

Nidus Personal Planning Resource Centre and Registry

Feedback to Ministry of Attorney General and Ministry of Health

on Bill 29 Regulations and related issues

The following is an excerpt from Nidus' submission on Bill 29 Regulations. These recommendations and comments deal only with proposed Regulations with respect to the *Adult Guardianship Act*.

Prior to the Ministry's deadline for submissions, Nidus convened a meeting with community groups to discuss the proposed Regulations and to develop this response.

SPECIFIC RECOMMENDATIONS

Incapacity Assessments Regulation (*Adult Guardianship Act*)

RECOMMENDATION:

19. Revise the wording related to the determination of incapability in the proposed Regulation 10 (1) and (2) and 11 and 12 (1) and (2) and 14 (a). The wording is not clear. For example:

12 (1) For the purposes of **determining whether an adult is incapable** of making decisions about the adult's financial affairs, a qualified health care provider must make the determination **based on whether the adult demonstrates an understanding of all of the following:**

- (a) the nature of the adult's financial affairs, including the approximate value of the adult's business and property;
- (b) the obligations owed to the adult's dependants;
- (c) the decisions or actions respecting the adult's financial affairs that must be made or taken for the reasonable management of the adult's financial affairs;
- (d) the risks and benefits of making particular decisions or taking particular actions in respect of the adult's financial affairs;
- (e) information given to the adult respecting the matters set out in paragraphs (a) to (d);
- (f) that the information referred to in this subsection applies to the situation of the adult.

- Does the above mean that the determination of incapability requires the adult to 'fail' to understand in all of the areas? And therefore, if the adult understands one of the areas then the assessment ceases?
- Or does it mean that the determination of incapability requires that the adult fail to understand in only one of the areas and then the assessment moves on to the requirements in subsection (2) cited below?

- ◇ If this is the intent of the Regulation, this is a sure-fail and regressive approach to incapability assessments.
- With respect to 12 (2) below, what does “personally able to take steps” mean? Where is this defined?
 - (2) In addition to the matters set out in subsection (1), a qualified health care provider must make the determination of incapability based on whether the adult demonstrates that he or she is personally able to take steps to ensure that his or her decisions respecting financial affairs can be implemented.

COMMENTARY ON REGULATIONS RELATED TO ADULT GUARDIANSHIP ACT

Incapability Assessments Regulation

The Regulation does not recognize the multi-faceted nature of capability or the interdependent nature of decision-making.

- Assessments are cognitive-based; not functional. As shown above, they require the adult to “demonstrate an understanding.”
- In the second part of the assessment procedure, the adult must demonstrate s/he is “personally able to take steps.” Not knowing what this meant, we asked someone involved with the PGT’s Committee on Incapability Assessments. When asked whether the adult could demonstrate this by saying or indicating “my friend is going to help me..”, the response was that the adult would have to ‘understand’ that the friend might not do it.
- Another example of this limited view of capability is found in the draft information material prescribed for the court process. It says that one of the factors the judge will consider when deciding whether to appoint a guardian is “that you are incapable of making those decisions – in other words, you cannot make those decisions or carry them out by yourself.” If this is the real test of in/capability; most British Columbians will fail. While this is only one condition a judge considers, it perpetuates old and outdated ideas about capability and the nature of decision-making which seems to underlie these Regulations.

We understand that there is intent to develop Practice Guidelines and possibly a course being developed for assessors.

1. Given there is no requirement for assessors to follow guidelines, how will these be used? How much is being spent on this effort?
2. Assessing incapability by assessing an adult’s cognitive function is the traditional approach based in the medical model. Any number of health care providers are doing this now for court applications. The new Regulations don’t appear to propose any different practice or skill-base than currently used under the outdated *Patients Property Act*.

It is concerning that the proposed Regulation 5 (3) allows that assessors may require a person, other than the adult, not to be present during the assessment EVEN IF the adult requests the person to be there. While there may be some concern of undue influence in a minority of cases, this must be balanced against the entirely 'abnormal' experience of being assessed and the potential this has for skewing the adult's responses. An assessor can always note their concerns about the other person but to deny an adult's request suggests that the assessor has already determined the adult incapable because they 'do not know what is good for them.'

A medical examination is required (Section 6) to presumably rule out physical or medical causes (such as medications) that may affect an assessment? The proposed Regulation 6 (1) (b) (also referenced in 6 (2)) allows for a medical practitioner to review the adult's medical status in lieu of a medical examination. Why is there no time frame for this? How old may the record of the adult's medical status be?

Regulation 8 says that an assessor must complete a report with details of the assessment, including the factors that were considered in making a determination of the adult's capability or incapability. But how is it that we can prove an adult is capable? **An adult is presumed capable and the onus is on the assessor to prove that the adult is incapable.** The assessor does not prove or 'approve' that the adult is capable.

With respect to Regulation 8 (c), it says that upon completing an assessment, the health care provider (assessor) has to 'advise the adult of their determination of capability or incapability.' Does this mean the adult is not entitled to a copy of the entire report? Also, any attorneys under an Enduring Power of Attorney or representatives and monitor under a Representation Agreement should be copied; unless there is proof that they have abused their duties.

The report form completed by an assessor for court appointed guardianship has one box to tick for personal care. However, unlike other areas, personal care is not automatically a plenary authority. Therefore assessors must assess and report accordingly (See Bill 29, Section 4 amending Part 2 Section 16 (1) (b)).

On Form 3, Certificate of Incapability, will anyone other than the Public Guardian and Trustee himself sign this form? If so, you need to provide space under the signature for person to print their name and title.

Is there a reason to label the forms used as Form 1, Form 2 and Form 3? This is meaningless. It also looks quite strange that those are the titles and appear in such a large font when they don't describe the purpose. Why not title them:

- Assessment Report for Court Appointed Guardianship
- Assessment Report for Statutory Property Guardianship
- Certificate of Incapability for Statutory Property Guardianship

Prescribed information material (Adult Guardianship Act, Section 5(3))

The draft information material provided for consultation needs considerable work on the wording, headings and formatting.

It must contain information about Representation Agreements, particularly as an alternative to guardianship and include referral to the community for information.

Are the assessment reports going to accompany this information? The information should refer to the assessments in any case.

The example does not answer some basic questions such as:

- What is the effect of having a guardian? People make assumptions about the term guardian. It needs to be explained.
- What is a hearing? When is it? How do I get there? Can I speak at the hearing? Can someone speak on my behalf?
- Who will help me find a lawyer? How much will it cost?

The material should be field tested. Did people who have the experience of being served as part of the Committeeship process help to put this together?

Adult Guardianship Regulation

Prescribed reporting and record-keeping requirements are very detailed. What are the consequences of failing to meet the requirements? What if records are in the custody of another party? Is it appropriate that a spouse, family member or friend who is acting as a property guardian or statutory property guardian is required to keep the same level of detail as required of a financial institution? Reviewing all these records will take considerable PGT staff time and expense. Likely there will be compromise on the amount and frequency of such oversight.

Affidavits and Guardianship Plans

These documents contain a lot of personal information and subjective comments about the adult. There are some questions to be answered:

- How private is this information?
- Who defends the adult in this? Who ensures the information is accurate?
- Under what authority can an application gather this information and release it to others? Does the applicant have to get authority from the adult? From relatives?
- Why are the ages of the adult's relatives requested?
- We know there is a tendency when designing such documents to ask for more information than is really required. Has anyone reviewed this from the privacy and freedom of information perspective?