

Incapacity

**M. Estelle Theriault, Q. C. and
Richard S. Niedermayer
November 27, 2008**

**Society of Trust and Estate Practitioners
Atlantic Branch**

STEWART MCKELVEY

When results count.

Topics

- Capacity
- Powers of Attorney for Property
- Health Care Directives
- Living Wills
- Guardian Appointments
- Adult Guardianship
- Guardianship of Minors
- Application to Mr. R
- Application to Little Johnny

Capacity

- Adults in Nova Scotia are presumed competent until a Court determines otherwise
- Competency is a legal question, not a medical one
- Involves the application of legal principles to the facts of each case
- Courts are guided by specialist medical opinions on competency
- Lay evidence also important, especially when the specialist has not personally assessed the patient
- Test varies depending on act in question (i.e. testamentary capacity vs. capacity to consent the medical treatment)

Capacity (Cont'd)

- Use various tools to assess capacity such as:
 - Mini Mental State Examination (MMSE)
 - Montreal Cognitive Assessment (MOCA)
 - Lay observation over time
 - Specialist medical opinion/testing/analysis

Capacity (Cont'd)

- Minors (under age 19) are not competent to manage their assets
- Court appointed guardianship of the property of that minor is required or Public Trustee has authority to deal with assets

Who is the Public Trustee?

- The Public Trustee is a corporation sole established by an act of the Provincial Legislature
- There is a Public Trustee in every jurisdiction in Canada except Newfoundland and Labrador where many of the same functions are performed by the Court Office
- I am the Public Trustee of Nova Scotia

Who is the Public Trustee? (Cont'd)

- The legislative powers of the Public Trustee are broad and are found in many pieces of legislation including the *Public Trustee Act*, the *Probate Act*, the *Hospitals Act*, the *Involuntary Psychiatric Treatment Act*, the *Adult Protection Act*, the *Survival of Actions Act*, the *Powers of Attorney Act*, the *Human Tissue Gift Act*, etc.
- The Public Trustee has powers from the birth of a child to the death of Nova Scotians
- My part of this presentation may be titled the “Role of the Public Trustee – whether you want it or not”

Powers of Attorney for Property

- A delegation of authority to another
- Can be a general power or a specific/restricted power
- Since 1988 can be “enduring”
- Governed by the *Powers of Attorney Act*

Powers of Attorney for Property (Cont'd)

- If enduring, power continues through subsequent incapacity
- Substitute attorneys can (and should) be named
- Effective immediately or when a physician certifies the donor is unable to manage his affairs – a “springing” power
- Governed by law of agency

Powers of Attorney for Property (Cont'd)

- Attorney must act in best interests of donor at all times
- Appointing another person as attorney does not remove the donor's ability to act on his own behalf, provided the donor is still competent
- Can be revoked by donor if he has capacity

Powers of Attorney for Property (Cont'd)

- Authority under a power of attorney ceases on the death of the donor
- If donor doesn't have capacity, the Supreme Court of Nova Scotia has supervisory control of enduring powers on application by an interested party

Powers of Attorney for Property (Cont'd)

- Very little case law in Nova Scotia about capacity to make a property power of attorney
- No guidance in the *Powers of Attorney Act*

Powers of Attorney for Property (Cont'd)

- Generally donor must have ability to understand:
 - That the attorney can exercise the powers of the donor as set out in the power during the lifetime of the donor unless the power is revoked
 - That a general enduring power of attorney gives the attorney wide power to deal with everything that the donor owns
 - That the donor will lose the right to revoke the power in the event that he becomes incompetent

Powers of Attorney for Property (Cont'd)

- Test for revocation of a power is the same
- Some question in Nova Scotia whether a donor must appreciate the nature and extent of his property and financial affairs
- Arguably included in the test for a general enduring power of attorney, but no Nova Scotia case law

Role of Public Trustee in Relation to Powers of Attorney Act

- Section 4 of the *Powers of Attorney Act* – exclusion of Public Trustee’s financial intervention pursuant to Section 59 of the *Hospitals Act*
- Section 5(1) – review of actions of attorney when creator of the power becomes incompetent – falls to the Public Trustee
- Sections 5(2) and 5(4) – power of Public Trustee to review accounts of attorney

