions, including about who Mrs. Adler wanted to act as her attorney for property and personal care. However, by January 2018, Ms. Casey reported that she was “unable to obtain instructions at present on who Agnes would like to have as her POA.” While, she said, Mrs. Adler wanted to ‘go back to the way it was before’, when asked what that meant, Mrs. Adler vacillated on whether she wanted Andrea to act as her sole attorney or Andrea and Judy to act together.

[66] By March 2018, consideration was being given to the appointment of Ms. Casey as section 3 counsel. In communication with the office of the Public Guardian and Trustee, Ms. Casey noted that Mrs. Adler’s instructions on who she wished to act as her power of attorney “appeared to vary (I suspect based upon which daughter she just spoke to).”

(e) Conclusion on Capacity to Grant Powers of Attorney in 2017

[67] My analysis starts with acknowledging the presumption of capacity and that a finding of incapacity, regarding any function, is a serious incursion into the rights and privacy of the person. As Low J. wrote in *Abrams v. Abrams*, 2009 CanLii 12798 (Ont. Div. Ct.):

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 judgement *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.

[68] One of the purposes of the SDA regime is to avoid idiosyncratic and value-laden judgments of mental capacity and to require compelling evidence of a person’s mental or cognitive limitations in her ability to understand decisions and to appreciate their consequences before a finding of incapacity is made.

[69] The evidence clearly establishes Mrs. Adler’s present wishes; she wants her daughters to get along and to cooperate in her care and the management of her property if and when she cannot look after these functions herself. The evidence,

in my view however, also clearly establishes that Mrs. Adler is no longer capable of looking after her own property and at least some of her own personal care. The evidence also establishes that she lacks insight into her limitations in these areas.

[70] The evidence also establishes that Mrs. Adler was and remains well aware that her children can not get along and were not, at all material times, getting along. This is reflected repeatedly in her communications to others. She was, among other things, aware Judy's husband was suing Andrea and her husband for defamation arising out of allegations relating to the management and disposition of Mrs. Adler's property.

[71] Having regard to the evidence as a whole, even if Mrs. Adler was, in September 2017, capable of understanding the nature of the decision to appoint an attorney or attorneys for property and personal care, she was manifestly incapable of appreciating the consequences of appointing Judy and Andrea as her joint attorneys.

[72] Mrs. Adler was capable of appreciating these problems in 2015 when, with the assistance of her own, long-standing counsel, she changed her joint and several powers of attorney and appointed Andrea as her sole attorney. This, on the available evidence, was a rational choice in the circumstances.

[73] The same cannot be said of her actions in 2017. Mr. Conroy was unknown to Mrs. Adler. He was suggested to Judy by her husband. Judy and her husband secretly arranged to have Mrs. Adler see Mr. Conroy while Mrs. Adler was in their exclusive care on a vacation in Europe for three weeks. The day after Mrs. Adler's return, without even going home, she was taken to meet with Mr. Conroy. As noted earlier, there is no indication Mr. Conroy explained the consequences of having two people who were in open conflict with one another appointed as her joint attorneys or that Mrs. Adler had any appreciation of the consequences of doing so.

[74] Mrs. Adler's hope that her children cooperate and get along is, in the circumstances, understandable but completely out of touch with reality. I find that Mrs. Adler was, in September 2017, incapable of appreciating the consequences of what she was doing when she appointed Andrea and Judy as joint attorneys for property and personal care.

[75] I, therefore, find that the 2017 powers of attorney are invalid. This has the result that the 2015 powers of attorney stand as the only valid powers of attorney.

[76] Although Judy's application pleads, in the alternative, that Andrea be removed as power of attorney and replaced with someone else as guardian, this was not seriously pursued at the hearing. The evidence does not warrant Andrea's removal nor is there any evidence of a third party qualified, able and willing to become Mrs. Adler's guardian.

## 2. Undue Influence

[77] Due to Mrs. Adler's dementia and short-term memory loss, I find she was extremely vulnerable to manipulation in September 2017. The most reasonable inference from the facts as I have earlier found them to be is that Mrs. Adler was manipulated by Judy into executing the 2017 powers of attorney.

[78] Thus, although, given my findings on Mrs. Adler's lack of capacity, it is not strictly necessary to resolve the issue of undue influence, I find (in the alternative) that Mrs. Adler's will was, by virtue of her dementia, suborned by the urgings and manipulations of Judy in connection with the meeting with Mr. Conroy and the execution of the September 2017 powers of attorney.

[79] I would, therefore, have set aside those powers of attorney on this basis as well.

