

GUARDIANSHIP:

A LAST RESORT, NOT A DEFAULT MEASURE

What is a guardian?

A guardian is a type of substitute decision-maker (“SDM”) that is often appointed by the courts. The court can make an order for guardianship of the person, of property, or both. The effect of guardianship is that the person loses all of their decision-making rights with respect to one or more domains of decision-making (i.e. property, health care decisions and/or day-to-day personal care decisions involving shelter, nutrition, hygiene, safety and clothing).

What’s involved?

The process for obtaining a guardianship order starts with a formal assessment of your loved one’s capacity to make decisions about their personal care and/or property. Assuming the assessor finds them incapable in one or more domains of decision-making, a court application needs to be filed in Ontario’s Superior Court of Justice (or guardian of property can be pursued through the Office of the Public Guardian and Trustee (the “PGT”). You should anticipate costs in the range of \$5,000 – \$10,000, and a timeline of approximately one year to obtain the court order and/or approval from the PGT... if all goes well and your application is not challenged by anyone.

Concerns with guardianship

Guardianship is only one example of substitute decision-making – one we consider to be a last resort. This is because it is an expensive, time-consuming process that ultimately removes decision-making rights from the person with a disability. Once guardianship is in place, it is very difficult to reverse. Guardianship can have a range of negative impacts on the person with a disability, including diminished overall well-being, lowered self-esteem, social stigmatization, and feelings of hopelessness. Additionally, the guardianship structure can leave the person vulnerable to abuse, neglect, and isolation, particularly once you have passed on and your loved one is left without any decision-making rights due to an earlier finding of incapacity.

What are the alternatives?

While people with disabilities may indeed encounter barriers to their decision-making at various points in their lives, there are often solutions that are less restrictive and more accessible than guardianship. Often, a guardianship order will end up simply confirming some of the rights that you already have by virtue of Ontario legislation and/or your ability to make decisions based on existing mechanisms. More on this below.

Financial and Property-Related Decisions

Family members, including parents, do not have any automatic decision-making authority over a person's property, even in circumstances where the person has a disability. Despite this reality, there are several existing mechanisms by which family members can support a person in the management of their finances and property. For instance:

- You could apply to ODSP to become the trustee of your family member's ODSP income, if there is some evidence they need help managing their money and paying their bills.
- Joint banking arrangements can be explored with your local bank, or through online banking.
- If your family member cannot manage their RDSP on their own, a spouse, common law partner, parent or sibling can act as the plan holder.
- Individualized and Direct Funding in the developmental services sector may be paid by Transfer Payment Agencies directly to trusted family members and friends to administer support arrangements for the person with a disability.
- If your family member cannot manage Family-Managed Home Care funding on their own, that funding can be managed by the same person who manages their ODSP, Ontario Works or Passport funding.
- With a solid estate plan, you can leave an inheritance to your loved one in a trust structure, with appointed trustees who will manage liquid assets and even real property for the benefit of the beneficiary with a disability.

Health Care Decisions

Ontario's *Health Care Consent Act* includes a list of SDMs, in priority order, who are authorized to make health care decisions if the health professional does not believe their patient is capable of consenting to treatment. As you will see from the graph below, parents and other family members are recognized by the law as having this authority, if there are no legally-appointed SDMs higher up the chain.

1. Court-appointed Guardian of Person	Legally-Appointed SDM
2. Attorney for Personal Care (named in Power of Attorney document)	
3. Representative appointed by the Consent & Capacity Board	
4. Spouse or Partner	Automatic Family Member SDM
5. Parents or Children	
6. Parent with right of access only	
7. Siblings	
8. Any other relative	
9. Ontario's Public Guardian & Trustee	SDM of Last Resort

Day-to-day personal care decisions

There are fewer barriers to be faced in this domain of decision-making. Third-parties, particularly support agencies operating in the developmental services sector, will typically seek direction from trusted family members or friends in coordinating services and supports for a personal with a disability who may have difficulty expressing their wishes and decisions. Such agencies will rarely, if ever, require a family to pursue guardianship.

Do I need to apply for Guardianship?

The short answer, is likely not. We encourage families to take an approach centred on educating, supporting and advocating for your loved one's right to make decisions whenever possible. You might also explore whether your loved one can create Powers of Attorney ("POAs") for themselves, with the help of a legal professional of course! To learn about more about how to, and who can, create POAs, contact PooranLaw.

Note – many families approach us as their child is turning 18 years old, thinking they must begin an application for guardianship. ***The transition to adulthood does not automatically trigger a need for guardianship.***

If your family member of any age is facing barriers to accessing services, supports, or funding sources, or if there is a serious risk of abuse (including financial abuse) by another family member or third party, this could drive a discussion about the need for guardianship. In such cases, a member of our team would be happy to meet with you to explore whether guardianship is the right approach for your particular situation.

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