Role of Public Trustee in Relation to Powers of Attorney Act (Cont'd)

- Section 5(3) – Public Trustee must be served with legal documents when attorney seeks to have a substitute attorney appointed
- Public Trustee can and is appointed as attorney in Powers of Attorney
- Power of Public Trustee to act does not automatically terminate when the creator or donor of the Power of Attorney dies (Section 15 of the *Public Trustee Act*)

Health Care Directives

- Health care directives (also known as a power of attorney for health care or personal care) are governed by the *Medical Consent Act*
- Donor must be of the age of majority (19) and “capable of giving consent to medical treatment or directions respecting medical treatment”
- Created by statute

Health Care Directives (Cont'd)

- Person named must be at least 19
- Applies when the person who gave the authorization is no longer capable of giving consent or directions
- Must be in writing, signed by the person giving the authorization and witnessed by a person who is not the person named or the spouse of the person named

Health Care Directives (Cont'd)

- Authorization ends when the donor dies or otherwise revokes the authorization, when a court appoints a guardian of the person, or when a judge of the Supreme Court makes an order revoking the authorization and/or substituting another person under the authorization

Health Care Directives (Cont'd)

- Capacity to name a substitute decision maker for medical treatment requires:
 - The ability to understand whether the proposed attorney has a genuine concern for the donor's welfare
 - An appreciation that the proposed attorney may need to make health decisions for the donor

Health Care Directives (Cont'd)

- Can be part of an enduring power of attorney for property or a separate document
- Substitute attorneys can (and should) be appointed

Health Care Directives (Cont'd)

- Can personal care decisions which are not “medical treatment” such as long-term care placement be delegated to another person?
- Yes, under principles of agency if the document includes reference to decisions regarding “personal care” broadly, but authority ceases when capacity is lost so of little practical benefit
- New *Personal Directives Act* will create statutory authority to grant enduring power to another person to make personal care decisions

Living Wills

- Generally considered to mean an expression of wishes in the event of terminal illness
- Are not statutorily authorized in Nova Scotia, but are in other provinces
- Generally respected by physicians if included as part of a health care directive/power of attorney for health care

Role of Public Trustee in Relation to Health Care Decisions

- If no health care directive and no court appointed guardian of the person and the person is found by a physician or psychiatrist not to be capable of making treatment decisions, the *Hospitals Act* sets out who may give consent to treat

Role of Public Trustee in Relation to Health Care Decisions (Cont'd)

- Enumerated list of people:
 - spouse or common law partner
 - adult child of patient
 - Parent of patient or person who stands in *loco parentis*
 - Adult brother or sister
 - Any adult next of kin of patient
 - Public Trustee

Role of Public Trustee in Relation to Health Care Decisions (Cont'd)

- People on enumerated list, except the Public Trustee, must have had contact with patient within the preceding twelve months and be willing to assume responsibility for consenting or refusing to consent
- The substitute decision maker must make decisions in relation to specific treatment in accordance with the patient's prior capable informed expressed wishes

Role of Public Trustee in Relation to Health Care Decisions (Cont'd)

- Or, in absence of above, in accordance with what the substitute decision maker believes to be in the patient's best interest
- To determine best interest, substitute decision maker must consider the following:
 - whether the patient's condition will improve with treatment
 - whether the patient's condition will improve without the treatment

Role of Public Trustee in Relation to Health Care Decisions (Cont'd)

- does benefit of treatment outweigh the risk of harm
- whether the specified medical treatment is the least restrictive and least constrictive
- On average 25 consents for treatment are provided on an annual basis by the Public Trustee mainly for psychiatric treatment and surgery – power to give consent restricted to a hospital setting

Role of Public Trustee in Relation to Health Care Decisions (Cont'd)

- New *Personal Directives Act* – impact on Public Trustee's Office:
 - authority to give consent for treatment anywhere where patient resides – no longer just in hospital setting
 - ability to make decision to accept nursing home placement
 - new division being developed in Public Trustee's Office to deal with influx of new caseload

