

## REASSESSMENTS OF INCAPABILITY: MINISTRY REVIEW

Dated: June 30, 2014

### BACKGROUND:

In the Report, “No Longer Your Decision: British Columbia’s Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults,” the Ombudsperson found that the *Patients Property Act* does not require that an adult have access to a reassessment, and made the following recommendation:

**Recommendation 25:** “The Ministry of Justice take steps to require that an adult has access to a reassessment on request before a certificate of incapability is issued and within a reasonable time frame after a certificate of incapability is issued.”

The Ministry of Justice committed to reviewing this recommendation and to publicly report on the results of this review.

### PURPOSE:

With respect to access to a reassessment within a reasonable time frame *after* a certificate of incapability is issued, legislation scheduled to come into force on December 1, 2014, will provide an adult with a right to a second assessment immediately following the issuing of a certificate as well as access to reassessments on an ongoing basis. Therefore, the focus of this report is consideration of whether a right to reassessment *before* a certificate of incapability is issued should be required by legislation.<sup>1</sup>

### CONCLUSION:

Enshrining in legislation a right to reassessment before a certificate of incapability is issued is not recommended. While the procedural fairness benefits of such a reassessment are recognized, a requirement for a further assessment prior to a certificate being issued would add additional procedures, lengthening the period of time between when the need for a statutory property guardian is identified and when assets are brought under the management of the guardian. This would be particularly problematic where an adult’s assets are at risk.

---

<sup>1</sup> Proposing legislative amendments for consideration by the Legislature is the manner that the Ministry of Justice could take steps to require a reassessment.

Legislative rights to a second assessment and reassessment following the issuing of a certificate of incapability provide an opportunity for the adult to challenge the original assessment while ensuring the adult's assets are protected. The right to reassessments, particularly, recognizes that an adult's circumstances may change over time. Also, a number of new procedural fairness requirements and standards for conducting assessments will enhance the process around and quality of the original assessment, as well as the process for issuing a certificate of incapability.

#### **ANALYSIS:**

A new legislative framework that will update the process by which the Public Guardian and Trustee becomes statutory property guardian for an incapable adult by means of the issuing of a certificate of incapability is scheduled to come into force on December 1, 2014.

The new statutory guardianship process will require an assessment of an adult to be conducted by a qualified health care provider, in accordance with prescribed procedures. A health authority designate must be satisfied of specified matters before issuing a certificate of incapability, including that the adult is incapable of making decisions about the adult's financial affairs, that the adult needs to make decisions about financial matters, and the needs of the adult would not be sufficiently met by alternative means of assistance. If a certificate of incapability is issued, the Public Guardian and Trustee becomes statutory property guardian for the adult, and has authority to make decisions about the adult's financial affairs.

The Ombudsperson noted that, while a reassessment may be arranged at the adult's request by the Public Guardian and Trustee or the health authorities, there is no provision under the existing legislative framework that guarantees that an adult has access to a reassessment. However, with the implementation of the new legislative provisions relating to the certificate of incapability process, statutory rights to a second assessment and reassessment after a certificate is issued will be introduced.<sup>2</sup> These rights will increase procedural fairness and will achieve the objective of providing a mechanism for an adult to challenge the original assessment, for example, where the adult does not agree with the results of the assessment. Also, the right to reassessments on an ongoing basis recognizes that an adult's decision-making ability may change over time, for example, with improvement of a medical condition.

As an added safeguard, an adult will be able to apply to court for a review of a determination of incapability on the second assessment or reassessment.

---

<sup>2</sup> See Appendix A for more details of the new statutory provisions regarding the second assessment and reassessments, and the circumstances where they are available.

