

GUARDIANSHIP CHECKLIST: PERSONAL CARE

The Duties and Powers of a Guardian of the Person/Attorney under a Power of Attorney for Personal Care (“POAPC”)

The powers and duties of a guardian/attorney of the person are fully set out in the *Substitute Decisions Act, 1992*¹(the “SDA”) and the *Health Care Consent Act, 1996*²(the “HCCA”).

The essential role of an attorney/guardian for the person (personal care) is to act as a substitute decision maker. The attorney/guardian makes decisions in respect of an incapable person and makes personal care decisions when necessary.

Personal care decisions pursuant to the applicable statutes and legislation may include decisions about where to live, what to eat, safety, security, clothing, personal hygiene, healthcare, and treatment decisions.

Not every incapable person has, or needs, a guardian/attorney of the person.

The person under disability may have already appointed an attorney for personal care or may be content to have the provisions of the HCCA govern if necessary.

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, or if there is a valid Power of Attorney for Personal Care appointing an Attorney. Therefore, it is only in exceptional circumstances that an incapable person needs or will get a guardian.

A guardian of the person/attorney under POAPC may obtain the following powers as a result of an appointment or resulting from an application for guardianship or otherwise from a court order or judgment:

- ✓ 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;

¹ *The Substitute Decisions Act, 1992* - <http://canlii.ca/t/2tq>

² *The Health Care Consent Act, 1996* - <http://canlii.ca/t/2wh>

- ✓ 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.

Legal Responsibilities of A Guardian of the Person/Attorney Under POAPC

A guardian of the person/Attorney must exercise his or her duties and powers diligently, and in good faith. Where a decision is made on behalf of an incapable person, that decision must be made solely for the benefit of the incapable person.

A Guardian/Attorney under a POAPC MUST...

- ✓ Be aware that an individual of 16 years of age is capable of giving or refusing consent to his/her own personal care
- ✓ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the "SDA") and the *Health Care Consent Act, 1996*, (the "HCCA")
- ✓ Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions to be made on the grantor's behalf
- ✓ Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid
- ✓ Be aware that an attorney cannot be appointed as an attorney for personal care if, the attorney is providing health care, residential, social, training or support services to the grantor, for compensation, unless the attorney is a spouse, partner or relative of the grantor

- ✓ Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
 - Is the power to be exercised solely or jointly?
 - Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?
- ✓ Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
 - Does the grantor have the ability to understand and appreciate the role of the attorney and, in particular, the risks associated with the appointment?
 - Does the grantor have capacity to give instructions for decisions to be made as to personal care?
 - Is the grantor aware of his/her power to revoke the Power of Attorney?
 - Notably, the grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care.
- ✓ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- ✓ Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
- ✓ Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- ✓ Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document
 - The *HCCA* applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
 - The *HCCA* prescribes certain decisions which require the grantor of

the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney

- What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?

- ✓ Be aware that special provisions that exist in the *SDA* and the *HCCA* addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment

- ✓ Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the *SDA* and the *HCCA*

- ✓ Arrange for a capacity assessment at the request of the grantor, except where there has been an assessment performed in the six months immediately previous

- ✓ Be aware the statutory requirements concerning resignation
 - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable

 - Notify persons previously being dealt with on the grantor's behalf

- ✓ Be aware that a Power of Attorney for personal care terminates on the death of the grantor

- ✓ Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care

- ✓ Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions

- ✓ Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor

- ✓ Keep records of all decisions made on the grantor's behalf
- ✓ Facilitate contact between the grantor, relatives and friends
- ✓ Consult with relatives, friends and other attorneys on behalf of the grantor
- ✓ Facilitate the grantor's independence
- ✓ Make decisions which are the least restrictive and intrusive to the grantor
- ✓ Refrain from using or permitting the use of confinement, monitoring devices, physical restraint by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another
- ✓ Refrain from using or permitting the use of electric shock treatment unless consent is obtained in accordance with the *HCCA*
- ✓ Maintain comprehensive records
 - A list of all decisions made regarding health care, safety and shelter
 - Keep all medical reports or documents
 - Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor
- ✓ Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required
- ✓ Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority
- ✓ Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records

Guiding Principles

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

1. If the person/attorney under a POAPC 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.

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

2. If the guardian of the person/attorney under a POAPC 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 a 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 to the course 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/attorney under a POAPC 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, hospital records and reports and records from a community care access center.

