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THE MYTH OF A HIERARCHY OF DECISIONAL CAPACITY: A MEDICO-LEGAL PERSPECTIVE

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INTRODUCTION

Decisional capacity is an area in which law and medicine have a shared responsibility, a true medico-legal paradigm. While legal professionals must often work with clients who have medical or cognitive impairments, medical practitioners are often asked to apply legal standards and even review evidence retrospectively in order to help to determine whether a person possessed the requisite decisional capacity to undertake a certain task. Historically, we have tended to approach decisional capacity along a threshold-based hierarchy, with some decisions often described as requiring a lower threshold than others in terms of the requisite factors or criteria to be satisfied. For example, the legal literature has traditionally conceptualized the requisite capacity to marry as encompassing a lower threshold than that required for other types of decisions, such as testamentary capacity. However, there is a clear acknowledgement in the jurisprudence that, as Justice Boyko noted in the Ontario Superior Court of Justice decision of *Covello v. Sturino*,[1] a hierarchy delineating differing levels of decisional capacity does not exist. Rather, different types of decisional capacity simply call for different criteria to be applied.

In a general sense, we tend to organize information in terms of hierarchies in order to facilitate ease of decision making, predictability and hence understanding. We occupy a legal regime in which

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1. 2007 CarswellOnt 3726 (Ont. S.C.J.) [*Covello*] at para. 21, citing *Godelie v. Ontario (Public Trustee)* (1990), 39 E.T.R. 40, 21 A.C.W.S. (3d) 1251, 1990 CarswellOnt 497 (Ont. Dist. Ct.).

we often prefer the consistency of thinking in hierarchical terms, applying broad normative standards to specific circumstances. What may be lost in pursuit of this sort of efficiency, however, is that a paradigm that encompasses hierarchical thinking, whether express or implied, may have serious ramifications with regard to a finding of lack of decisional capacity which, in turn, can have a potentially life-altering impact on an individual's safety and autonomy.

It may be suggested that the hierarchical paradigm, though seemingly efficient, constitutes an incomplete or inaccurate means of understanding capacity. This monograph seeks to dispel the myth of a hierarchy of decisional capacity, and explores the importance of elucidating not only what decision is being made, but why, by whom and in what context, when determining requisite decisional capacity.

Dispelling the Notion that there is a Hierarchy of Decisional Capacity

The assessment of decisional capacity is an inexact science, both legally and medically speaking. One factor that makes these assessments complicated is the foundational premise that capacity is decision, time and situation specific. This means that a person can be capable with respect to particular decisions, at different times, and under varying circumstances. In effect, there is no such concept as "global" capacity. Rather, decisional capacity is determined on a case-by-case basis in relation to a specific task or decision at a particular moment in time.[2] Each decision is made in unique circumstances; the decision and all the circumstances surrounding it must be evaluated. Hence, to weigh or compare any two decisions is inevitably flawed.

Historically speaking, we have placed emphasis on the "what" of decisional capacity, inquiring into what decision is being made in the circumstances to the possible exclusion of other fields of inquiry. While the law has indeed categorized decisional capacity in accordance with the type of decision contemplated, it is, however, imperative that professionals practising in estates and related areas be aware of the need to investigate who is making a particular decision, and why, so as to determine what type of threshold is to be met in any given circumstance while having regard to a particular decision or task. Depending on the "who" and the "why" in the decision tree, the criteria for ascertaining requisite decisional

2. Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" (2013), 32 E.T.P.J. 215.

capacity can be simple in one situation and yet incredibly complex in another.

MEDICAL BACKGROUND

Many clinical conditions may impact decisional capacity. Notably, the rising prevalence of dementia and related Alzheimer's disease in the ageing population at large has caused increased focus within estates and related areas of practice on a client's decisional capacity. Indeed lawyers in every area of practice whose clientele is ageing are facing the same such issues. If symptoms of a condition such as dementia are not adequately screened, there is a risk that a client's true and valid wishes will not be ascertained or indeed given effect.

Red Flags

There are a number of red flags from a clinical perspective that constitute possible indicators of a lack of requisite decisional capacity. Importantly, Canada is currently facing an unprecedented social and health challenge as approximately 500,000 Canadians suffer from Alzheimer's disease or related dementias, the most significant cause of disability among older adults.[3] Thus, advanced age in itself arguably constitutes a potential red flag. That one must be careful of ageism is imperative yet, when discharging a professional duty of care, red flags are a constant consideration and a reality in today's society rife with complex demographics.

In addition, concerns from family members are not to be taken lightly, as such reported changes in behaviour from a cognitive perspective are generally accurate, although explanations and attributions for the change are often not correct. Dramatic changes from prior expressed wishes, behaviours, attitudes or thinking, in addition to the presence of paranoid delusions are often common in the early stages of dementia. As such these changes may be reason to suspect a lack of requisite decisional capacity. Red flags include consideration of inconsistency, multiple and successive changes to planning documents and unusual transactions, conflict arising from complex family relationships, bereavement, physical vulnerability and disability, or other circumstances suggesting that undue influence may be at play.

3. The Alzheimer Society, "Rising Tide: The Impact of Dementia on Canadian Society" (2010), online at www.alzheimer.ca/~/media/Files/national/Advocacy/ASC_Rising_Tide_Full_Report_e.pdf at 8.

Cognitive Screening Tests

When conducting an assessment of mental and cognitive function, clinicians routinely make use of cognitive screening tests. Unfortunately, lawyers who receive reports involving these test results are often poorly equipped to understand how to contextualize them within the ambit of requisite decisional capacity. Importantly, the results of a cognitive screening test do not imply a specific diagnosis. Moreover, it is possible to have a condition such as Alzheimer's disease and still possess the requisite capacity to make certain decisions. Capacity is state-dependent, not trait-dependent. While cognitive screening tools are helpful, they are only one component of a broader toolkit. A formal diagnosis is not solely dependent upon a cognitive screening test but, rather, on a full clinical assessment, which will include a detailed history and other pertinent investigations.

