

# In the Court of Appeal of Alberta

**Citation: Cerato v Cerato, 2026 ABCA 40**

**Date:** 20260218  
**Docket:** 2401-0102AC  
**Registry:** Calgary

**Between:**

**Nadia Maria Cerato**

Appellant

- and -

**Francesco Jeffrey Cerato**

Respondent

- and -

**Ludmilla Maria Cerato also known as Lucy Maria Cerato**

Not Party to the Appeal

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**The Court:**

**The Honourable Justice Michelle Crighton  
The Honourable Justice April Grosse  
The Honourable Justice Joshua B. Hawkes**

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## **Memorandum of Judgment**

Appeal from the Order by  
The Honourable Justice C.C.J. Feasby  
Dated the 4th day of March, 2024  
Filed on the 6th day of March, 2024  
(Docket: 2001-07201; 2301-07629)

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## Memorandum of Judgment

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### The Court:

### Introduction

[1] The appellant is the maker of a personal directive and an enduring power of attorney appointing her brother, the respondent, as her agent and attorney. She seeks to have those set aside on the grounds that she has capacity, and to have a caveat registered against property in her name cancelled. The court below declined to make those orders. She appeals from that decision.

### Facts

[2] In February and March 2019, the appellant made a personal directive and an enduring power of attorney appointing the respondent as her agent and attorney pursuant to the *Personal Directives Act*, RSA 2000, c P-6 and the *Powers of Attorney Act*, RSA 2000, c P-20 respectively. In August 2019 two medical doctors, Dr. Pandya and Dr. Virjee, made declarations of incapacity and the instruments came into effect.

[3] On June 5, 2020, the appellant brought an application seeking to revoke the personal directive and power of attorney on the basis that she had capacity (the “Capacity Application”). On June 9, 2023, she brought an application seeking an order removing a caveat that her mother had registered against property owned by the appellant (the “Caveat Application”).

[4] A series of further applications by the appellant followed, seeking the same relief, or seeking to add information to the record. The respondent filed a cross application for direction and a litigation plan. These applications culminated in an order dated October 2, 2023, directing a capacity assessment by the Alberta Health Service Regional Capacity Assessment Team (RCAT) and suspending other deadlines and hearings pending the outcome of that report. The order noted that the appellant had requested a referral to RCAT from Dr. Dawes, identified elsewhere in the record as her primary care physician

[5] On December 14, 2023, RCAT delivered its assessment. In brief, the authors concluded that the appellant lacked capacity with respect to health care decision making, choice of accommodation, choice of associates, legal (non-financial) matters, and financial matters. Following the RCAT assessment, the respondent was directed by Simard J. to bring an application setting out the specific relief he was seeking, including a request for the court to make a formal determination of the appellant’s capacity. The respondent filed an application seeking among other things a determination of capacity pursuant to the RCAT assessment, and the dismissal of the appellant’s Capacity Application and Caveat Application. The appellant was directed to and did

submit a letter in response, dated February 2, 2024, setting out the materials she would rely on in opposing the application.

[6] At the chambers application on March 4, 2024, the appellant referenced capacity assessments completed prior to the RCAT assessment including reports dated June 25, 2020, August 5, 2020, and September 7, 2022 from three different qualified assessors. Most of her submissions focused on allegations of bias against the authors and sources cited in the RCAT report, and complaints about her brother's conduct as her agent and attorney under the instruments described above. After considering her submissions the chambers justice accepted the conclusions of the RCAT report, declared the applicant to not have capacity in the areas noted by RCAT and dismissed the Capacity Application and the Caveat Application. She appeals from that decision.

### **Standard of Review**

[7] An appeal is not a new hearing into the appellant's capacity at present or as it may have been historically. This court is tasked with reviewing the decision of the lower court based on the record before it.

[8] The trial judge's decision was predicated on his acceptance of the RCAT report. Acceptance or rejection of expert evidence by the trial judge is reviewed on the palpable and overriding error standard: *R v Nqumayo*, 2010 ABCA 100 at para 19.

### **Analysis**

[9] The appellant raises 15 grounds for appeal. The nub of these reiterate arguments made before the chambers justice that the RCAT report was biased, based on anecdotal evidence, relied on information from the respondent which was also biased, and failed to consider prior capacity tests she had undertaken.

[10] The appellant also brings three new evidence applications, dated October 10, 2024, March 18, 2025, and May 13, 2025, respectively. These applications contain evidence in relation to matters occurring before and after the ruling under appeal. Broadly speaking, that evidence relates to volunteer work the appellant has engaged in, online courses she has completed, some agreements she made with the respondent and her care facility, and other capacity assessments she had undertaken.

