

**CITATION:** Urbisci v. Urbisci, 2010 ONSC 6130  
**COURT FILE NO.:** 03-88/10  
**DATE:** 20101108

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Franco Urbisci and Floriana Urbisci, Applicants

**AND:**

Maria Urbisci, Trillium Health Centre, Stephania Urbisci, also known as Stefania Urbisci and The Public Guardian and Trustee, Respondents

**BEFORE:** D. M. Brown J.

**COUNSEL:** C. Wagner, for the Applicants

S. Philbert, for the Respondent, Maria Urbisci

J. Herszkopf, for the Respondent, Stephania Urbisci

D. Bur, for the Public Guardian and Trustee

**HEARD:** November 2, 2010

**REASONS FOR DECISION**

**I. Application for a court-ordered capacity assessment**

[1] Franco Urbisci, and one of his daughters, Floriana Tetford, apply for an order, under section 79(1) of the *Substitute Decisions Act, 1992*, that Maria Ubrisci, Franco's wife and Floriana's mother, be assessed by Dr. Michel Silberfeld for the purpose of opining on Maria's capacity.

[2] Maria was represented by counsel on this application. She opposes the order sought.

[3] Franco and Maria have one other daughter, the respondent, Stephania Urbisci. She supports her mother's position.

[4] Franco and Floriana also seek an extensive order giving directions. Maria has brought a cross-application seeking the partition and sale of the matrimonial home located at 1276 Shamir

Crescent, Mississauga (the “Home”). Maria also has commenced divorce proceedings against Franco.

[5] For the reasons set out below, I dismiss the applicant’s request for a capacity assessment under section 79(1) of the *SDA* and I give directions regarding further steps in this application and in the matrimonial litigation commenced recently by Maria in Brampton.

## **II. Events leading to this litigation**

[6] Maria is 61 years old; Franco is 64. They were married in 1973 and until recently lived together in the Home, which they jointly owned.

[7] Their daughter, Floriana, who is 36 years old, lives at the Home with her young son. Stephania is 30 years old.

[8] This past January Maria began to suffer seizures. She was taken to the Trillium Health Centre. The doctors found a brain tumor. Maria was treated, released and followed clinically. However, in April she returned to the hospital complaining of increased difficulty with her speech and right-sided weakness. A CT scan revealed that the tumor had increased in size. Maria underwent surgery in April, followed by chemotherapy and radiation therapy. She returned home. Maria has been diagnosed with a Grade 4 glioblastoma brain tumour.

[9] June saw her return to the hospital as a result of a fall at Home. She stayed at Trillium for two weeks, then was released.

[10] On July 27, 2010, Maria was re-admitted to Trillium as a result of further seizures. She stayed in the hospital for many weeks. Family discord developed during that time.

[11] Franco, Maria and Floriana each filed affidavits. Maria offers one version of events; Franco and Floriana offer quite a different picture of how the family discord came about. None of them have been cross-examined.

[12] Simply put, Franco and Floriana contend that after Maria was admitted to the hospital in late July, 2010, Stefania began to become quite hostile towards them, tried to limit their access to Maria, and told them that back in May, 2010, Maria had executed a power of attorney in favour of Stefania. That document was not produced in the record before me.

[13] Franco deposed that he was very surprised that Maria had executed a new power of attorney because in 1997 he and Maria had executed reciprocal powers of attorney and mirror wills appointing each other as executor and leaving their residues to each other. Franco filed copies of a continuing power of attorney and power of attorney for personal care purportedly signed by Maria. Both documents lacked a specific date, simply bearing the date of July, 1997, and the copies filed in evidence did not bear Maria’s signature. Similarly, the copy of the 1997 will of Maria adduced by the applicants lacked a specific date and did not bear Maria’s signature.

[14] According to the applicants, in July Stefania began to threaten her sister, Floriana. Stefania paints quite another picture, contending that she is the only immediate family member who has devoted time to caring for Maria. That said, I cannot tell which of the sisters to believe on this untested evidence. What I can conclude, without reservation, is that a high degree of animosity exists between the two sisters.

[15] When he learned about his wife's new power of attorney, Franco consulted a lawyer, Mr. Ciraco, who wrote to Trillium. I have not seen that letter, but Trillium's reply of August 6, 2010 was filed. In its reply the hospital wrote:

The family is currently in agreement with care decisions; the POA is not an issue at this time as Maria has not been declared unable to make decisions.

[16] Then, on August 11 and 12, incidents occurred involving the signing of documents. Maria deposed that on August 11 "Franco and Floriana attended the hospital and intimidated me in to signing financial papers without me having a say or explaining to me what I was signing."

[17] Franco deposed that on August 12 Stefania asked that her parents sign a cheque for \$6,000 to cover her rent. Franco refused but, according to him, Stefania "then forced Maria to sign the cheque." In her affidavit Maria saw the matter in a different light: "The event on August 13, 2010 that triggered my separation was that Franco and Floriana attended the hospital and intimidated me about signing the cheque for Stefania's rent...[I]t was clear to me that neither Franco nor Floriana were acting in a manner that I believed was in my best interest and that they were focused on money not my health."

[18] The upshot of this incident was that Maria told a nurse that she did not want to see Franco or Floriano anymore, so Trillium denied the applicants access to Maria.

[19] That prompted the applicants to bring an urgent motion under the *SDA* for access to Maria and for a court-ordered capacity assessment of her. I heard the motion on September 8, 2010. In my endorsement (2010 ONSC 4922) I adjourned the matter and directed that the parties select an independent person who could facilitate private discussions between Maria and Franco, and then Maria and Floriano, at the hospital. The parties selected Dr. Fabio Varlese as the facilitator. I understand those discussions took place, but did not result in a family resolution.

[20] The application, and Maria's cross-application for partition and sale of the Home, came back on before Conway J. on September 20, 2010. On the consent of the parties she adjourned the matters on terms, and noted in her endorsement that "the parties have worked out an order to try + resolve this matter w/o further court proceedings if possible."

[21] Unfortunately, the parties did not reach any resolution.

