

Guardians of Property: The Who, the What, the Why

RBC Wealth Management, Estate & Trust
Services

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INTRODUCTION

- **Agenda**

- Who or what is a “guardian” in Ontario?
- When is guardianship is appropriate?
- What is the process of appointment?
- What are the duties and obligations of a guardian?
- Questions

WHO IS A “GUARDIAN”

- “Guardian” is generally defined as a “**defender, protector, or keeper**”

- In the legal sense:
- A substitute decision maker for incapable individuals who are vulnerable and may be susceptible to financial and physical abuse



- **Attorney under POA vs. Guardian:**
- Grantor decides attorney *while capable*
- Court appoints guardian *after* person becomes *incapable*

- **Similarities between Attorney & Guardian:**
- Duties and obligations
- Extensive powers for both an attorney under a Continuing Power of Attorney for Property (CPOAP) & Guardian of Property:
 - Anything the incapable person could normally do in relation to his or her property EXCEPT make or change a Will

- Guardians are often the choice of **last resort**
- *Substitute Decisions Act* (SDA) forbids a Court from appointing a guardian if the need for substitute decision making can be satisfied in a less restrictive way



WHEN WILL A GUARDIAN BE APPOINTED?

- Two conditions for appointment of Guardian of Property:
 1. Person is incapable to manage property, AND
 2. Resulting necessity of having decision made by another person

Capacity in General

- No single legal definition for “capacity”
- Certain factors are to be considered in an assessment of requisite mental capacity to make a certain decision/undertake a certain task at a particular time
- Capacity is decision, time and situation-specific
- Capacity may fluctuate



Capacity is Decision Specific

- Capacity to grant a CPOAP vs. capacity to grant a POAPC
- Capacity to execute a Will vs. capacity to marry or make an *inter vivos* gift etc.
- Each decision has its own specific capacity criteria/factors/considerations



Capacity is Time Specific

- Legal capacity can fluctuate over time
- The law provides for “good days” vs. “bad days”
- Experts’ opinions vary
- Any expert capacity assessment, or examination of capacity, must state date and time



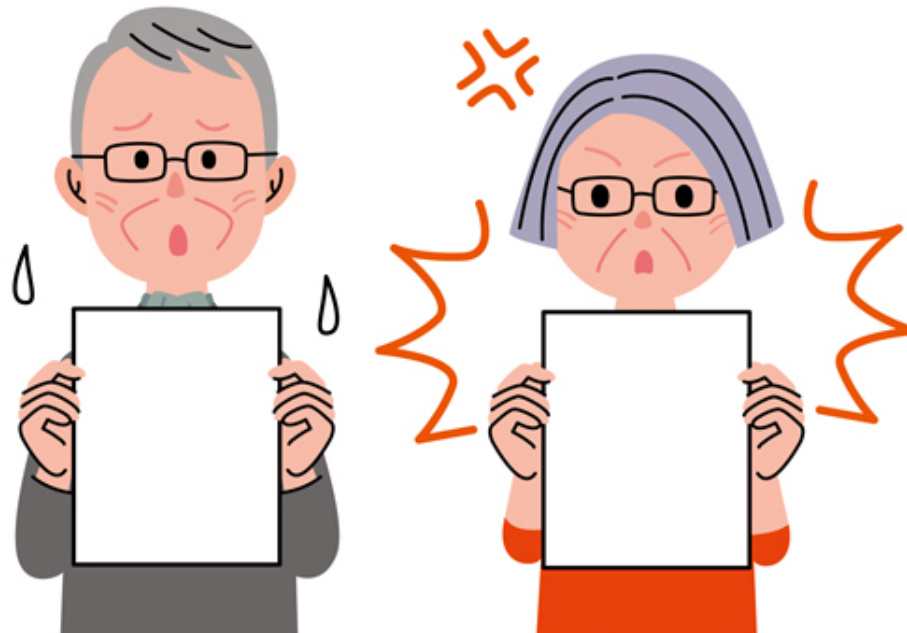
Capacity is Situation Specific

- Under different circumstances a person may have differing capacity
- At home vs. in doctor's or financial advisor's office
- During stressful situation



Capacity in General

- Ability to understand all of the information that is relevant to the decision being made and possible implications of the decision in question



Capacity & Guardianships

- S. 6 of the SDA
- A person is **incapable of managing property** if the person is:
 - a) not able to understand the information that is relevant to making a decision in the management of his or her property; OR
 - b) is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision

Capacity Assessments



Restrictions

Exercising extreme diligence

Meticulous files

Right to refuse to be interviewed / challenge

Explain significance

Carefully probe answers

- **Evidence** for Court to appoint a guardian
- Must be sufficient to satisfy the Court that it can make a finding that the person is incapable of managing property
- Third party independent evidence if possible

- Incapable of managing property but are they incapable of granting a CPOAP?
- Least restrictive approach is required
- S.8 SDA – Capacity to grant or revoke CPOAP:
 - a) Knowledge of property and approximate value
 - b) Awareness of obligations owed
 - c) Knowledge of attorney's extensive powers

Capacity to grant/revoke CPOAP cont.