A determination of requisite decisional capacity is dependent on specific components of mental capacity, rather than on a particular mental state, since capacity is situation and time specific. Common law decisions such as *Banks v. Goodfellow*[4] are illustrative of this tenet. In *Banks*, the presence of delusions on the part of a testator did not preclude the presence of the requisite criteria for possessing testamentary capacity. Similarly, in *Laszlo v. Lawton*,[5] the British Columbia Supreme Court noted that "[t]o lack testamentary capacity does not mean that the testator must be in a perpetual state of substandard competence. Seemingly rational persons may be without it, while seemingly compromised persons may possess it".[6]

Notably, just as a condition such as dementia is not necessarily an indicator that an individual lacks requisite decisional capacity, an impaired performance on a cognitive screening test is not determinative of a lack of capacity. Instead, a cognitive screening test acts as a signal. For a diagnosis to be made and then a determination of capacity, a clinician must conduct a full examination which involves several factors, including a client/patient's history, a mental status examination and imaging as well as biochemical investigations.

Cognitive screening tests are commonly used in assessing high-risk individuals. For example, in those clients with significant risk factors for dementia such as advanced age, family history, head

4. (1870), [1861-73] All E.R. Rep. 47, 39 L.J.Q.B. 237, L.R. 5 Q.B. 549 (Eng. Q.B.) [*Banks*].
5. 2013 BCSC 305, [2013] 8 W.W.R. 747, 2013 CarswellBC 492 (B.C. S.C.) [*Laszlo*].
6. *Ibid.*, at para. 191.

injury or delirium, clinicians will use cognitive screening tests in an "opportunistic" sense in order to discern whether cognitive impairment or dementia may be present. Two psychometric measurements are key elements in such a screening: sensitivity and specificity. Sensitivity refers to the correct identification of "true positives", the likelihood that the condition screened for is truly present. If the cognitive screening test's sensitivity is low, there is a risk that some individuals who are impaired will not be identified as suffering from the condition screened for, false negatives. Specificity, on the other hand, refers to the propensity of a cognitive screening test to identify "true negatives", cases in which a negative result is achieved for those individuals who do not possess the condition screened for. If the specificity of a cognitive screening test is too low, a large number of individuals may be incorrectly identified as suffering from the condition screened for, false positives.

Most Commonly Used Screening Tests

1. The Mini-Mental State Examination ("MMSE")

The most commonly used cognitive screening test is the Mini-Mental State Examination (MMSE), which assesses, based on a score out of 30, an individual's orientation to time and place, short-term memory, concentration, language and visuospatial abilities.[7] It should be noted that the MMSE does not account for executive brain function or frontal lobe function such as judgment, planning or impulsivity, all of which may be particularly relevant to mental capacity. In addition, the normative standards applied by the MMSE are founded in education and language abilities. The MMSE score alone is not probative with regard to diagnosis or capacity.

2. The Clock Drawing Test ("CDT")

The clock-drawing test has become a particularly popular screening test due to its quickness and ease of administration.[8] This test assesses a wide range of cognitive functions, including comprehension, planning, visual memory, visuospatial ability, motivation and concentration. While the test is simple to administer, it is challenging to score, leading to global assessments of mental capacity

7. M.F. Folstein, S.E. Folstein and P.R. McHugh, "Mini-mental state. A Practical method for grading the cognitive state of patients for the clinician" (1975), 12(3) J. Psychiatr. Res. 189.
8. K.I. Shulman, "Clock-drawing: is it the ideal cognitive screening test?" (2000), 15(6) Int. J. Geriatr. Psychiatry 548.

as either intact or mildly, moderately or severely impaired. The CDT, as with other screening tests, offers a means of tracking changes over time.

3. Mini-Cog

The Mini-Cog consists of a three-word, delayed recall test, followed by administration of the clock-drawing test. It has been shown to be an effective predictor of the presence of dementia.[9]

4. The Montreal Cognitive Assessment ("MoCA")

Since it was designed to screen for mild cognitive impairment, the MoCA is a more sensitive and challenging test than the MMSE. It includes several tests of executive/frontal lobe function, including the trails B test, which asks the test taker to alternate numbers and letters. The MoCA also includes the CDT and an assessment of verbal fluency and abstraction.

5. Frontal Lobe Tests

In order to assess the status of particular frontal/executive brain functions, clinicians rely on what is known as "set shifting". Tests that require alternating responses, such as the trails B test, are used to assess set shifting. From these tests, it is possible to assess cognitive functions relevant to planning, judgment and impulsivity which are reflective of the mental capacities required to orchestrate complicated mental functions including the ability to manage personal care or property or testamentary capacity. Once again, these tests are not probative but, rather, corroborative in nature.

Clinical Red Flags as Indicators for Professionals

From a clinical perspective, the results of cognitive screening tests may act as red flags signalling the presence of a condition impacting an individual's capacity to make a particular decision. In addition, concern on the part of professionals regarding an individual's capacity in some respect may signal the need for a capacity assessment and resultant clinical perspective. Indeed, the commonly cited red flags may be thought of as constituting an invitation to conduct a

9. S. Borson et al., "The mini-cog: a cognitive 'vital signs' measure for dementia screening in multi-lingual elderly" (2000), 15(11) Int. J. Geriatr. Psychiatry 1021.

more fulsome assessment of whether a person indeed possesses the legal capacity to make a particular decision.

