

WINDSOR REGIONAL HOSPITAL
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ISSUES RELATING TO PATIENTS WHO LACK LEGAL CAPACITY TO MAKE THEIR OWN CHOICES

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THOMSON ROGERS

PERSONAL INJURY LAWYERS

Introduction

The purpose of this paper is to not only alert the reader to the legal test for capacity and the accompanying requirement of a guardian, but to hopefully instruct on when a guardian is not required, thereby allowing the ABI sufferer to maximize their own independence and quality of life.

Legal Test for Guardianship: Property

Individuals who have reached the age of majority (18) are governed by the *Substitute Decisions Act*, S.O. 1992, c. 30. It presumes all adults have the capacity to manage their property and their person.

The *Substitute Decisions Act* requires a guardian of property be appointed for an individual determined to be “incapable of managing property”.

Section 6 of the *Substitute Decisions Act*, defines a person incapable of managing property as follows:

A person is incapable of managing property if the person is not able to understand 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 or lack of decision.

What does this mean?

Depending on one's point of view, this definition of incapacity could apply to every individual travelling up Highway 400 every day to Casino Rama.

Obviously, these individuals do not need legally appointed Guardians of Property.

It is instructive to review some of the cases in this regard. In 1997, Justice Quinn of the Ontario Court of Justice in St. Catharines heard an appeal by Ms. Linda Koch from a tribunal that ruled she was incapable of managing her financial affairs and property. Justice Quinn stated:

It must be remembered that the appellant has the right to spend her money foolishly if she desires. The right to be foolish is an incident of living in a free and democratic society.¹

Justice Quinn went on to state:

It is the mental capacity of Ontario residents that is the test, and not wisdom. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The state has no business with meddling with either. The dignity of the individual is at stake.

The Supreme Court of Canada has also given some guidance concerning the test for capacity. In the 2003 decision, *Starson v. Swayze*, the Supreme Court of Canada stated that the test is solely to adjudicate on the individual's capacity. The court's "conception of the patient's best interest is irrelevant to that determination". As the reviewing judge observed "a competent patient has the

¹ *Koch (Re)* [1997] O.J. 1487, p. 24 at paragraph 64

absolute entitlement to make decisions that any reasonable person would deem foolish”.²

The Supreme Court stated that the test for competence requires the individual “to have the ability to appreciate the consequences of a decision. It does not require actual appreciation of those consequences. The distinction is subtle but important.”³

The Supreme Court of Canada went on to state that a finding of incapacity to manage property is justified only if there are reasons and facts that demonstrate an individual’s disability prevents him or her from having the ability to appreciate the foreseeable consequences of the decision.

It is improper for the court to allow its own conception of an individual’s best interest to influence its findings.

This philosophy is also expressed by the Ministry of the Attorney General in its published Guidelines for Conducting Assessments of Capacity. It states:

Ideally, vulnerable individuals will have access to a multiplicity of services and social supports, which optimize functioning and assist with decision-making. Guardianship, as a legal option, should only be used as a last resort when existing supports become inadequate or a legally authorized intervention would bring substantial benefits to the incapable person. In fact, the *Substitute Decisions Act*

² *Starson v. Swayze* [2003] S.C.J. No. 33, p. 24 at para. 76

³ *Ibid*, para. 80

specifically prohibits the court appointment of a guardian if less restrictive alternatives exist.⁴

Other Legislative Capacity Provisions

Children

In law, there is a presumption that a child under the age of 18 is incapable of managing his or her own finances. As we all know, parents are the informal guardians of property for children.

However, where there is a large amount of money involved, Section 47 of the *Children's Law Reform Act* provides for the court to appoint a formal guardian of property for a child. The legislation states:

47(1) 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.

(2) A guardian of the property of a child has charge of and is responsible for the care and management of the property of the child.