[22] On October 8, 2010, Maria commenced an application in the Superior Court of Justice in Brampton, Court File No. FS-10-70306-00, seeking a divorce, spousal support, equalization of net family properties, sale of the Home, and other relief (the "Matrimonial Litigation"). That application has not yet been served on Franco. Maria's counsel informed me that he had

encountered difficulties in serving Franco. I do not have any financial statements from Maria or Franco before me, but from the submissions of counsel it appears that the couple's major asset is the Home which has a net value in the neighbourhood of \$400,000.00.

[23] The parties argued the application and cross-application before me on November 2, 2010. Franco and Floriana sought a court-ordered capacity assessment of Maria and an extensive order giving directions. Maria was prepared to defer her cross-application for partition and sale of the Home if her Matrimonial Litigation could proceed expeditiously.

### **III. Request for a court-ordered capacity assessment**

[24] The key relief sought by the applicants is a court-ordered assessment of Maria's capacity under section 79(1) of the *SDA*. I therefore will consider the applicable law and then review the evidence filed by the parties on that issue.

#### **A. The governing legal principles**

[25] The *Substitute Decisions Act, 1992* contains the basic principle that absent reasonable grounds to believe the contrary, a person is presumed to be capable.<sup>1</sup> The *Health Care Consent Act, 1996* contains a similar presumption with respect to treatment, admission to a care facility and personal assistance services.<sup>2</sup> The capacity of a person may vary, depending upon the function in issue and its complexity.<sup>3</sup> Section 79(1) of the *SDA* enables a court to order a person to undergo a capacity if reasonable grounds exist to believe the person is incapable:

79. (1) If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable, the court may, on motion or on its own initiative, order that the person be assessed by one or more assessors named in the order, for the purpose of giving an opinion as to the person's capacity.

[26] On an application under section 79(1) the applicant bears the onus in satisfying the two conditions outlined in the section.<sup>4</sup> Those conditions are cumulative and both must be satisfied before the court may order a capacity assessment.<sup>5</sup>

[27] In his decision in *Abrams v. Abrams*,<sup>6</sup> Strathy J. identified the key interests at stake on an application under section 79(1) of the *SDA*:

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<sup>1</sup> *SDA*, s. 2(1) and (2); *Neill v. Pellolio*, [2001] O.J. No. 4639 (C.A.), para. 16.

<sup>2</sup> *Health Care Consent Act*, 1996, s. 4(2).

<sup>3</sup> *Park v. Park*, 2010 ONSC 2627 (S.C.J.), para. 49.

<sup>4</sup> *Ibid.*, para. 52.

<sup>5</sup> *Neill v. Pellolio*, [2001] O.J. No. 4639 (C.A.), para. 15.

<sup>6</sup> [2008] O.J. No. 5207 (S.C.J.).

In considering whether to order an assessment, whether on motion or on its own initiative, a court must balance the affected party's fundamental rights against the court's duty to protect the vulnerable. The appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual. As Mr. Justice Pattillo said in *Flynn v. Flynn* (December 18, 2007), Doc. 03-66/07 (Ont. S.C.J.): "[a] capacity assessment is an intrusive and demeaning process."<sup>7</sup>

As Strathy J. noted elsewhere, although the utility of a capacity assessment cannot be understated, "it is important to resist the temptation to order an assessment based on the argument 'it can't hurt.' It can hurt."<sup>8</sup>

[28] The case law<sup>9</sup> under section 79(1) of the *SDA* reveals that in considering whether an applicant has demonstrated that there are reasonable grounds to believe that a person is incapable, the courts have turned their minds to a variety of factors, including:

- (i) the wishes of the person sought to be examined, taking into account the evidence concerning his or her capacity;
- (ii) the nature and quality of the non-medical evidence before the court about the person's capacity, including the person's behaviour, personality changes, susceptibility to undue influence or exploitation, or unusual dispositions of property;
- (iii) the nature and quality of the medical evidence before the court about the person's capacity;
- (iv) if there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached, the adequacy and reliability of the report, including any evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper statutory criteria;
- (v) the probative value of an assessment to the adjudication of the issues before the court;

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<sup>7</sup> *Ibid.*, para. 50.

<sup>8</sup> *Kischer v. Kischer*, [2009] O.J. No. 96 (S.C.J.), para. 10.

<sup>9</sup> *Abrams*, *supra.*, para. 53; *Kischer*, *supra.*, paras. 14 and 15; *Forgione v. Forgione*, [2007] O.J. No. 2006 (S.C.J.), paras. 3 and 4; *Re Ranieri Estate*, 2009 CarswellOnt 6658 (S.C.J.), paras. 17 and 18; *Park v. Park*, *supra.*, paras. 55 to 69.

(vi) what harm might result if an assessment does not take place, in particular whether any risk would exist for the person's capacity who is in issue should an assessment not be performed; and,

(vii) whether there any urgency exists to perform a capacity assessment.

I shall consider these factors as I review the evidence.

## **B. The evidence**

[29] A singular feature of this case is that over the past 10 months Maria has spent a considerable amount of time under the observations of health care practitioners. As a result the record contained numerous comments from health care practitioners about Maria's ability to understand information, make decisions upon such information, and communicate her wishes. I therefore propose to consider first the evidence from health care practitioners, before turning to that from the lay witnesses.

### **B.1 Evidence from health care practitioners and capacity assessors**

#### **The hospital looks to Maria to provide consent to treatment**

[30] As I noted above, when the family's discord surfaced following Maria's late July admission to Trillium, a lawyer for the applicants wrote to the hospital eliciting an August 6, 2010 response from Ms. Catherine Sodoski, Clinical Manager, that "the POA is not an issue at this time as Maria has not been declared unable to make decisions." At the hearing applicants' counsel acknowledged that throughout Maria's various hospitalizations this year Trillium has looked to Maria to provide informed consent to any treatment and has not sought consent from a substitute decision-maker on Maria's behalf.

#### **August 9 speech-language assessment**

[31] On August 9, 2010, Maria underwent a speech-language pathology communication assessment at Trillium which concluded that Maria presented with moderate expressive aphasia, or the loss of ability to understand or express speech owing to brain damage. With respect to auditory comprehension, the assessment recorded abnormal findings for object identification, command following and speed of processing, indicating Maria had difficulty in following 3-step commands and demonstrated word-finding difficulties. She was functional in dealing with yes/no questions.