Cognitive screening tests may be illuminating but they are only one component of a cognitive and mental status examination and are not to be interpreted as a diagnosis or, for that matter, a determination, especially a final determination, as to whether an individual possesses the requisite capacity for a decision. As the court noted in *Laszlo* in the context of testamentary capacity, this type of decisional capacity

> . . . is not a medical concept or diagnosis; it is a legal construct. Accordingly, scientific or medical evidence – while important and relevant – is neither essential nor conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence, or reject the medical evidence altogether.[10]

LEGAL BACKGROUND

At law, there is no single legal definition of capacity, though it is often elusively said that there are legal "tests" for determining or establishing decisional capacity. The *Substitute Decisions Act, 1992*[11] (the "*SDA*") simply applies a set of criteria for various decisions, and defines "capable" as meaning "mentally capable". There is no single approach to determining requisite decisional capacity. Instead, such an assessment incorporates factors to be considered and is dependent on the task and situation at hand. In other words, decisional capacity is time, situation and task specific.[12]

As a starting point, the law presumes that every person is capable of making decisions, though this presumption may be legally rebutted.[13] In order to rebut the presumption of capacity, we look to both law and fact, and apply the available evidence to the criteria for

10. *Laszlo*, *supra*, footnote 5, at para. 199.
11. R.S.O. 1992, c. 30.
12. Kimberly A. Whaley and Ameena Sultan, "Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity" (2013), 32 E.T.P.J. 215.
13. *Palahnuk v. Palahnuk Estate* (2006), 154 A.C.W.S. (3d) 996, 2006 CarswellOnt 8526, [2006] O.J. No. 5304 (Ont. S.C.J.) [*Palahnuk*]; *Brillinger v. Brillinger-Cain*, 2007 CarswellOnt 4011, [2007] O.J. No. 2451 (Ont. S.C.J.) [*Brillinger*]; *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216, 2004 CarswellOnt 1228 (Ont. S.C.J.), affirmed (2005), 14 E.T.R. (3d) 27, 137 A.C.W.S. (3d) 1076, 2005 CarswellOnt 877 (Ont. C.A.) [*Knox*].

determining requisite decisional capacity in that particular situation.[14]

Capacity is Decision Specific

Capacity is specific to the particular decision being made or task undertaken. The relevant criteria employed in assessing whether an individual has the requisite capacity to grant a continuing power of attorney for property, for example, necessarily differs from the criteria for granting a power of attorney for personal care, and from the capacity to manage one's property or personal care. Similarly, the capacity to enter into a contract, transfer real property, give a gift, marry, separate or divorce will all involve very different considerations, as determined by statute and at common law. As a result, it is not possible and is legally and medically incorrect to conclude that a given decision is higher or lower on a threshold based spectrum. Instead, every situation is unique, and the presence of decisional capacity, or its absence in one area does not necessarily imply its presence or absence in other areas. In effect, the possibilities are endless when it comes to combinations of decisional capabilities, since each decision brings with it concordant standards or factors to be considered in its determination.[15]

Capacity is Time Specific

At law, capacity can and does fluctuate over time. Indeed, courts have consistently adopted the premise that the requisite capacity to grant a power of attorney or make a will can vary over time.[16] This specificity in terms of the timing of any given decision renders expert assessments of capacity a complicated undertaking. Accordingly, expert assessments or examinations must adhere to procedures which include clear demarcations of date and time. Given that assessments, whether expert or otherwise, are not always conducted concordantly with a particular decision, the probative value of the evidence may be impacted.[17]

A recent medical review of the legal notion of "lucid intervals" and "cognitive fluctuations" in dementia[18] revealed that although some dementias are indeed associated with fluctuations in cognition, these

14. *Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722, 225 D.L.R. (4th) 385 (S.C.C.) [*Starson*].
15. Kimberly A. Whaley and Ameena Sultan, *supra*, footnote 12.
16. *Palahnuk*, *Brillinger*, and *Knox*, all *supra*, footnote 13.
17. Kimberly A. Whaley and Ameena Sultan, *supra*, footnote 12.
18. K.I. Shulman et al., "Cognitive fluctuations and the lucid interval in

fluctuations tend to primarily affect attention and are relatively short and small in magnitude. At least in dementia, the notion of "good days and bad days" does not correlate with alternating decisional capacity and as such, the "lucid interval" constitutes yet another myth that needs dispelling.

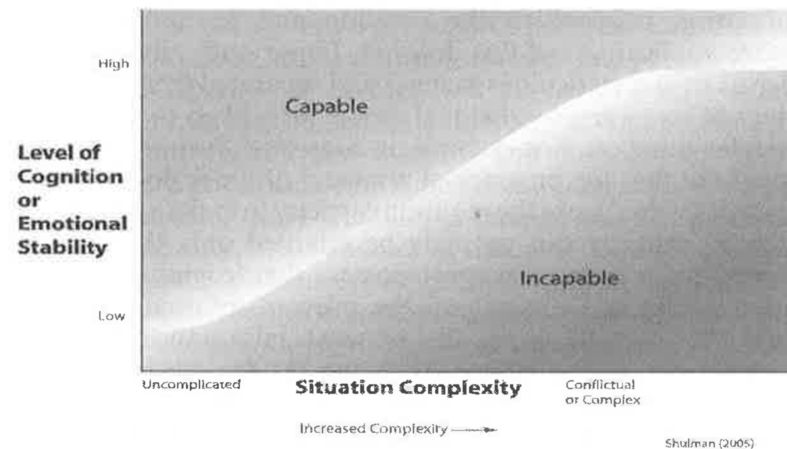
Capacity is Situation Specific

Generally speaking, the requisite capacity to make a decision is demonstrated by an individual's ability to comprehend the information relevant to the decision and to understand the possible implications of this decision. Importantly, this enquiry is undertaken in a meticulous manner and separated from traditional notions of how a given individual should, or is likely to respond to a particular situation. For example, in *Starson v. Swayze*,[19] the court pointed out that the presence of a mental disorder does not imply that an individual lacks the requisite capacity to make a decision and that legal capacity can properly be rebutted only through clear evidence.[20] An individual must possess the "cognitive ability to process, retain and understand the relevant information",[21] and should "be able to apply the relevant information to his/her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof".[22] It is important to note that reasonableness of decision making, or other normative standards, are not essential elements of requisite decisional capacity. As indicated in *Re Koch*,[23] "[i]t is mental capacity and not wisdom that is the subject of the [*SDA*] and the [*Health Care Consent Act*[24]]. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected".