Assistance from the Consent and Capacity Board (the “CCB”)

Sometimes an attorney/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 attorney/guardian may depart from the wish.

A guardian of the person/attorney under a POAPC 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 – Application for Advice and Directions

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

Records to be kept by an attorney/guardian of the person

A guardian of the person/attorney under a POAPC should always keep a notarized copy of the court order or the Power of Attorney document or the court order appointing him or her.

The records that a guardian of the person/attorney under a POAPC 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

Maintaining confidentiality

A guardian of the person/attorney under a POAPC 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 attorney's/guardian's duties, or if ordered to do so by a court.

A guardian of the person/attorney under a POAPC 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

Concluding Comments

A guardian of the person/attorney under a POAPC 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.

Compensation for the Guardian of The Person/Attorney Under a POAPC

The *SDA* does not regulate or prescribe compensation for a guardian(s) of the person, though the court has been known to make such awards on application. The guardianship of the person involves ethical implications concerning the payment of a person on carrying out life and death decisions being made on behalf of an individual with a disability, and therefore compensation claimed remains in the jurisdiction and discretion of the court. The case of *Re Brown* was a case where a trust company was appointed as the guardian of property, and of the person. In the course of passing its accounts, an objection was raised by the Public Guardian and Trustee to a claim for personal care services compensation. The court made an award based on the following observations:

- (a) there is no statutory prohibition against such compensation;
- (b) the fact that the legislature has not passed a statute, or regulation providing for the payment of compensation to a guardian of the person, or fixed in the manner in which it is to be calculated, does not prevent the court from awarding it and fixing it;
- (c) Section 32(12) of the *SDA* does not oust the application of Section 61(1) of the *Trustee Act*, as the basis for awarding compensation to a guardian. However, the use of the word “estate” in the latter section, implies a guardian of a property rather than a guardian of the person;
- (d) The court does have jurisdiction to award compensation for legitimate services rendered by a committee of a person to an incapable person so found, provided there is sufficient evidence of the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation;
- (e) The court routinely deals with claims for compensation for work done or services rendered in a variety of situations, and there is no reason, in the absence of any statutory prohibition, for rejecting such a claim, simply because it is made by a committee of the person;
- (f) Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property; in the latter case, traditionally, the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;
- (g) The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;
- (h) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided; the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be

an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question; and

- (i) There must be some evidentiary foundation to support the claim for compensation.

In the more recent decision of *Childs v Childs* the superior court considered a daughter's claim for compensation as a result of the personal care she provided for her incapable mother in the attorney and guardianship context. While the Court held that a child should not be paid to care for an ailing mother, the Court drew a distinction between care that is provided when a child acts as a primary care attendant and the services a child provides in managing an incapable person's personal care. The Court awarded compensation to the guardian for personal care on the basis that the guardian would have to manage the services her mother received and the care givers provided to her mother.^[1]

The Court in *Childs* supported the principle that compensation may be awarded for personal care where the services performed were a benefit to the incapable person and the amounts claimed are demonstrably reasonable. The reasonableness of the amount of compensation awarded to a Guardian of the person must be assessed in the context of the specific financial circumstances of the incapable person. The amount awarded must not only be reasonable in relation to the services performed, it must be proportional to the means of the incapable person. Its payment should not pose a risk to the overall financial affairs of the incapable person.^[2]

This memorandum is intended for the purposes of providing information and guidance only and is to be used only for the purposes of guidance. This memorandum is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS

^[1] *Childs v Childs*, 2015 ONSC 4036 at paras. 33, 45,46.

^[2] *Ibid* at para. 31.