[32] Maria evidenced some difficulties in her verbal expression, including agrammatic speech and an inability to repeat sentences longer than four words in length. However, she was able to read the headlines of a magazine without difficulty, could write single words, but could not write sentences. In terms of her motor speech, the assessment recorded an 80% intelligibility. Her attention/concentration and orientation cognitive functions were functional, but Maria displayed difficulty with short term retention of memory.

### **August 10 and 12 occupational therapy cognitive assessments**

[33] The next day Julie Ray conducted an occupational therapy assessment of Maria. That day Maria was unable to complete certain tracing, drawing and naming exercises. Ms. Ray noted that she would continue with the testing at a later date. Ms. Ray's notes also record a conversation she had with Stefania. Part of the conversation dealt with consent to treatment decisions:

[Stefania] reported she is the POA + she said she wants the staff @ THC to direct questions/decisions toward the [patient] as she believes she can still make her own decisions and that her mind is "sharp".

[34] Ms. Ray continued her assessment of Maria on August 12. She administered a MMSE, or Mini Mental Status Exam, and recorded a score of 18/30 "indicating moderate impairment". Maria scored a 9 out of 10 on orientation, 3 out of 5 on attention, and 5 out of 6 on language. Maria completed a clock drawing exercise. Ms. Ray wrote, in part:

Due to [patient's] aphasia, pt. unable to find words to express correct answers on MMSE, however, pt. appears highly reliable to answer yes/no questions. Given multiple answers and asking yes/no to each, pt. response an emphatic "yes" when presented with her choice of response...

[Patient] appeared very capable to make choices and decisions for herself.

### **August 17 consultation of Dr. Donald Head**

[35] Dr. Donald Head is a medical psychiatrist at Trillium who has 17 years of clinical experience in Consultation-Liaison Psychiatry at the hospital. He saw Maria on August 17 and prepared a lengthy consult note. Dr. Head interviewed Maria in the absence of any family member. Let me reproduce the salient portions of Dr. Head's consultation note:

I note the patient's language skills have been affected by the brain tumor...I asked her series of yes/no questions, and having background information from the chart, I note the patient was able to answer all the questions accurately...

The patient was oriented to exact date and place. She did not demonstrate any fluctuations in her level of consciousness during the interview...

I focused on the issue of Power of Attorney with the patient. With using the term Power of Attorney, the patient was not able to clearly demonstrate a working knowledge of the definition. However, she did understand that she has signed some papers to allow other people to have the ability to make treatment decisions for her, and that she has allowed other people to take charge of her bank accounts. She was quite clear that she does not trust her husband or her older daughter, but she does trust her younger daughter. She said that this was a recent change. She could not tell me in detail what precipitated that

change in her trust. The best she could do is say “my husband won’t talk to me anymore”.

Dr. Head then recounted discussions he had with Maria about her money. He continued:

The initial impression is that of a 61-year old female with adjustment to illness issues. There seems to be significant family discord, with a split occurring between the patient and the youngest daughter, and the husband and the older daughter.

I do get the impression that the patient can be pressured into doing things that she might not want to do. For example, her description of signing this paper provided by her husband. At the same time, the patient is consistent in telling me that she is unhappy with the situation with her husband. She cannot elaborate on the details, but she does not trust her husband and her oldest daughter, and feels that they do not communicate with her. She does trust her youngest daughter and wants her to be a substitute decision maker for any medical decision or financial decisions. This opinion is consistent with what she expressed when she signed the Financial Power of Attorney near the beginning of August, and when she signed a Personal Care Power of Attorney back in May, 2010. I note that the medical team has called in the witnesses for both of those documents and they have confirmed that they witnessed the patient signing those papers.

It is my initial impression that the patient is capable to sign a Power of Attorney with regard to personal care and finances. Although she has a brain tumor that affects her ability to communicate, her wishes were clearly, and consistently, expressed during my assessment today. I do not feel that she demonstrated a degree of cognitive impairment that would interfere with processing that information. Although she did not demonstrate the ability to define what a Power of Attorney was, she was able to express her wishes regarding the building blocks of such a concept. That is, the patient identified a level of trust in her youngest daughter that she does not have in her husband and oldest daughter at this time, for whatever reasons.

#### **August 18 letter of opinion from capacity assessor**

[36] On August 18, 2010, Ms. Jane McCallum, a designated capacity assessor under the *SDA*, meet with Maria, at Stefania’s request, and provided a “letter of opinion”. As stated in her letter, the purpose of the assessment was “to confirm that Mrs. Maria Urbisci is 1) capable of making property decisions and signing a power of attorney for property 2) capable of revoking a power of attorney 3) capable of understanding and signing a Will, and also recognizing that the Will may be challenged.” Ms. McCallum interviewed Maria in the absence of any family member and used what she called “supportive conversation” in communicating with Maria. Supportive conversation involves writing down specific words as the question is asked so that the person can see the words relating to the question.

[37] Ms. McCallum came to the following conclusions:

It is my opinion that under Section 8 of the Substitute Decisions Act, Mrs. Urbisci meets the “understand and appreciate” criteria of a person who is capable of signing a Continuing Power of Attorney for her finances. This finding is based on the questioning of the assessor as well as corroborating information provided by other Trillium staff. Although Mrs. Urbisci had difficulty communicating because of her brain tumor, her wishes were clear and consistent throughout my assessment. Mrs. Urbisci is capable of providing instruction to prepare a Will. She fully understands that Will takes effect following her death. She recognizes that her family will be angry and will likely challenge the Will. She has decided that she would still like to proceed with completion of her Will.

### **August 19 letter of Dr. Minh Nguyen**

[38] On August 19, 2010, Dr. Nguyen, a physician at Trillium, wrote a brief letter which stated:

Mrs. Urbisci has been assessed by myself as well as by a psychiatrist who is qualified in competency assessment, a social worker qualified in financial capacity assessment, and by an occupational therapist qualified in cognitive assessment. The patient is currently capable of making decisions for herself. She is not confused. She is competent in determining who she wants to be her power of attorney for financial and personal care matters.