Regardless of what decision is being made, the level of conflict and complexity in the context of a decision emphasizes the importance of situation-specific factors in raising or lowering the threshold for capacity and is reflected in Figure 1 below.[25] The greater the conflict

dementia: implications for testamentary capacity" (2015), 34 J. Am. Acad. Psych. and Law 287.
19. *Supra*, footnote 14.
20. *Ibid.*, at para. 77.
21. *Ibid.*, at para. 78.
22. *Ibid.*, at para. 78.
23. (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712, 27 O.T.C. 161 (Ont. Gen. Div.) at para. 89, additional reasons (1997), 35 O.R. (3d) 71, 72 A.C.W.S. (3d) 230, 28 O.T.C. 22.
24. S.O. 1996, c. 2, Sched. A.
25. Figure 1: Cognition, Emotions and Situation-Specific Capacity table, Kenneth I. Shulman et al., "Assessment of Testamentary Capacity and

and complexity in the life circumstances of a decision maker, the higher the threshold to reach capacity for a specific decision. The more impaired or emotionally vulnerable a decision maker, the less conflict or complexity will be necessary to reach a level of incapacity. In a simpler life circumstance even an impaired individual may retain decisional capacity.



Capacity and Legal Professionals

For professionals working within wills, estates, trusts and related practice areas, as well as lawyers in general, decisional capacity and proceedings where capacity is at issue, raise a host of potential minefields. For example, counsel appointed pursuant to s. 3 of the *SDA* respecting representation of a person whose capacity is at issue, face an arduous task when it comes to establishing appropriately their role and responsibilities. It has been noted that:

> Persons involved in proceedings where capacity is in issue, whether represented by counsel, or otherwise on one's own, often do not understand the need for the appointment of counsel for the allegedly incapable person and often do not necessarily appreciate the particular role and responsibilities of s. 3 counsel.[26]

Vulnerability to Undue Influence" (2007), 164:5 Am. J. Psych. 722. Reprinted with permission from the American Psychiatric Association.

26. Kimberly A. Whaley and Ameena Sultan "Between a Rock and a Hard

This difficulty is presumably in part due to a lack of definitive statutory guidance: "there have been a number of complaints raised against lawyers acting as court-appointed s. 3 counsel, in the form of complaints to the Law Society of Upper Canada, as well as claims alleging negligence".[27] Observations such as these demonstrate that, despite the complexity affiliated with the concept of capacity, an understanding of decisional capacity and how it may impact clients and others is essential for legal professionals.

The Rules of Professional Conduct for Lawyers must also be considered in representing clients whose capacity is at issue in proceedings. The Law Society of Upper Canada's *Rules of Professional Conduct*[28] (the "Rules") for example, stipulate that the lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about legal affairs and to give lawyers instructions. The Rules also recognize that the client's ability to make decisions depends on factors such as age, intelligence, experience, mental and physical health, and on the advice, guidance and support of others. Moreover, a client's ability to make decisions may change over time. When a client is suffering from a disability that impairs his/her ability to make decisions, this impairment may be minor or might prevent the client from having the requisite legal capacity to give instructions or enter into binding relationships. The Rules make explicit that, if a client no longer has legal capacity to manage legal affairs, a lawyer may need to take steps to have a lawfully authorized representative appointed or to obtain assistance in order to protect the client's interests.[29] The fortitude of a Litigation Guardian appointment may be in order. That such a consideration is complicated is an understatement.

TYPES OF DECISIONAL CAPACITY AT LAW

While certain decisions and their corresponding requisite legal capacity requirements are governed by statute, such as the *Substitute Decisions Act, 1992*, others have developed over time, through common law precedent and jurisprudence. The purposes of the *SDA* are to protect vulnerable individuals under disability while also

Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the Substitute Decisions Act, 1992" (2012), 40 Adv. Q. 408 at 410.

27. *Ibid.*, footnotes omitted, citing The Law Society of Upper Canada, Regulatory Proceedings, Complaints Services; and *Newell v. Felker* (August 7, 2012), Edward J., Doc. CV-11-422094 (Ont. S.C.J.).

28. The Law Society of Upper Canada, *Rules of Professional Conduct* (Law Society of Upper Canada, 2000).

29. Rule 3.2-9 and related Commentary.

respecting and promoting their autonomy. An overview of some of the more commonly encountered situations of decisional capacity which are statutorily mandated under the *SDA* include:

(i) Capacity to Manage Property

In order to be deemed to possess the requisite decisional capacity to manage property, a person must have:[30]

- the ability to understand the information that is relevant in making a decision involving the management of one's property; and
- the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

(ii) Capacity to Manage Personal Care

The requisite capacity to make personal care decisions is found where a person has:[31]

- the ability to understand the information that is relevant to making a decision relating to his/her own health care, nutrition, shelter, clothing, hygiene or safety; and
- the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

A person who is 16 years of age or older is presumed to be capable of making personal care decisions.[32] A person may be capable with respect to one or more personal care decisions, and not capable with respect to others.

(iii) Capacity to Grant a Power of Attorney for Property (a "POAP") and a Continuing Power of Attorney for Property (a "CPOAP")

The requisite capacity for granting or revoking a CPOAP includes the person possessing the following:[33]

- knowledge of what kind of property he/she has and its approximate value;
- awareness of obligations owed to his/her dependants;

30. *SDA*, s. 6.
31. *SDA*, s. 45.
32. *SDA*, s. 2(2).
33. *SDA*, s. 8.

- knowledge 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 CPOAP;
- knowledge that the attorney must account for his/her dealings with the person's property;
- knowledge that he/she may, if capable, revoke the CPOAP;
- appreciation that unless the attorney manages the property prudently its value may decline; and
- appreciation of the possibility that the attorney could misuse the authority given to him/her.

