



Capacity and Representation

The Unique Role of Counsel appointed under Section 3 of the *Substitute Decisions Act*

By Aameena Sultan*

“Section 3 Counsel” is the term used to refer to lawyers appointed to represent allegedly incapable persons in proceedings brought under the *Substitute Decisions Act, 1992*, S.O. 1990, c. 30 (SDA). Section 3 counsel play a unique and important role in providing a voice to individuals who would otherwise be unrepresented in proceedings that can profoundly affect their autonomy and decision-making ability.

Proceedings brought under the SDA include guardianship applications and applications respecting powers of attorney, where a person’s mental capacity is generally at issue, and the Court may be asked to determine whether a person should have financial or personal decisions made by someone other than him or herself, and if so, who that person should be.

While section 2 of the SDA provides a presumption of capacity to make financial and personal care decisions, the outcome of SDA litigation can be serious, in that individuals may find they are no longer legally authorized to make their own choices.

Section 3 of the SDA provides that in proceedings brought under the SDA, where an incapable person does not have a lawyer, the Court may direct that counsel be appointed for that person. The legislation also provides that, in spite of any other determinations of capacity, “the person shall be deemed to have capacity to retain and instruct counsel.”

The role of section 3 counsel is delicate and complicated. Often in guardianship and power of attorney proceedings other parties (and/or their counsel) are concerned that the incapable person’s “best interests” are not being put forth by that person’s lawyer. However, as section 3 counsel, the lawyer is required to convey the allegedly incapable person’s wishes, even if that position runs counter to other parties’ views of the person’s best interests.

In the decision of *Banton v. Banton* [1998] O.J. No. 3528, 164 D.L.R. (4th) 176 at 218 (Ont. Gen. Div.) Justice Cullity highlighted the complicated nature of acting for individuals whose capacity is in question:

The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the *Substitute Decisions Act* is potentially one of considerable difficulty. Even in cases where the client is deemed to have capacity to retain and instruct Counsel pursuant to Section 3(1) of the Act, I do not believe that Counsel is in the position of a litigation guardian with authority to make decisions in the client’s interests. Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking. A very high

degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and Counsel's duty to the Court.

Section 3 counsel must determine whether he or she has received instructions that can be conveyed or can simply communicate wishes on behalf of the client. Section 3 counsel may have regard to prior capable wishes – that is, wishes that were clearly expressed by the client when the client was capable - and can highlight those to the Court.

Rule 2.02 (6) of the Rules of Professional Conduct sheds some light on a lawyer's duty when acting for a client with a mental disability, and provides that:

When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

The role of section 3 counsel is an essential element in the balance between protection of the vulnerable, and the respect of their rights. The SDA aims to strike that balance by providing for internal protections and ensuring that the rights of those whose capacity is in question are not disregarded in complicated legal proceedings.

In *Abrams v. Abrams* (2008 Carswell Ont 7788), a prolonged and highly contentious guardianship application, Justice Strathy noted that the SDA "contains a number of provisions that indicate that the dignity, privacy and legal rights of the individual are to be assiduously protected." Justice Strathy pointed to section 3 of the SDA as one of those provisions.

In spite of the difficulties encountered by section 3 counsel in executing their duties to their client and to the Court, their role is essential in protecting the legal rights of those who are most vulnerable and whose voice is least likely to be heard.

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