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GUARDIANSHIP OF ADULTS

THIS BOOKLET EXPLAINS

- the process one must go through to become a guardian
- the responsibilities of a guardian
- the alternatives to guardianship

The booklet provides general information only. If you are applying for guardianship you should talk with a lawyer.

Note: The process for appointing a guardian for a child is different and is not discussed in this booklet.

WORDS AND PHRASES USED IN THE BOOKLET

Affidavit: An Affidavit is a sworn written statement. The person making the statement must swear before a Commissioner of Oaths or Notary Public that the statement is true.

Commissioner of Oaths/Notary Public: Lawyers are Notaries Public and Commissioners of Oaths. Persons other than lawyers may be appointed Commissioners of Oaths. There is usually a Commissioner in the local Provincial Court Clerk's Office, in the Town or City Clerk's Office, in government offices, hospitals and homes for special care

Estate: What a person owns. It includes land, personal effects and money.

Mentally Competent: Competency is a legal term used to describe a person's capacity to understand and act reasonably.

Adults are presumed to be mentally competent and able to manage their affairs. They will only be declared mentally incompetent if there is clear medical evidence that they are unable to manage their affairs because of infirmity of the mind.

People may be mentally competent to do one thing and not another. For example, they may be able to make day to day decisions about where to live, what to eat, what to wear. However, they may be unable to manage their finances because they cannot keep track of what they owe, when accounts should be paid and how much money they have.

Mentally Incompetent: Under the *Incompetent Persons Act*, a provincial law, being mentally incompetent means that you are unable to manage your affairs because of infirmity of the mind. Being incompetent does not necessarily mean that you are insane.

There are a number of reasons why you may be unable to manage your affairs. For example you:

- are in a coma following an accident, or suffer brain injury
- have an illness such as Alzheimer's Disease which affects your mental capacity
- were born with a mental disability which prevents you from managing your affairs.
- may have a stroke or hardening of the arteries

The Incompetent Persons Act: A provincial law which sets out procedures for appointing a guardian. Only a judge can declare a person incompetent and appoint a guardian.

ADULT GUARDIANSHIP

In Nova Scotia the *Incompetent Persons Act* sets out the procedure for appointing guardians for adults who lack the mental capacity to manage their own affairs. The appointment of a guardian requires a court hearing to establish if the individual is still

capable of administering their estate. The guardianship process may be begun by a relative or friend or the local committee of the social services district. A municipality housing an individual can ask the Public Trustee to commence the guardianship process in order to make financial arrangements for the individual.

Guardians are entrusted with the full care and control over the person and the estate of the adult for whom they are appointed. Their duties include the payment of all just debts owed by the individual; the receipt and settlement of all accounts due to the individual; and, if required, the sale of any real property (requires specific court approval). The central purpose of a guardian is to manage the estate of the person in their charge "frugally and without waste" and to apply the profits to the maintenance of their charge and their family.

ADULT PROTECTION ACT

Once adults are unable to manage their own affairs they may become subject to the *Adult Protection Act*. This Act applies to all individuals above the age of 16 who are the victims of abuse or neglect or who are unable to care for themselves in their homes due to infirmity or disability. The Act provides for investigative procedures when a report of an adult in need of protection is received. The province may then appoint adult protection workers.

If a person is found to be in need of protection they may be given care by the Province, including placement in a facility to prevent neglect, abuse or to provide necessary care. If there is no guardian to care for the individual, or if the guardian is neglecting or abusing the individual the Public Trustee can assume care and control of the individual and their estate.

HOSPITALS ACT

Patients in hospitals are subject to the provisions of the *Hospitals Act* respecting one's ability to manage their affairs or consent to medical treatment. Patients who have extended stays in hospital, or those who are suspected of being mentally incompetent may be examined by a psychiatrist to determine if they can still consent to treatment and manage their estate. If the patient is found to be incapable of managing their estate, and no guardian or attorney has been appointed (see section respecting Enduring Powers of Attorney) the Public Trustee can assume control of the patient's effects and property.

