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## **Guardianship – What Is It and What Is Required?**

**Rick Bickhram**

Tel: (416) 640-3626

Fax: (416) 369-1517

Email: [rbickhram@hullandhull.com](mailto:rbickhram@hullandhull.com)

**HULL & HULL LLP**  
Barrister and Solicitors

### **TORONTO**

141 Adelaide Street West, Suite 1700  
Toronto, Ontario M5H 3L5  
TEL: (416) 369-1140  
FAX: (416) 369-1517

### **OAKVILLE**

228 Lakeshore Road East  
Oakville, Ontario L6J 5A2  
TEL: (905) 844-2383  
FAX: (905) 844-3699

[www.hullandhull.com](http://www.hullandhull.com)  
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## ISSUES AFFECTING GUARDIANS

**Rick Bickhram<sup>1</sup>**

In Canada, about one in every 11 people over the age of 65 is living with Alzheimer's or a related dementia. There have been predictions that cases of this mind-robbing disease will more than double to 1.25 million within 30 years as baby boomers age<sup>2</sup>.

The *Substitute Decisions Act, 1992*<sup>3</sup> (the "SDA") governs planning for mental incapacity and substitute decision making for incapable adults. The SDA allows a person to apply to the court for the purpose of obtaining an appointment as guardian of property, a guardian of person or both.

### **INCAPACITY**

Finding a person incapable triggers the provisions under the SDA, which allows a person to apply for guardian of the incapable person. The appointment of guardian for an incapable person in the Province of Ontario has the effect of bestowing comprehensive powers upon the guardian to manage an incapable person's property and personal care. However, the SDA expressly prohibits a court from appointing a guardian of property for the person if it is satisfied that the need for decisions to be made will be met by an alternative course of action that does not require the court to find the person to be incapable of managing property or making personal care decisions and is less restrictive

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<sup>1</sup> Rick Bickhram is associate Counsel with Hull & Hull LLP. For further information, Mr. Bickhram may be contacted by e-mail at [rbickhram@hullandhull.com](mailto:rbickhram@hullandhull.com) or by telephone at: (416) 640-3626

<sup>2</sup> Alzheimer Society, *Rising Tide: The Impact of Dementia on Canadian Society*, 2009

<sup>3</sup> *Substitute Decisions Act*, 1992, S.O. 1992, c. 30

of the person's decision making rights than the appointment of a guardian.<sup>4</sup> For instance, if a person has granted a valid Power of Attorney, a finding of incapacity may not be required.

Pursuant to section 6 of the *SDA*, a person is incapable of managing property if:

the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.<sup>5</sup>

Under section 45 of the *SDA*, a person is incapable of personal care if:

the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.<sup>6</sup>

## **WHO MAY BE APPOINTED**

Sections 24 and 57 of the *SDA* set out the criteria that a court will consider when determining the appointment of a guardian. Section 24(5) of the *SDA* states:

Except in the case of an application that is being dealt with under section 77 (summary disposition), the court shall consider:

- (a) whether the proposed guardian is the attorney under a continuing power of attorney;
- (b) the incapable person's current wishes, if they can be ascertained; and

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<sup>4</sup> Ibid, s.22(3)

<sup>5</sup> Ibid, s. 6

<sup>6</sup> Ibid, s. 45

<sup>7</sup> Ibid, s. 24(5)

- (c) the closeness of the relationship of the applicant to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.<sup>7</sup>

Under section 24(5) of the *SDA*, when determining the appointment of a guardian the court is required to consider, among other things, the incapable person's current wishes if they can be ascertained. However, the incapable person's current wishes are not binding on the court.

Section 24 (1-4) of the *SDA* states that a person who provides health care, residential, social, training or support services to an incapable person for compensation is not permitted to be the guardian unless that person is the spouse, partner, relative or attorney of the incapable person. Security is also required from an out of province property guardian unless the court orders otherwise.

There is a history of jurisprudence, which considers whether a court favours the holders of powers of attorney over challengers. "It is clear that the court, does favour holders of powers of attorney over challengers because the powers of attorney represent the capable wishes of the grantor and are shown a high degree of deference"<sup>8</sup>.

## **DUTIES OF A GUARDIAN**

The powers and duties of a guardian are governed by the *SDA*.

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<sup>8</sup> Jan Goddard, Ontario's Substitute Decisions Act: Cases past and looking forward, unpublished

The responsibilities of a guardian are a big undertaking. It is important that the appointed guardian perform his or her function diligently and with sensitivity to the incapable person so that they can comfortably enjoy a safe life.

As the guardian of property, one of the main legal responsibilities is to maintain a record of accounts of all transactions involving the incapable person's property. Keeping records is one of a guardian's most fundamental duties. Guardians must keep a record of everything they receive and everything they pay out on the incapable person's behalf. The guardian should further be able to provide, without delay, a thorough description of everything they have received and disbursed for any given period of time.

Guardians may eventually be required or may wish to "pass accounts". A passing of accounts is a court audit of accounts which must be prepared and filed in a prescribed format. In guardianship matters, the passing of accounts must be on notice to the government body responsible for protecting incapable persons, either the Public Guardian and Trustee ("PGT") or the Children's Lawyer as the case may be. The passing of accounts will result in a decision by the court approving or criticizing the administration.

If the court approves the accounts, the guardian is freed from all liabilities during the period of the accounts for acts and omissions as the Property Guardian, except liability for fraud.

If the court does not approve the accounts, it can make a wide variety of remedial Orders, including an Order that the guardian must personally reimburse the incapable person for losses that it deems the guardian to have caused.

The records that a guardian for property must keep include:

- A comprehensive list of the incapable person's assets on the date of the guardian's appointment, and all documents relied on to prepare or verify that list. Assets include real estate, money, securities, investments, motor vehicles, other personal property, and any other claims, interests, or entitlements;
- An up-to-date list of all assets acquired and disposed of on the incapable person's behalf, and all documents relied on to prepare or verify that list. The guardian must include the date and reason for acquiring or disposing of the property and the name of the person from or to whom the assets were acquired or disposed;
- An up-to-date list of all assets that the guardian will pay out or receive on the incapable person's behalf, including details associated with the transaction, i.e. the date, reason, information about the account withdrawn from or deposited into, and the person with whom the guardian carried out the transaction, and all documents relied on to prepare or verify that list;
- An up-to-date list of all investments made on the incapable person's behalf, including amount, date, interest rate, and type of investment, and all documents relied upon to prepare or verify that list;
- An up-to-date list of the incapable person's liabilities on the date of the guardian appointment, and all documents relied on to prepare or verify that list;
- An up-to-date list of all liabilities the guardian has paid off or taken on, if any, on the incapable person's behalf, including the date, the nature of the liability, and

the reason for it being discharged or incurred, and all documents relied on to prepare or verify that list; and

- An up-to-date list of all compensation that the guardian takes, including the amount, date, and method of calculation and a list of the assets and the value of each asset used to calculate the guardian's management fee, if any, and all documents relied on to prepare or verify that list.
  
- A guardian for personal care shall keep a record of all decisions made by the guardian on the incapable person's behalf, including but not limited to, records of decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes.

When making decisions on behalf an incapable person, the guardian for personal care must consider what is in the best interest of the incapable person. Section 66(4) of the *SDA* elaborates on the criteria that a guardian for personal care must consider when taking into consideration the incapable person's "best interest".

1. In deciding what the person's best interests are for the purpose of subsection (3), the guardian shall take into consideration,

- (a) the values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;
- (b) the person's current wishes, if they can be ascertained; and
- (c) the following factors:
  - 1. Whether the guardian's decision is likely to,
    - i. improve the quality of the person's life,

- ii. prevent the quality of the person's life from deteriorating, or
- iii. reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate.

2. Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision.

It is important for a guardian of personal care to take into consideration appropriate living arrangements, including care, for the incapable person.

### **PREPARATION OF APPLICATION MATERIALS**

"The essence of a guardianship application is: please take away this person's right to make decisions because the person is mentally incapable; pick me exclusively to make the decisions for the person; trust me to do what is right. As a result, it is of great importance that the applicant, who voluntarily proposes to assume the role of a fiduciary, can concretely demonstrate the merits of the application with evidence that is full, fair, frank but focused on the dual aspect of such applications."<sup>9</sup>

The relief a guardian seeks in their guardianship application is severe. Given the severity of the relief sought, your Notice of Application should name or be served upon the following people:

1. The incapable person;
2. Any person appointed under a power of attorney for property or personal care;
3. Any trust company that is being proposed as a guardian;
4. The Public Guardian and Trustee or the Children's Lawyer;

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<sup>9</sup> Vani Santi, Property Guardianship Applications and Management Plans, November 2009

5. Immediate family members of the incapable person.

The courts have made it clear that they will appoint a guardian only on clear direct evidence of incapacity as defined under the *SDA*, and where there is further substantiated evidence that there is no other less intrusive alternative course of action. Within the supporting affidavit, the Applicant should also include any evidence of incapacity (capacity assessments and any other reports of incapacity from health care professionals). There must also be signed consents, which are included as exhibits to the Applicant's affidavit indicating that the person consents to being appointed as guardian for the incapable person.

Another requirement of the Applicant is to prepare and file a management plan for property and/or a guardianship plan for personal care. To be appointed as the guardian for an incapable person, the Applicant must demonstrate their suitability, particularly describing how the property of the incapable person will be properly managed and preserved for the benefit of the incapable person. The management plan satisfies this requirement.

The management plan should include the details of the incapable person's income, expenses, assets and liabilities. The order appointing the guardian will often require the guardian to submit an amended management plan for approval by The Public Guardian and Trustee, as all the information may not be readily available at the time the original plan is completed.

The guardian of property has a responsibility to ensure that the expenditures incurred are reasonable and necessary for the incapable person's support, education and care in accordance with guiding principles.

## **CONCLUSION**

The role of a guardian is an important one. It starts at the initial client interview. As lawyers, it is our responsibility to advise the proposed guardian of their duties and obligations at the outset. Failing to do so may result in extreme harm to the incapable person and to others, liability on the part of the proposed guardian or both.