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Francois v. Francois, 2025

ONSC 589

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Introduction

- How should the Court treat guardianship orders and findings of incapacity made over a decade earlier?
- Planning after incapacity becomes litigation: costly, protracted and uncertain

Background

- 2012: Court found Stephanie incapable of managing her property under s. 6 of the *SDA*
- Husband appointed guardian of property
- Divorce from husband, who thereafter moved to Haiti
- 2025: Stephanie moves to appoint John Bailey as substitute guardian under s. 26 of the *SDA*

Issues Before the Court

1. *Standing* – Did she have the statutory right under s. 26?
2. *Litigation Guardian* – Did she need one under r. 7.01?
3. *Capacity Paradox* – If she can choose a guardian, why not execute a Power of Attorney?

Standing Under s. 26 of the SDA

- S. 26: anyone who had to be served under the original Application can move to substitute the guardian
- Stephanie had been served in 2012 as the person alleged incapable
- Therefore, she had standing to bring the motion

Litigation Guardians Under r. 7.01 of the *Rules*

- R. 7.01: a “party under disability” must act through a litigation guardian
- The exception (7.01(2)) doesn’t apply here → Stephanie was the moving party, not the Respondent

Litigation Guardians Under r. 7.01 of the *Rules*

- The PGT will step in as the litigation guardian of last resort
- Here: PGT did not oppose the motion BUT approval was conditional → court must find Stephanie **remains incapable**
- Created an untenable position
 1. Unresolved Rule 7.01
 2. Capacity paradox

The Capacity Paradox

- Counsel: She is capable of “deciding who can be her guardian as opposed to whether she needs a guardian”
- Court: Distinction is not meaningful → if she can choose, why not execute a Power of Attorney?
- Court suggests that the 2012 capacity finding may be outdated

The Capacity Paradox

- Counsel: Power of Attorney would necessitate a court order lifting the existing guardianship
- Court: Safeguards around incapacity are not red tape
“The price of liberty is eternal vigilance”

The Court's Decision

Motion dismissed

- Court not satisfied that Stephanie remains incapable of managing property or executing a Power of Attorney

Key Takeaways

1. Incapacity May Not be Permanent

- Past findings \neq present incapacity

2. Autonomy is Paramount, Even After Incapacity

- Even after a finding of incapacity, wishes may still be expressed

Key Takeaways

3. Procedural Safeguards are a Part of Planning

- May appear technical but are essential for protecting autonomy

4. Lessons for Practitioners

- Best Approach: Proactive POAs, regular capacity assessments, clear instructions

Where Ontario Goes from Here

- Currently
 - The “all or nothing” model
- The Critique
 - *2017 Final Report on Legal Capacity, Decision-Making and Guardianship*
- The Future?
 1. Support Authorizations
 2. Network or Co-Decision-Making
 3. Tailored and Time-Limited Guardianships

Thanks! And Remember...

Planning Does Not Stop After the Diagnosis:
It turns into litigation