A NEW LEGAL STANDARD?

An examination of Canadian jurisprudence regarding the capacity to reconcile

BY KIMBERLY A WHALEY[1]

ABSTRACT

- *In the recent decision of* Chuvalo *v* Chuvalo[2] *Justice Kiteley examined the issue of the requisite decisional 'capacity to reconcile'.* Chuvalo *raises the complex issue of when and how a substitute decision-maker can and should be involved in the intimate relationship decisions of an incapable person. The decision highlights a changing understanding of the capacity to make marriage-related decisions.*

- *In this paper, the author argues that the decision in* Chuvalo *applies the appropriate legal test for the capacity to reconcile, which is fact-driven as well as time-, situation- and task-specific.*

- *The author also concludes that the jurisprudence in this area is moving away from the understanding of marriage as a simple contract towards a more complex understanding of marriage, divorce, separation and reconciliation that takes into account the emotional and financial consequences of each act.*

1 Kate Stephens, student-at-law, assisted in the editing of this article
2 *Chuvalo v Chuvalo*, 2018 ONSC 311 (CanLII) (*Chuvalo*)

George Chuvalo, now retired, was a legendary boxer who fought over 93 fights throughout his 22-year career. Now, at 80 years old, George is still making news headlines – but unfortunately they are about his would-be private affairs in a public familial dispute over custody and control.

Recent media articles[3] have reported on George's significant cognitive decline and his children's fight to have their father's expressed wishes recognised by a court. Specifically, over the last two years, his children have been in a fierce legal battle with Joanne Chuvalo, George's spouse. His children, in their capacity as his attorneys under powers of attorney, brought divorce proceedings against Joanne on behalf of George. Joanne, however, seemingly seeks to reconcile and not divorce her husband, in spite of their apparent separation.

In their application, the children, on behalf of their father, reportedly raised allegations of kidnapping, brainwashing, extortion and reckless spending, and alleged that Joanne preyed on George's vulnerable mental state to 'extort cash money'.[4]

In January 2018, a three-day hearing of an application was heard, in part focusing on the sole

3 Mary Ormsby, 'The Fight Over Boxing Legend George Chuvalo', *The Toronto Star*, 3 November 2017, bit.ly/2zv5m0e; Mary Ormsby, 'George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules', *The Toronto Star*, 13 January 2018, bit.ly/2IJDIY2
4 *Ibid*, 'The Fight Over Boxing Legend George Chuvalo'

issue of whether George had the requisite capacity to decide to reconcile with Joanne.[5] The application as a whole also centred on the related issue of divorce, but that issue was put over to a trial. At the outset of the hearing, the parties agreed that the evidence demonstrated that George lacked the requisite decisional capacity to instruct his counsel. As such, the Office of the Public Guardian and Trustee was appointed as his representative, pursuant to rule 4(3) of the *Family Law Rules* (akin to a litigation guardian in estate proceedings).[6]

In her decision dated 12 January 2018, Kiteley J decided that George 'does not have capacity to decide whether to reconcile' with Joanne, and further noted that she need not decide whether or not he has the capacity to divorce.[7]

Kiteley J relied on the expert opinion of Dr Richard Shulman, a geriatric psychiatrist, and also referenced the opinion of Dr Heather Gilley, a geriatrician. Dr Shulman set out the legal criteria applicable to assessing whether or not an individual possesses the requisite decisional capacity to make a particular decision as:

- **the ability to understand information relevant to making the decision (for example, relevant facts); and**
- **the ability to appreciate the consequences of making or not making the decision (relevant to the context of the situation-specific nature of decisional capacities).**

Dr Shulman had assessed George, and testified that, earlier in the spring of 2017, he was able to understand and appreciate what he was doing, why he was doing it, and whether or not he wanted to do it as far as the divorce proceedings were concerned. Dr Shulman explained that, at that time, George had an adequate understanding of the fact that he was then separated and was pursuing a divorce, and he had consistently indicated that divorce, rather than reconciliation, was his preferred option.[8]