If the patient is also found to be incapable of consenting to medical treatment this Act allows the spouse; next-of-kin or the Public Trustee to make treatment decisions for the patient. This list of decision makers is only resorted to where no appointment has been made under the *Medical Consent Act*.

ALTERNATIVES TO GUARDIANSHIP

If you are not mentally competent to manage your affairs you must rely on someone else to manage them. Usually, this will be done on an informal basis by a spouse, child or other relative. Although it is not illegal to have such an informal arrangement, problems may arise if you have property and financial assets which require management, or differences of opinion arise.

Under an informal arrangement, your relative cannot deal with your real estate or stocks and bonds unless you have given him or her an Enduring Power of Attorney.

Here are some ways of preparing for the future in case you become unable to manage your affairs because of illness, accident, or advancing years.

Power of Attorney: A Power of Attorney is a document which authorizes a person to act on your behalf. You must be mentally competent at the time you give the Power of Attorney. An Enduring Power of Attorney has a clause which allows the Power to remain in force even if you become mentally incompetent. An Enduring Power of Attorney allows you to choose the person who will look after your affairs should you become unable to do so. Effectively you appoint your own Guardian.

Note: Power of Attorney which is not an Enduring Power ceases to be effective if you become mentally incompetent.

Power to Give Medical Consent: You may also choose who will give consent to medical treatment should you become unable to consent. You must be mentally competent at the time you give the medical consent power.

Note: A judge can override your decision and appoint a guardian to look after your affairs and to appoint a person to give medical consent on your behalf. A judge might do this where, for example, the person is not acting in your best interests.

Joint Bank Accounts: You may have a joint bank account with a family member or other person whom you wish to handle your affairs should you be unable to do so. This person would have access to the joint account but not be able to handle your other affairs without a Power of Attorney. You should be aware that there is always the potential for the person with a Power of Attorney or who has a joint account with you to take advantage of the situation. You should therefore choose carefully who you wish to have handling your affairs.

Caring for Your Dependants: If you have a dependant such as a spouse

or-child who has a mental disorder you may wish to provide for him or her in your will. You should talk with a lawyer about the best way to provide for such a dependant. Further information is contained in the Estate Planning Guide, a booklet published by the Friends of Schizophrenics of Nova Scotia, and Connections published by the Association for Community Living.

ADULT GUARDIANS

What is a guardian?

A guardian is a substitute decision-maker appointed by a judge. A guardian can make decisions for you if, because of infirmity of the mind, you are unable to make decisions about your personal and financial affairs.

Your guardian is responsible for your care and custody.

The main laws covering guardianship of adults are contained in the *Incompetent Persons Act*, the *Public Trustee Act*, the *Inebriates Guardianship Act*, and the *Medical Consent Act.*

Types of Guardianship

There are two types of guardian, guardian of the person and guardian of the estate. One may apply to be appointed guardian of another person or of their estate or of both. If one applies to be guardian of a person only, someone else must agree to be guardian of the estate so that all the incompetent's affairs will be taken care of. Usually one person is appointed to be guardian of both person and estate. Also, it is possible to have two persons appointed to act jointly as guardians in either or both capacities.

Guardian of the Person:

If a person is appointed as guardian of another other person the Guardians are responsible for making decisions about the personal care, where they live and their general welfare. A guardian may also have power to consent to medical treatment on the incompetent person's behalf.

Guardian of the Estate:

If a person is appointed as guardian of another's estate they are responsible for managing the incompetent's finances and property. The responsibilities may include managing the money so that it is used to provide for personal care, arranging for the incompetent to receive an allowance, deciding how to invest their money and managing investments.

Who can be a guardian?

