

THE DUTIES AND POWERS OF A GUARDIAN OF PROPERTY OF MINORS UNDER THE *CHILDREN'S LAW REFORM ACT*

Introduction

The purpose of this fact sheet is to explain the important role of a guardian of property of a minor (“guardian”). It explains the purpose of a guardian, what information the Court requires for guardianship applications, how a guardian is supposed to meet his or her obligations, and the legal responsibilities and powers of a guardian. The powers and duties of a guardian of property of a minor are outlined in legislation called the *Children’s Law Reform Act* (the “CLRA”).

This fact sheet is a summary only. It is not legal advice and if you have any questions about how to interpret this information, you should consult with a lawyer.

The Purpose of a Guardian of Property for a Minor

A guardian of property is a court-appointed individual who steps into the shoes of a person who is considered legally incapable of making financial decisions by nature of their minority and who carries out financial transactions on that minor’s behalf. Among other things, the guardian may pay bills, invest money and make purchases to meet the minor’s needs.

There are numerous situations in which money may be payable to a minor, including:

- under a court order for damages;
- in an estate (with or without a will);
- under a life insurance policy where the child has been named as the beneficiary;

- under an RRSP or other pension plan; or
- under some other death or accident benefit.

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At law, a minor is considered to be incapable of making his or her own financial decisions. As a result, when a minor is entitled to receive a substantial sum of money the minor requires a third-party to step in to manage those funds on the minor's behalf. If a minor does not have a guardian, the money he or she is entitled to receive will be paid into court to the Accountant of the Superior Court of Justice ("ASCJ"), who will hold the funds until either (1) the minor reaches the age of majority; or (2) a guardian of property is appointed by the court and the court orders that the funds shall be paid out to that guardian.

Passing control of a minor's income and assets to a guardian of property does not mean that the guardian assumes ownership of the income and assets. Ownership remains in the name of the minor, and the guardian is accountable to the minor for how he or she manages the minor's money. However, the guardian does not become personally liable for any of the minor's financial needs. The guardian is instead responsible for managing the minor's funds in his or her best interests. By performing the role diligently and sensitively, the guardian is in a position to enhance the minor's quality of life and to invest the minor's funds for his or her future needs.

The Legal Responsibilities of a Guardian of Property for Minors

A guardian of property is responsible for the care and management of the minor's property. The guardian is required to:

- act in accordance with the management plan established for the property; • keep careful records (called "accounts") of all dealings with the minor's property; • make proper investments in accordance with the management plan approved by the Court (guardians must comply with the *Trustee Act* requirements for the investment of trust funds); and
- transfer all the property to the child at the age of 18, unless ordered otherwise by the Court.

Who May Bring a Guardianship Application?

A parent or any other person may be appointed as guardian of a minor's property

upon application to the Court and with notice to the Office of the Children's Lawyer (the "OCL"), which is the government of Ontario body that protects the legal rights of all minors in the province. In Ontario, a parent is not automatically the guardian of property of his or her minor child. A parent can only receive such authority on

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behalf of a child by statute, court order or other document, such as a will or life insurance policy.

Generally, a minor's parents are preferred as guardians over non-parents and both parents of a minor child are equally entitled to be appointed as guardians. However, another family member or concerned person may also apply to be appointed as the minor's guardian, if appropriate. In addition, more than one person may be appointed as a guardian. If there are multiple guardians, they are jointly responsible for their management of the minor's finances. Where the amount of money the minor is entitled to receive is large, the Court may require an insured professional, like a trust company, to act as guardian, either on their own or with a parent or other concerned person.

Which Court Can Make a Guardianship Order?

The Ontario Superior Court of Justice and the Ontario Court of Justice have jurisdiction to make guardianship orders for minors' property. However, only the Ontario Superior Court of Justice has jurisdiction to grant a guardianship judgment that permits encroachment, which means that the minor's funds can be paid out and spent for the minor's benefit. Most commonly, guardianship applications are brought in the Superior Court of Justice where the minor will need access to the funds during his or her minority.

When the Court grants a guardianship order, it is specific to the property. Accordingly, a guardianship application should only be commenced after the minor's entitlement to property (and the quantum) has been finally determined. In order for the OCL and the Court to assess the application against the requirements of the *CLRA*, particularly the reasonableness of the proposed guardian's plans, the nature and quantum of the minor's property must be ascertained.

The Materials Required for a Guardianship Application

The following materials are required for an application to be appointed as a

guardian for property for a minor child:

- information concerning the minor child and, if applicable, information concerning any litigation and settlement proceeds received on behalf of the minor;

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- information concerning the minor's family history and if applicable, information as to why other persons are unwilling or are unsuitable to become guardian; and
- the proposed guardian's connection to the minor child and reasons supporting why the proposed guardian is the most suitable person to become guardian.

Posting a Bond

The Court requires the guardian of property of a minor to post a bond to protect the minor's interests. However, this requirement may be dispensed with where the proposed guardian is a parent of the child or a professional trust company. If a parent is requesting that the Court dispense with the requirement for a bond, the parent must satisfy the Court as to why it is not appropriate or necessary to be required to post a bond. Usually, the Court will not dispense with a bond where the proposed guardian does not have assets in excess of the amount of the minor child's

funds. The Management Plan

A guardianship application also requires a Management Plan to be submitted. The Management Plan is a document outlining the details of how the guardian plans to manage the minor's property. It should be prepared and signed by the proposed guardian, and not the financial advisor or lawyer, because it is the proposed guardian that the Court will hold accountable.

The proposed investments in the Management Plan should reflect consideration of the duty to act as a prudent investor under the *Trustee Act*. The Management Plan should allow for flexibility in the type of investments made for the benefit of the minor by providing a percentage range of investment as among cash, fixed income and equities, and should include particulars of any fees or commissions associated with the investments. It should also be drafted in a way that is forward-looking, in order to try to capture what the needs of the minor will be in the foreseeable future.