Guardian Appointments

- Applies to persons who have care and custody of minor children in Nova Scotia
- Only applies to guardianship of the person
- Guardianship of property requires court order (more later)
- But, can express a wish as to who would like to act as guardian(s) of the property
- Governed by *Guardianship Act* (s.19)
- Appointment must:
 - be in writing;
 - have two witnesses;
 - be made by all persons having care and custody on the day immediately before the appointment is to take effect (unless there is a simultaneous death)

Guardian Appointments (Cont'd)

- Guardian must consent to act
- Applies both on death of person with care and custody or “for any period during the lifetime of the person having care and custody” (i.e. when that person is unable to care for minor)
- Can be in a will or separate document
- Court retains jurisdiction to appoint and remove guardians of the person of the minor

Adult Guardianship

- Governed by the *Incompetent Persons Act*
- Somewhat outdated statute
- Terminology problems (i.e. “insane person” or “lunatic” to describe an incompetent person) were addressed in 2007
- Poor alternative to enduring powers of attorney
- Guardianship trumps a power of attorney/health care directive

Adult Guardianship – Application Procedure

- Application is to the Supreme Court of Nova Scotia by the proposed guardian
- Affidavits from two medical practitioners are required
- Consents of family members and an affidavit from the proposed guardian are also necessary

Adult Guardianship – Application Procedure (Cont'd)

- Copies of all documents are served on the alleged incompetent and the administrator of the institution having care of that person
- Hearings are generally uncontested, but are held in open court

Adult Guardianship – Duties of Guardian

- Guardianship includes 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

Adult Guardianship – Duties of Guardian (Cont'd)

- Guardians of the estate must:
 - Identify and safeguard all of the incompetent's property and effects (both financial and otherwise)
 - Inventory that property and file the inventory with the court
 - Manage the assets frugally and without waste

Adult Guardianship – Duties of Guardian (Cont'd)

- Use the profits or income from the assets for the incompetent's comfort and maintenance
- Follow the “prudent investor” standard in the *Trustee Act*
- Keep accounts and records of their function as guardian
- Pay the incompetent's income taxes as necessary

Adult Guardianship – Duties of Guardian (Cont'd)

- Guardian of property is a fiduciary and trustee
- Guardian of the person is similar to an attorney acting under a health care directive
- Guardian can manage all aspects of the incompetent person's health and personal care (including long-term care placement)

Adult Guardianship – Duties of Guardian (Cont'd)

- Guardians in all cases 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 the same person(s) serves in both capacities

Adult Guardianship – Bonding Requirements

- Every guardian of the estate will be required to give a bond to secure the performance of their duties
- Typically the largest expense of a guardianship
- Bond is equal to the face amount of the value of the incompetent person's assets
- Can be reduced if assets include land as land can't be sold without a further court order

Adult Guardianship – Bonding Requirements (Cont'd)

- Could be a corporate bond or a personal bond with two sureties
- Neither the Public Trustee nor a trust company is required to give a bond

Adult Guardianship - Compensation

- Guardians of the estate will generally be allowed compensation from the incompetent's assets and income based on 5% of income and two-fifths of 1% of capital each year
- Compensation must be approved by the court
- Guardians of the person (if different from guardian of the estate) can receive compensation on a “time and effort” basis

Adult Guardianship – Resignation and Removal

- Guardians can be removed by the court if they:
 - Become unable to manage their own affairs
 - Are otherwise incapable of acting as guardian
 - Are not fulfilling their duties by wasting the incompetent's property
 - Die
- Guardians may also resign voluntarily
- Court will appoint another person to act in the place of the original guardian

Role of Public Trustee in Adult Guardianship

- Public Trustee is authorized by the *Public Trustee Act* to be appointed as guardian of the estate and person
- Public Trustee does not consent to be guardian of person due to staff and funding restraints – try to have family or friend take on appointment as guardian of person

Role of Public Trustee in Adult Guardianship (Cont'd)

