

AUTISM AND ESTATE PLANNING

Part I – Planning for the Autistic Child
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When results count.



Topics

- Competency
- Guardianship of Minors
- Powers of Attorney for Property
- Personal Directives
- Wills
- Adult Guardianship
- **Note: Part II - Planning for the Parents of an Autistic Child - November 23, 2010**



Competency

- Individuals under the age of 19 in Nova Scotia are presumed at law to be incapable of managing their own affairs
- Adults in Nova Scotia (over age 19) are presumed competent to manage their own affairs until a court determines otherwise
- Competency is a legal question, not a medical one
- Involves the application of legal principles to the medical and other facts of each case
- Courts when assessing competency are guided by specialist medical opinions on competency
- Competency is assessed on a case by case basis
- Note: a person can be incompetent to manage one's own affairs or to make their own financial or healthcare decisions, but be competent to sign a power of attorney or a personal directive



Guardianship of Minors

- Guardianship of minors governed by *Guardianship Act* in Nova Scotia
- Split between guardians of the person and guardians of the property of minors
- Parents are presumed to be guardians of the person of their minor children
- If a guardian of property is required (because minor has assets in his or her own name), court application by proposed guardian (even if parent) is required, along with a bond
- Proper planning can usually avoid this situation (see more in Part II)



Power of Attorney for Property

- A delegation of authority to another
- Can be a general power or a specific/restricted power
- Governed by the *Powers of Attorney Act*
- Since 1988 can be “enduring”
- If enduring, power continues through subsequent incapacity
- Substitute attorneys can be named
- Governed by law of agency
- Attorney must act in best interests of grantor at all times
- Appointing another person as attorney does not remove the grantor’s ability to act on his or her own behalf, provided the grantor is still competent



Power of Attorney for Property (Cont'd)

- Can be revoked by grantor if he or she has capacity
- Authority under a power of attorney ceases on the death of the grantor
- If grantor doesn't have capacity, the Supreme Court of Nova Scotia has supervisory control of enduring powers on application by an interested party
- To give a power, grantor must have the ability to understand:
 - The types of things an attorney can do for the grantor
 - That the attorney can exercise the powers of the grantor as set out in the power during the lifetime of the grantor unless the power is revoked
 - That the grantor will lose the right to revoke the power in the event that he or she becomes incompetent
- Test for revocation of a power is the same
- Default if no power of attorney for property is adult guardianship under the *Incompetent Persons Act* (more later)



Personal Directives

- The *Personal Directives Act* came into force on April 1, 2010
- Replaced the *Medical Consent Act*
- Provides for persons over 19 (or under 19 if they are “mature minors”) to appoint a delegate (person over 19) as a substitute decision maker with respect to healthcare and personal care decisions
- Replaces healthcare directives, powers of attorney for healthcare and advance directives
- Also authorizes a “living will” (an expression of final wishes in the event of a terminal illness)
- Can only appoint one delegate at a time, but substitute delegates can be named
- Can also express wishes as to care options
- Must be in writing, signed by the person giving the authorization and witnessed by a person who is not the delegate or the spouse of the delegate



Personal Directives (Cont'd)

- Test for capacity to make a personal directive is “the ability to understand information that is relevant to the making of personal-care decisions and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision”
- Default if no personal directive in place is a series of substitute decision makers in order of precedence as follows:
 - spouse
 - child
 - parent
 - sibling
 - grandparent
 - grandchild
 - aunt or uncle
 - niece or nephew
 - other relative



Wills

- Anyone over age 19 can make a will if competent
- Competency to make a will requires a testator to understand:
 - The nature and extent of his or her property and financial affairs
 - The nature and effect of the testamentary act
 - The persons that he or she would ordinarily be expected to benefit
 - The nature of the claims that excluded beneficiaries might bring
- Alternative is intestacy
- Administrator (not executor) appointed pursuant to the *Probate Act* based on defined order (next of kin resident in Nova Scotia have priority) and with a bond
- Assets distributed pursuant to *Intestate Succession Act* to next of kin



Adult Guardianship

- Governed by the *Incompetent Persons Act*
- Very old statute
- Language/terminology updated in 2007
- Poor alternative to enduring powers of attorney/personal directives
- Guardianship trumps a power of attorney/personal directive
- Guardianship applies when a person is incapable from “infirmity of mind of managing the person’s own affairs”



Adult Guardianship – Duties of Guardian

- Guardianship covers both guardian of the person and guardian of the estate of the incompetent person
- Guardian of the estate is similar to an attorney under a power of attorney for property
- Guardian of the person is similar to an a delegate acting under a personal directive
- Guardian of the person can manage all aspects of the incompetent person's personal and health care
- In all cases guardians must act with utmost good faith and in the best interests of the incompetent person
- Separate guardians for an incompetent's person and estate can be appointed, but typically one person serves in both capacities



Adult Guardianship – Application Procedure

- Court application in the Supreme Court of Nova Scotia by the proposed guardian(s) is required
- Affidavits are required from two medical practitioners as to the person's incapacity
- Consents of family members and an affidavit from the proposed guardian (s) are also necessary
- Copies of all documents are served on the alleged incompetent person and the administrator of the institution having care of that person (if applicable)
- Hearings are generally uncontested, but are held in open court
- Guardians of the estate must post a bond to secure performance of their duties equal to 1.25 times the value of the incompetent person's assets



Adult Guardianship – Application Procedure (Cont'd)

- Can be a corporate bond issued by an insurance company or a personal bond with two personal sureties
- Guardians can be removed by the court if they:
 - Become unable to manage their own affairs or die
 - Are otherwise incapable of acting as guardian
 - Are not fulfilling their duties by wasting the incompetent's property or not acting in the incompetent's best interests
- Guardians may also resign voluntarily
- In either case the court can appoint another person(s) to act in the place of an original guardian(s)



Conclusion

- Capacity varies depending on the context
- It is a mixed question of fact and law – the application of legal principles to the facts of a particular case is required
- The court's reliance on medical evidence (particularly specialist evidence) is high
- Powers of attorney, personal directives and wills are preferable to guardianship and intestacy, but defaults are built in if a person does not or cannot execute such documents



QUESTIONS?

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