Some months later, in November 2017, Dr Shulman again assessed George and noted that his cognitive ability had declined sharply and that he was, at that time, no longer able to 'appreciate the consequences of his choices in regard to the matrimonial proceedings' that involve a 'realistic appraisal of outcome and justification of choice'.[9] Kiteley J accepted the evidence and expert opinion of Dr Shulman.[10]

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In addition to the expert evidence, '[a]fter laying the evidentiary groundwork', Kiteley J ruled that, 'based on Ms O'Hara's special skill and based on Ms Chuvalo's knowledge and experience, each of them could form an opinion as to whether Mr Chuvalo had the *ability to decide where he wants to live*. Each witness said he had that ability and that he expressed his desire to live with Ms Chuvalo' [emphasis in original].[11] Ms O'Hara is Joanne's sister and was called as a witness on behalf of Joanne.

Kiteley J began her analysis with a review of the decision in *Calvert* v *Calvert*,[12] which dealt primarily with the issue of whether or not the applicant wife had the capacity to form the requisite intention to separate from her husband. In that case, the Ontario Superior Court of Justice, General Division, relied on the expert evidence of Dr Molloy in finding that the applicant had the requisite capacity to separate from her husband. Dr Molloy opined that, to be competent to make a decision, a person must understand the context of the decision; know their specific choices; and appreciate the consequences of the choices.[13]

5 *Chuvalo*, para.16
6 *Chuvalo*, paras.4–5
7 *Chuvalo*, paras.16–17
8 *Chuvalo*, para.34
9 'George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules'; *Chuvalo*, paras.33 and 35, *supra* note 2
10 *Chuvalo*, paras.44–48
11 *Chuvalo*, para.29
12 *Calvert (Litigation Guardian of)* v *Calvert*, 1997 CanLII 12096 (ON SC), aff'd 1998 CarswellOnt 494; 37 OR (3d) 221 (CA), leave to appeal to SCC refused 7 May 1998
13 *Chuvalo*, para.52

Her Honour additionally considered and cited *Banton* v *Banton*[14] and *Feng* v *Sung Estate*,[15] relying on the following principles: 'an individual will not have the capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves';[16] and 'a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected'.[17]

Kiteley J also referred to the recent decision of *Hunt* v *Worrod*:[18]

> 'The consensus of opinion from the medical experts and witnesses, evidence which I note was un-contradicted by other medical experts, is that Mr Hunt lacked the ability to understand the responsibilities or consequences arising from a marriage, and that he lacked the ability to manage his own property and personal affairs as a result of the injuries he sustained on 18 June 2011.'

In *Chuvalo* v *Chuvalo*, the Ontario Superior Court of Justice concluded that the requirement for an individual to understand and appreciate the consequences of making or not making a decision to reconcile was consistent with the medical parameters outlined in Dr Shulman's report, as well as the jurisprudence.[19]

Kiteley J found that George expressed a wish to live with his wife, but explained that 'there is no evidence that he understood whether there would be consequences to a decision to "live with" his wife. Indeed, there are consequences such as changing the financial status quo between them... There are other consequences such as the emotional impact if the attempted reconciliation fails'.[20]

Counsel for Joanne submitted that there was no evidence that George ever intended to separate. The Court acknowledged that, by finding that George lacked the capacity to decide whether or not to reconcile, it appeared to be implicit that there was a separation. Her Honour did not decide whether or not George did separate from Joanne, and held that if it was at issue, it would be addressed in the future trial.

At the close of the hearing, Kiteley J encouraged the parties to focus on George's 'best interests', and to 'bury the hatchet and co-operate to develop a plan that will work in the best interests of George in his remaining years while he continues to experience inevitable decline'.[21] Her Honour found that Joanne was not successful, and was not entitled to her costs.