### **August 23 discharge note of Dr. Nguyen**

[39] In his hospital discharge summary of August 23, 2010, Dr. Nguyen wrote, in part:

Ms. Urbisci’s hospital stay was mostly due to social reasons. Prior to admission, the patient lived at home with her husband and with one of her daughters, Floriana. However, it was quickly apparent that these two individuals were not on good terms with the patient’s other daughter, Stefania. The patient is currently felt to be competent to make decisions with regard to power of attorney and with regard to managing her finances...

In the meantime Ms. Urbisci is being treated palliatively and will be transferred to the Chronic Palliative Care facility. Ms. Urbisci is DNR.

### **September 9 letter of opinion from capacity assessor**

[40] Ms. McCallum prepared a second letter of opinion, this one dealing with the issues of Maria’s capacity of understanding, appreciating and signing documentation related to a separation and divorce from Franco and also “to confirm that Mrs. Maria Urbisci made her decisions on her own with no pressure or influence from her daughter, Stefania Urbisci”. Ms. McCallum met alone with Maria on September 7 at the Trillium chronic/palliative care facility and again used “supportive conversation” to communicate with Maria due to the latter’s expressive aphasia.

[41] In the course of recounting her discussions with Maria, Ms. McCallum wrote the following:

Assessor asked Mrs. Urbisci if Stefania asked her to get a divorce to sell the house. Mrs. Urbisci stated “no” and indicated “my marriage is over”. Assessor once again asked Mrs. Urbisci if Stefania had told her to get a divorce so that Mrs. Urbisci could have more money. Mrs. Urbisci stated “no” and then responded “I wanted this.”

[42] By way of conclusion Ms. McCallum wrote:

Based on Mrs. Urbisci’s responses, she has shown that she understands the concept of separation and divorce and could provide information to support why she wanted a divorce. She was consistent in her response to assessor in acknowledging that she was not pressured to seek a divorce or to sell her home by her daughter Sefania. Mrs. Urbisci consistently stated that she did not wish to return to the family home and did not wish to see either Franco or Floriana.

### **October 15 letter from Princess Margaret Hospital**

[43] Maria has been under the care of Dr. Cynthia Ménard of the Princess Margaret Hospital. Dr. Ménard works in the Radiation Medicine Program at that hospital and provided radiation and chemotherapy treatment to Maria from April until June of this year. In an October 15 letter Dr. Ménard noted that during the summer Maria’s “course was complicated by a severe swelling reaction from the treatment that resulted in functional decline and admission to Trillium hospital. She has now recovered from this episode and living with her daughter.” The doctor continued:

Due to the location of her tumor, she has a severe permanent deficit of expressive aphasia. Despite her difficulties with communication as a result of her illness, Ms. Urbisci is able to process information and her comprehension is intact. I am also pleased to report that her brain tumour is stable, although her prognosis remains guarded.

### **Dr. Silberfeld’s “paper review” of the August observations about Maria’s capacity**

[44] The applicants requested Dr. Silberfeld, a psychiatrist who has experience in capacity assessments, to “formulate a critique of assessments which Maria Urbisci has undergone on several occasions.” Dr. Silberfeld conducted a paper review; he did not examine Maria. In an October 13 report Dr. Silberfeld commented on the following assessments: (i) the August 10 and 12 occupational therapy assessments, (ii) Dr. Head’s consultation note, (iii) the two letters of opinion prepared by Ms. McCallum, and (iv) the brief letter prepared by Dr. Nguyen.

[45] Dr. Silberfeld opined that “the assessments of Maria Urbisci are inadequate to the task.” Significantly, Dr. Silberfeld offered no opinion, tentative view, or expression of concern on the issue of Maria’s capacity. His opinion was limited to a paper review of the various assessments conducted of Maria.

[46] Dr. Silberfeld made two general comments about all the assessments. First, the location of Maria's tumour in her frontal lobe region affected higher levels of functioning including sequencing, organization abstraction and planning. He stated: "The Mini Mental State Examination is notoriously weak in being able to capture difficulties in higher levels of mental function." Dr. Silberfeld made no comment about the 18 out of 30 score the occupational therapist recorded on the MMSE administered to Maria.

[47] Second, Dr. Silberfeld opined that biases were introduced into the assessments because of the special communication techniques that each person had to use in order to communicate with Maria.

[48] As to the assessments by the occupational therapist, Dr. Silberfeld remarked on the presence of Stefania at each. He thought that Ms. Ray's statement that Maria "was very capable to make choices and decisions for herself" was "not justified by the patient's orientation, partial ability to attend to numbers, being able to name simple objects and follow a three stage command with one error."

[49] Dr. Silberfeld stated that Dr. Head had failed to consider the criteria set out in the *SDA* for determining whether a person possessed the capacity to give a power of attorney and also failed to perform his own cognitive assessment.

[50] Dr. Silberfeld opined that Ms. McCallum had failed to address all the appropriate criteria for considering the issues of capacity to give a power of attorney and testamentary capacity, and that her technique of using supportive conversation had introduced biases into her assessment.

[51] Finally, Dr. Silberfeld commented that Dr. Nguyen failed to give any basis for how he came to his conclusions.

### **The responses to Dr. Silberfeld's "paper review"**

[52] Those critiqued by Dr. Silberfeld provided brief, emailed responses. Ms. Ray stated that Stefania remained in the room during the assessment at the insistence of Maria, but "Stefania was informed not to coach or lead her mother in any manner, and to my recollection, she did not." Ms. Ray wrote that her statement that Maria "appeared very capable to make choices and decisions for herself" referred specifically "to her ability to choose/decide which visitors she was agreeable to allow into her room".

[53] Ms. McCallum wrote that the technique of supportive conversation "would facilitate higher processing because it ensures that the person is understanding the basic information and can then move forward with further understanding."

[54] Dr. Head commented that frontal lobe dysfunction, in and of itself, "does not equal an incapacity to make certain decisions." He stated that he did perform tests of cognitive function in his evaluation, but chose not to repeat all of the assessment performed by a capable colleague. Dr. Head was also of the view that Maria grasped the general concept of a power of attorney "sufficient to make a decision".

