CONTESTED COMMITTEESHIPS

The purpose of this paper is to draw your attention to some of the practical issues of contested commiteeships as well as some of the pitfalls that both you and your client should be aware of.

A. PROCEDURAL MATTERS

As a preliminary matter, consider who your client is and whether the proposed patient was a long time client of yours and you are now approached by his family to act for them to apply to become your client's committee. Are you in a conflict? Do you have information in your file that the committee should not see?

If you receive instructions to oppose the choice of committee by another family member and that family member wishes to be committee, file and serve on the parties and Public Guardian and Trustee your client's Notice of Application under the Petition and their Affidavit of Kindred and Fortune. This ensures your client's application is properly before the Court and available for the Court's consideration. If your client's care plan, for example, is different than the Petitioner's, set out in as much detail as possible in their Affidavit of Kindred and Fortune. Also obtain other independent affidavits that support your client's application or care plan proposed.

While there is no requirement that you serve anyone other than the proposed "patient" and the Public Guardian and Trustee, Rule 16-1(3) provides a general direction that a petition and the affidavits in support must be served on "all persons whose interests may be affected by the order brought. The Court will want to know that the adult's next of kin and other persons who might be interested such as the holder of a Power of Attorney or Representation Agreement have been given notice. If you suspect a family member, for example, will oppose your application all the more reason to give them notice – you do not want to be "pulling a fast one" – the Court will frown upon you and your client and may result in a sanction of costs.

If the matter is opposed by the patient as to their incapacity, the matter must be heard by a judge: *BC (Public Trustee) v. Batiuk*, (1995) 10 ETR (2d) 207. See also Practice Direction 34.

B. MEDICAL EVIDENCE

Unless a Certificate of Incapability has been issued which has already declared the adult incapable of managing their affairs (you do not need new medical affidavits if you are applying to replace the Public Guardian and Trustee when they were appointed under a Certificate of Incapability: *Re: Brady* (1996), 14 ETR (2d) 118), the first step in any committeeship proceeding is to canvass the doctors for their opinions. You will need the opinions of two doctors who are members of the BC College of Physicians and Surgeons. Typically you will seek the opinion of the adult's family physician and any other doctor your client is aware of. If you only have the family physician's name then you might solicit him or her for a second doctor (they often will have someone else from their clinic or another colleague see their patient for the second opinion). If they are hospitalized this is easier to accomplish. If they are living at home and will not attend on another physician this becomes more problematic. If the adult is being followed by a mental health team, you could contact their case manager and see if a physician could make a home visit. Otherwise, you may be left having to hire a doctor to make a house call.

If there are concerns that the adult's caregiver is denying access to physicians and other health care practitioners, it may be possible for an entry order to be made pursuant to the *Adult Guardianship Act* (see below) but that will be up to the designated agency to make that order if they deem it in the adult's best interests.

You must have two medical opinions in the form of affidavits before the matter can be heard. Rule 7-6 (Physical Examination) is not available to the Court given the provisions of the *Patients Property Act*: see *British Columbia (Public Trustee) v. Batiuk*, (1995), 17 BCLR (3d) 288 and *Re: Scow* (1985), 63 BCLR 287. If the patient refuses or is being kept from attending, query whether another physician can review the chart and other collateral information provided to provide an opinion without actually having examined the patient. If the Court was not satisfied with that affidavit given the physician didn't examine the adult, the Court could then make an order to examine the patient under s.5 of the *Patients Property Act* or that the adult attend the hearing pursuant to Rule 9(2) of the *Patients Property Act Rules.*
The case of *Temoin v. Martin*, 2012 BCCA 250 perhaps opens the door for the Court to exercise its *parens patriae* power in certain circumstances that are in the best interests of the adult. The circumstances might be where the adult is personally at risk or is subject to abuse or neglect.

The medical opinions must be reasonably current – i.e. be within the last 6 months. However, if the Court is satisfied that at the time the opinions were made, that it was unlikely that the adult's cognitive function would improve, the Court may decide not to order a further medical report be obtained: *Re: Pepe,* 2012 BCSC 24.

VIEWS OF THE PATIENT

You must serve the adult unless the Court orders otherwise based on the opinions of the doctors that serving the patient would be injurious to them (not just upset them): *Del Orostica* (18 December 1987) Vancouver 872816. When the adult is served, make arrangements to have another person they know with them when the process server arrives (a family member, social worker, neighbour, etc.).

Adult Challenging Declaration of Incapacity

The adult may not think they are incapable or may not want the applicant to be their committee. Even if they have not formally responded to the application, they may well attend the hearing. You should be prepared for that and call out for them prior to chambers unless you are absolutely certain they will not be attending.

