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## THE DUTIES AND POWERS OF A GUARDIAN OF THE PERSON

### Introduction

The purpose of this fact sheet is to explain the important role of a guardian of the person (“guardian”). It explains what is involved in being a guardian, the powers of a guardian, what a guardian is allowed to do and how a guardian is supposed to meet his or her obligations to an incapable person.

The powers and duties of a guardian of the person are fully set out in the *Substitute Decisions Act, 1992* and the *Health Care Consent Act, 1996*. **This fact sheet is a summary only.** It is not legal advice, and if you have questions about how to interpret this information, you should consult with a lawyer.

### The purpose of a guardian of the person

The essential role of a guardian of the person is to act as a substitute decision maker. The guardian “steps into the shoes” of an incapable person and makes personal care decisions when necessary. These need to be made carefully and sensitively.

Personal care decisions can include decisions about where to live, what to eat, safety, clothing, personal hygiene and healthcare, including treatment.

Not every incapable person has, or needs, a guardian of the person. The incapable person may have already appointed an attorney for personal care. The *Health Care Consent Act* also provides for substitute decision making for treatment and admission to a nursing home for every incapable person, even one who has no guardian or attorney for personal care.

A guardian of the person can only be appointed by the court. The court will not appoint a guardian if there is an alternative that is less restrictive of the person's decision making rights and does not require the court to declare the person incapable. Therefore it is only in exceptional circumstances that an incapable person needs or will get a guardian.

Examples of these exceptional circumstances may include:

- Where a power of attorney cannot be used because the person asserts that he or she is capable
- Where an incapable person is living in an environment of abuse or neglect
- Where a dispute arises between family members over the care or custody of an incapable person

#### Powers of a guardian of the person

The need for a guardian of the person arises only in extraordinary situations. Therefore a court order appointing a guardian may include powers for the guardian that go beyond the powers of an attorney for personal care or any other substitute decision maker.

The powers of a guardian of the person may include the following:

- The right to exercise custodial power over the incapable person, determine his or her living arrangements and provide for his or her shelter and safety
- The right to instruct a lawyer, settle claims and commence and settle proceedings on the incapable person's behalf, in certain circumstances
- The right to have the same access to personal information, including health information and records, that the incapable person could have access to if capable, and the right to consent to the release of that information to another person, with some exceptions
- The right to make decisions about the incapable person's healthcare, nutrition and hygiene

- The right to make decisions about the incapable person's employment, education, training, clothing and recreation and any social services provided to the person
- The right to apprehend the person, with the assistance of a police officer, by entering specified premises at specified times

The powers set out above are not automatically included in every court appointment of a guardian of the person. A guardian who wishes to exercise any of the powers described above should consult with a lawyer before doing so in order to ensure that the specific power in question has been given to the guardian by the court.

A guardian of the person who is asked to consent to electric shock as aversive conditioning, sterilization or the removal of tissue for transplantation, or the incapable person's participation in a procedure whose primary purpose is research should consult with a lawyer before making a decision.

#### Guiding principles for decision making

In making a decision for an incapable person, a guardian of the person must follow these principles:

1. If the guardian knows of a **wish** the person expressed when capable, and the wish applies to the circumstances, the guardian must make the decision in accordance with the wish. For example, if the guardian knows that the incapable person did not wish to receive antibiotics for the treatment of pneumonia, the guardian must refuse to consent to treatment with antibiotics.

The wish can be in writing, such as in a "living will", but it does not have to be.