[55] Dr. Nguyen commented that because he is not legally qualified to make capacity assessments he obtained the assistance of other staff. He continued:

I have, however, seen the patient on a daily basis during her hospital stay, even on weekends. My overall impression as a physician is that Mrs. Urbisci was capable of knowing who she wanted to see and not to see. She has repeatedly and consistently said while in hospital that she did not want her husband or her daughter Floriana to visit her. Please refer to my handwritten progress notes from Aug 9, 11, 13, 18, 20. This is also well documented in nursing notes (Aug 11 and Aug 13) and social worker notes. Mrs. Urbisci reasoned appropriately and consistently to my questions during my interactions with her and I had no indication that she did not understand what she was talking about.

## **B.2 Evidence from lawyers**

[56] On August 27, 2010, Maria met with Stephen Morgan, a lawyer who has practiced family law for the last eight years. Although Stefania accompanied her mother to Mr. Morgan's office, Mr. Morgan asked Stefania to leave during his meeting with Maria. Mr. Morgan discussed the possibility of matrimonial litigation with Maria. He deposed:

I found Mrs. Urbisci more than capable of expressing her wish to separate from her husband and a Retainer Agreement was prepared and signed. Mrs. Urbisci then assisted me in preparing a court Application to be served on Mr. Urbisci seeking spousal support, a restraining Order, equalization of the Net Family Property, exclusive possession of the matrimonial home and its contents or, failing an Order that Mrs. Urbisci have exclusive possession of the matrimonial home, that the matrimonial home was to [be] partitioned and sold.

Mrs. Urbisci read over the Application twice and instructed me to make some minor changes regarding her desire to have a restraining order in place against her daughter, Floriana, as well as her husband. Mrs. Urbisci said that she wanted to go home but she did not want her husband to be there anymore. Mrs. Urbisci said that she wanted to live in peace and would do whatever it took to go home and get her clothes and her possessions back. Mrs. Urbisci was also very clear that she expected Mr. Urbisci to provide her with spousal support because she was not well enough to work at that time, or, if he was unable to do so, that Mrs. Urbisci wanted their house sold so that she would have the funds to take care of herself while she was unable to work.

I can advise this court that in my professional capacity I was completely satisfied that Mrs. Urbisci was competent to retain and instruct me and execute the prepared documents.

[57] On August 27, 2010, Maria also met with Mr. Michael Weir, a lawyer who has practiced real estate and estates law for the past 50 years. Mr. Morgan referred Maria to Mr. Weir to prepare new powers of attorney and a will. Mr. Weir did so; those powers of attorney and the will were not filed in evidence. She also consulted Mr. Weir about severing the joint tenancy for

the Home so that she and Franco would hold the Home as tenants in common. In his affidavit Mr. Weir addressed the issue of Maria's capacity:

I can advise this court that in my professional capacity I confirmed that Maria was competent to execute the retained work.

In coming to this conclusion that Maria is competent to execute the Will and to sever the joint tenancy and to execute both the General and Personal Care Power of Attorneys. I reviewed the report of Minh Nguyen, MD FRCP dated August 19, 2010. This report, in my opinion clearly confirmed that Maria was competent in both understanding and executing the said documents. In addition to this, I interviewed Maria myself, alone with her on the 27<sup>th</sup> day of August in the afternoon after she had arrived from Stephen Morgan's office. When I was with Maria alone, I questioned her in regards to the document to sever the joint tenancy and I showed her the document and I explained to her what it meant and I asked her if she wanted to proceed and her answer was yes. Subsequently, I then showed her the Will and I carefully read over to her the main provision of the Will, I asked her if she agreed as to who the executor should be. I asked her if she agreed as to who should receive her estate and she emphatically indicated her daughter Stefania. I asked her if she wanted to leave anything to her daughter Floriana and her husband Franco and she said No, she did not want to leave anything for them. I then reviewed with her the General Power of Attorney and once again, I reviewed with her what a power of attorney meant and she indicated she knew what a power of attorney was for and that she wanted Stefania to have her power of attorney. After the careful review with her of these documents, I was satisfied together with the report and with Stephen Morgan's opinion that Maria understood and was competent in proceeding to execute the said documents. Maria proceeded to execute the documents in front of myself and my two law clerks. Subsequently on September 3, 2010, Maria and Stefania returned to my office to execute the Personal Care Power of Attorney. Once again, I reviewed with her the Personal Care Power of Attorney and once again, I reviewed with her what the document meant and she asked if her brother, Graziano Signoretta can be the substitute for her personal care and I confirmed that he could be the substitute and after reviewing with her this document, once again the document was executed in the presence of my law clerks.

### **B.3 Evidence from family members**

#### **Franco and Floriana**

[58] Franco filed two affidavits – one which he swore on his own, and another which he swore jointly with Floriana. The thrust of his first affidavit was that he could not understand why Maria did not want to see him. In paragraph 17 he deposed:

Maria and I have been happily married for 36 years. We had a very simple basic plan. When one of us died the other would get our property. Now that I see what has happened

to the ownership of our home, I can only guess that Stefania may be preventing us from seeing Maria to prevent us from finding out what had happened.

In paragraphs 19 and 20 he stated:

The refusal to see me, Floriana, her grandson and other concerned family and friends and the other things that happened is totally the opposite of everything Maria has always done. When you remember that Maria only had very basic simple reading English skills and is weak and dying with a brain tumor, it is very suspicious to me what is going on.

I am not a doctor, but to me it seems that Maria either does not have the ability to decide what she wants or is so sick and weak that she needs her own lawyer.

Of course Maria is represented by her own lawyer, and Maria continues to oppose the relief sought by Franco.

[59] In her initial affidavit Floriana made no independent comment or observation about her mother's capacity or lack of it. Her affidavit focused on recounting the conflict between Stefania and herself. Floriana reproduced the content of several text messages she said Stefania sent her on July 30 and 31. Stefania has not responded to Floriana's allegations on that point. However, if Stefania indeed authored those emails, they displayed nothing short of a hatred for her sister and the use of the most inappropriate language.

