Blaney McMurtry LLP

PUBLICATION

Disability support: Guardianship applications

Date: January 23, 2020

This article was originally published by *The Lawyer's Daily* (www.thelawyersdaily.ca), part of LexisNexis Canada Inc. Click here to view the PDF file.

Under Ontario law, adult capacity is task-based rather than diagnosis-based.

The upshot is that an individual's required level of capacity can vary depending on the nature of the decision to be made. For example, having capacity to make a will or power of attorney (POA) is different from having capacity to manage property and finances or make personal care decisions.

When evaluating capacity, it is also important to keep in mind that capacity can vary due to medication and other health factors — even over the course of single day.

The preferred option when planning for the possibility of impaired decision making is to prepare POAs for property and care. Where a person lacks capacity to do this, and no POA is available naming someone who is able and willing to act, the solution is a guardianship application under Ontario's *Substitute Decisions Act* (SDA).

An adult guardianship application requires a court order declaring the respondent incapable of managing property or personal care or both. This is not a sweeping statement about the value of the person. It is merely a factual finding necessary to obtain the guardianship order. In fact, the guidelines that capacity assessors are required to observe include the following:

"The language of the SDA itself has implications for structuring a capacity assessment. In its legislation, the government of Ontario has codified the belief that mental capacity is, at its core, a cognitive function. The SDA operationally defines capacity as the ability to understand information relevant to making a decision and appreciating the reasonably foreseeable consequences of a decision or lack of decision. By emphasizing the cognitive underpinnings of

capacity, the presumption of capacity can only be overridden by compelling evidence of a person's mental or cognitive limitations in his or her 'ability to understand and appreciate'. Any existing incapacity must be of a nature and degree sufficient to interfere with the ability to manage property or meet essential personal care needs. The law recognizes that a capable individual can make unpopular, unwise or eccentric choices in the absence of incapacity. Capable but risky or even foolish decisions must be respected."

The guidelines then go on to discuss key tenets that must be observed: right to self-determination; presumption of capacity; decisional capacity; the domain-specific nature of incapacity; and guardianship as a last resort.

The last tenet can make guardianship difficult to obtain. It creates a disconnect between law/policy and practical need because it is at odds with the reality that sometimes guardianship may be necessary to simply accomplish pragmatic goals such as managing an RDSP or filing the joint election for a qualified disability trust under the federal *Income Tax Act* so that it will be eligible for testamentary tax rates.

The key components of any guardianship application are the management plan and the guardianship plan, both prescribed forms under the SDA. Completing them demands a thorough review and understanding of the respondent's needs with an explanation of the plan for each listed category of need.

The approved plans bind the guardians as schedules to the final order. If a change in circumstances outside the scope of the original plans and order arises, a new application, including service on the public guardian and trustee, is required for approval of new or amended plans.

The court has authority to require security as a condition of an applicant's appointment. However, this can be waived subject to an obligation to pass accounts regularly.

Where a minor (under 18 in Ontario) stands to receive a substantial amount of money or other assets from an inheritance or otherwise, but there are no trust provisions in the will, two options are available to address the lack of legal capacity. One is to have the funds paid into court with the balance being distributed upon the minor attaining the age of majority; the second is a childhood guardianship application under the *Children's Law Reform Act*.

Unlike some other provinces, Ontario parents are not automatically the guardians of property for their minor children. However, they have the legal right to custody of their children and to make personal care decisions on their behalf.

Whatever the reason for lack of capacity, proactive planning can put in place solutions more cost-effectively than fixes after the fact. That's where proactive disability planning, the subject of my next article, comes into play.

Blair L. Botsford is a partner at Blaney McMurtry LLP.