

Planning for the Future

Legislative Change and Practice opportunities

Advance Care Planning
Guardianship
Health care consent

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Canadian Centre for Elder Law

- National organization dedicated to addressing the legal issues of older adults in Canada
- Law Reform
- Public Legal Education and Information
- Community Outreach

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Themes

1. Health Care Consent
2. Advance Care Planning
3. Changes to Guardianship
4. Care Facility Admission

It is all about consent!

- Who gives consent to a third party when an adult is legally incapable of doing so him/herself?
- In BC – various methods for health choices and/or financial choices
- The capable adult can decide to appoint someone, express written wishes, or rely on a default list for health care choices

Financial documents such as a Power of Attorney have no bearing for health care choices in BC

You have to talk to the person

- It is not the job of the health care provider to do advance care planning or “get their clients/patients” to do advance care planning
- It is a choice each capable adult makes – can also choose NOT to plan – this is a valid option as well

Client / Patient Choice

- Goals are to support the client / patient
- Support independence, freedom to choose
- A client / patient NEVER HAS to do advance care planning as part of admission, to get care or for any other reason – it is a choice

PLANNING FOR FUTURE DECISIONS

- NEXUS OF CAPABILITY
- OFTEN A “GREY” ZONE - CHANGING CAPABILITY

CAPABLE	INCAPABLE
YOU DECIDE	SOME ONE ELSE DECIDES (SDM)

Health care Consent Act - Rankings

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- Court-appointed Guardian (person) (now called a Committee)
- Representative
- Health Care Consent Act default list

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CURRENT DEFAULT LIST IN BC HEALTH CARE

1. Representative - Appointed in a Rep Agreement
2. Spouse
3. Child
4. Parent
5. Brother or sister
6. Anyone else related by birth or adoption to the adult
7. Public Guardian and Trustee as last resort

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New DEFAULT LIST IN BC FOR HEALTH CARE

1. Representative - Appointed in a written Representation Agreement
2. Spouse
3. Child
4. Parent
5. Brother or sister
6. Grandparent
7. Grandchild
8. Anyone else related by birth or adoption to the adult
9. Close friend
10. A person immediately related to the adult by marriage
11. Public Guardian and Trustee as last resort

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nexus of capability health care sdm (bc)

- HEALTH DECISIONS ONLY

CAPABLE	INCAPABLE
YOU DECIDE	GUARDIAN REPRESENTATIVE SPOUSE CHILD SIBLING GRANDPARENT GRANDCHILD ANY OTHER RELATION CLOSE FRIEND IN LAWS PGT

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ADVANCE DIRECTIVES

- IN THE REVISED LEGISLATION, NEW “ADVANCE DIRECTIVES” ARE CREATED
- SIMILAR IN CONCEPT TO A “LIVING WILL”
- FOUND IN PART 2.1 OF BILL 29
http://www.leg.bc.ca/38th3rd/3rd_read/gov29-3.htm

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ADVANCE DIRECTIVES

- Written, signed by 2 lay witnesses or 1 lawyer / notary
- Restrictions on who can witness an Advance Directive

(NOT PERSON PROVIDING CARE OR SERVICES FOR COMPENSATION, CHILD, PARENT, EMPLOYEE OR AGENT OF THE ADULT, PERSON WHO IS NOT AN ADULT, PERSON WHO DOES NOT UNDERSTAND ADULT’S FORM OF COMMUNICATION UNLESS TRANSLATION - S.19.5)

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WHEN AN ADVANCE DIRECTIVE DOES NOT APPLY

- 19.8 (1) This section applies if a health care provider reasonably believes that
- (a) the instructions in an adult's advance directive do not address the health care decision
 - (b) in relation to a health care decision, the instructions in an adult's advance directive are so unclear that it cannot be determined whether the adult has given or refused consent to the health care,
- (c) since the advance directive was made and while the adult was capable, the adult's wishes, values or beliefs in relation to a health care decision significantly changed, and the change is not reflected in the advance directive, or
- (d) since the advance directive was made, there have been significant changes in medical knowledge, practice or technology that might substantially benefit the adult in relation to health care for which the adult has given or refused consent in an advance directive

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ISSUES RAISED ADVANCE DIRECTIVES

- Doctors may be forced to interpret “legal” documents
- Advance directive may be “out of date”
- Should not conflict with a Rep Agreement, but confusion about which document should be used etc

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Changes on the Horizon

- BILL 29 - ADULT GUARDIANSHIP AND PLANNING STATUTES AMENDMENT ACT, 2007
- Passed
- Not yet in force
- AGA, HCCCFA, REP AGREEMENT ACT