[60] Floriana and Franco filed a second, joint affidavit. In it they disputed much of what Maria deposed in her affidavit about the family's history and state of relationships. It was their position that Maria had painted "an untruthful picture of our family" either because her illness had affected her judgment or because Stefania was influencing what Maria said. They contended that Stefania was cutting Maria off from seeing other people. Both affiants called into question the state of Stefania's mental health. In their view the conflict in the family is not between husband and wife or the two sisters, but "we believe the conflict is in large part due to Stefania's need for psychiatric help and her refusal to get it." Both deposed that Maria's present desire to separate from Franco "is 100% inconsistent with the previous 36 years they lived together".

[61] Floriana and Franco described as false and untruthful statements made in affidavits submitted by Maria's brother, Graziano Signoretta, Maria's uncle, Domenic Greci, and by a neighbor, Maria Thiel.

#### **Maria's brother: Graziano Signoretta**

[62] Maria's brother, Graziano Signoretta, submitted an affidavit. He dismissed any notion that Stefania was unduly influencing Maria. Instead, he deposed:

Maria is doing a lot better now that Franco and Floriana is not stressing her out. On September 6, 2010 Maria and Stefania and I went out for dinner downtown Toronto and Maria really enjoyed herself.

Contrary to what is being stated by Franco and Floriana, Maria is not on her deathbed and I hope she lives many more years and that she gets the opportunity to have her life the way she wants to live it.

The main problem is between Floriana and Stefania and the bad thing that Franco did was to take sides in his daughters' fight. As a result, Franco has taken Floriana's side and does not care about Maria's well being.

### **Maria's uncle: Domenic Grenci**

[63] Maria's uncle, Domenic Grenci, filed an affidavit. Like most of the other affidavits it dealt with aspects of the family's conflict which really are not relevant to the issue of Maria's capacity. However, on the latter issue he deposed:

I have heard the comments that Maria is on her deathbed and I strongly disagree. I can advise the court that as recent as September 4, 2010 I attended at Stefania's apartment and had lunch with Maria who was in good spirits and mentally sound.

### **Franco's brother: Giovina Smargiasso**

[64] The applicants filed a statement from Franco's brother, Giovina Smargiasso. It was not sworn, so I have not taken it into account.

### **Maria's niece, Rosina McMillan**

[65] The applicants filed an affidavit from Rosina McMillan, a niece of Maria. As was the case of affidavits from other family members, Rosina placed herself squarely in one camp, in her case the pro-Floriana/ Franco camp. It is quite unfortunate that the larger Urbisci family is so divided; no family member has stepped forward in this litigation to provide a dispassionate, independent view of matters.

[66] I must note two observations that Rosina made in her affidavit but, before I do, let me point out one internal contradiction in Rosina's affidavit that casts doubt on the reliability of her evidence. As I said, the tone of Rosina's affidavit was decidedly pro-Floriana and anti-Stefania. In paragraph 18 of her affidavit Rosina deposed to a conversation she had with Stefania, apparently in August, in which Stefania told her that "she really wanted to live at her parents' house." That remark led Rosina to state: "I found it strange that a woman her age (30 years old) would still want to live with her parents..." Of course, Floriana, who is 36 years old, has lived in the Home with her parents for the past year or so, yet that fact did not elicit from Rosina any comment about how "strange" it was that Floriana still lived with her parents at her age. In view of that patent contradiction in Rosina's affidavit, I approach her testimony with some skepticism.

[67] That said, Rosina recounted two conversations that she had with Maria in late August which touched upon the issue of Maria's capacity. Rosina visited Maria at Trillium on August 27. Stefania was present. During the course of the conversation Stefania mentioned that Maria

planned to separate from Franco. Rosina asked Maria why she wanted to separate and, according to Rosina, Maria replied that she did not know.

[68] Rosina brought clothes to Maria at the hospital on the evening of August 30. In paragraph 56 of her affidavit she described the conversation that she had with Maria at that time:

The lights were out in Maria's room, so I was going to drop them off and leave. As I entered and I was trying to figure out where to leave them, Maria lifted her head up. I said hello and I told Maria that I had brought her clothes. I asked her where she wanted me to put them. She told me to leave them by the wall. I showed her the money [which Franco had sent], a rosary and a magazine, and I asked her if she wanted to see the other stuff. She said no. I asked her where she wanted me to leave the money. She said on the food tray. I put them under a book. I told her that Franco and Floriana said hello, that they told me to tell her that they loved her and were waiting for her to return home. She smiled and said, "okay thank you". I left. Maria did not look upset nor did she tell me she did not want to see me as Stefania had said on her [August 29] voice mail.

#### **B.4 Evidence from friends**

[69] The applicants filed a statement from a neighbor of Franco and Maria, one Penelope Trigiani. The statement was not sworn, so I have not taken it into account.

[70] The respondents filed an affidavit from Maria Thiel, a 30-year neighbor of Maria and Franco. The thrust of her affidavit was that Franco had not demonstrated strong concern for Maria once she fell ill and that Stefania had worked hard to care for her mother. Ms. Thiel offered no useful direct evidence about Maria's current mental state.

#### **B.5 Evidence from Maria**

[71] Maria filed two affidavits – September 13 and October 21, 2010. On their face, the affidavits addressed relevant issues and recounted facts in a coherent and intelligible fashion. Maria deposed that she always had a closer relationship with Stefania than with Floriana, and that during the course of her hospitalization this past summer she concluded that Franco and Floriana were more concerned about money matters than about Maria's health, so she decided not to see them anymore.

[72] Maria was very upset that during the summer Franco and Floriana had changed the locks on the Home without giving her a new set of keys. Franco and Floriana admitted to changing the locks, but contended they did so in fear of Stefania. Maria was also upset about the difficulty she encountered in retrieving clothes and personal effects from the Home in August and September. Indeed, it is uncontroverted that on one occasion the police were called in to assist Maria in accessing the Home to obtain some clothes – including having Maria pushed in a wheelchair to the front steps of the Home when Franco and Floriana refused admission to others to fetch the clothes - and that throughout September and October arrangements to obtain Maria's clothes had to be made through the parties' respective lawyers. That Urbisci family affairs had descended to such depths over the simple issue of Maria retrieving clothes she required signals the inability of

Franco, Floriana and Stefania alike to focus on Maria's best interests during her final stage of life.