- The Public Trustee has to submit same documentation to the Supreme Court to be appointed except the Public Trustee need not be bonded
- Seek consent of family members before applying for guardianship
- Try to encourage family to apply in lieu of Public Trustee

Role of Public Trustee in Adult Guardianship (Cont'd)

- The Public Trustee does charge trustee/guardianship fees as per the suggested fees in the Practice Memorandum set out in the Rules of the Supreme Court, i.e. 2/5ths of 1% of capital and 5% of income on an annual basis
- The Public Trustee also charges for its legal fees in any court application
- Generally lawyers on staff in the Public Trustee Office do the necessary court work

Role of Public Trustee as a “Statutory Guardian”

- Notice to Public Trustee pursuant to Section 59 of the *Hospitals Act*
- Power under Section 59 of *Hospitals Act*
- Notice to Public Trustee pursuant to Section 13 of the *Adult Protection Act*

Role of Public Trustee as a “Statutory Guardian” (Cont’d)

- Amendment to *Public Trustee Act* passed in spring 2008 of the legislature:
 - authority of Public Trustee to continue to act as trustee/statutory guardian even after patient leaves hospital or adult protection order no longer in existence
 - will reduce need for application under the *Incompetent Persons Act* → time saving and cost saving for client and courts

Guardianship of Minors

- Governed by *Guardianship Act*
- Substantially revised in 2002
- Guardianship split between guardian of the person and guardian of the property as with incompetent adults

Guardianship of Minors – The Person

- As noted before, governed by s.19 and ties into concept of “care and custody”
- Inter vivos and testamentary appointments are possible
- Failing appointment, if appointed person(s) cannot or will not act or if there is a contest about who is the appropriate person(s) for the role, Supreme Court has jurisdiction to decide what is in the best interest of the minor

Guardianship of Minors – The Property

- Similar regime to incompetent adults
- Cannot be done by parent – Supreme Court only has jurisdiction
- Can be single or co-guardians
- Parents are equally entitled

Guardianship of Minors – The Property (Cont'd)

- On application, Court looks at:
 - Ability of guardian to care for and manage the minor's property
 - Merits of the plan for management of the property
 - Views and preferences of the minor if their views can be “reasonably ascertained”
- Court has power to put limits on the guardianship (in length of time or for specific assets)

Guardianship of Minors – The Property (Cont'd)

- Bond is required, but no specified percentage
- May be with or without sureties
- Court can dispense with bond entirely (unlike *Incompetent Persons Act*)
- Once appointed and bond filed with Court, guardian has full authority to deal with minor's assets, give releases and receipts, litigate on the minor's behalf etc.
- Guardians are subject to the *Trustee Act*

Guardianship of Minors – The Property (Cont'd)

- Accounts can be compelled by the Court on application by an “appropriate person to represent the interests of the child”
- Accounts can be passed in Supreme Court or by the Public Trustee pursuant to s. 37 of the *Public Trustee Act* **but:**
 - the Public Trustee due to staff and funding restraints does not review the accounts of trustee/guardians and encourages all trustees to have accounts approved by the court
 - in the twenty-eight years the current Public Trustee has been in office Section 37 of the *Public Trustee Act* has never been utilized
- Property of the minor turned over to him/her at age 19

Guardianship of Minors – The Property (Cont'd)

- Guardian can receive a “reasonable amount” for fees plus expenses
- Typically *Trustee Act* compensation (2/5th of 1% of capital and 5% of income)
- Guardian(s) can resign with leave of the court and can be removed for cause or because it is in best interest of child

Guardianship of Minors – The Property (Cont'd)

- Specific court order regarding sale or mortgaging of land when minor has an interest is required.

Guardianship of Minors – The Property (Cont'd)

- Must be “necessary or appropriate” for the “support or education” of the minor, will “substantially benefit” the minor, or is “necessary or avoidable to correct or address a problem or defect in the title” if that does not “adversely affect” the minor.