In order to revoke a CPOAP, the same factors are applied. A person is capable of revoking a CPOAP if he/she is capable of granting one.[34]

It is often inaccurately suggested that the criteria applied in determining whether an individual possesses the requisite decisional capacity to grant or revoke a CPOAP are less onerous than the criteria required in order to be said to possess the requisite capacity to manage property. Instead, the factors to be applied are simply different, rather than more or less stringent. In fact, a person need not have the requisite capacity to manage property to have capacity to grant or revoke a CPOAP. If the grantor is incapable of managing property, a CPOAP made by him/her is still valid as long as he/she meets the requisite criteria for capacity to grant the CPOAP at the time the document was made.[35]

The drafting solicitor is responsible for assessing a client's capacity to grant or revoke a power of attorney, either for property or personal care,[36] though that solicitor may recommend, encourage or suggest a formal assessment conducted by an assessor in order to protect the autonomy of an individual, the decision made and assist in the prevention of future litigation.

(iv) Capacity to Grant a Power of Attorney for Personal Care (the "POAPC")

In order to grant or revoke a POAPC, a person must have:[37]

34. *SDA*, s. 8(2).
35. *SDA*, s. 9(1).
36. *Egli (Committee of) v. Egli*, 2005 BCCA 627, 262 D.L.R. (4th) 208, 20 E.T.R. (3d) 159 (B.C. C.A.).
37. *SDA*, s. 47.

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

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.[38]

A POAPC is valid if, at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[39] The only exception to this is if the POAPC incorporates specific instructions for personal care decisions. Any such alternative instructions are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.[40]

Common Law Decisional Capacity Requirements and their Corresponding Criteria Include:

(i) Capacity to Make a Will

The requisite capacity to make or revoke a will, otherwise known as testamentary capacity, has been established at common law and does not emanate from statute. It includes:[41]

- the ability to understand the nature and effect of making a will;
- the ability to understand the extent of the property in question; and
- the ability to understand the claims of persons who would normally expect to benefit under a will of the testator.

The testator does not require a thorough understanding of the above criteria, but must have a "disposing mind and memory", meaning a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like".[42]

38. *SDA*, s. 47(3).
39. *SDA*, s. 47(2).
40. *SDA*, s. 47(4).
41. *Banks*, *supra*, footnote 4; *Pare v. Cusson* (1921), 60 D.L.R. 105, [1921] 2 W.W.R. 8, 31 Man. R. 197 (Man. C.A.); *Fowler, Re*, [1937] O.W.N. 417, 1937 CarswellOnt 208 (Ont. C.A.).
42. *Leger v. Poirier*, [1944] S.C.R. 152 at p. 153, [1944] 3 D.L.R. 1, 1944 CarswellNB 11 (S.C.C.).

Importantly, testamentary capacity is essential at the time at which instructions are given, not necessarily when the testamentary document is executed. In *Parker v. Felgate*,[43] the court established that, even if the testator lacked the requisite testamentary capacity at the time the will was executed, the will is still valid if:

a) the testator had testamentary capacity at the time he/she gave the lawyer instructions for the will;
b) the will was prepared in compliance with those instructions; and
c) when the testator executed the will, he/she was capable of understanding that he/she was signing a will that reflected his/her own previous instructions.

As with other types of decisional capacity, testamentary capacity is often colloquially, or inadvertently in error, situated along a spectrum, and described as requiring a higher threshold than that of, for instance, capacity to grant a POAPC.[44] It is important to note that the criteria for ascertaining testamentary capacity are not placed at a higher threshold. Instead, the necessary criteria are simply different from those of other types of decisional capacity. As noted in Figure 1 above, the threshold is also affected by situation-specific complexity. Indeed, if an individual is found to lack the requisite capacity to manage his/her affairs, this does not necessarily imply that that person lacks testamentary capacity. Discerning whether a testator understands his/her assets and the impact a will may have is a separate enquiry from whether the testator had the requisite capacity to manage his/her property.[45]

Even disordered thinking does not necessarily lead to a conclusion that a testator lacks testamentary capacity. In *Laszlo*,[46] for example, the Supreme Court of British Columbia examined the effect of delusions on testamentary capacity. The individual whose capacity was in question believed she could communicate telepathically with objects and that unidentified individuals had conspired to steal funds from her. These delusions, however, were not clearly connected to her decision to disinherit her husband's family who were previously named as beneficiaries in her will. The individual's cognitive faculties

43. (1883), L.R. 8 P.D. 171 (Eng. P.D.A.).
44. *Penny v. Bolen* (2008), 169 A.C.W.S. (3d) 659, 2008 CarswellOnt 5644 (Ont. S.C.J.) at para. 19, additional reasons (2008), 172 A.C.W.S. (3d) 317, 2008 CarswellOnt 6552.
45. *Hamilton v. Sutherland* (1992), 45 E.T.R. 229, [1992] 5 W.W.R. 151, 26 W.A.C. 51 (B.C. C.A.).
46. *Supra*, footnote 5.

were intact at the time she made her will, in spite of the presence of delusional thinking. Though the court ultimately found that this person lacked testamentary capacity, this finding was due to the fact that she did not understand the nature and quantum of her estate.

(ii) Capacity to Marry

While there are no specific statutory criteria for determining the requisite decisional capacity to marry, this area of the law has been established jurisprudentially yet is out of date given developments in the statutory regime for family property rights under the *Family Law Act*.[47] Some peripheral assistance is also provided by s. 7 of the Ontario *Marriage Act*[48] which prohibits a person from issuing a licence to or solemnizing a marriage of a person who, based on what he/she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason. Certain Ontario legislation therefore requires that a person possess the requisite capacity to marry and capacity to consent to marriage. However, just what this requisite capacity entails is not particularly clear.

According to common law precedent, in order to enter into a valid marriage contract, a person must have the ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children.[49]

Traditionally, according to English common law, the factors to be applied in determining the requisite capacity to marry are analogous to those of entering into a contract, meaning that a person must have the ability to understand:

a) the nature of the contract of marriage; and
b) the effect of the contract of marriage.[50]

According to this traditional view of the requisite capacity to marry, spouses must understand only the basic components of marriage such as the commitment to be exclusive to one another, that the relationship is terminated only upon death, and that the marriage is founded on principles of support and cohabitation. A person does not need to have the ability to understand the more serious financial implications that accompany marriage including revocation of previous wills, support obligations and potential equalization.[51]

47. R.S.O. 1990, c. F.3.
48. R.S.O. 1990, c. M.3, s. 7.
49. *Barrett Estate v. Dexter*, 2000 ABQB 530, 34 E.T.R. (2d) 1, 268 A.R. 101 (Alta. Q.B.) [*Barrett Estate*].
50. Kimberly A. Whaley, Dr. Michel Silberfeld, Honourable Justice Heather McGee and Helena Likwornik, *Capacity to Marry and the Estate Plan* (Aurora, Ont.: Canada Law Book, 2010).