Guardian of the Person

In addition to the appointment of a guardian of a property for an incapable person, the *Substitute Decisions Act* provides for the appointment of a guardian

⁴ Guidelines for Conducting Assessments of Capacity, Ministry of Attorney General, May 2005.

of “the person”. Guardianship of the person relates to personal care decision making and has been divided into six domains:

- a) Health Care
- b) Nutrition
- c) Clothing
- d) Hygiene
- e) Shelter
- f) Safety

The test for a finding of incapacity for personal care is almost identical to the test for a finding of incapacity for property. Section 45 of the *Substitute Decisions Act* states:

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.

It is not unusual for a finding that an individual has capacity in one domain and not have capacity in another. For example, an individual may have the capacity to choose what medication they wish to take but not be able to remember to take them.

What is the Interface between the Requirement of a Guardian and any Lawsuit or Benefit Claims?

Many ABI victims have claims through the court system. In addition, ABI victims often have claims to significant accident benefits or disability benefits.

Eventually, these lawsuits or benefit entitlements get resolved, either by trial or settlement often resulting in a significantly large payment.

Rule 7.08 of the *Rules of Civil Procedure* states:

7.08(1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

Rule 1.03 of the *Rules of Civil Procedure* defines disability as:

“disability” where used in respect of a person, means that the person is,

...

b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act 1992*, in respect of an issue in the proceeding, whether the person has a guardian or not.

What about ongoing Claims?

I have often been retained years after a catastrophically impaired individual's motor vehicle accident. I have seen instances where a young infant's or severely impaired ABI victim's, \$2,000,000.00 lifetime entitlement for attendant care and

medical/rehabilitation benefits have been significantly exhausted without any appointment of a guardian.

The parents or family members who have done this (and also the insurer) have, in my view, exposed themselves to potential criticism and liability. Neither the insurance company nor the family member was acting with the legal authority required to significantly exhaust these funds. If you are a family member facilitating an ABI victim's benefits and entitlement who may not have capacity, a capacity assessment should be obtained and depending upon the result, an application to be appointed a guardian be commenced immediately.

Guardianship Applications

In order to apply before the court to be appointed a guardian of property, the following will be required:

1. a proper medical report by a certified capacity assessor setting out the finding of incapacity, either as to property or person or both, and the reasons behind the finding;
2. a completed Management Plan setting out clearly for the court's consideration, the actual and/or expected incoming income and assets, and the proposed expenses being proposed;

3. service of the court materials on siblings, spouses, parents and the person affected;
4. evidence that the material has been served on either the Ontario Office of the Children's Lawyer or the Ontario Office of the Public Guardian and Trustee for its review and consideration;
5. an Affidavit setting out the background and the particulars of the matter for the Judge's consideration. This must include compliance with the *Substitute Decisions Act's* requirements that the person proposed to be found incapable, has been fully advised of the process and his/her right to oppose it;
6. while not a requirement under the *Substitute Decisions Act*, I have found it useful before the court to file an executed Consent by the person being affected by the finding of incapacity.

Attached to this material are the forms provided for a Management Plan **(Tab A)** for property and a Guardianship Plan **(Tab B)** for the person published pursuant to the *Substitute Decisions Act*. There is no specific Management Plan form for an application for guardianship under the *Children's Law Reform Act*.

What is the Role of the Guardian

Guardian of Property

A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently; with honesty and integrity and in good faith, for the incapable person's benefit. They must explain their powers to the incapable person and encourage the incapable person's participation.

A guardian of property has the power to do, on the incapable person's behalf, anything in respect to property that the person can do, if capable, except make a Will.

The guardian of property is usually required every two to three years, to prepare an accounting for filing with the court, setting out what monies they received and what they did with them.

Compensation for a Guardian

Guardians of property are entitled to be paid, as of right, on an annual basis:

- a) 3% on capital and income received;
- b) 3% on capital and income disbursed; and
- c) 3/5 of 1% on the annual average value of the assets as a care and management fee.