It is noted, incidentally, that in a separate proceeding, the Court addressed Joanne's attempt to seek guardianship of her husband, in which she disputes the validity of the power of attorney granted to George's two children.[22]

Chuvalo is now under an appeal, in which Joanne asserts that Kiteley J erred in not applying *Calvert*, by applying an incorrect test and by creating a more onerous test than the established tests or factors to be applied in determining the requisite decisional capacity to separate or to divorce, among other issues.[23]

COMMENTARY AND ANALYSIS

George's circumstances are not unfamiliar, particularly in our rapidly ageing population. With age and longevity often comes an increase in the occurrence of medical issues affecting cognitive ability, and impairment of the executive functioning of the brain. Dementia, Alzheimer's, strokes, Parkinson's and other conditions involving reduced executive functioning are examples of the illnesses that can give rise to decisional capacity concerns. The *Chuvalo* proceedings illustrate how issues concerning, for example, the capacity to marry or divorce are increasingly prevalent in our ageing demographic.

CAPACITY TO MARRY AND DIVORCE

Decisions concerning the capacity to marry and divorce are still evolving in the law. Historically, courts have viewed the contract of marriage as a 'simple' contract, one not requiring a high degree of intelligence to comprehend. This same threshold for determining the requisite decisional capacity to marry has been equated to the requisite decisional

14 1998 CarswellOnt 3423, 1998 CanLII 14926, 164 DLR (4th) 176 (Ont Gen Div)
15 (2003) 1 ETR (3d) 296, 37 RFL (5th) 441 (Ont SCJ), aff'd 11 ETR (3d) 169, 2004 CarswellOnt 4512 (ONCA)
16 *Chuvalo*, para.55
17 *Chuvalo*, para.56
18 *Hunt* v *Worrod*, 2017 ONSC 7397; *Chuvalo*, paras.91 and 58
19 *Chuvalo*, para.59
20 *Chuvalo*, paras.60–61
21 *Chuvalo*, para.69
22 *Supra* note 2, 'George Chuvalo Lacks Capacity to Decide on his Marriage, Judge Rules'
23 See 'Appeal Sought in Chuvalo Divorce Case', *The Lawyer's Daily*, bit.ly/2GRotkq

'Recent cases appear to be moving the law in the direction of developing more detailed factors that should be considered when determining the requisite decisional capacity to marry'

capacity to divorce.[24] Issues related to the capacity to marry and divorce are of increasing importance in our society, particularly since marriage and divorce carry with them significant financial and property rights and consequences. In many provinces, marriage revokes a testamentary document, while divorce revokes bequests to a prior spouse.

A recent stream of cases[25] appears to be moving the law in the direction of developing more detailed factors that should be considered when determining the requisite decisional capacity to marry that both reflect and accord with the real-life financial implications of marriage or divorce.

Importantly, each of these cases has its own unique facts, defining characteristics and evidence to be weighed and considered. The hallmarks of a predatory relationship often include alienation, sequestering, isolation and a deliberate and purposeful lack of medical evidence of cognitive impairment. In these recent decisions, the presiding judges have had the benefit of extensive, probative medical evidence in rendering their decisions, which is not often the case.

The consideration of determining the requisite capacity to reconcile is not frequently deliberated before the court. A few cases have addressed the requisite decisional capacity to separate,[26] but until *Chuvalo*, none have expressly addressed reconciliation from a purely cognitive assessment perspective.

Kiteley J in *Chuvalo* considered[27] the oft-cited quotation from Justice Benotto in *Calvert* dealing with the various 'levels of capacity':

> 'There are *three levels of capacity* that are relevant to this action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.
>
> *'Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.*
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> 'The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park*,[28]... at p.1427. If marriage is simple, divorce must be equally simple. The American courts have recognised that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins* [citation omitted].
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> *'There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding.* The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will: *Park, supra*, at p.1426... [emphasis added]'

While *Calvert* may be the current state of the law, the question of whether or not it is sustainable remains.