The foundational case of *Durham v. Durham*[52] established the notion that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend".[53] Similarly, in the decision *In the Estate of Park, Deceased*,[54] the court delineated the requirements for the capacity to marry stating that "a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage". Curiously, Justice Karminski indicated that the capacity to marry carries with it a lower threshold than testamentary capacity.[55] Cases such as these demonstrate that marriage has, at least historically, been conceptualized as a simple contract, notwithstanding the mischaracterization of "lower threshold".

Despite the traditional view, an alternative perspective on capacity to marry became increasingly prevalent, as demonstrated in cases such as *Browning v. Reane*[56] and *Spier v. Spier*.[57] The court in *Browning* stated that, for a person to be capable of marriage, he/she must be capable of managing his or her person and property. Similarly, in *Spier*, the court indicated that one must be capable of managing his/her property in order to be capable of marrying.[58] These cases demonstrate a clear tension between the traditional view of marriage as an easily understandable contract, as opposed to the reality represented by the serious implications of marriage for the estate, including revocation of previous wills.[59]

One of the most influential cases regarding capacity to marry is that of *Banton v. Banton*,[60] in which Justice Cullity assessed whether an 88-year-old man had possessed the requisite capacity to marry a 31-year-old woman. In reviewing the law on the validity of marriage, Justice Cullity noted that Mr. Banton had been a "willing victim"

51. *Ibid.* at 50.
52. (1885), 10 P.D. 80, [1885] 1 T.L.R. 338 (Eng. P.D.A.).
53. *Ibid.*, at 82.
54. (1953), [1953] 2 All E.R. 1411, [1954] P. 112 (Eng. C.A.).
55. *Ibid.*, at 1425.
56. (1812), [1803-13] All E.R. Rep. 265, 161 E.R. 1080 (Eng. Ecc.).
57. [1947] *The Weekly Notes* 46 (Eng. P.D.A.).
58. *Ibid.*, at para. 46 *per* Wilmer J.
59. Kimberly A. Whaley, "Predatory Marriages: Legal Capacity to Marry and the Estate Plan" (2016), at http://whaleyestatelitigation.com/blog/2014/06/paper-predatory-marriages-legal-capacity-to-marry-and-the-estate-plan.
60. (1998), 164 D.L.R. (4th) 176 at 244, 1998 CarswellOnt 4688 (Ont. Gen. Div.) [*Banton*].

who had consented.[61] Importantly, Justice Cullity distinguished between consent and capacity and analyzed the relevant criteria for capacity to marry, stating that an individual will not have the requisite capacity unless he/she is capable of understanding the nature of the relationship and the obligations and responsibilities it entails.[62] Since Mr. Banton had been married several times and had sufficient memory and understanding to continue to appreciate the nature and responsibilities of the relationship, this satisfied "the first requirement of the test of mental capacity to marry".[63]

With regard to whether there existed an additional requirement for capacity to marry, the court referred to *Browning* and *Spier* for "the test for capacity to marry at common law". Noting some inconsistencies in the jurisprudence, Justice Cullity consulted older cases and statutes and concluded that it was only with the enactment of the *SDA* that the line between capacity of the person and capacity with respect to property was more clearly defined. Justice Cullity preferred the interpretation provided in *Browning* which stipulates that, while marriage has an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would be . . . to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate".[64] The marriage was consequently upheld as a valid one.

Subsequently, another notable decision is that of *Feng v. Sung Estate*,[65] where Justice Greer considered the requisite capacity to marry and adopted the criteria articulated by one of the medical experts, Dr. Malloy, in the decision of *Barrett Estate v. Dexter*.[66] Dr. Malloy indicated that, in order for a person to be capable of marriage, he/she must understand the nature of the marriage contract, the state of previous marriages, and his/ her children and how they might be affected.[67] Since Mr. Sung did not understand the nature of the marriage contract and the fact that it required the execution of both parties, Mr. Sung was found to lack the requisite decisional capacity to marry.

61. *Ibid.*, at para. 136.
62. *Ibid.*, at para. 142.
63. *Ibid.*, at para. 144.
64. *Ibid.*, at para. 157.
65. (2003), 1 E.T.R. (3d) 296, 2003 CarswellOnt 1461, [2003] O.J. No. 1593 (Ont. S.C.J.), additional reasons (2003), 4 E.T.R. (3d) 137, 126 A.C.W.S. (3d) 365, [2003] O.T.C. 355, affirmed (2004), 11 E.T.R. (3d) 169, 9 R.F.L. (6th) 229, 134 A.C.W.S. (3d) 844 (Ont. C.A.) [*Feng*].
66. *Supra*, footnote 49.
67. *Ibid.*, at para. 72, also referred to in *Feng*, *supra*, footnote 65 at para. 62.

As the jurisprudence has demonstrated, the requirements for capacity to marry have evolved, and continue to do so. Central to the shifting conceptualization of this type of decisional capacity is the question of whether it entails an ability to manage one's person and property. From a review of the case law, it appears that courts are increasingly adopting an approach that more readily implicates the financial considerations of marriage.[68] Particularly considering the potential financial and property rights consequences of marriage and the fact that marriage revokes a will, it is misleading to conclude that the capacity to marry falls lower on a threshold than other types of decisional capacity. Rather, it may be suggested that one's person and property are central components of the factors to be considered in determining whether an individual has the requisite capacity to marry. Though such considerations are undertaken in the course of a time and decision specific analysis, it is possible that the criteria for capacity to marry ought to include the criteria for the capacity to manage property and personal care.