These fees can be paid to the guardian of property, as of right, without any endorsement or permission from either the court or the Public Trustee's office. If the guardian is of the view that this compensation is not adequate, the *Substitute Decisions Act* provides for the guardian to apply to the court for more compensation for their efforts.

What does it all mean?

Obviously, in many instances, the need for a guardian of property and person will be obvious. If an ABI victim remains in a coma, the requirement is self-evident. If a severely injured ABI victim with obvious deficits is unable to have any appreciation whatsoever of those deficits and limitations and problems accompanied therewith, it is also obvious.

What if the individual is just having difficulty? What if they are just simply slower at an activity, such as bill paying? If it simply takes them longer, or they require some assistance at organizing and they are able to implement a system that works, then a guardian of property is not required.

SCHEDULE A

FORM 2

Substitute Decisions Act, 1992

MANAGEMENT PLAN

A. This Management Plan is provided as part of the application made by _____
_____ to be appointed as guardian of the property of _____
_____ .

To the best of my knowledge and belief, the assets, liabilities, income and expenditures of _____ at this date are stated below. My plans for managing them and the reasons for these plans are as follows:

B. **LAND:**

Type and Address of Property or Properties	Estimated Market Value
	\$
TOTAL:	\$

PLAN:

For each of the above-noted properties indicate your plans (e.g., sell at market value, lease at market value, other), the anticipated time frame for completing the transactions, if applicable, and your reasons for these plans:

C. **GENERAL HOUSEHOLD ITEMS AND VEHICLES:**

Item	Particulars	Estimated Current Market Value
General Household:		\$
Vehicles:		
	TOTAL:	\$

PLAN:

Explain your plans for these items (e.g., retain for use of person for whom guardianship is sought, sell at market value, place in storage, gift, other) and your reasons for these plans:

D. VALUABLES:

Item	Particulars	Estimated Current Market Value
		\$
		TOTAL: \$

PLAN:

Explain your plans for these items (e.g., sell at market value, place in storage, other) and your reasons for these plans:

E. SAVINGS AND SAVINGS PLANS:

Category	Institution	Account Number	Current Amount Or Value
			\$
			TOTAL: \$

PLAN:

Explain your plans for the savings described above (e.g., close current accounts and consolidate in a trust account, deposit cash, maintain savings plans, collapse plans as required to meet ongoing expenditures, etc.) and your reasons for these plans:

F. SECURITIES AND INVESTMENTS:

Category	Number	Description	Estimated Current Market Value
			\$
			TOTAL: \$

PLAN:

Explain your plans with respect to the above-noted securities and investments (e.g., maintain in current form, renew as required, convert, redeem, etc.) and your reasons for these plans:

G. ACCOUNTS RECEIVABLE:

Particulars	Amount
	\$
TOTAL:	\$

PLAN:

Explain your plans regarding collection of the above-noted debts and your reasons for these plans:

H. BUSINESS INTERESTS:

Name of Firm Or Company	Interest	Estimated Current Value
		\$
		TOTAL: \$

PLAN:

Explain your plans regarding the above-noted business interests (e.g., maintain, dissolve, sell, etc.) and your reasons for these plans:

I. OTHER PROPERTY:

Category	Particulars	Estimated Current Market Value
		\$
		TOTAL: \$

PLAN:

Explain your plans for the property described above and the reasons for these plans:

J. LIABILITIES:

Description of Debt	Particulars	Amount of Debt
		\$
	TOTAL:	\$

PLAN:

Explain your plans with respect to these debts and the reasons for these plans:

K. INCOME:

Type of Income	Particulars	Approximate Annual Amount
Pension:		\$
Employment:		\$
Interest:		\$
Rental:		\$
Business		\$
Other:		\$
	TOTAL:	\$

PLAN:

Explain your plans for the collection, deposit and allocation of the income described above:

L. EXPENSES:

Expense	Particulars	Approximate Annual Amount
Residential:		\$
Utilities:		
Recreational/Entertainment:		
Travel:		
Personal Care:		
Support for Dependents:		
Property Maintenance:		
Gifts:		
Loans:		
Charitable Donations:		
Other:		

Expense	Particulars	Approximate Annual Amount
		TOTAL:

PLAN:

Explain below:

- (a) Whether any of the payments described above are of direct or indirect financial benefit to you, a person you live with or to whom you are related. If so, please explain why these payments are necessary and appropriate:

- (b) Whether any significant increases or decreases in the above expenditures are anticipated, or whether any additional expenditures are likely. If so, please explain:

- (c) Whether the expenditures listed above will adequately meet the personal needs and maximize the enjoyment of life of the person for whom guardianship is sought:

- (d) If you are planning to make gifts, loans or charitable donations, please explain the reasons why you believe these expenditures are appropriate:

- (e) If payments to dependents, or for their benefit, are required please provide details about the nature of these payments and the reasons for them:

- (f) Are there any expenditures which others have recommended which you are not planning to make? If so, please explain:

M. LEGAL PROCEEDINGS:

Nature of Legal Proceedings	Status of Proceedings

PLAN:

- (a) Please explain your plans in respect of these proceedings:

- (b) Do you anticipate that legal proceedings may need to be commenced or defended on the person's behalf in respect of his or her property? If so, please explain:

- (c) What arrangements for legal representation for the person have been made or do you propose?

- (d) Are you aware of any existing court orders or judgments which are relevant to the management of the person's property? If yes, describe or attach copies.

Yes

No

If yes, describe:

N. ADDITIONAL INFORMATION:

- (a) I have consulted with the person for whom guardianship is sought in making this plan:

Yes

No

If no, please provide reasons:

- (a) I have consulted with the following other people in preparing this plan:

- (b) To the best of my knowledge, the person for whom guardianship is sought would not object to any aspect of this management plan:

Yes, would object

No, would not object

If yes, please explain:

- (c) I am aware of my duty to encourage the participation of the person for whom guardianship is sought in decisions I may make and to consult with supportive family and friends and caregivers. My plans to do so are as follows:

- (d) I am aware that I would, as guardian of property, be required to make reasonable efforts to determine whether the person for whom guardianship is sought has a will and, if so, what the provisions of the will are and I am entitled to obtain the incapable person's will. My plans to do so are as follows:

- (e) I am aware that I am not to dispose of property that I know is subject to a specific testamentary gift in the will of the person for whom guardianship is sought unless the specific testamentary gift is of money or if the disposition of that property is necessary to comply with my duties as guardian of property or to make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37 of the Substitute Decisions Act, 1992.

SUBSECTIONS 32(10) AND 32(11) OF THE SUBSTITUTE DECISIONS ACT, 1992 PROVIDE:

ss. 32(10): A GUARDIAN SHALL ACT IN ACCORDANCE WITH THE MANAGEMENT PLAN.

ss. 32(11): IF THERE IS A MANAGEMENT PLAN, IT MAY BE AMENDED FROM TIME TO TIME WITH THE PUBLIC GUARDIAN AND TRUSTEE'S APPROVAL.

SUBSECTIONS 89(5) AND 89(6) OF THE SUBSTITUTE DECISIONS ACT, 1992 PROVIDE:

ss. 89(5): NO PERSON SHALL, IN A STATEMENT MADE IN A PRESCRIBED FORM, ASSERT SOMETHING THAT HE OR SHE KNOWS TO BE UNTRUE OR PROFESS AN OPINION THAT HE OR SHE DOES NOT HOLD.

ss. 89(6): A PERSON WHO CONTRAVENES SUBSECTION (5) IS GUILTY OF AN OFFENCE AND IS LIABLE, ON CONVICTION, TO A FINE NOT EXCEEDING \$10,000.00.

