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BRITISH COLUMBIA
LAW INSTITUTE

COMMON-LAW TESTS OF CAPACITY PROJECT

Backgrounder

Proposed Legislative Changes in the Report on Common Law Tests of Capacity

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INTRODUCTION

In its *Report on Common-Law Tests of Capacity*, the British Columbia Law Institute through its Common-Law Tests of Capacity Project Committee recommends that the Legislative Assembly of British Columbia enact legislation called the *Personal and Estate Planning Statutes Amendment (Mental Capacity) Act*. The proposed act would amend a series of British Columbia statutes to deal with mental-capacity issues. This backgrounder summarizes the proposed legislative changes and briefly lists the reasons for adopting them.

WILLS, ESTATES AND SUCCESSION ACT

(1) Statutory-Will Procedure

What is the proposed change?

- A new division creating a procedure that permits an application to be made on behalf of a person who lacks testamentary capacity to court to authorize the making, amendment, or revocation of a will for the person lacking testamentary capacity.

Why should the legislature enact the proposed change?

- it will help people with diminished capacity and their families to tailor their estate plans to changing circumstances and to avoid potential hardships;
- by giving pride of place in the procedure to the wishes of the person with diminished capacity, it will enhance that person's autonomy and self-determination;
- it is consistent with similar procedures that have worked well in England and Australia, and it is also consistent with procedures in existing BC legislation on *inter vivos* gifts and powers of attorney and adult property guardianship.

(2) Presumption of Testamentary Capacity

What is the proposed change?

- A new section establishing that a will-maker should be presumed to be capable to make a will.

Why should the legislature enact the proposed change?

- it will harmonize the *Wills, Estates and Succession Act* with similar presumptions found in the *Power of Attorney Act* and the *Representation Agreement Act*, creating consistency for major life- and estate-planning documents;
- it will clarify that, as a starting place, a person should be presumed to have testamentary capacity;
- it will combat stereotypes by expressly saying that a person's way of communicating should not influence the assessment of a person's capacity to make a will.

ADULT GUARDIANSHIP ACT

(1) Necessaries

What is the proposed change?

- A new section consolidating existing statutory and common-law rules on payment for necessary goods and services delivered to a person who lacks the capacity to enter into a contract.

Why should the legislature enact the proposed change?

- it will clarify and simplify the law;
- it will make the law more accessible, by consolidating two rules and relocating them to a more obvious place in the statute book.

(2) Legal Counsel

What is the proposed change?

- A new section making it clear that a person whose mental capacity is at issue in proceedings under the act has the capacity to retain and instruct legal counsel.

Why should the legislature enact the proposed change?

- it will enhance access to justice for people with diminished capacity;
- it will lend greater certainty to legal counsel in representing a person whose capacity is in issue in proceedings under the act.

LAW AND EQUITY ACT

What is the proposed change?

- A new section spelling out the test of capacity applicable to an *inter vivos* gift.

Why should the legislature enact the proposed change?

- it will clarify the law, which has become confused by conflicting lines of authority;
- it will enhance the test of capacity's protective function.

PATIENTS PROPERTY ACT

(1) Nomination of Committee

What is the proposed change?

- Amending the existing section allowing for nomination of a committee to spell out the applicable test of capacity.

Why should the legislature enact the proposed change?

- it will clarify an obscure area of the law;
- it will promote the nomination of committees, which can be a useful personal-planning document.

(2) Legal Counsel

What is the proposed change?

- A new section making it clear that a person whose mental capacity is at issue in proceedings under the act has the capacity to retain and instruct legal counsel.

Why should the legislature enact the proposed change?

- it will enhance access to justice for people with diminished capacity;
- it will lend greater certainty to legal counsel in representing a person whose capacity is in issue in proceedings under the act.

REPRESENTATION AGREEMENT ACT

What is the proposed change?

- Amending an existing section confirming that an adult who has the capacity to make a representation agreement with standard provisions also has the capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement.

Why should the legislature enact the proposed change?

- it will clarify an uncertainty in the law, which had the effect of making it difficult for some adults who wished to make a representation agreement to obtain legal advice;
- it will promote the creation of representation agreements, a useful personal-planning document.

HEALTH CARE (CONSENT) AND CARE FACILITY (ADMISSION) ACT & MENTAL HEALTH ACT

What is the proposed change?

- New sections in both acts making it clear that a person whose mental capacity is at issue in proceedings under the acts has the capacity to retain and instruct legal counsel.

Why should the legislature enact the proposed change?

- it will enhance access to justice for people with diminished capacity;
- it will lend greater certainty to legal counsel in representing a person whose capacity is in issue in proceedings under the act.