The serious consequences of a failure to appreciate that capacity to marry does not fall lower on a fabricated hierarchy of decisional capacities is demonstrated by the potentially life-altering consequences of marriage and the increasing prevalence of "predatory marriages" which are a form of exploitation and abuse for financial profit. Arguably, the requisite criteria for capacity to marry were developed at a time when the financial consequences of marriage were not as significant as they are today. This notion, in conjunction with the observation that our society is aging at a rapidly accelerating rate, leads to the conclusion that the criteria for the capacity to marry, if left unchanged, may prompt an increase in the incidence of predatory marriages. The application of equitable principles, such as undue influence, unconscionability, and unjust enrichment may serve an important public policy impetus towards recognition of the significant consequences of marriage in modern society. At any rate, the capacity to marry is not necessarily to be viewed as falling below other types of decisional capacity at law on a hierarchy.[69]

Hierarchical Capacity in the Legal Literature

Despite clear academic acknowledgement within the legal and medical professions that the types of "capacities" identified at law do not fall along a threshold based hierarchy, in practice there none-

68. See, for example, *Banton*, *supra*, footnote 60.
69. Kimberly A. Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 E.T.P.J. 269.

theless appears to be a tendency to apply such a model. For example, in *Babiuk v. Babiuk*,[70] the court pointed out that "[i]ncapacity in relation to the various aspects of an individual will depend on different factors which are examined according to the ability in question".[71] However, the court went on to cite what the court deemed to be Robertson's recognition of a "hierarchy of capacities":

> Capacity to marry may exist despite incapacity in other legal matters. This necessarily follows from the fact that the requirements of legal capacity vary significantly as between different areas of the law, and must be applied specifically to the particular act or transaction which is in issue. Thus, for example, a person may lack testamentary capacity yet have capacity to marry. Similarly, a person may be capable of marrying despite having been declared mentally incompetent and having had a property guardian or guardian of the person appointed.[72]

The court in *Babiuk* went on to cite *Calvert (Litigation Guardian of) v. Calvert*[73] stating that:

> 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 a desire to remain separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage. The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend . . . If marriage is simple, divorce must be equally simple.
>
> 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 . . . While Mrs. Calvert may have lacked the ability to instruct counsel, that did not mean that she could not make the basic personal decision to separate and divorce.[74]

70. 2014 SKQB 320, 51 R.F.L. (7th) 334, 2014 CarswellSask 649 (Sask. Q.B.) [*Babiuk*].
71. *Ibid.*, at para. 43.
72. Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2nd ed. (Toronto: Carswell, 1994) at 254.
73. (1997), 27 R.F.L. (4th) 394, 32 O.R. (3d) 281, 69 A.C.W.S. (3d) 125 (Ont. Gen. Div.), affirmed (1998), 36 R.F.L. (4th) 169, 37 O.R. (3d) 221, 106 O.A.C. 299 (Ont. C.A.), leave to appeal refused (1998), 111 O.A.C. 197 (note), 228 N.R. 98 (note), [1998] S.C.C.A. No. 161 (S.C.C.) [*Calvert*].
74. *Babiuk*, *supra*, footnote 70 at para. 45, citing *Calvert*, *ibid.*, at para. 54.

The court in *Babiuk* also cited the decision of *Wolfman-Stotland v. Stotland*,[75] in which the court stated, "[a]s the authorities make clear, the capacity to form the intention to live separate and apart has been accepted as equivalent to the capacity to enter into a marriage. As the court stated in *Calvert*, the intention to separate requires the lowest level of understanding. The requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one's affairs".[76]

Similarly, in *Ross-Scott v. Groves Estate*,[77] the court cited cases such as *Wolfman-Stotland* and appears to have created a forum for the proposition that there exists a hierarchy of levels of capacity.

Despite the characterization in these select few decisions, it does not logically or foundationally follow that simply because one may have capacity with respect to certain decisions and not to others, that those decisions fall along a linear hierarchy. It may be that, in cases such as *Babiuk*, what the court viewed as a hierarchy can be properly characterized as an acknowledgement of the specificity with which we must analyze the various types of decisional capacities at law.

That some are statute based and others bearing their roots in common law does not overcome the difficulty in defining such specificity.

Recognizing different standards or criteria for the requisite capacity to make various decisions does not imply that such decisions fall along a threshold based hierarchy.

Arguably, cases such as *Babiuk* show a possible impulse on the part of the judiciary to recognize the autonomy of individuals whose capacity is, in some respect, at issue. It may be the case, then, that an acknowledgement of various decisions falling lower on a hierarchy than others, provides licence to the court to more readily give effect to the allegedly incapable person's wishes, without that person having to meet a standard that may be perceived to be higher. Though this may be a socially admirable aim, the notion that a hierarchy of decisional capacity exists may be dispelled by referring, instead, to the specificity with which we must approach the criteria to be applied to each decision. A hierarchy of decisional capacity is not necessary where each decision is analyzed as it should be, with reference to the particular time and situation in which it is contemplated.

75. 2011 BCCA 175, 333 D.L.R. (4th) 106, 303 B.C.A.C. 201 (B.C. C.A.) at para. 27, leave to appeal refused (2011), 533 W.A.C. 319 (note), 313 B.C.A.C. 319 (note), 427 N.R. 400 (note) (S.C.C.) [*Wolfman-Stotland*].
76. *Babiuk*, *supra*, footnote 70 at para. 46, citing *Wolfman-Stotland*, *ibid.*, at para. 27.
77. 2014 BCSC 435, 96 E.T.R. (3d) 277, 2014 CarswellBC 684 (B.C. S.C.).