DATE:

Signature of Proposed Guardian(s) of
Property

Address:

Phone:

FORM 3

Substitute Decisions Act, 1992

GUARDIANSHIP PLAN

SECTION 1 – Identifying Information:

A. This plan is for:

Name (in full): (referred to throughout this guardianship plan as “the person”)

Address:

,

Telephone: Residence
Business

B. (1) As the proposed guardian of the person [or attorney for personal care] for , I have consulted with the following persons in preparation of this guardianship plan:

- the person identified in A.
- family members of the person
- friends of the person
- care providers to the person
- the person’s guardian of property [attorney under a continuing power of attorney]
- others (please specify relationship):

SECTION II – Areas where personal care decision making authority is sought:

A. I am seeking personal care decision making authority in the following areas:

- Health Care (including decisions to which the Health Care Consent Act, 1996 applies)
- Nutrition
- Shelter/Accommodation
- Clothing
- Hygiene
- Safety

B. Powers Requiring Specific Court Authorization:

1. I am asking the court for an order authorizing me to apprehend the person [Section 59(3)].

- Yes No

2. I am asking the court for an order authorizing me to change existing arrangements in respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child [Section 59(4)].

- Yes No

3. a) I am asking the court for an order permitting me to exercise other powers or perform other duties in addition to those set out in the Substitute Decisions Act, 1992 [Section 59(2)(g)].

- Yes No

b) If the answer to 3a) is yes, please identify the other powers and duties:

C. Notice Regarding Extraordinary Matters:

The law limits or restricts a guardian's authority to make decisions in the following areas relating to personal care:

Sterilization

The law prohibits a substitute decision maker from consenting to non-therapeutic sterilization of a person who is mentally incapable of such a decision. Any proposal to consent on behalf of the person to his or her sterilization as medically necessary for the protection of the person's health must be consistent with the law and should appear in the Guardianship Plan or be the subject of an amendment to the Guardianship Plan prior to consent being given.

Regenerative Tissue Donation

The law restricts the authority of a substitute decision maker regarding decisions to permit regenerative tissue donations by a person who is mentally incapable of such a decision. Any proposal to authorize the removal of regenerative tissue for implantation in another person's body must be consistent with the law and should appear in the Guardianship Plan or be the subject of an amendment to the Guardianship Plan prior to permission being given.

SECTION III – The plan for personal decisions making:

HEALTH CARE (INCLUDING TREATMENT), NUTRITION AND HYGIENE

Background:

- (a) Describe the current status of the health, nutrition and hygiene of the person, including all known health conditions for which treatment is being received or is proposed:

- (b) Describe any wishes or instructions made by the person while capable that are known by you and that relate to his/her preferences about health care, treatment, nutrition and hygiene and attach a copy of any written wishes or instructions (e.g., a written advance directive, power of attorney for personal care, living will, etc.):

Plan:

- (c) Describe the long-term goals (2–6 years) for decisions under this heading:

- (d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

- (e) Briefly describe your reasons for these plans:

SHELTER/LIVING ARRANGEMENTS AND SAFETY

Background:

- (a) Describe the current status of the person's living arrangements, including any factors relating to safety:

- (b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about living arrangements and safety issues and attach a copy of any written wishes or instructions:

Plan:

- (c) Describe the long-term goals (2–6 years) for decisions under this heading:

- (d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

- (e) Briefly describe your reasons for these plans:

LEGAL PROCEEDINGS

Background:

- (a) Describe the current status of any existing or anticipated legal proceedings relating to this person (including divorce, custody, access, adoption, restraining orders, criminal matters, landlord and tenant matters):