[73] Maria stated that she found living in the presence of Floriana and Franco stressful because what she recounted as the frequent yelling that punctuated the conversations of those two.

[74] In paragraph 59 of her first affidavit Maria deposed: "I am of sound mind and at all times knew what I was doing and the consequences that would result of my actions." In paragraph 77 she stated: "I acknowledge that my body may be weak, but my mind is strong..." In her second affidavit Maria deposed: "I can advise the Court that although I am diagnosed with brain tumour, I still have the capacity to decide for my own and can ably comprehend the events happening around me."

[75] Maria opposed the relief sought by the applicants. She denied that Stefania had influenced her in any way. Maria stated that she no longer wished to live at the Home, but wanted the property sold so that she could gain her equity from it.

### **C. Conclusion on request for capacity assessment**

[76] In the present proceeding the applicants clearly have put in issue Maria's capacity. The question then becomes whether the applicants have demonstrated that there are reasonable grounds to believe that Maria is incapable. On the totality of evidence filed before me, I conclude that reasonable grounds do not exist to believe that Maria is incapable. I reach this conclusion for several reasons.

[77] First, as a result of Maria's lengthy stays at Trillium a significant amount of evidence exists from health care practitioners and a capacity assessor about Maria's capacity. Ms. Ray, Dr. Head, Ms. McCallum, Dr. Nguyen and Dr. Ménard of Princess Margaret are all independent practitioners who expressed their views in the ordinary course of discharging their professional duties. Each had met Maria. Some, such as Dr. Nguyen and Dr. Ménard, had treated Maria over significant periods of time. These practitioners were uniform in their views that Maria was capable.

[78] Dr. Silberfeld criticized aspects of the interviewing techniques used by some of those who ventured views about Maria's capacity and he stated that Dr. Head did not turn his mind to the relevant statutory criteria when expressing his view. Each of the practitioners responded to Dr. Silberfeld's critiques.

[79] Only Ms. McCallum conducted formal assessments pursuant to the *SDA*. The other practitioners expressed their views during the course of assessments they conducted as part of Maria's treatment. Even while keeping in mind the criticisms that Dr. Silberfeld made about their methodologies, one is still left with a firm consensus view amongst the health care practitioners who have treated Maria that she is capable.

[80] Second, the applicants point to two features in Maria's conduct since she became ill as evidence of unusual changes by her which give rise to a reasonable belief about Maria's capacity. The first involved Maria's decision to execute new powers of attorney in May and August, 2010, to make new wills, to sever the joint tenancy of the Home which she enjoyed with Franco, and to initiate divorce proceedings. Certainly those represent material changes in the relationship between Franco and Maria and those changes occurred only after Maria became ill. Yet, Maria has filed evidence explaining why she did what she did. In her affidavits she deposed that she became concerned that Franco and Floriana were more interested in her money than in her health, so she gravitated towards the daughter – Stefania – whom she saw as providing her with support. Significantly, the two lawyers whom she consulted on those issues, Messrs. Morgan and Weir, both filed affidavits attesting that they were alive to the issue of Maria's capacity, made inquiries, and were satisfied that Maria possessed the capacity to instruct them on the relevant matters and to execute the relevant documents.

[81] The other change by Maria involved her decision to refuse to see Franco and Floriana. Maria gave an explanation why she so decided. Most of the affidavits from family members and neighbours divided into two camps around Maria and Franco, and without cross-examination it is difficult to assess where the truth actually lies about what has gone on in the Urbisci household since July. However, there is no dispute that Franco and Floriana failed to provide Maria, or her designate, with immediate access to her clothes and personal belongings and ultimately it took negotiations through lawyers, and one intervention of the police, to enable Maria to get the clothing she wanted and needed. In light of such conduct by Franco and Floriana (or perhaps it was really only one of them), it is not surprising that Maria might not be inclined to see either of them.

[82] I am acutely alive to the allegations made by Franco and Floriana that Stefania unduly influenced Maria to make these decisions. Those allegations are countered by two sets of material facts. First, all of the truly independent witnesses – Ms. Ray, Dr. Head, Dr. Nguyen, Ms. McCallum, Dr. Ménard, Mr. Morgan and Mr. Weir – stated that in their views Maria was making decisions for and by herself. Second, the palpable hatred manifested by each sister to the other in their affidavits makes it difficult to prefer one version of events over the other in the absence of seeing each give *viva voce* evidence.

[83] In sum, notwithstanding the caution which a court must apply when faced with a person who is suffering from a brain tumour and a terminal illness, I am not persuaded that the applicants have demonstrated that reasonable grounds exist to believe that Maria is incapable at this point of time. They have not adduced evidence which displaces the legal presumption that Maria is capable. On the contrary, the overwhelming evidence and views from independent medical and legal professionals is that throughout August, September, and October, 2010, Maria was capable.

[84] Maria is quite ill; she suffers from a very serious brain tumour. According to her doctors, her prognosis is guarded. At some point in the future, and it may not be too distant in the future, Maria might have to rely on others to manage her affairs. But, in that regard Maria is no different a position than most of us; at some point in our lives I expect most of us will have to

rely on the good-will and love of others to see us through to our natural ends. But, for today, Maria can manage her own affairs. I therefore consider as premature the requests for declaratory relief sought by the applicants in respect of the powers of attorney and wills made by Maria earlier this year - it is possible that Maria might execute a new will and new powers of attorney, so there is no purpose in examining at this point of time the validity of the current documents.

[85] At some point in the future issues may arise about the validity of the most recent powers of attorney or will made by Maria. The appropriate analysis about the validity of those documents will have to be performed at that point of time. The possibility of future Urbisci-family litigation over those documents is not a reason justifying subjecting Maria to a capacity assessment today.

[86] For these reasons, I find that the applicants have not satisfied the requirements of section 79(1) of the *SDA* and I dismiss their motion to require Maria to submit to a capacity assessment.