First referenced are the various 'levels' for the capacity to separate, divorce and marry within a hierarchical analysis. Although it may be easier or instinctive to apply hierarchies to such

24 *Calvert, supra*, at paras.57-58; *AB v CD*, 2009 BCCA 200, leave to appeal to SCC refused in 2009 CarswellBC 2851; *Wolfman-Stotland v Stotland*, 2011 BCCA 175

25 *Banton v Banton, supra*; *Barret Estate v Dexter* (2000), 34 ETR (2d) 1, 268 AR 101 (Alta QB); *Feng v Sung Estate, supra*; *Devore-Thompson v Poulain*, 2017 BCSC 1289; *Hunt v Worrod, supra*

26 *Calvert, supra*; *Babiuk v Babiuk*, 2014 SKQB 320

27 At para.50

28 *Re Park* [1953] 2 All ER 1411

'The question of a higher or lower level or threshold is dispelled by the decision that is being undertaken: each decision has different factors to be applied in ascertaining requisite decisional capacity'

analysis, a hierarchy delineating differing levels of decisional capacity does not exist. Rather, different types of decisional capacity simply call for different standards to be applied.[29] The Court in *Chuvalo* did not get caught up in an analysis of hierarchical paradigms.

Second, at first glance, it appears that, in *Calvert*, Benotto J found that capacity to separate is simply determining with whom one wants, or does not want, to live. Finding that separation only requires the decisional capacity to decide with whom one wants to live is not in keeping with the *Molodowich*[30] factors – since reconciliation or separation does not necessarily involve living together – and is but one in a sea of factors to consider in analysing separation, all of which have far-reaching consequences. Separation, and specifically determining the date of separation, has legal and financial consequences in the family law and statutory context, since it is used to determine the equalisation of net family property, separation agreements that may be entered into and other domestic contractual arrangements or divorce decrees.

Benotto J went on to find in *Calvert* that there is a distinction between deciding with whom one wants to live and decisions with financial consequences, concluding that financial matters require a 'higher level of understanding'. The decision to separate inherently involves financial considerations and consequences, as do marriage and divorce. The question of a higher or lower level or threshold is really dispelled by the decision itself that is being undertaken: each decision has different factors to be applied in ascertaining requisite decisional capacity.

CAPACITY TO RECONCILE IN *CHUVALO*

A determination of the capacity to reconcile therefore also requires an analysis of a multitude of factors. Neither separation nor reconciliation is simply about with whom one wants, or does not want, to live. If it was, then perhaps the factors to be applied in the determination of both issues would be the same. For George, perhaps the question was more about where he wanted to live than with whom he wanted to live. There was, notably, no discussion about personal care decisional capacity. Kiteley J clearly notes the distinction in her decision, and concludes that Joanne and Ms O'Hara could 'form an opinion as to whether Chuvalo had the ability to decide where he wants to live', but it was only the experts who could express an opinion on George's executive functioning and his cognitive ability to decide to reconcile.

Determining the requisite capacity to reconcile may be situation-specific, depending on the intentions and terms of the contemplated reconciliation. For example, it may involve living together, or living separately and apart for the purposes of the Canadian *Divorce Act*.[31] In this case, Joanne removed George from the long-term care facility in which he was residing and took him to her house. Few people willingly want to live in a long-term care facility; and living with Joanne was likely a happy alternative for him, but that is not the only consideration in determining the question of requisite decisional capacity (or desire) to reconcile with his wife.

Two key paragraphs to examine in this decision are paras.61–62:

> '... However, expressing a desire to live with his wife is just that. There is no evidence that he understood whether there would be consequences to a decision to "live with" his wife. Indeed, there are consequences such as changing the financial status quo between them; such as changing the date of separation for purposes of

29 See Kimberly A Whaley, Kenneth I Shulman, and Kerri L Crawford, 'The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective', Adv Q, Vol 45 No 4 (July 2016)

30 *Molodowich v Penttinen*, 1980 CanLII 1537 (ON SC)

31 RSC 1985, c. 3 (2nd Supp)

'Perhaps the standard or factors to consider when determining the requisite decisional capacity to reconcile should be the same as applied in determining the capacity to marry (or marry again)'

s.8(2) of the *Divorce Act*. There are other consequences such as the emotional impact if the attempted reconciliation fails.