2. If the guardian does not know of any wish, or if it is impossible to comply with the wish, the guardian must act in the incapable person's **best interests**. In doing so, the guardian must consider:

- The values and beliefs the guardian knows the person held when capable and believes the person would still act on if capable

- The person's current wishes (if they can be ascertained)
- Whether the decision is likely to improve the person's situation, prevent the person's situation from deteriorating or reduce the extent to which, or the rate at which, the person's situation is deteriorating. The person's situation could include his or her condition and well being (where a treatment decision is being made) or his or her quality of life (where placement decision or other personal care decision is being made)
- Whether the incapable person's situation is likely to improve, remain the same or deteriorate if the guardian does not choose the course of action under consideration
- Whether the benefit to the incapable person from the proposed course of action outweighs the risk of harm to him or her
- Whether there is a more desirable alternative of action under consideration (for example, a less restrictive or intrusive course of treatment, or a less restrictive option than admission to a long-term care facility)

A guardian of the person is entitled to receive the information relating to the incapable person that is necessary for the guardian to make a decision regarding treatment or admission to a nursing home. This may include medical reports, hospitals records and reports and records from a community care access centre.

#### Assistance from the Consent and Capacity Board

Sometimes a guardian may find it difficult to interpret a wish, or may believe that if the incapable person were capable at the present time, and asked to make the decision, he or she would now make a decision contrary to the wish.

If the decision is about treatment or admission to a nursing home, the guardian may ask the Consent and Capacity Board to assist him or her in interpreting the wish or deciding whether the guardian may depart from the wish.

A guardian who wants to ask the Consent and Capacity Board for assistance may wish to consult with a lawyer before doing so.

### Assistance from the court

A guardian of the person can also ask the court for directions on any questions arising in a guardianship. This involves a formal court procedure, and the guardian may want to consult with a lawyer for assistance in doing so.

### Records to be kept by a guardian of the person

A guardian should always keep a notarized copy of the court order appointing him or her as guardian in a safe place.

The records that a guardian must keep include:

- A list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date
- A copy of medical reports or other documents, if any, relating to each decision
- The names of any persons consulted, including the incapable person, in respect of each decision and the date
- A description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed
- A description of the incapable person's current wishes, if these can be ascertained, and if they are relevant to the decision
- For each decision taken, the guardian's opinion on each of the guiding principles listed above

### Legal responsibilities of a guardian of the person

With the right to have such powers over another person comes responsibility for how those powers are used. A guardian of the person must exercise his or her duties and powers diligently, and in good faith. When a guardian is appointed and makes a personal care decision for an incapable person, that decision must be made solely for the benefit of the incapable person.

The following are some of the legal responsibilities of guardian of the person:

- The guardian must explain his or her powers and duties to the incapable person
- The guardian must encourage the incapable person to participate in decisions the guardian makes, to the best of the incapable person's ability to do so
- The guardian must seek to foster the incapable person's independence
- The guardian must choose the least restrictive and intrusive course of action that is available and is appropriate
- The guardian must seek to foster regular personal contact between the incapable person and supportive family members and friends
- The guardian must consult from time to time with supportive family members and friends who are in regular personal contact with the incapable person and with the persons from whom the incapable person receives personal care
- The guardian must keep records of decisions he or she makes on the incapable person's behalf
- The guardian must make reasonable efforts to find out if the incapable person expressed any wishes and instructions, while capable, that apply to the decision the guardian is making
- The guardian must not use confinement, monitoring devices or physical or chemical restraints on the incapable person or consent to their use unless doing so is essential to prevent serious bodily harm to the incapable person or others, or allows the incapable person greater freedom or enjoyment

#### Maintaining confidentiality

A guardian is not allowed to disclose any information contained in his or her records unless required to do so in order to make decisions on the incapable person's behalf or otherwise fulfill the guardian's duties, or if ordered to do so by a court.

A guardian must produce copies of his or her records upon request to:

- The incapable person
- The incapable person's guardian under a continuing power of attorney for property or guardian of property
- The Public Guardian and Trustee

### Conclusion

A guardian of the person is entrusted by the court with the important responsibility of making decisions for an incapable person about shelter, diet, clothing, safety, hygiene and health care, including treatment. This responsibility, and the powers that come with it, are always subject to limits placed on them by the court. Decisions must be made sensitively, with respect for the incapable person and in consultation with supportive family members and friends. The guardian also has a duty to follow the guiding principles for decision making set out in the law, and exercise his or her powers with care.

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