#### **IV. Request for order giving directions; cross-application for partition and sale of the Home**

[87] What flows from that conclusion? The applicants seek an extensive order giving directions which focuses on two broad areas of relief: (i) a determination that Maria is incapable and that Franco should act as her attorney or guardian, and (ii) declarations that any powers of attorney or Will executed by Maria this year are invalid. On her part, Maria seeks an order of partition and sale for the Home and intends to proceed with her Matrimonial Litigation.

[88] Courts cannot wave a magic wand and transform a dysfunctional family, like the Urbisci family, into a group of loving, caring adults. Only the members of the Urbisci family can solve their own problems. What the court can do is to prevent the court process from inflaming an existing problem. The court can call a “time-out” to afford a group of adults an opportunity to talk through their differences in a facilitated manner.

[89] The facilitated conversations which I directed in my September 8 endorsement were a rough-and-ready attempt to craft a form of mediation on an urgent basis. Those talks did not work. That, however, is not a reason against directing further talks. Accordingly, I am not prepared to consider the applicants’ request for the other aspects of the order giving directions which they seek, and I am not prepared to deal with the cross-application for partition and sale, until the parties have submitted to formal mandatory mediation.

[90] Maria submitted that the court should eschew mandatory mediation under Rule 75.1 in favour of allowing her Matrimonial Litigation to proceed in Brampton, during the course of which case and settlement conferences will be held. Yet, time is not on Maria’s side; the “normal course” of scheduling in matrimonial litigation may not be adequate for her needs given the state and severity of her illness. Quicker resort to mediation is required.

[91] Consequently, I direct Franco, Maria, Stefania and Floriana, to participate in a mandatory mediation no later than November 30, 2010. They should select one of the mediators named in the applicants’ draft order – i.e. Ian Hull, Archie Rabinowitz, Howard Black, Kimberley Whaley

or Liza Sheard. While I appreciate that each of those mediators has a very busy schedule, I am confident that when they become aware of the urgent nature of this proceeding at least one of them will make the time to conduct a mediation. The mediation should canvass all issues raised in this *SDA* proceeding and in the Matrimonial Litigation. Although the Matrimonial Litigation proceeds under the *Family Law Rules*, it still remains litigation brought in the Superior Court of Justice and efficiency, cost-effectiveness and common sense dictate that the mediation I have ordered should address the issues in both proceedings.

[92] I leave it to the mediator and the parties to agree on any pre-mediation steps. Extensive application materials exist which can provide the mediator with the background to the Urbisci family dispute, but no doubt the mediator will require a concise statement of issues and the position of each party on each issue.

[93] While I will not interfere formally in the manner in which the mediator conducts the mediation, there may well be great merit in starting by involving only Maria, Franco and their counsel, in the discussions. Obviously, Floriana and Stefania will have to participate at some point since they are parties, but I think that Maria and Franco need an opportunity to talk candidly about the legal and personal issues separating them without injecting the toxic relationship that exists between Floriana and Stefania into those initial discussions.

[94] I do make one formal direction to the mediator. In the event the mediator develops any reason to believe that Maria lacks capacity in respect of deciding matters raised by this litigation or the Matrimonial Litigation, the mediator shall provide me with a report within 7 days of the completion of the mediation, with copies to go to the parties. If the mediator provides such a report, he or she should attempt, as much as possible, to refrain from recounting any without prejudice discussions that passed amongst the parties.

[95] The parties ultimately shall divide the costs of the mediation four-ways equally amongst themselves – i.e. Franco, Floriana, Maria and Stefania. However, the evidence suggests that most of Franco and Maria's accessible cash currently is under Franco's power and control, so I require Franco to fund initially the mediator's costs, but he is entitled to recover 75% of those costs from the other three parties, in equal shares.

[96] Until the mediation occurs, I refrain from giving any further directions regarding this proceeding. Maria's request for partition and sale is best dealt with in the Matrimonial Litigation, and I decline to consider the cross-application at this point of time.

[97] As to the Matrimonial Litigation, in light of the difficulties Maria has encountered in serving Franco with her application, I order that Maria may serve Franco with her Matrimonial Litigation application by serving a copy on Charles B. Wagner & Associates.

[98] I make no other formal direction regarding the Matrimonial Litigation, save my direction above that the mediation I have ordered should include a mediation of issues in the Matrimonial Litigation. Pursuant to the order of Conway J. Franco must make a further payment of \$3,000.00 to Maria before November 15, 2010. I have ordered that the mandatory mediation occur before the end of this month. It is my strong desire that the parties work out informally any other

financial support that Maria requires for the balance of this month without resorting to a formal motion in the Matrimonial Litigation before the mediation is held. The parties can canvass their positions fully at the mandatory mediation later this month.

[99] In high-conflict capacity disputes such as this I think it important that one judge remain seized of the matter and hear all motions in the matter. Accordingly, I will remain seized to hear all motions in this proceeding. Before a party brings back on any remaining aspect of this application and cross-application, or any other motion in this proceeding, they must first secure a date from my office after consulting with the other side about mutually convenient times.

## **V. Conclusion**

[100] By way of summary, I make the following orders:

- (i) I dismiss the application of the applicants for an order under section 79(1) of the *SDA* that Maria attend a capacity assessment;
- (ii) I direct the parties to attend a mediation on or before November 30, 2010 before any of the mediators listed in paragraph 91, or any other mutually acceptable mediator, and the mediation shall address all issues raised in this proceeding and Maria's Matrimonial Litigation. Franco shall initially fund the costs of the mediation, but ultimately the four individual parties shall bear equally the costs of the mediation as described in paragraph 95 above;
- (iii) In the event the mediator develops any reason to believe that Maria lacks capacity in respect of deciding matters raised by this litigation or the Matrimonial Litigation, the mediator shall provide me with a report within 7 days of the completion of the mediation, with copies to go to the parties;
- (iv) I authorize service by Maria of her Matrimonial Litigation application on Franco by serving the application on Charles B. Wagner & Associates; and,
- (v) I direct that any further motion in this proceeding be made returnable before me.

[101] I will not call at this point of time for submissions on costs. If the parties are not able to resolve their disputes at the mediation, each may make brief written cost submissions to me, with the copies to filed through my office.

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D. M. Brown J.

**Date:** November 8, 2010