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Patients property act

- Repealed - old “binary” all or nothing law
- Little evidence required for guardianship
- Largely disliked legislation

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Adult Guardianship Act

- Modern understanding of capability
- Higher standards of evidence for incapability
- Higher service requirements

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Guardianship Application

- 2 assessment reports, completed in prescribed form by HCP, describing extent of incapability (s5.2)
- Guardianship plan is prepared in prescribed form
- Any copies of Rep Agreement or POA if applicable
- Any Advance Directive

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Service of Guardianship notice

- s. 5(3) - all documents 30 days before hearing date
- must be served on: adult in question, spouse, adult children.
- if none applicable then another “near relative”
- guardian, if any
- proposed guardian, if not applicant
- PGT, if not applicant
- Known attorney or representative
- Any person the court directs₂₁

Mediation

- s.6 - Mediation will be mandatory if:
 - a) if it is a matter about whether or not the person who is subject to an application needs a guardian
 - b) who the proposed guardian should be
 - c) the adequacy of the plan for guardianship

Cannot be mediated

- s.6(2)
 - a) whether or not the adult is incapable
 - b) the content of any written or oral comments submitted by the PGT under s.7(2)(c)
 - c) any other prescribed matter

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Issues raised by mediation

- CCEL will commence a project into issues raised by elder and guardianship mediation issues
- Ethical considerations and abuse issues
- Practical and legal considerations

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Transition PPA - AGA

- s.8(4) Unless there is good and sufficient reason for refusing the appointment, the court must appoint as guardian a committee nominated under the PPA, before the Act was repealed, or a person nominated by the adult as guardian, if the nomination was:
 - a) made in writing, signed, mentally capable...
 - b) executed in accordance with wills execution...

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Temporary property guardians

- s.11 - PGT may apply to the court if it has reason to believe that...
 - a) adult incapable
 - b) urgent need ...protect damage or loss
 - c) no service required
 - d) no mental capability assessment required

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Reviewing a guardianship

- s.25 - A guardian **MUST** apply for a review if:
 - a) adult's needs, circumstances or ability to make decisions has changed significantly since the order was made and a change or cancellation of the order appears to be in the best interests of the adults
 - b) court orders a review (s.13)
 - c) guardian no longer able or willing to act

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NEW - Statutory Property Guardians

- Part 2.1 - s.32 - If a person has reason to believe that an adult may be incapable...
 - a) if HCP, request a (different?) HCP to assess
 - b) in any case, notify the PGT of the person's belief, and PGT may request an assessment
- HCP may report an incapability finding to a Health Authority designate, then PGT consults re: Health Authority findings if incapable

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Statutory Property Guardian

Once given notice by PGT, a right exists for another capability assessment (s. 33.3(a))

s. 33 - on becoming statutory property guardian, the PGT has all associated duties and must advise the adult, spouse or a near relative of the guardianship and of the incapable adults rights

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Re-Assessment

- s.34 - the incapability of an adult who has a statutory guardian must be reassessed by a HCP according to prescribed procedures if:
 - a) receiving mental health treatment (MHA)
 - b) the adult's statutory property guardian informs the Health Authority that a reassessment should occur
 - c) the adult requests reassessment and has not been reassessed for 12 months
 - d) the court orders a reassessment

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Replacing A Statutory Property Guardian

- s.36 - either an individual or an institution authorized to do trust business
- must be in prescribed form with documents
- PGT must be satisfied of the suitability of the proposed guardian and the proposed plan

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ISSUES

- NEW LAWS ARE NOT YET IN FORCE
- UNCERTAIN WHEN IN FORCE - LIKELY 1YR
- MAY BE SOME CONFUSION IN THIS TRANSITION TIME
- EDUCATION AT ALL LEVELS

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Some Useful resources

- CANADIAN CENTRE FOR ELDER LAW
www.ccels.ca (especially our “links” and “resources” pages)
- PUBLIC GUARDIAN AND TRUSTEE
www.trustee.bc.ca
- BC CENTRE FOR ADVOCACY AND SUPPORT
www.bcceas.ca
- REPRESENTATION AGREEMENT RESOURCE CENTRE
www.rarc.ca
- ADVOCACY CENTRE FOR THE ELDERLY
www.advocacycentreelderly.org (ONT)

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**Canadian Conference on Elder
Law / International Guardianship
Network Conference 2008
Nov 13-15, 2008
www.ccels.ca**