A guardian must be 19 or older and mentally competent. Usually it will be a relative or friend, but a lawyer, trust company or the Public Trustee may be appointed guardian. The Public Trustee, a government official, will only handle a person's estate. Trust companies usually only agree to be appointed guardian of he estate. They will occasionally agree to be appointed guardian of the person.

Who appoints a guardian?

The Judge's Role:

A guardian may only be appointed by a judge of the Supreme Court of Nova Scotia. Before appointing a guardian the judge must hold a hearing to decide whether a person is mentally incompetent and unable to manage their affairs.

The Doctor's Role:

A doctor may declare a person incompetent for all or some purposes. For example a doctor may decide that a person is not competent to consent to medical treatment because he is unable to understand the nature and consequences of the treatment. However, the doctor cannot appoint a guardian for a person.

The Psychiatrist's Role:

If the person is in a psychiatric facility, a psychiatrist may declare that he is not competent to manage his finances. However, the psychiatrist cannot appoint a guardian to look after a person's affairs. The Public Trustee will handle his affairs until a guardian is appointed to handle them.

Further information on the rights of psychiatric patients is contained in Rights and Responsibilities: A Guide for Psychiatric Patients published by the Canadian Mental Health Association, NS Division. Who appoints a guardian?

Can a guardian be appointed for someone against their will?

Yes, However, the judge must be satisfied that the person cannot look after their affairs because of a mental disability and that it is in their best interests to be declared incompetent.

THE PROCESS OF APPOINTING A GUARDIAN

The process takes from three to six weeks. It may take longer if witnesses are not available or if the person requiring a guardian or other family members disagree with the application for appointment of a guardian.

Hiring a Lawyer:

Usually the person wishing to apply for guardianship will hire a lawyer to make the application and to draw up the necessary legal documents.

You should talk with a lawyer about the process and the legal costs. The person thought to require a guardian also has the right to talk with a lawyer. Costs for both lawyers are paid out of the incompetent person's estate. Usually the judge is asked to approve costs at the guardianship hearing.

Nova Scotia Legal Aid may provide a lawyer free of charge for persons with low incomes or receiving social assistance.

Medical Evidence:

Before the application for guardianship is made the person requiring a

guardian must be examined by two doctors for their opinion as to whether he is mentally competent.

Usually one of the doctors will be the family doctor. The doctors swear affidavits giving their medical opinion.

If the person requiring a guardian will not agree to the examination, you may still apply for guardianship. You will have to explain to the judge why the person has not been examined by a doctor and provide evidence about their mental condition.

If a person's mental condition makes them a danger to them self or others they may be committed to a psychiatric facility where they will be examined by a psychiatrist.

If the disability causes the person to be unable to look after himself adequately, the Adult Protection Service may become involved. If there is evidence that a person is an adult in need of protection because of neglect or abuse, the Adult Protection Service may arrange for a doctor to assess their competency.

COURT HEARINGS

First Hearing:
You or your lawyer must apply for a hearing to the Nova Scotia Supreme Court usually in the district where the person requiring a guardian lives. You may make the application even if you want someone else to be appointed as guardian. For example, if you live in Ontario you may apply to have a relative living in Nova Scotia appointed as guardian.

The first hearing is "exparte" which means notice of the hearing does not have to be given to the person requiring a guardian.

At the hearing the judge will look at the application and will require some evidence that there are grounds to believe that the person is unable to look after their affairs because of infirmity of the mind. Medical affidavits will usually be sufficient evidence.

If satisfied that the application should proceed, the judge will set a date for a formal hearing and decide who should receive notice of the hearing.

Second Hearing:
14 days notice of the second hearing must be given to the person requiring a guardian. The notice must be in writing and must be served personally on the individual.

If the person is "under restraint" in a psychiatric unit, notice may be given to the person who is responsible for their care. The suspected incompetent does not have to be told about the hearing. If the suspected incompetent is in a nursing home or residential care facility, they are not under restraint and usually will be given notice.

Others such as family members who have not consented to the appointment of a guardian should also consent or receive notice. They should also receive copies of all affidavits.