The Management Plan must set out details of any authorized encroachments, for example for the minor's treatment needs, assistive devices, medication, income tax and preparation of income tax returns, and future known legal fees. It must also be sufficiently specific to permit meaningful review on a passing of accounts, discussed in more detail below, or when the child reaches the age of majority. If the guardian seeks authority to use the minor's funds for the minor's support, details supporting this request will be required, particularly if the proposed guardian is a parent since

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under the *Family Law Act* (the "FLA") a parent has a legal obligation to support his or her child.

The Office of the Children's Lawyer

The OCL is an independent law office operating within the Victims and Vulnerable Persons Division of the Ministry of the Attorney General in Ontario. The OCL delivers programs in the administration of justice on behalf of children with respect to their personal and property rights. The OCL has in-house lawyers, clinicians and agents across the province. Lawyers within the OCL represent children in various areas of law including child custody and access disputes, child protection proceedings and civil litigation.

An application to be a guardian of property for a minor must be served on the OCL. The OCL represents the legal interests of the minor at the request of the Court. The OCL's role in a guardianship application is to review the materials submitted by the proposed guardian (called the "Applicant") and to provide comments and raise any concerns about the guardian's plan to manage the minor's money.

In reviewing a guardianship application, the OCL will look at the factors listed in the *CLRA* and considered in the case law, such as:

- the Applicant's ability to manage the property;
- the merits of the plan for the care and management of the minor's property (Management Plan put forward by the Applicant);
- whether the anticipated rate of return on the minor's property is likely to be more favourable than if the funds are paid into court to the ASCJ;
- the Applicant's ability to keep accounts, to account and, if required, pass accounts;

- whether the Applicant will charge compensation for acting as guardian; and
- the Applicant's ability to post a bond, if required.

What Factors Does the Court Consider?

In reviewing the guardianship application, the Court considers all circumstances including the ability of the proposed guardian to manage the property, the merits of the proposed Management Plan for the investment of the minor's funds, the views and preferences of the minor where they can be reasonably ascertained, and the

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position of the OCL regarding its review of the application. The Court will also consider the best interests of the minor.

Maintaining and Passing Accounts

One of the main legal duties of a guardian of property is to keep accounts (i.e., detailed records and supporting documentation) of all transactions involving the property. This includes all investments, receipts and disbursements of the minor's funds. Where a large amount of money is involved, the guardianship order may require the guardian to regularly return to the court to bring an application to pass the guardianship accounts at fixed intervals. The intervals may range from one to five years.

Authority of a Guardian

A guardian of property of a minor child has charge of and is responsible for the care and management of the property of the child. The guardian is allowed to do anything on the minor's behalf in relation to his or her property subject to the limits of the court-approved Management Plan. For example, within the confines of the Management Plan, a guardian is allowed to do the following on the minor's behalf:

- open and close bank accounts;
- apply for benefits or supplementary income to which the person is entitled; •
- deal with investments;
- collect debts;
- pay bills ;
- buy goods and services ;

- start or defend lawsuits, if there are financial implications;
- lend, sell, store or dispose of personal belongings; and
- maintain or sell a house or vehicle.

Where the guardianship order does not expressly allow the guardian to spend the minor's money, the guardian only has authority to hold and invest the money until the child reaches the age of majority.

The guardian should not use the child's money to pay a lawyer for a court guardianship application unless the guardianship order authorizes it.

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The child's money cannot be used for the general financial support of the child. Parents have a legal obligation to support their children. As a result, guardians are not entitled to use the child's funds to provide support for the child unless the guardianship order/management plan authorizes it.

Assistance from the Court

If any difficult questions about the management of the property arise, a guardian may apply to the court for directions on how to resolve the issue. The Court will give directions as to what it considers to be in the best interests of the minor.

Maintaining Confidentiality

A guardian of property is not allowed to disclose any information contained in the guardianship accounts and records unless required to do so in order to make transactions on the minor's behalf or otherwise fulfil the duties as a guardian, or if required by law, or if ordered to do so by the Court.

Personal Injury Proceeds

If the guardianship order applies to funds received by the minor from a personal injury settlement or award, information about the minor's ongoing needs will be required (for example, Future Care Costs Report, Home Accessibility Report etc.). Factors considered will include the timing and size of payments from a structure, the costs of housing, transportation, therapies, assessment, attendant care, professional fees, etc. Depending on the quantum involved, and the structure and award, a corporate guardian (i.e., a professional trust company) may be more appropriate.

If there is a possibility that a minor may be incapable of managing property upon attaining the age of majority, the guardianship judgment should include a term requiring the guardian to arrange for the minor to be assessed by a qualified capacity assessor prior to the minor's 18th birthday. The judgment should set out who will arrange for the assessment and how it will be paid for and provide that, if the minor is found incapable of managing property, making personal care decisions, and granting powers of attorney for property and personal care, arrangements will be made for a guardian to be appointed in accordance with the *Substitute Decisions Act, 1992*.

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Conclusion

Those who are unable to manage their own finances and are not capable of making their own financial decisions by reason of being a minor are vulnerable to exploitation. Since minors are not able to make a valid power of attorney for property, no person, even the minor's parent, is able to manage a minor's funds unless authorized by the court to do so. This is so that the minor can be protected from exploitation. Other than having a minor's funds paid into court, guardianship is the only means for a person or trust company to obtain the requisite authority to manage the financial affairs of minor children. The decision of the court to appoint a guardian of property for a minor is not done lightly, as it is the court's way of determining that it will entrust some other person or entity with the important responsibility of making financial decisions for a minor.

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