

A HERO'S JOURNEY: TRAUMA, TRANSITIONS, AND THRIVING

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GUARDIANSHIP: WHAT ARE MY RIGHTS?

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Barristers and Solicitors

OVERVIEW

- Legal Tests for Guardianship
- Family, Friends & Health Care Providers: What Should we Look For?
- Capacity Assessment
- Application Process
- Guardian: What is my Role?
- Joe: What are my Rights?

LEGAL TESTS FOR GUARDIANSHIP: PRELIMINARY CONSIDERATIONS

- Presumption of Capacity
- Domain-specific
- Distinct from:
 - Litigation Guardian
 - Power of Attorney
- Age:
 - *Substitute Decisions Act v. Children's Law Reform Act*
 - Property: 18 or older
 - Personal Care: 16 or older

LEGAL TESTS FOR GUARDIANSHIP: PROPERTY

SDA s. 6:

A person is incapable of managing property if the person is **not able to understand the 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.

CLRA, s. 47:

Upon application by a child's **parent or by any other person**, on notice to the Children's Lawyer, a court may appoint a guardian of the child's property.

LEGAL TESTS FOR GUARDIANSHIP: PERSONAL CARE

SDA, s. 45:

A person is incapable of personal care if the person is not able to understand 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 decision.

CLRA:

N/A

FAMILY, FRIENDS & HCPs: WHAT SHOULD WE LOOK OUT FOR?

- Bad Decision vs. Incapable of Making Decision
- Property:
 - Memory
 - Bills & taxes
 - Scams
 - Math (in \$)
- Property:
 - Scheduling med/rehab appointments
 - Eating
 - Shelter for needs
 - Bathing
 - Emergencies

CAPACITY ASSESSMENT

- Right to Request an Assessment: *SDA* s. 16
- Qualified Assessor: *O. Reg. 460/05*
- Two Questions:
 - Standard of understanding:
 - Factual knowledge base
 - Understanding of options
 - Standard of appreciating:
 - Realistic appraisal of outcome
 - Justification of choice
- Guidelines:
 - www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp

APPLICATION PROCESS

- Applicant(s):
 - Sole or joint
 - Re Personal Care: no one who provides health care, residential, social, training, or support services for compensation
 - What about family members directed attendant care benefits?
- Respondents:
 - Joe
 - Re Property: PGT

APPLICATION PROCESS

- Notice:
 - Existing statutory guardian or attorney
 - Joe
 - P.G.T. (if property)
 - Spouse/partner
 - Children (min. 18 or 16)
 - Parents
 - Siblings (min. 18 or 16)

APPLICATION PROCESS: Property

- Management Plan
 - Only Joe's share (not household)
- Categories of Property
 - Land
 - Household items & vehicles
 - Valuables
 - Savings
 - Investments
 - Accounts receivable
 - Business interests
 - Other property
 - Liabilities
 - Income
 - Expenses
 - Legal proceedings

APPLICATION PROCESS: PROPERTY

- Plan:
 - Ex. Savings: open trust account
 - Ex. Legal proceedings: retain lawyer

APPLICATION PROCESS: PERSONAL CARE

- Guardianship Plan
 - Background
 - Joe's wishes
 - Short-term & long-term plans

- Categories
 - Health care, nutrition, and hygiene
 - Shelter/living arrangements and safety
 - Legal proceedings
 - Employment, education, and training
 - Recreational, social, and cultural activities
 - Social and support services

GUARDIAN: WHAT IS MY ROLE? PROPERTY

- What is my Duty?
 - “**fiduciary** whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s behalf” – *SDA*, s. 32
 - Pass accounts
- What Can I Do?
 - **Anything** respecting Joe’s property that Joe could do if capable
 - **Exception:** making a will
- What if I Mess Up?
 - Liable for damages resulting from breach of fiduciary duty
 - **Exception:** acted honestly, reasonably, and diligently

GUARDIAN: WHAT IS MY ROLE? PROPERTY

- What's in It for Me?
 - Compensation:
 - 3% on capital & income receipts;
 - 3% on capital and income disbursements; and
 - 3/5 of 1% on the annual average value of the assets
 - Monthly, quarterly, or annually

GUARDIAN: WHAT IS MY ROLE?

PERSONAL CARE

- What is my Duty?
 - “powers and duties of a guardian of the person shall be exercised and performed **diligently and in good faith**” – *SDA*, s. 66
 - Keep record of decisions
- What Can I Do?
 - Decisions re: living arrangements
 - Be a Litigation Guardian
 - Settle claims/commence actions
 - Access personal information
 - Decisions re: *Health Care Consent Act*
 - Decisions re: health care, nutrition, and hygiene
 - Decisions re: employment, education, training, clothing, recreation, and social services
 - Other Court-ordered powers/duties

GUARDIAN: WHAT IS MY ROLE? PERSONAL CARE

- What if I Mess Up?
 - “good faith” immunity
- What’s in It for Me?
 - No monetary compensation

JOE: WHAT ARE MY RIGHTS?

- Right to Oppose
 - Refuse a capacity assessment
 - Oppose Application
 - Re Personal Care: less restrictive alternative?
- Right to be Informed & Consulted
 - Mandatory language: “shall”
 - Property:
 - Explain what guardian’s powers and duties are.
 - Encourage Joe’s participation in decisions
 - Foster regular contact between Joe and supportive family & friends
 - Management Plan: acknowledge will consult w/ Joe

JOE: WHAT ARE MY RIGHTS?

- Cont. Right to be Informed & Consulted
 - Personal Care:
 - Explain Guardian's duties & powers
 - Take into consideration when considering best interests:
 - Joe's values & beliefs
 - Current wishes
 - Whether decision will improve quality of life
 - Whether benefits of decision outweigh risks
 - Encourage participation in decisions
 - Foster independence
 - Foster relationships

JOE: WHAT ARE MY RIGHTS?

- Right to Review Guardianship Order
 - Directions
 - Vary Order or substitute guardian
 - Terminate guardianship

CONCLUSION: POINTS TO TAKE AWAY

- Capacity is domain-specific
- Keep an eye out for fine line between bad decisions and inability to make decisions
- Application process is strict to ensure not abused
- *Guardianship is about protection & empowerment

Questions? We would be happy to help.