'This court cannot rely on Mr Chuvalo's assertions that he wants to live with his wife as a basis on which to find that he is capable of making the decision to reconcile.'

Kiteley J decided that George did not have the requisite decisional capacity to reconcile. For, in order to reconcile, he would need to be able to foresee and understand the consequences of a reconciliation that involves not only emotional, but also financial, consequences.

Kiteley J looked at several cases and appropriately applied the standard that is arguably developing in more recent case law. Perhaps the standard or factors to consider when determining the requisite decisional capacity to reconcile should be the same as applied in determining the capacity to marry (or marry again), which ought to include both factors of property and personal care management, given that these factors attach to relationship decisions, as found in *obiter* by the Honourable Justice Cullity in *Banton*, and again by the Honourable Justice Greer in *Feng*.

Kiteley J made her decision on the evidence before her. Dr Shulman was the only expert called to give evidence (and be cross-examined on this evidence), and he was in the fortunate position of having seen and assessed George, both while he was decisionally capable of certain tasks and at a later point of significant decline in cognitive and executive functioning. This made Dr Shulman a very compelling and appropriate medical expert witness, and he addressed the correct legal questions (i.e. the ability to understand information relevant to making the decision, and the ability to appreciate the consequences of making the decision or not). So, in the author's respectful opinion, Kiteley J properly declined to apply the hierarchical or 'levels' of decisional capacity approach. Moreover, based on the evidence that George could not understand the consequences of reconciliation (including both financial and emotional considerations) and was not capable of instructing his counsel, it is the author's opinion that the Court correctly determined that George lacked the requisite decisional capacity to reconcile on the evidence before it.

To complicate matters a little in the reading of this decision, there were two concepts of reconciliation at play, relative to the presumed separation:

- **in the statutory context, s.10 of the *Divorce Act*, which deals with, *inter alia*, dates of separation and the divorce proceedings proper (which will be dealt with at a future hearing/trial, where evidence will be marshalled surrounding their separation in accordance with that statute); and**
- **what Kiteley J was asked to do in this hearing, which was to determine whether or not George had the requisite decisional capacity to reconcile at the time the application on this issue was heard.**

THE *CHUVALO* APPEAL

It will be interesting to learn the outcome of the appeal. Joanne's position seems to involve the proposition that an understanding of the legal effect of reconciliation ought not to be part of the assessment of the requisite decisional capacity to reconcile, and that Kiteley J failed to apply *Calvert*. However, the author does not see how it can be concluded that Her Honour failed to apply *Calvert*; indeed, the reasons for the decision reference a

selection of relevant and notable cases that were considered, evaluated and examined in tandem with the medical and expert evidence and the fact-specific nature of the issues for determination before her.

In the author's respectful view, the suggestion that Kiteley J created a more onerous 'test' (an argument Her Honour addresses head-on and provides reasons for) simply does not carry any weight.[32] The consequences are all part of the 'test' or factors to be applied in the determination of capacity for any decision made, even for simple contractual capacity. In the end, she preferred the probative evidence of the expert that George did not have the requisite capacity to instruct counsel and to reconcile.

The only part of the decision that may perhaps raise some question for future examination or consideration are the comments made on the reverse onus. There is a legal presumption of capacity, so therefore the onus is usually on the person who challenges capacity to prove a lack of capacity on a balance of probabilities. Here, Kiteley J directed George to prove that he had capacity. Nevertheless, Her Honour still concludes[33] that she is satisfied with the evidence and does not have to worry about the burden in this instance, with no further comment on point provided.

Ultimately, Kiteley J reviews and acknowledges the standards or factors to be applied in determining requisite decisional capacity, but does not apply any particular factors, standard or 'test' per se. Instead, Her Honour relies on the evidence before the Court, and concludes that George was decisionally incapable of reconciliation at the time of the application, and perhaps on a preliminary basis, since it appears that the divorce proceedings are still the subject matter of a further hearing/trial before the Court.