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants

- The Public Trustee is (without the need for a court order) guardian of the finances of every infant in this province for whom no guardian or custodian of the estate has been appointed – Section 4(2) of the *Public Trustee Act* and Section 14 of the *Guardianship Act*

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants (Cont'd)

- Public Trustee is entitled to receive and hold funds for an infant from
 - insurance proceeds
 - death benefits
 - intestacy or bequests under will if no trustee
 - under a trust, settlement, deed or in any other manner whatsoever

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants (Cont'd)

- If there is already a guardian or trustee of property or assets of a child and the trustee wishes to surrender assets to the Public Trustee to manage, assets may be transferred to the Public Trustee if the Public Trustee consents (Sections 14 and 15 of the *Guardianship Act*)

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants (Cont'd)

- Section 17 allows person holding funds for child to release up to \$2,000.00 per year to a child if child has legal obligation to support another person, to a parent, or to a legal guardian of the person as long as the total amount received does not exceed \$10,000.00 and to get a proper release

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants (Cont'd)

- The Public Trustee has never refused to accept money for children
- If funds/assets are received for infants without any trust provisions or court order the Public Trustee administers funds pursuant to Section 10 of the *Public Trustee Act*
 - for maintenance and education
 - if sum under management is under \$100,000 both income and capital may be used

Role of Public Trustee as *ex-officio* guardian of estate/finances of infants (Cont'd)

- If sum under management is over \$100,000 the Public Trustee may utilize only the income earned by the trust but may apply to the court if there is need to encroach on the capital
- Public Trustee provides annual accounting

Application to Mr. R - Competency

- Mr. R's capacity has been assessed by geriatric specialist – not competent to manage finances or health care based on MMSE of 18/30 - moderate stage Alzheimer disease
- Capacity is a question of fact, not a question of law

Application to Mr. R – Power of Attorney for Property

- Mr. R may not have capacity to make a power of attorney for property
- Refer to the test for capacity discussed previously
- Note: test for capacity to manage property may not be the same as the test for capacity to appoint someone else to manage property

Application to Mr. R – Health Care Directive and Living Will

- Mr. R may have the capacity to execute a health care directive and living will
- Refer to the test for capacity discussed previously

Application to Mr. R – Long-Term Care Placement

- Mr. R may have capacity to consent to long-term care placement
- No statutory test for this, nor any clearly articulated common law standard
- Individual must:
 - Understand the information relevant to making the decision about admission (i.e. their care once placed, deficits in their ability to care for themselves at home etc.)
 - Be able to appreciate the reasonably foreseeable consequences of the placement decision or lack of a decision

Role of Public Trustee in relation to Mr. R – Long-Term Care Placement

- If Mr. R lacks the capacity to accept long-term care placement and has no guardian of person, Adult Protection are often contacted to determine if Mr. R qualifies as an “adult in need of protection”

Role of Public Trustee in relation to Mr. R – Long-Term Care Placement (Cont'd)

- “Adult in need of protection” means an adult who, in the premises where he resides,
 - (i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and
 - (ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason or physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention

Role of Public Trustee in relation to Mr. R – Long-Term Care Placement (Cont'd)

- If found to be an adult in need of protection, Adult Protection Service can apprehend the adult and move the person to a nursing home
- If the adult in need of protection has no enduring power of attorney or guardian of his finances, a notice is sent to the Public Trustee pursuant to Section 13 of the *Adult Protection Act* and the Public Trustee may assume financial management of the patient's estate

Application to Mr. R – Will or Codicil

- Mr. R likely does not have capacity to make a will or a codicil to a will or to do other testamentary estate planning such as changing beneficiary designations on life insurance policies or registered plans such as RRIFs

Application to Mr. R – Will or Codicil (Cont'd)

- The test for “testamentary” capacity is that the person must:
 - Understand the nature and effect of the testamentary act
 - Understand the nature and extent of his property and financial affairs
 - Be aware of the persons that he would ordinarily be expected to benefit
 - Understand the nature of the claims that excluded beneficiaries might bring

Application to Mr. R - Marriage

- Perhaps surprisingly, Mr. R probably has capacity to marry
- Test for capacity to marry is lower than the capacity required to manage property
- Closer to test for capacity to manage personal care
- Must understand the nature of the marriage relationship and the obligations and responsibilities it involves
- Marriage revokes a prior will