The "Who" and "Why" (Rather than "What")

Decisional capacity requirements, and ascertaining same, embrace incredibly complicated areas of the law, particularly since each task has a particular standard or set of criteria to be applied, and because there is no clear uniformity with regard to approaching requisite decisional capacity. Though courts are typically reluctant to accord one type of decisional capacity prominence over others, this often occurs nonetheless. In *Covello*,[78] however, Justice Boyko emphasized that various capacity standards are not necessarily higher or lower than one another but simply different. Similarly, in *Barrett Estate v. Dexter*,[79] the Alberta Court of Queen's Bench examined requisite capacity to marry in the context of a 93-year-old man marrying a 54-year-old woman, and agreed with the capacity assessor's assertion that it is possible for an assessor to set a high or low threshold, but that no matter where the threshold was set, the testator in that case failed.[80]

Regardless of cases such as these, it seems that an adherence to a decisional hierarchy, whether outright or tacit, has contributed to a great deal of complexity and misunderstanding among professionals that need not exist.

Because of the complicated nature of decisional capacity, and in the absence of statutory definitions to take the guesswork out of such matters, a professional working in practice areas touching on decisional capacity where capacity is at issue must be constantly mindful of the client's capacity to complete a particular task and the importance of knowing as much as possible about who the client is and why the client is seeking to undertake the particular task. A probative approach with the client is key. Taking complicit instructions or asking leading questions to complete thoughts and reasonable outcomes is a dangerous approach. The jurisprudence suggests that professionals must be satisfied that their client possesses the requisite capacity to give instructions for and execute the documents in question, or to undertake the task contemplated, this notwithstanding a legal presumption of capacity. Where "red flags" exist signalling a lack of requisite decisional capacity, discharging professional obligations is more important. In circumstances where the client is elderly, infirm, vulnerable, dependent, or otherwise provides instructions that raise suspicion in some respect, professional obligations must be discharged with

78. *Supra*, footnote 1.
79. *Supra*, footnote 49.
80. *Supra*, footnote 49, at para. 72.

careful attention and considerable caution. Caution is also called for in situations where the client is accompanied by another individual who appears to be overly involved in the client's affairs, or who will benefit from the planning undertaken.

The analysis of common law precedent demonstrates that it is not sufficient for a professional to apply a uniform approach to every client. For example, in the Ontario Superior Court of Justice decision of *Walman v. Walman Estate*,[81] in which the children of a testator successfully sought to set aside the testator's third Will, Justice Corbett examined the drafting solicitor's conduct. The testator's wife had ignored the advice from a previous drafting solicitor that the testator should obtain a capacity assessment prior to making a new will, and instead took the testator to a new lawyer, who failed to adequately investigate the suspicious circumstances that were present. Justice Corbett noted that, while the drafting lawyer acted appropriately in many respects, the solicitor "needed to go further" due to the presence of suspicious circumstances that could have been elucidated upon further investigation. Justice Corbett stated that: "Had these issues been explored, [the solicitor] would have discovered what the case law refers to as 'suspicious circumstances', recent transfers of substantial wealth from [the husband] to [the wife] that had the effect of significantly denuding [the husband's] financial position to the benefit of [the wife]."[82]

Decisions such as *Walman* demonstrate how important a thorough assessment of the "how" and the "why" of a particular decision undertaken is, for legal and other professionals. Ideally, lawyers will be able to take their time in reviewing with a client their legal needs, and various outcomes. A comprehensive interview ideally will provide the client with an opportunity to provide necessary information, while adequately informing the client of their legal rights and remedies. Client meetings should see the lawyer meticulously recording observations and probative questions, replete with answers and corroboration of facts and details.

In decisions such as granting or revoking powers of attorney, statutory provisions such as under the *SDA* tend to focus on the "what" respecting what an attorney can or cannot do. However, in most contested litigation cases involving POAs, the contentious issue is often, the "who and the why" regarding the choice of an attorney. This is often reflective of the ongoing conflict and complexity surrounding the life circumstances of the individual granting or

81. 2015 ONSC 185, 4 E.T.R. (4th) 82, 2015 CarswellOnt 350 (Ont. S.C.J.), add'l reasons 2015 ONSC 653, 4 E.T.R. (4th) 119, 248 A.C.W.S. (3d) 783.
82. *Ibid.*, at para. 55.

revoking the POA. For instance, the common law precedent speaking to the requirements for testamentary capacity places an emphasis on what a testator knows about his/her assets and potential beneficiaries. However, decisions are not made in a common law vacuum, and resulting capacity assessments frequently involve a dispute as to the choice of attorney or beneficiary. These circumstances prompt the need to ask, in a detailed manner, about aspects of a decision such as an individual's rationale for a decision, or prior expressed wishes. In other words, in the absence of accessibility to legal criteria to consult, ensuring a consistent rationale for particular decisions, an analysis of the "who" and the "why" is integral.

CONCLUSIONS

The notion that the capacity to marry has been alternately viewed by the courts as both incredibly simple and particularly complex, and the fact that significant property rights in the modern world attach to the union of marriage, constitutes an apt illustration of how it is insufficient to conceptualize decisional capacity in hierarchical terms. In essence, an analysis of various types of decisional capacity demonstrates the importance of an in-depth analysis of the "who" and the "why" underlying a particular decision, rather than a mere consideration of what decision is being made.

Our legal system, in its propensity towards predictability and prescriptive ideologies, is replete with situations in which deceptively simple dichotomies are routinely applied to complex and nuanced social structures. This is readily apparent in the above analysis of decisional capacity. While it is tempting to assume that requisite decisional capacity merely consists of a spectrum, with various decisions requiring higher or lower thresholds in terms of identifying the applicable criteria to ground a finding of incapacity, the reality is that the process at law is much more intricate. Of course, law, to a certain extent, requires the imposition of an inflexible structure on complicated and nuanced pursuits, such as a finding that a person is or is not capable with respect to a particular decision. However, within that seemingly strict dichotomy there is great leeway for detailed analysis of the relevant criteria, and it is in this difficult space that professionals involved in capacity issues and questions must operate.

Certainly, assessing an individual, with the constituent elements that impinge upon that person at a given time and in a particular circumstance, is an exceptionally onerous task, but the alternative is to adhere to a model that leaves little recourse for those situations

that do not fit tidily within pre-established legal and societal norms. Though it is a difficult undertaking, it is imperative for professionals to move beyond structured, hierarchical normative standards when working within the tremendously complicated field of decisional capacity.

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