### *The Joint Accounts*

[80] According to Andrea, she became a joint owner of her mother's bank accounts in 2015. Since the commencement of this litigation, there has been an informal accounting and the accounts have been produced. Mrs. Adler's "gift" to Andrea of \$25,000 is the only transaction being questioned by Judy. That issue is dealt with below.

[81] Whatever convenience may have an associated with Andrea being a joint owner of Mrs. Adler's accounts has now been superseded by my finding that Mrs. Adler is incapable of managing her property, in conjunction with my finding that the 2015 powers of attorney, appointing Andrea as Mrs. Adler's sole attorney, are the only subsisting, valid powers of attorney of Mrs. Adler. Andrea has the power

to manage Mrs. Adler's finances (for Mrs. Adler's benefit) under the power of attorney for property.

[82] There is no benefit and some risk to leaving the accounts as joint accounts. Andrea could, for example, become indebted to a third party. Joint property is potentially exposed to execution by Andrea's creditors. That these funds may be held in trust for Mrs. Adler is potentially subject to challenge. Litigation is costly and outcomes are notoriously uncertain.

[83] In the circumstances, I order Andrea to put all of Mrs. Adler's accounts unambiguously under Mrs. Adler's ownership and to ensure Andrea herself is excluded from any ownership interest in these accounts.

### ***The \$25,000 "Gift"***

[84] Andrea's evidence is that after she was served with Mr. Lotin's statement of claim in February 2017, Mrs. Adler was upset and "insisted that she pay for the litigation." Mrs. Adler wrote a cheque to Andrea for \$25,000 on February 17, 2017. The cheque is accompanied by what appears to be a post-it note on which Mrs. Adler wrote, "I pay for Andreas defence [illegible]" and placed her signature.

[85] Andrea did not cash the cheque right away, she says, because she wanted to make sure her mother really meant to give her this money. In June 2017, Andrea says her mother confirmed that she wanted to help Andrea with the cost of defending Mr. Lotin's claim. It was only then she cashed the cheque.

[86] The essential elements of a gift are: a) intention to make a gift; b) acceptance by the donee; and c) delivery of the gift to the donee. Proof of these elements lies with the donee. Here, the questions are Mrs. Adler's capacity to make a gift and whether this gift was made of her own free will. In the case of a gift by cheque, it is the date the cheque is cashed, not when it is written, that gives effect to the gift, *Teixeira v. Estate of Maria Markgraf*, 2017 ONCA 819 at para 46.

[87] By June 2017, Andrea had been helping manage her mother's property and been a joint owner on her mother's accounts for almost 2 years. After the cheque was written but before it was cashed, Mrs. Adler was diagnosed with dementia and prescribed Memantine. During this period as well, Mrs. Adler was known to have encountered other problems with memory and disorientation and was asked to stop volunteering at Baycrest as a result.

[88] It was only a month after Andrea cashed the cheque that Dr. Varlese found Mrs. Adler showed acute deterioration to the point of not being able to recognize her own doctor. This is also when Dr. Varlese recommended Mrs. Adler have a capacity assessment because he felt Mrs. Adler was no longer able to make any decisions for herself.

[89] In the circumstances, it is highly inappropriate for Andrea, who must in all the circumstances be regarded as her mother's fiduciary, to be accepting gifts, particularly significant amounts of cash for use in a legal dispute with Judy's husband. Having regard to my concerns over the uncorroborated evidence of either sister in this litigation, I am not satisfied that Andrea has proved, on a balance of probabilities, Mrs. Adler had the capacity to make this gift, un-coached and of her own free will, in June 2017.

[90] For this reason, I order Andrea to repay \$25,000 into her mother's account.

### **Costs**

[91] The parties have already submitted bills of costs. I have, in a prior ruling, made it clear that Andrea and Judy should have no expectation that Mrs. Adler will pay any of their legal expenses of this application and that they may well be asked to absorb the cost to their mother of having independent representation.

[92] I invite the parties to seek to resolve the issue of costs. If not resolved, the parties may supplement the bills already submitted by delivering a brief written submission, not to exceed three typed, double-spaced pages. In that context, I also invite Andrea and Judy to explain why they ought not to share equally in the reimbursement of Mrs. Adler's full indemnity costs fixed at \$50,624.31.

[93] Mr. Delagran's submission shall be delivered within seven days; Mr. Arkin's within a further seven days.

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Penny J.

**Released:** May 24, 2019

**CITATION:** Adler v. Gregor, 2019 ONSC 3037  
**COURT FILE NO.:** 03-014/18  
**DATE:** 20190525

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JUDY ANN PATRICIA ADLER

Applicant

– and –

ANDREA GREGOR, AGNES ADLER and  
THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

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**REASONS FOR JUDGMENT**

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Penny J.

**Released:** May 24, 2019