If they are opposing the declaration of incapacity, they will require the affidavits from physicians that refute the opinions contained in the affidavits in support of the Petition. As stated above if there are conflicting opinions, the Court may order a further examination and report – this can be by a new physician to the proceedings or a board of 3 medical practitioners designated by the College of Physicians and Surgeons at the request of the Court. If the adult asks for an examination under this section, unless the Court is satisfied the person is not mentally competent to form and express the request then the Court must order the examination.

Adult Opposing Choice of Committee

If the adult is opposing the choice of committee, they may offer up an alternative person or simply take the position that they do not want the Petitioner. If that is the basis of the contest, some thought should be given to an alternate who may be agreeable to the adult such as another trusted family member, a trust company or perhaps the Public Guardian and Trustee (the consent of any alternate must be

secured first). It is never recommended that two opposing parties become joint committees – it almost invariably fails and the result is a further application to remove one or both.

If the adult has executed a nomination of committee the court must appoint the person named unless there is "good and sufficient reason for refusing the appointment" (see s. 9 of the *PPA*). Where a representation agreement has been executed by the patient, again the Court is satisfied that there is no indication of disability on the part of the adult, no cause for concern with respect to the circumstances under which the agreement was executed, "the agreement is broadly worded demonstrating broad faith in the abilities of the representative" and there had been no significant change in the circumstances, the Court can "save" the representation agreement pursuant to s.19(b): *Lindberg v. Lindberg*, 2010 BCSC 217. Where those criteria are not met, however, the Court is not satisfied with the circumstances as of the date of the execution of the representation agreement, the Court may well not save it: *Dawes v. Dawes*, 2012 BCSC 1323.

The adult is entitled to counsel in the opposition of the Petition: *Re: Arden* (21 July 2005), Vancouver Registry L050721. With respect to affidavit evidence sworn or affirmed by the adult, the Court will admit it if 1) the evidence showed that the deponent could understand the nature and extent of an oath and could communicate the evidence; and 2) no medical information to the contrary existed. The onus is on the person opposing the adult's capacity to testify. You may want to consider having another lawyer take the adult's affidavit and then have that lawyer swear an affidavit of the steps taken by him or her to ensure that the above test was met.

COSTS

The first thing to discuss with your client at the very first meeting is the possibility of a contested Petition and the costs to them and possibly the adult. Costs are in the discretion of the Court. While the usual order on an **uncontested** Petition is generally ordered to be paid from the adult's estate on a special costs basis (see *Royal Trust Corp. of Canada v. Clarke* (1989), 35 BCLR (2d) 82 (BCCA) and *Re: Bush* (1995), 8 ETR (2d) 293), that is not necessarily the case in contested matters.

Your client should be prepared for the possibility that all of the expense will be borne by them personally. To see how out of control a contested Petition might get read *Re: Palamarek*, 2011 BCSC 563.

If the Court does not see the contest as being in the adult's best interests but is rather the product of "personal animosity", then the Court may order each of the applicants to pay their own costs: *Zhang v. Wu* (1999), 33 ETR (2d) 320.

There are however situations when the Court has awarded special costs to the losing Petitioner or party where the opposition was thought to be advanced in good faith and in the best interests of the adult: *Demediuk v. British Columbia (Public Trustee)* (1996), 21 BCLR (3d) 97.

If the matter proceeds to an appeal, the parties may well bear those costs: *Stubban v. Stubban*, 2002 BCCA 398.

Counsel for the adult is entitled to be paid by the adult's estate even if there is no order of costs in that regard: *Watson Goepel Maledy v. Watson*, 2009 BCSC 149

ADULT GUARDIANSHIP ACT

Currently under the *Adult Guardianship Act*, there is an ability of a designated agency (a mental health unit, for example), to apply to the Provincial Court for an access Order for the purposes of preparing a capacity assessment or to remove the adult from an abusive environment. The difficulty with this is that the applications cost the designated agencies legal fees and they do not have those funds in their budget. The limitations are of course that only the designated agencies can obtain these types of orders.

The current proposal to reform this area contained in the *Adult Guardianship and Planning Statutes Amendment* Act, 2007 includes the following new approaches to Court appointed guardians. There will be a specified list of persons that must be served and the application will include a plan for the care or guardianship. An Order can also be sought by the applicant to have the adult assessed (s.4). The new provisions will also specifically deal with contested matters and mandates a mediation (s.6) take place prior to the hearing of the matter. The only issues that cannot be the subject of a mediation are whether or not the adult is incapable, the Response submissions of the Public Guardian and Trustee or any other prescribed matters.

The new provisions will also allow the Court to divide duties and responsibilities between guardians (s.9). Again, unless those individuals are able to work together it is not recommended to have two opposing parties in these roles.