d) Knowledge attorney must account

e) Knowledge that he or she may, if capable revoke the CPOAP

f) Appreciate that unless attorney manages prudently property value may decline; AND

g) Appreciate the possibility that attorney could misuse authority

- When will **Guardian of Property** be appointed?
- 1) Incapable person has not executed a CPOAP and a guardianship appointment is in order such that the incapable person's property can be managed on their behalf (no capacity to grant a CPOAP)

2) Incapable person HAS executed a POA for property **but:**

- It does not survive incapacity like a CPOAP contemplates; or
- It becomes necessary or advisable to appoint a guardian, thus overriding the CPOAP – i.e. 3rd party concerned with chosen attorney or chosen attorney becomes incapable

3) The incapable person is a minor who, has for one reason or another, property which must be managed on the incapable minor's behalf as per the *Children's Law Reform Act*

- Court must consider:
 - Whether proposed guardian is acting as attorney under CPOAP
 - Incapable person's wishes (if ascertained)
 - Closeness of the relationship between guardian and incapable person

- Guardians of property CANNOT be people who provide health care, residential, social, training or support services to incapable person **for compensation**
- Exceptions: spouse, partner, or relative or is person's attorney for property or personal care

- Wishes of incapable person plays an important role
- In ***Lazaroff v Lazaroff*** the incapable person did not want sister as guardian, Public Guardian and Trustee was appointed
- PGT – cannot be appointed w/o consent and only when no other suitable person

- **PGT as Statutory Guardian**
- Ss. 15 & 16 of the SDA – someone deemed incapable and statutory guardian appointed
 1. Admitted to psychiatric facility and physician assesses capacity to manage property (*Mental Health Act*)
 2. Finding of incapacity by authorized capacity assessor – can only be requested in limited circumstances

WHAT IS THE PROCEDURE?

Procedure

- Part III of the *SDA*
- Who must be served:
 - Alleged incapable person
 - Attorney under CPOAP (if known)
 - Guardian of person and attorney for personal care (if known)
 - PGT
 - Proposed guardian of property

Procedure cont.

- Also the family must be served by ordinary mail:
 - Spouse or partner of allegedly incapable person
 - Children who are at least 18 years old
 - Parents
 - Brother and sister who are at least 18

Procedure cont.

- Documents?
 - Notice of Application
 - Supporting affidavit by the applicant
 - A draft order
 - Proposed guardian's consent
 - Statement signed by the applicant that alleged incapable person has been informed **and. . .**

Procedure cont.

...a “**Management Plan**”

- List of person’s property
- Guardian’s plans for each item or asset, plus reasons for each decision
- Particulars re fees, loads, commissions etc.
- Signed by person applying to be guardian NOT the financial advisor or lawyer who may have assisted with drafting the plan.

- May be required to post a **BOND**
- Ensure incapable person's property is protected
- Security for due performance
- *Gryszczuk v. Gryszczuk*



Compensation

- *SDA* provide for a guardian of property may be compensated for performing duties
 - **3%** of disbursements of capital and revenue;
PLUS
 - an annual care and management fee of **0.6%** of the FMV of assets under administration
 - Taken monthly, quarterly or annually

Compensation cont.

- **Five Factors Approach**
 1. Magnitude
 2. Care and responsibility
 3. Time
 4. Skill and ability displayed
 5. Success

DUTIES & OBLIGATIONS OF A GUARDIAN

Duties & Obligations

- ss.31-42 of SDA
- Fiduciary
- Powers and duties **MUST** be exercised and performed diligently, with honesty and integrity and in good faith for the incapable person's benefit

Duties & Obligations cont.

- Maintain accounts:
 - Assets
 - Money
 - Investments
 - Liabilities
 - Compensation
- Passing of Accounts

- Extensive powers but NO AUTHORITY to make decisions of **personal nature**
- Powers also subject to SDA and any conditions imposed by the Court

Duties & Obligations cont.

- Must **consult** with incapable person
- **Encourage** participation by incapable person
- Consult with “**supportive**” family and friends
- Must **explain** powers and duties as guardian
- Act in accordance with the Management Plan

Duties & Obligations

- Standard of Care?
- No compensation: expected to exercise the degree of care, diligence and skill that **a person of ordinary prudence** would exercise in the conduct of his or her own affairs
- Compensation: expected to exercise degree of care, diligence and skill that **a person in the business of managing the property** of others is required

Duties & Obligations

- Liable for damages arising from a breach of the guardian's duties
- BUT if the Court is satisfied that a guardian of property who has committed breach nevertheless acted **honestly, reasonably and diligently**, may relieve the guardian from all or part of the liability

Conclusion – Guardians of Property

- **5 Takeaways:**

- 1) Last resort
- 2) You choose attorney; Court appoints guardian
- 3) Extensive powers
- 4) Presumed capable; serious ramifications of finding of incapacity
- 5) Fiduciary – honesty, integrity, in good faith – benefit of the incapable person

Practical Risks

- Client Management – Knowing the issues and party dynamics
- Duties – Remembering who they are owed to
- Outside Counsel – Knowing when to get them involved
- War Stories

Questions?