### **The Chambers Hearing**

[11] RCAT is designated by Alberta Health to conduct capacity assessments for the courts. It is intended to serve as an impartial assessor. It had access to the appellant's medical records. The appellant agreed to participate in its assessment. It conducted two sessions with the appellant. Based on the interviews and its review of the records, RCAT produced a report authored by Ashley Marsh, psychologist, Yi-Nei Kao, occupational therapist, and Dr. Remi Olaosun, psychiatrist. The

authors opined that the appellant lacked decision making capacity in the domains of health care, accommodation, choice of associates, legal (non-financial) matters, and financial affairs. They recommended that the personal directive and power of attorney remain in effect. The authors of the RCAT report were not called for cross-examination.

[12] In the application before the chambers justice the appellant briefly referred to other capacity assessments that concluded she had capacity. She contended that the RCAT report was biased and based on inaccurate information supplied by the respondent and others. A review of that report reveals extensive corroboration from multiple sources. It also describes the appellant as ultimately acknowledging or admitting facts she initially disputed.

[13] The appellant filed three capacity reports that she had completed privately between June 2020 and September 2022. These reports pre-date the RCAT report dated December 14, 2023. The appellant briefly referenced one of these reports in her submissions before the chambers justice. These reports share a common limitation. They reference dated medical reports at the time of her initial finding of incapacity (i.e. the reports of Joshua Adams dated July 5, 2020 and James Murch dated September 7, 2022) or do not reference prior medical reports at all (i.e. what appears to be a form completed by Dr. Chuah that refers to a report as an attachment, which report is not contained in the record.)

[14] In contrast, the RCAT report is based on a complete and contemporaneous review of her medical records and interactions with care staff at the facility where she resides. It was the most current and detailed of the reports before the chambers justice. We have reviewed the evidence and all the complaints made by the appellant regarding the RCAT report. We are satisfied the chambers judge made no error in relying on it.

### **New Evidence**

[15] As noted above, the appellant brings three separate fresh evidence applications. The test for the admission of fresh evidence, whether it existed at the time of the proceedings or arose afterwards is the same.<sup>1</sup> The applicant must demonstrate the following:

- 1) the evidence could not, by the exercise of due diligence, have been available for the trial;
- 2) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- 3) the evidence is credible in the sense that it is reasonably capable of belief; and

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<sup>1</sup> *Barendregt v Grebilunas*, 2022 SCC 22 at paras 2-3, 34.

4) the evidence is such that, if believed, it could have affected the result at trial.<sup>2</sup>

[16] The new evidence falls into two categories. First, the appellant provides evidence of volunteer activities and the completion of online courses. This evidence is not sufficiently related to the determination of capacity or has other limitations. In some instances, the records shed no light on the issue of capacity, as the activities in question could be completed regardless of capacity issues. In others, such as volunteering in the count room in a casino as part of a team, the activities are supervised, and the skills demonstrated do not address the complex issues relating to incapacity raised in the medical evidence described below. Other evidence, such as agreements between the appellant and respondent, or communications between the appellant and respondent are simply not relevant to the issue.

[17] The second category consists of two related capacity assessments dated April 11 and April 25, 2025. In the unusual circumstances of this case it is only necessary to address the final element of the fresh evidence test described above. These assessments suffer from the same limitations as the pre-RCAT assessments described above. The April 11 assessment is a very short one page letter from a physician advising that the appellant attended the medical clinic on that date requesting a letter in support of a capacity application. After reviewing one of the pre-RCAT reports, coupled with “a brief exam review in clinic today” he concluded that she did have capacity. He did not refer to the RCAT report or to any other medical records. The second report, dated April 21, 2025, was completed by a designated capacity assessor based on an interview conducted at a public library. It listed prior medical diagnosis based on medical records or self reporting by the appellant as well as prior capacity assessments from 2019-2023. The only reference attributable to the RCAT report was that the 2023 report concluded that she did not have capacity.

[18] The RCAT report is the only report providing both a comprehensive review of the appellant’s complex medical history and contemporaneous examples of behaviour illustrating the challenges that she has faced even within a supportive living environment. We have reviewed the proposed new capacity assessments and find that in the circumstances of this case they lack sufficient cogency and detail to have impacted the result. As a result, we conclude that they are not admissible as fresh evidence. The other material included in the fresh evidence applications is not relevant to the issue of capacity.

## **Conclusion**

[19] We have carefully considered the arguments and evidence advanced by the appellant. For the reasons provided we conclude that they do not demonstrate that the chambers justice committed any reviewable error in relying on the RCAT report. The appeal is dismissed.

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<sup>2</sup> *Barendregt* at para 29.

[20] We have considered the request of the respondent for indemnity for costs. In light of our conclusion upholding the finding in relation to capacity of the appellant we decline the request.

[21] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order.

Appeal heard on November 10, 2025

Memorandum filed at Calgary, Alberta  
this 18th day of February, 2026

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Authorized to sign for: Crighton J.A.

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Grosse J.A.

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Hawkes J.A.

**Appearances:**

Appellant N. Cerato

B.Y. Minuk  
for the Respondent