CONSIDERATIONS FOR ATTORNEYS

Ultimately, a decision to marry, divorce, separate or reconcile is a deeply personal choice. Attorneys owe fiduciary duties and have obligations to the individuals they act for, including a duty to carry out the wishes of those individuals as far as possible, and so should take care not to substitute their own feeling about what is best for an individual for that individual's true wishes. However, attorneys also have a duty to guard the financial and emotional well-being of incapable individuals from self-interested parties and would-be predators. Therefore, the question of whether, and to what extent, an attorney should take steps to initiate or continue a divorce, separation or reconciliation on behalf of an incapable person must be analysed on the facts of each case.

The decision in *Hunt* v *Worrod* provides some guidance on how the court may make determinations of such issues. In that case, Koke J relied in part on the prior capable wishes of the now-incapable party, Kim Hunt, in deciding to void a marriage that occurred after the accident that resulted in the incapacity. Essentially, in the face of medical evidence that suggested that Kim lacked the capacity to marry after his accident, Koke J relied on Kim's previously expressed desire, codified in a domestic contract, to separate from his common-law spouse. Therefore, in situations where a person has expressed a specific desire to continue or end a relationship prior to becoming incapable, an attorney can likely rely on that wish after incapacity, as long as the desire remained constant.

In any case, it is likely advisable, and will presumably be required by the court, that the attorney arrange for a capacity assessment in order to ensure that the person in question does or does not have the capacity to undertake a certain course of action. However, a finding of incapacity will have a different impact based on whether or not the capacity to marry, divorce, reconcile or separate is in question.

As for divorce, *Calvert* makes it clear that, if an individual formed a clear and decisive intention to divorce at a time when they had the requisite capacity to divorce,[34] then that person's substitute decision-maker may initiate or continue divorce proceedings on their behalf, even after they have become incapable. This reflects the important financial consequence

32 Her Honour says at para.46: 'I do not accept the submission that [Dr Shulman] created his own "new and elevated test for capacity" or a "higher and impossible test" by introducing the element of understanding of consequences. As indicated above, Dr Shulman and Dr Gilley similarly describe the elements of capacity and an understanding of the consequences is key. As Dr Shulman said, capacity involves the decision-making process, not the decision itself'

33 At para.24

34 *Supra* note 12 at 75

of divorce, and serves to prevent a would-be former spouse from taking a benefit under the will of the incapable person, simply because that person became incapable of deciding to divorce; the capable spouse would, of course, still be entitled to the equalisation of net family property and support, pursuant to the applicable family law statutes.

If a person has a previously expressed wish to marry, but has been found incapable of marrying, then no valid marriage can be entered into. It would be patently absurd for an attorney to claim to enter into a marriage on behalf of an incapable person.

The same logic would appear to apply to reconciliation – how can an attorney claim to renew a relationship on behalf of a person who is incapable of appreciating the consequences of doing so? Equally, how can an attorney purport to separate, thereby starting the process required to legally end a relationship, on behalf of someone who cannot appreciate the consequences thereof? There are, however, some reasonably foreseeable hypothetical situations where doing so may be the correct course of action, and in those situations, attorneys should seek the advice and direction of the court.

If, for example, a now-incapable person expressed, while capable, a desire to reconcile with or separate from a partner, but was not able to take steps to do so, the attorney arguably has a duty to facilitate those capable wishes. This is a particularly tricky issue, as it turns on the issue of whether a desire to separate or reconcile has been crystallised, and if the crystallisation of that desire is sufficient to begin the process of separation or reconciliation such that the attorney has an obligation to continue the process. It is additionally complex because it involves decisions within the purview of both the attorney for personal care and the attorney for property.

As Kiteley J held in *Chuvalo*, reconciliation, and by extension separation, is about more than wanting to live with or apart from someone. *Molodowich* outlines a long list of questions that should be considered, under seven different headings, in determining whether or not two people cohabitate for the purposes of family law. Due to these complexities, the involvement of the court will likely be required in cases where capacity and separation/reconciliation are at issue.

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