At the hearing the applicant guardian must show that the person is incapable of managing their affairs because of an infirmity of the mind. Usually, the medical affidavits filed with the application provide the evidence.

In addition to the medical affidavits an applicant will have to provide:

- written consent that the person named as guardian agrees to the appointment,
- an affidavit that notice of the hearing has been served on interested parties such as the incompetent person or the person responsible for their care,
- written consent of other family members (next of kin) to the appointment of a guardian. If next of kin will not consent to the application, they should receive notice of the hearing.

If the person thought to require a guardian disagrees with the guardianship application he can have his own medical witnesses give evidence by affidavit or in person. They may have a lawyer represent them.

Who can go to the hearing?
Those who may attend the hearing are:

- the applicant and/or their lawyer
- the person requiring a guardian and/or their lawyer
- anyone who has received notice of the hearing.

Most applications for guardianship are for persons who are no longer able to understand the process or to make decisions. It is unusual for such a person to attend the hearing or to have a lawyer. Usually, medical witnesses are not present at the hearing. The judge can accept their affidavits as evidence. The judge may order medical witnesses to be present where their evidence is being challenged. Both sides can have their own medical witnesses. Others waiting to have matters heard-by the judge may also be in court. The general public and the media may attend but rarely do so. The applicant's lawyer can ask the judge to hear the matter in private.

The Judge's Decision:
Having heard all the evidence the judge may:

- dismiss the application if the judge is not satisfied that the person is mentally incompetent or that it would not be in their best interests to be declared incompetent, or
- find the individual mentally incompetent and appoint a guardian.

Appeals:
Either party may appeal to the Supreme

Court of Nova Scotia, Appeal Division. Anyone considering appealing should talk with a lawyer before deciding what to do.

THE DUTIES OF A GUARDIAN

The guardian must:

1. Be Bonded

The guardian must provide a surety bond. A surety bond is a type of insurance policy whereby the person giving the bond (the surety) guarantees to pay money or perform acts if the guardian fails in their duties or misapplies assets.

This doesn't mean that the guardian has to provide cash. The guardian can arrange for the bond through an insurance agent. The bond is for I 1/4 the value of the incompetent person's estate. The value of real estate is not usually taken into account.

An insurance company may ask for the first three years premiums in advance. Often a discount is offered on the premium for the second and third years.

The annual insurance premium for the bond is paid out of the incompetent person's estate. If there is not enough money in the estate to pay the premium, the guardian is responsible for paying it. The bond must be filed with the court. If the value of the estate diminishes the guardian can go back to the court and ask that the amount of the bond be reduced.

The bond remains in force until the guardian is discharged and the estate accounted for.

While individuals appointed as guardian are required to post a bond, the Public Trustee and trust companies do not have to post a bond.

2. Make an Inventory

The guardian must make an inventory of the incompetent person's assets including property, investments, cash, jewellery and other valuables. The inventory must be filed with the court within 60 days after the order is granted. It is wise for a guardian to have furniture, jewellery, works of art, etc. professionally appraised.

3. Be a Sound Manager

The guardian must:

- manage the incompetent person's property in a way which is in the incompetent's best interests;
- use income from the incompetent person's estate for their benefit and the benefit of their dependants. For example the incompetent person may have dependant children or a spouse who need to be provided for;
- not waste the assets. For example, by buying high risk investments;
- obtain a license from the court before selling real estate. The guardian must apply to the court for permission to sell property. The court will require reasons for the sale and affidavits from two real estate appraisers as to the value of the property.

4. Be Accountable

A guardian must give an account of income and property within a year of the appointment and at such other times as the court directs. This accounting should be made to the court annually. At the end of the guardianship the guardian must account for and deliver up the incompetent's property. For example if the person dies, the guardian must give an account of the property to the executor of the incompetent's estate.

