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Guardianship

It is sometimes necessary to have other people make financial or personal care decisions for us. Such people are known as "substitute decision-makers". A substitute decision-maker is also called an attorney (not necessarily a lawyer!) who is named in a power of attorney document. Alternatively, a substitute decision-maker may be a guardian who has either applied to Court to be appointed or becomes guardian by operation of law. If a guardian is court appointed, he or she can replace or supercede an attorney appointed under a power of attorney. This brochure discusses how and why a guardian might be appointed. The information provided here only applies in Ontario.

A power of attorney is appointed by a person (the "grantor") when the grantor is mentally capable of making the appointment by signing a power of attorney document. See our brochure entitled *Capacity to Make a Will or Powers of Attorney* for a list of mental capacity criteria. A guardian is appointed by operation of law after a person has become mentally incapable and does not have a valid, signed power of attorney document. The duties and responsibilities of an attorney and a guardian are quite similar. However, there can be significant differences as the power of attorney document can set out other requirements or give more discretion than might otherwise be available to a guardian. An attorney is not required to 'pass their accounts' (allow a Court to audit their records) whereas a guardian may have to pass their accounts on a regular basis. The costs associated with passing accounts are charged to the incapable person.

The Substitute Decisions Act ("SDA") governs the appointment of substitute decision-makers, including guardians and powers of attorney. The Public Guardian and Trustee ("PGT") is the government office that is responsible for ensuring the Substitute Decisions Act (SDA) is given effect. The PGT acts as a last resort substitute decision-maker for incapable persons, maintains a register of guardians, and investigates reports of abuse or neglect of incapable persons.

Guardianship of Property

If a person has never signed a Power of Attorney document or has signed one but the attorney(s) named is/are unable or unwilling to act and that person becomes incapable, it is necessary for that person's financial affairs to be administered by a guardian. There are two types of guardians for property – a statutory guardian and a court-appointed guardian.

A guardian must be at least 18 years old to act. With some exceptions, those who provide health care or residential, social, training or support services to incapable persons for pay cannot be appointed as a guardian of property. The exceptions include the incapable person's spouse, partner, or relative, or the attorney named in a power of attorney signed while the person was capable. More than one person may be appointed at the same time with equal and joint responsibilities. Alternatively, more than one person may be appointed at the same time but each may be given different responsibilities.

Statutory Guardian

A "statutory guardian" is appointed by operation of law. The SDA provides for the appointment of a guardian of property without going to court in certain circumstances. The process begins when a person is assessed and found to be incapable of managing their property. The SDA sets out who may assess a person as being incapable of managing their property. These "qualified assessors", often psychiatrists, are independent of government but have undergone a specialized training program approved by the government. If a qualified assessor finds a person incapable of managing his or her property, the

assessor issues a Certificate of Incapacity to the PGT and the PGT automatically becomes the statutory guardian of property of the incapable person.

Anyone who has concerns regarding a person's ability to manage their property may ask a qualified assessor to conduct an assessment provided that the person does not object and the person has not appointed an attorney for property. A qualified assessor is often a practicing psychologist or psychiatrist who is certified by the Ontario government and who will charge a fee for this service. Before an assessment is performed, the person must be advised of the purpose of the assessment, the possible consequences, and the right to refuse the assessment. When a Certificate of Incapacity is issued, the PGT must inform the incapable person that the PGT has become his or her guardian of property and that the assessor's findings may be reviewed by the Consent and Capacity Review Board ("CCRB").

The SDA allows an incapable person's spouse, partner, relative, or trust corporation (in some cases) to apply to the PGT to take over the role of guardian of property. The applicant(s) must be approved by the PGT and the PGT may impose conditions on their approval.

A key component of the application to the PGT is the "management plan". It is a detailed plan setting out the incapable person's income, assets, expenses, and debts. The plan also outlines the steps the guardian intends to take in managing the incapable person's property. The PGT also considers the incapable person's wishes and the closeness of the relationship between the applicant and the incapable person. If refused by the PGT, the applicant may bring the matter to court.

Statutory guardianship of property ends when a capacity assessor reports that the incapable person has regained their capacity, the finding of incapacity is overturned by the CCRB, the incapable person dies, or the guardian resigns, dies, or becomes incapable him or herself.

Court Appointment

A judge also has the power to appoint a guardian of property for an incapable person. An application to court to become a person's guardian of property can be brought by anyone and is necessary where, for example, a power of attorney does not exist, a person refuses to be assessed, the applicant is not a relative, or the power of attorney is acting improperly.

The court must first find that the person is incapable of managing their property and, secondly, that he or she needs to have decisions made about his or her property. The court will not appoint a guardian if there is an alternative course of action available that does not require a finding of incapacity or which is less restrictive of a person's right to make his or her own decisions. A person is presumed to have capacity and the court will require compelling evidence to override this presumption. The court has the power to order that a person undergo a capacity assessment. The incapable person must be informed by the applicant of application and of their right to oppose it.

Once the court has determined that the person is incapable and a guardian is required, the judge considers the suitability of the proposed guardian and the management plan (as discussed above). The court considers whether the proposed guardian is trustworthy, cares about the welfare of the incapable person, and is likely to manage their finances responsibly. The court also considers the closeness of the relationship between the applicant and the incapable person as well as the views of others in the incapable person's life.

It is common for the court to place conditions on the appointment in order to safeguard the incapable person. A typical condition is a "bond" which is a special form of insurance that protects the incapable person's money in the case of theft or fraud by the guardian. Another common condition is the requirement to have the guardian's accounts periodically reviewed by the court (known as a "passing of accounts"). The court may appoint the PGT but only in situations where no one else is willing, suitable, or available.

Undisputed court applications may not require a hearing. In such cases, written material is provided to the judge. This written material includes a sworn statement by the applicant, a management plan, and at least one statement by a qualified assessor.

A court appointed guardianship ends if the court makes an order terminating the guardianship or if the incapable person or guardian dies.

Trusteeships

If an incapable person has not signed a valid power of attorney for property, it is not always necessary to apply for guardianship of his or her property. There is another option, commonly known as "trusteeship", which is available in limited circumstances. The administrators of some government benefits programs, such as OAS, CPP, and ODSP, have the ability to appoint a "trustee" to manage benefit payments on behalf of an incapable recipient. A trusteeship may be requested by a family

member or friend. A trusteeship is not appropriate if the incapable person has other assets, income, or legal matters that need to be managed. In such cases, it is necessary to seek guardianship.

Guardianship of the Person

Personal care encompasses six areas: health care, accommodation, safety, nutrition, hygiene, and clothing. Decisions may be necessary in one or more of these areas.

A capable person can appoint a substitute decision-maker to make personal care decisions for them in the event they become incapable by signing a power of attorney for personal care while capable. Unlike guardianship for property, there is no statutory guardian of personal care. A judge can appoint a guardian of the person for an incapable person where, for example, there is no power of attorney for personal care or where the appointed attorney resigns or becomes incapable.

Before appointing a guardian of the person, the court must be satisfied that the person is incapable of making decisions in at least one aspect of their personal care and there are decisions which the incapable person needs to have made. The court will not appoint a guardian if the need for making decisions can be met by an alternative course of action that does not require the court to find the person incapable of personal care or is less restrictive of the person's decision-making rights. The court has the power to order an assessment.

The court will consider the suitability of the applicant and the "guardianship plan" which is a detailed outline of how the applicant intends to carry out their responsibilities with respect to the incapable person's personal care. The applicant must inform the incapable person of the application and of his or her right to oppose it.

The court has the ability to make an order for full guardianship which covers all aspects of personal care decisions or for partial guardianship which covers only those areas where the person is incapable. More than one person may be appointed and each may be given different responsibilities.

As with an application for guardianship of property, a court hearing is not always necessary. In such cases, a judge can make a decision based on written material. This written material includes at least a sworn statement by the applicant, a guardianship plan, and two statements by qualified assessors.

Health Care Consent Act

The Health Care Consent Act ("HCCA") deals with decisions concerning treatment, admission to a long-term care facility, and assistance to people in such facilities. The HCCA describes who may act as a substitute decision-maker if a decision needs to be made for an incapable person about treatment or admission to long-term care facility and certain services provided in such facilities. Relying on the HCCA will be sufficient where other types of personal care decisions are not needed (accommodation or safety) or the incapacity is short term. If other types of personal care decisions need to be made and there is no power of attorney, it is necessary to apply for guardianship.

Need for Lawyer

There is no legal requirement to hire a lawyer when applying for guardianship by way of any of the methods described above. Some people choose to do so, however, especially when an application to court is necessary. If the application is successful, the guardian can use the incapable person's money to pay any legal fees.

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