- (b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about existing or anticipated legal proceedings and attach a copy of any written wishes or instructions:
- (c) If legal proceedings are in progress, describe arrangements for legal representation of the person, if known:
- (d) Where there is a guardian of property or attorney under a continuing power of attorney, is he or she aware of the existing or anticipated legal proceedings described in (a)? If so, please describe his or her involvement:
- (e) Are you aware of any existing court orders or judgments against the person? If yes, describe or attach copies:
- (f) Is the person on probation or are there pending criminal proceedings in which the person is involved? If so, please provide details:

Plan:

- (g) Describe the long-term goals (2–6 years) for decisions under this heading:
- (h) Briefly describe your reasons for these plans:

EMPLOYMENT, EDUCATION AND TRAINING

Background:

- (a) Is the person employed, or involved in any educational or training programs? If so, please describe current status:

- (b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about participation in employment, education or training programs:

Plan:

- (c) Describe the long-term goals (2–6 years) for decisions under this heading:
- (d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:
- (e) Briefly describe your reasons for these plans:

RECREATIONAL, SOCIAL AND CULTURAL ACTIVITIES

Background:

- (a) Describe the activities that the person is involved in (or significant activities that the person was involved in), including hobbies, clubs, affiliations, volunteering:
- (b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about participation in recreational, social and cultural activities:

Plan:

- (c) Describe the long-term goals (2–6 years) for decisions under this heading:
- (d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:
- (e) Briefly describe your reasons for these plans:

SOCIAL AND SUPPORT SERVICES

Background:

- (a) Describe social and support services received by the person within the past year, including any services currently received:

- (b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about receipt of social and support services:

Plan:

- (c) Describe the long-term goals (2–6 years) for decisions under this heading:

- (d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

- (e) Briefly describe your reasons for these plans:

SECTION IV – Additional Information:

- (a) I have consulted with the person for whom guardianship is sought in making this plan:

Yes

No

If no, please provide reasons:

- (b) I have consulted with the following other people in preparing this plan:

- (c) If consultation did not occur with any of the persons identified in Section I – B(1) above, provide reasons why:

(d) To the best of my knowledge, the person for whom guardianship is sought would not object to any aspect of this guardianship plan:

Yes, would object

No, would not object

If yes, please explain:

(e) I am aware of my duty as a guardian of the person to foster the person's independence, to encourage the person's participation in decisions I make on his or her behalf, and to consult with supportive family and friends and caregivers. My plans to do so are as follows:

SUBSECTIONS 66(15) AND 66(16) OF THE SUBSTITUTE DECISIONS ACT, 1992 PROVIDE:

ss. 66(15): A GUARDIAN SHALL ACT IN ACCORDANCE WITH THE GUARDIANSHIP PLAN.

ss. 66(16): IF THERE IS A GUARDIANSHIP PLAN, IT MAY BE AMENDED FROM TIME TO TIME WITH THE PUBLIC GUARDIAN AND TRUSTEE'S APPROVAL.

SECTION 67 OF THE SUBSTITUTE DECISIONS ACT, 1992 PROVIDES:

ss. 67: SECTION 66, EXCEPT SUBSECTIONS 66(15) AND (16), APPLIES WITH NECESSARY MODIFICATIONS TO AN ATTORNEY WHO ACTS UNDER A POWER OF ATTORNEY FOR PERSONAL CARE.

SUBSECTIONS 89(5) AND (6) OF THE SUBSTITUTE DECISIONS ACT, 1992, PROVIDE:

ss. 89(5): NO PERSON SHALL, IN A STATEMENT MADE IN A PRESCRIBED FORM, ASSERT SOMETHING THAT HE OR SHE KNOWS TO BE UNTRUE OR PROFESS AN OPINION THAT HE OR SHE DOES NOT HOLD.

ss. 89(6): A PERSON WHO CONTRAVENES SUBSECTION (5) IS GUILTY OF AN OFFENCE AND IS LIABLE, ON CONVICTION, TO A FINE NOT EXCEEDING \$10,000.00.

DATE:

Signature of Proposed Guardian(s)/
Attorney(s) for Personal Care

Address:

Phone: