
Law Reform Notes

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Law Reform Notes is produced twice yearly in the Legislative Services Branch of the Department of Justice, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the projects currently under way in the Branch, and to ask for responses to, or information about, items that are still in their formative stages.

The Branch is grateful to all of those who have commented on items in earlier issues of *Law Reform Notes*; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in *Law Reform Notes*, they should let those groups know what the Branch is considering and suggest that they give us their comments. We are unable to distribute *Law Reform Notes* to everybody who might have an interest in its contents, for these are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.

We emphasize that any opinions expressed in these Notes merely represent current thinking within the Legislative Services Branch on the various items mentioned. They should not be taken as representing positions that have been taken by either the Department of Justice or the provincial government. Where the Department or the government has taken a position on a particular item, this will be apparent from the text.

A: UPDATE ON ITEMS IN PREVIOUS ISSUES

1. Attorney for personal care

Once again, we received a number of responses to the suggestion for the creation of an attorney for personal care. Most supported both the general idea and most of the specifics of the legislative approach outlined in *Law Reform Notes* #11. One, though, suggested that a more detailed approach to terminal care decisions would be preferable, while another argued for a more complete review of the law of substitute decision-making.

As to the terminal care decisions, we believe that the attorney for personal care provisions that we have outlined would be sufficiently flexible to allow an individual to give detailed directions to the attorney if he or she

wished. As to substitute decision-making in general, we recognize that attorney for personal care provisions are only one part of the picture. They are, however, something that we feel can be dealt with as a self-contained item in a relatively simple way.

In the rest of the correspondence, where no questions about the scope of the initiative were raised, two issues seemed to recur. There were several suggestions that it would be useful to give legal effect to a medical certificate of incompetence. There were also some comments relating to judicial supervision of the actions of the attorney.

As to the medical certificate, we are still doubtful that it would in fact prove as useful as it might initially seem. No doubt it would be convenient for attorneys and third parties to have something they felt they could rely on, but the down-side of this is that they may rely too heavily on the piece of paper and pay too little attention to the infirm person. People may well find it useful to obtain medical opinions and/or certificates in specific situations, but this does not lead to the conclusion that medical certificates, as such, should be given a particular and standardized evidentiary value under the Act. It would, of course, be open to an individual to set out in a power of attorney what medical or other evidence of incompetence was required in order for the power to become active.

As to the possibility of establishing some form of the judicial supervisory authority in relation to attorneys, we feel that the best approach is to keep things simple, avoiding new processes such as this. We also think we should abandon the suggestion made in *Law Reform Notes #11* that a court might be given the authority to terminate a power of attorney without appointing a committee of the person. Practically speaking, we think (a) that a court would be put in a difficult position if it were asked to remove an attorney but make no alternative arrangements for the care of a person who was admittedly mentally incompetent, and (b) that people would normally be unlikely to bring court proceedings to remove an attorney unless they were also willing to take on the role of committee. We therefore think that adding new provisions on supervision or removal of attorneys would complicate things too much, for too little substantial benefit.

We should note, though, that under the suggested revisions to s.39 of the Infirm Persons Act that we discuss below, the court might have the authority to make interventions that were more limited than the appointment of a committee of the person. In some cases this might provide people with a middle ground between doing nothing and seeking appointment as committee.

2. S.39, Infirm Persons Act

In *Law Reform Notes #10*, we mentioned that a lawyer had suggested that s.39 of the Infirm Persons Act should be expanded so

that the court could deal with not only the estate, but also the person, of people who are not "declared to be mentally incompetent" but are nevertheless "through mental or physical infirmity . . ." unable to care for themselves. Closer examination since then of both the language of the section and the case law (*Re West* (1978), 20 NBR (2d) 686 (CA)) confirms that s.39 is limited to the estate, even though there are a couple of cases in which courts have, without analysis of the section, appointed a committee of the person under it (*Re Carr*, (1996), 183 NBR (2d) 34 (QB); *Sonier v Sonier* [1998] NBJ No.365 (QB)).

We are recommending to the Department that the section should be amended to include authority over the person as well as the estate. We are also recommending that, at the same time, the language of the section should be revised to make it more evident that the court has a variety of options under the section, not just the power to appoint a committee. In relation to both the person and the property, we are suggesting, the court should have the power to take either specific or general decisions on behalf of an infirm person without necessarily transferring the entire responsibility for the person or the estate to a committee.

We believe that clarifying that the court has this ability to fine-tune its interventions will respond to the comments we have heard that the current Act is too blunt an instrument and that limited interventions on behalf of infirm persons are sometimes all that is needed.

3. Canadian Judgments

Several past issues of these *Notes* have discussed the possible creation of a new Canadian Judgments Act governing the enforcement in New Brunswick of money judgments from other provinces. The particular question raised in Issue #11 was whether such an Act would need to spell out which kinds of money judgments -- particularly default judgments -- could or could not be enforced here. We received no response to this. In the past, though, the comments we have received have all favoured spelling things out. We have recommended that this should be done. We have also suggested that this should be done principally in the Act itself, rather than by regulations under the Act.

We have also renewed the recommendation that the Reciprocal Enforcement of Judgments Act should be amended at the same time. If a new Canadian Judgments Act along the lines we have discussed is introduced, it will make the Reciprocal Enforcement of Judgments Act unnecessary for Canadian judgments. We are recommending that the latter Act should be amended to permit reciprocal arrangements to be made with jurisdictions outside Canada instead of with Canadian provinces and territories.

4. Trustees Act

Following discussion in earlier issues, *Law Reform Notes #11* described how we thought the Trustees Act might be amended to ensure that the powers of trustees as "prudent investors" include the power to delegate investment authority to appropriate persons. In the process, the amendment should remove technical doubts about whether trustees can invest in mutual funds.

We received little further comment on this, but we note that previous correspondence had confirmed that this would be a worthwhile clarification. We have recommended that it should be made.

5. Interprovincial subpoenas

Law Reform Notes #11 examined a recommendation by the Uniform Law Conference of Canada that provinces should amend their Interprovincial Subpoena Acts to include subpoenas issued by administrative tribunals in other provinces (and confirmed by a Superior Court Judge of that province). We said we supported the recommendation, and we received no criticism of this. We are recommending that the Act should be amended accordingly.

6. Uniform Law Conference of Canada

At the Uniform Law Conference's meeting in August, three Acts were adopted. These were the Uniform Registered Plan (Retirement Income) Exemption Act, the Uniform Electronic Commerce Act and the Model

Limited Liability Partnerships Act. Naming the third of these a "Model" Act rather than a "Uniform" Act was a matter of Conference protocol. A "Uniform" Act is one that the Conference recommends for adoption by its member jurisdictions. In relation to limited liability partnerships, however, the Conference had reservations about the scope of the proposed legislation, which would deal with a wide range of liabilities and would extend to all kinds of partnerships. The Conference therefore adopted it as a model Act which would be suitable in jurisdictions that decided that this was the proper scope of the legislation, but it made no recommendation on whether the scope of the legislation should indeed be so broad.

We would be interested to hear opinions on how high a priority the first two of these items should be for consideration in New Brunswick. Comments on the third should be made to the Corporate Affairs Branch of the Department, who would be responsible for any initiative in relation to limited liability partnerships.

Our current view in relation to the exigibility of future income security plans is that this would be best dealt with in the context of the broader review of judgment enforcement law that was begun some years ago but has not yet come to fruition. The Uniform Electronic Commerce Act, however, is something that we are seriously considering investigating.

Other projects of the Uniform Law Conference continue to evolve. Information on the work in progress is provided in *Law Reform Notes #11*.

B. NEW ITEMS

There are no new items that are currently ripe for review in these *Notes*. We are in fact at a stage when we expect to review our program of activities shortly. We have a number of projects both large and small that we have worked on in the past but have not yet concluded. Among the large ones are the Mechanics' Lien Act, the Judgment Enforcement Act and the Limitation of Actions Act. Other substantial projects that have been suggested to us include a Class Proceedings Act and, of course, electronic commerce legislation.

Now is a good time for people to suggest other items which they believe should be placed on our agenda. We are expecting that our work on the Protection of Personal Information Act will be winding down shortly. This has been a major commitment for some time. Choices as to what should be done next will then be made. Suggestions would be very welcome.

Responses to any of the above should be sent to the address at the head of this document, and marked for the attention of Tim Rattenbury. We would like to receive replies no later than January 31st 2000, if possible.