A right to reassessment prior to a certificate being issued would provide a formal mechanism for an adult to challenge the finding of incapability before the implications associated with the issuing of a certificate of incapability take effect. These implications may include loss of autonomy with the Public Guardian and Trustee becoming responsible for managing the adult's property and possible stigma associated with the issuance of a certificate of incapability. However, this advantage must be weighed against the need to ensure that adults' property is protected from risk of loss, noting that an assessment subject to new standard procedures will have just been completed and that the adult will have the rights to second and re-assessment if a certificate is issued, as noted above.

While it is not every case, often the certificate of incapability process is commenced where there is concern that an adult's assets are at risk, for example, as a result of financial abuse, neglect or self-neglect. A right to reassessment prior to a certificate being issued would result in delay in the appointment of the Public Guardian and Trustee as statutory property guardian that could, in some cases, expose an adult's assets to risk of loss. While the Public Guardian and Trustee has authority to take certain actions in urgent circumstances to protect the financial interests of vulnerable adults, such as freezing or redirecting assets, there is a time limit within which these measures can be taken and which may expire by the time the original assessment is completed.

The implementation of the new statutory framework will introduce a number of procedural requirements that will enhance the fairness and quality of the original assessment, and the process for issuing a certificate of incapability. For example, new standards will be put in place around assessments, including who can conduct assessments, and a requirement that the adult can have a support person present unless it would disrupt or adversely affect the assessment process. The assessor will generally be required to advise the adult<sup>3</sup> of the purpose of the assessment, the possible consequences of the assessment (i.e., the adult may have a statutory property guardian appointed), and that the adult can refuse to be assessed, in which case the assessment may be conducted using observational information and information gathered from other sources. Significantly, the adult will be advised that he or she may raise questions of, and raise concerns with, the qualified health care provider with respect to the assessment in which case the qualified health care provider would consider those concerns and determine what steps to take.

---

<sup>3</sup> The exception is if there is reason to believe that advising the adult may result in serious harm to the adult, or significant damage or loss to the adult's property.

Also, under the new legislative framework, an adult and family member will be given notice of the intent to issue a certificate, with reasons, and provided with an opportunity to respond. This provides an opportunity for the adult to raise concerns with the assessment or other matters relating to the certificate of incapability process. In practice, the health authorities may determine that, in the circumstances, a reassessment or follow up on part of an assessment may be warranted.

## Appendix A

### **Second Assessment and Reassessment under the *Adult Guardianship Act***

New provisions of the *Adult Guardianship Act*, relating to the statutory property guardianship process, are scheduled to come into force on December 1, 2014. These provisions provide for a second assessment and reassessment of incapability for an adult.

#### ***Second Assessment:***

When brought into force, the new statutory guardianship provisions of the *Adult Guardianship Act* will require the Public Guardian and Trustee, when a certificate of incapability is issued for an adult, to advise the adult and, if contact information is known, the adult's spouse or near relative, that the Public Guardian and Trustee is the adult's statutory property guardian and that the adult may request a second assessment of the adult's incapability. This request must be made within 40 days of the date that the Public Guardian and Trustee gives or sends the advice reference above to the adult. This second assessment provides an opportunity for the adult to challenge the assessment, for example, if the adult disagrees with the assessment or did not appreciate the consequences of the assessment being done. If the result of the second assessment is a finding that the adult is incapable of managing the adult's financial affairs, the adult may apply to the court for a review of that determination.

#### ***Reassessment:***

The new statutory guardianship provisions of the *Adult Guardianship Act* will provide that an adult who has a statutory property guardian (i.e., an adult for whom a certificate of incapability has been issued) must be reassessed in the following circumstances:

- with some exceptions, the adult is receiving psychiatric treatment in a facility designated under the *Mental Health Act* and the adult is to be discharged;
- the adult's statutory property guardian informs the health authority designate that a reassessment should occur;
- the adult requests a reassessment and has not been reassessed within the preceding 12 months;
- the court orders a reassessment.

As with the second assessment, if the result of the reassessment is a determination that the adult is incapable of managing the adult's financial affairs, the adult may apply to the court for a review of that determination.