Application to Mr. R - Options

- Mr. R signs a health care directive, an individual applies to be guardian of estate
- An individual applies to be guardian of person and estate
- Mr. R signs a health care directive, Public Trustee applies to be guardian of estate
- Public Trustee applies to be guardian of estate
- Adult Protection becomes involved

Application to Mr. R – Lawyer's Role

- Independent advisor to Mr. R
- Other interested parties need their own lawyers
- Public Trustee has her own lawyer
- All lawyers guided by specialist opinions on capacity

Adult Guardianship – Challenging Questions

- Q – To what extent (if any) can/should a guardian (or financial power of attorney) conduct estate planning transactions (i.e. settle on alter ego trust, do an estate freeze etc.) for an incompetent person?
- Q - To what extent can/should the Public Trustee ever do those things?
- See *O'Hagan v. O'Hagan*, [2000] BCJ No. 204 (CA) for an example of permitted estate/tax planning and *British Columbia (Public Trustee) v. Bradley Estate*, [2000] B.C.J. No. 205 (CA) for an example where estate/tax planning was not permitted
- Key – is there a transfer of beneficial interest out of the hands of the incompetent person?

Application to Little Johnny

- 12 years old
- Both parents die in car crash
- No wills – intestate
- No guardian appointment
- Assets include house, RRSPs, bank accounts and life insurance
- No other family in Nova Scotia

Application to Little Johnny-Guardianship of the Person

- The Public Trustee does not seek guardian of the person of a minor child
- The Supreme Court of Nova Scotia has the inherent jurisdiction with respect to children and a person may apply to the Supreme Court to be appointed guardian of the person of the minor child under the *Guardianship Act*
- Grandparent(s), other relative(s) or family friend(s) may apply

Application to Little Johnny-Guardianship of the Property

- Public Trustee will administer the property at the outset as administrator under the *Probate Act* (s.32)
- Someone (i.e. grandparent(s), other relative(s) or family friend(s)) may decide to apply to be appointed guardian of Johnny's property under the *Guardianship Act*
- If so, after the deceaseds' estates are fully administered and closed at the Court of Probate, Public Trustee would surrender the balance of the estate to the court appointed guardian

Application to Little Johnny- Guardianship of the Property (Cont'd)

- If no one was appointed guardian of Johnny's property, the Public Trustee would have a litigation guardian appointed to represent Johnny's interests at the probate closing
- The litigation guardian would be a lawyer
- After the closing, the estate proceeds would be transferred to a trust account held by the Public Trustee in trust for Johnny
- The Public Trustee is (without court order) guardian of Johnny's property

Application to Little Johnny- Guardianship of the Property (Cont'd)

- The trust fund will be administered by the Public Trustee until Johnny reaches the age of majority (19 years)
- The funds will be available for his maintenance and education
- Annual statements will be sent to whomever has custody of the child

Application to Little Johnny- Guardianship of the Property (Cont'd)

- In addition, the Public Trustee will apply for any insurance or pensions payable directly to him and not the estate of the deceased and the funds received would be placed in Johnny's trust account held at the Public Trustee Office

Questions?

STEWART MCKELVEY

smss.com

Charlottetown

Fredericton

Halifax

Moncton

Saint John

St. John's

Contact Information

Richard S. Niedermayer

Partner

Stewart McKelvey

900-1959 Upper Water Street

PO Box 997

Halifax NS B3J 2X2

Direct 902.420.3339

Fax 902.420.1417

Email RNiedermayer@smss.com

Website www.smss.com

STEWART MCKELVEY

smss.com

Charlottetown

Fredericton

Halifax

Moncton

Saint John

St. John's

Contact Information

M. Estelle Theriault, Q. C.

Office of the Public Trustee

Suite 405, 5670 Spring Garden road

PO Box 685

Halifax, NS

Direct 902.424.7760

Email theriame@gov.ns.ca

STEWART MCKELVEY

smss.com

Charlottetown

Fredericton

Halifax

Moncton

Saint John

St. John's