5. Act as Personal Representative

A guardian must represent the incompetent person in legal actions. For example, if the person is injured in an accident the guardian may sue the person responsible for the incompetent's injuries.

Is the guardian responsible for the acts of the incompetent? No. The guardian is not personally responsible for the incompetent person's actions. However, if the incompetent makes a contract with a third party who does not and could not know of the guardianship order, the guardian may have to honour the contract.

Whether the contract can be enforced depends on what the contract was for and the circumstances surrounding the making of the contract.

What is the standard of care required of a guardian?

The guardian has a duty to act prudently and in the best interest of the incompetent. What a guardian is expected to do depends on the particular guardian.

A trust company may be expected to show a higher competency in investing than a family member. The guardian is not expected to be a financial wizard but neither is her or she allowed to use the incompetent's money in risky deals.

Guidelines as to the type of investments a guardian may make are set out in a law called the *Trustee Act*. A guardian should get legal and financial advice before making investments. A guardian may use the services of an accountant, lawyer, investment broker or other professional for the incompetent person's benefit. Fees for professional services are paid out of the estate.

Who makes sure that a guardian is acting properly?

There is no formal system to ensure that a guardian is acting properly.

If the guardian misuses their position, the incompetent person may complain to the Public Trustee or ask someone to complain on his behalf or apply to the court to have the guardian removed as guardian. More likely it would be other family members, friends or caregivers who might observe such actions and complain.

6. Costs

There are several costs a guardian will face in applying for guardianship. Costs are paid out of the incompetent person's estate.

Court Fees:

Court fees are paid when the application for guardianship is made.

Lawyers' Fees:

Lawyers' fees may vary with the particular lawyer and the type of case. They range upwards from $2,500.

Fees cover the time the lawyer spends meeting with the applicant, getting affidavits from two doctors and other witnesses, preparing the case, filing documents in court and presenting the case in court. Usually lawyers require payment of some of their costs up front.

If the application is contested, the alleged incompetent has the right to have their own lawyer. If they cannot afford a lawyer, they may qualify for Legal Aid.

Witness Fees:

Professional witnesses such as doctors may charge a fee for giving an affidavit and/or going to court.

Ongoing Costs:

The premium for the security bond is payable annually. If there is not enough money to cover the premium, the guardian is personally responsible for paying the premium.

There are also ongoing costs for the services of a trust company appointed as a guardian. Indeed any guardian may charge a fee for acting.

How much does the guardian get paid?

The Supreme Court sets guidelines for the payment of guardians – 5% of the gross income plus 2/5 of 1% of the capital held in trust.

A trust company may negotiate higher rates.

The guardian's fees should be approved by the court.

7. Ending Guardianship

How does guardianship end?

The guardian or someone else may ask a judge to end the guardianship if the guardian:

- is unable to carry out her duties because of mental or physical disability;
- moves out of the province permanently;
- wastes the incompetent person's property or misuses their position;
- resigns;
- dies, or if the incompetent person dies.

Must the guardian provide final accounts?

At the end of the guardianship, the guardian must account for how they have dealt with the incompetent person's property. The court will not release the guardian from the guardianship until final accounts have been filed and approved. The premiums on the surety bond must be paid until the guardian is released.

The application for release from guardianship must be filed in court. A lawyer may prepare and file the documents or you may do this yourself.

Before someone is released as guardian a hearing is held before a judge. The guardian or their lawyer must attend the hearing.

Who can make an application for removal of the guardian?

Usually an application to have the guardian removed is made by the guardian, a family member or the Public Trustee. The application is made to the Supreme Court.

If the guardian is misusing his or her position anyone may inform the Public Trustee who will investigate and act on the situation.

If the incompetent person recovers can they have the guardian removed?

Yes. If the person can show that they are no longer mentally incompetent, they may apply to the court to have the guardian removed. The process is similar to having a guardian appointed. Evidence is usually required from two doctors that the person is no longer mentally incompetent. The process takes about six weeks.