

GUARDIANSHIP: POST-SETTLEMENT ADVOCACY

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PERSONAL INJURY LAWYERS

In Ontario, individuals who do not have mental capacity to make decisions regarding their financial or health care needs must have a legal Guardian appointed to act on their behalf¹. The appointment of a Guardian of Property is a significant step. It strips a person of his/her inherent right to make their own decisions with respect to health care and/or property. It is a cumbersome process which requires a finding of incapacity, followed by an Application to the Court, the Office of the Public Guardian and Trustee (PGT) or, in the case of a child, the Office of the Children's Lawyer (OCL)². This paper discusses when a Guardianship Application is made and provides an overview of the application process, including the important role the client's health care providers at this step of the claim.

Incapacity

In order to have a Guardian of Property or Person appointed, the client must first be deemed incapable. It is important to note that while a parent is automatically the Guardian of his/her child's person and has the inherent right to make decisions on their behalf. However, this does not encompass the right to make decisions regarding his/her child's property despite the fact that in the eyes of the law, children are presumptively incapable until they turn 18 years of age. This presumption reverses when the child turns 18 and any property the parent is holding for the child must be turned over unless there has been a finding of incapacity.

Section 2(1) of the *Substitute Decisions Act, 1992* (the "SDA") presumes that anyone who is 18 years of age or more is capable of making decisions on their own behalf. This presumption can only be overridden where a finding of

¹ This may not apply to mentally incompetent people who have given a valid Power of Attorney.

² The Application for Guardianship is served on the Office of the Children's Lawyer where the incapable person is under 18. A capacity assessment and further Guardianship Application must be served on the Office of the Public Guardian and Trustee when the incapable person turns 18.

incapacity has been made. Section 6 of the SDA defines the incapacity to manage property as follows:

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 thereof³.

Only designated Capacity Assessors can conduct assessments and provide opinions regarding capacity. Capacity Assessors are members of the College of Physicians and Surgeons of Ontario, the College of Psychologists of Ontario, the College of Nurses of Ontario (as a Registered Nurse or Registered Nurse (EC), the Ontario College of Social Workers and Social Service Workers (as a Registered Social Worker) and/or the College of Occupational Therapists of Ontario. They are overseen by the Ministry of Attorney General.

Although a plain reading of Section 6 (above) suggests that either branch of the test can be met in order to find incapacity, the Ministry of Attorney General requires Capacity Assessors to find that both parts of the test must be met in order to avoid a finding of incapacity⁴. Further, a finding of incapacity requires more than evidence of poorly informed or foolish decisions but rather evidence that the choices that have been made are the result of an impaired decision making process. Evidence of an impaired decision making process includes:

1. delusions or hallucinations which will likely materially affect the patient's understanding and management of finances;
2. a lack of orientation to time, place and person;

³ Section 45 of the SDA provides a similar test for a finding of incapacity for personal care. The person must be incapable of understanding 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 a decision.

⁴ Guidelines for Conducting Assessments of Capacity, Ministry of Attorney General May 2005. Also see *M.(Re)*, 2005 CanLII 57786 (ON CCB)

3. an inability to keep track of financial matters and decisions made;
4. insufficient calculating abilities given the circumstances;
5. specific thought process deficits that give rise to the conclusion that deficits in financial judgment also exist;
6. an impaired ability to learn the skills necessary to make the sort of decision required in an estate of the size, nature and complexity that he or she possesses;

In certain circumstances, even if the person is capable of handling basic consumer transactions and can manage small amounts of spending money, a finding of incapacity may be made if that person is easily confused or taken advantage of by others⁵.

Suffice it to say, that in all cases, the nature and degree of the alleged incapacity must be severe enough to warrant the Court's depriving the person of his/her right to live as he/she chooses⁶.

When is the Guardianship Application Made?

In most personal injury cases, a Guardianship Application is made at the same time the Motion to approve the settlement of the incapable client's *Statutory Accident Benefits* claim or tort action is made to the Court. The purpose of the Court's role at this step is to ensure the legal rights of the incapable client are not compromised or given up without proper compensation⁷. Rule 7.08(1) of the *Rules of Civil Procedure* which states as follows:

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect

⁵ *Lazaroff v. Lazaroff*, 2005 CanLII 44834 (ON SC).

⁶ *Re Koch*, 1997 CanLII 12138 (ON S.C.), (1999) 33 O.R. (3d), 485.

⁷ *Wu Estate v. Zurich Insurance Co.* [2006] O.J. No. 1939 (C.A.)

of the claim, is binding on the person [emphasis added] without the approval of a judge.

A detailed listing of the persons' assets, liabilities, financial needs and how their money will be spent must accompany the Application. Once appointed, the Guardian will be required to maintain detailed records as to how the money has been spent and will be required to file a periodic accounting with the Court, the PGT or the OCL to prove the incapable person's finances are being managed appropriately. Once the child turns 18, regardless of the severity of the brain injury, he or she is presumed capable and the entire process must be repeated.

The Guardianship Application

Anyone can bring a Guardianship Application ("Application") except a person who provides health care, residential, social, training or support services to the incapable person for compensation unless that person is the spouse, partner, relative or attorney of incapable person. The Application can include a request the appointment of a single or joint guardian. Alternatively, it may be preferable to appoint a bank or trust company to act as the Guardian where the incapable person has significant assets or there is no one willing to take on this role. Quite often, families will bring the Application jointly with a bank or trust company in order to alleviate them of the onerous record keeping requirements. In all circumstances, the PGT is the Guardian of last resort and will not be appointed unless the incapable person is at extreme risk due to self-neglect, financial exploitation or there is no other appropriate solution⁸.

The Application and accompanying documents must be served on the spouse of the incapable person, all their children over the age of 18 years, brothers and sisters over the age of 18 years old and the person's parents unless those persons consent to the Application and waive their right to service. The

⁸ Section 24 of the *Substitute Decisions Act*, R.S.O. 1992, S.O. 1992 c.30.

following factors will be taken into consideration by the Court and the PGT when appointing a Guardian:

1. whether the proposed guardian is the attorney under a continuing power of attorney
2. the incapable person's current wishes if they can be ascertained
3. 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 to the proposed guardian to the incapable person
4. the proposed guardian's financial circumstances and credit worthiness
5. the proposed guardian's level of experience in managing large amounts of money and making investment decisions

The Court can require the proposed Guardian to post security if it has concerns regarding suitability of the applicant or if the applicant lives out of province.

The Management Plan

The key component of any settlement approval and/or Guardianship Application is the Management Plan. The Management Plan is complete listing of the incapable person's income, expenses, assets and liabilities together with a plan as to how the proposed Guardian will manage the incapable person's assets. This requires the Guardian to describe in detail, the level of medical and rehabilitation services that will be provided going forward, the anticipated cost of these services, an explanation as to how these services will benefit the incapable person and a summary of recommended services that are not being provided along with justification for same.

The client's health care team plays a significant role in determining the level of medical and rehabilitation services the client needs going forward. As in most cases, the amount of the settlement is not enough to pay for a lifetime of services and treatment that mirrors what the client has received to date. The health care team's skills and expertise will be relied upon to identify the basic amount of services their client requires in order to maintain a good quality of life within his/her monthly budget. The team will also be required to provide justification for why certain services are being discontinued. Ideally, the health care team will prepare a supplementary Life Care Plan that includes medical support for the services included in as well as left out of the Management Plan.

In all cases, a well written & medically supported Management Plan becomes the tool used to advocate on behalf of the client in to ensure the client's quality of life improves or, at the very least, is maintained in such a way that he/she has a lifetime of comfort and independence.

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