



## **Making Decisions for a Mentally Incapable Adult**

This bulletin provides general information on the law of substitute decision-making in Ontario. It is not a substitute for legal advice. To obtain advice about your specific situation, you may wish to contact a lawyer. Referral information is included at the end of this bulletin.

### **Kinds of Substitute Decision-Making**

Generally speaking, there are two different kinds of decisions which may need to be made on behalf of a mentally incapable person:

- Decisions about the person’s property (finances);
- Decisions about the person’s personal care (health care, shelter, safety, nutrition, hygiene, and clothing).

The same person may be appointed to make both kinds of decisions, or the two roles may be held by different people.

### **Appointment of a Substitute Decision-Maker for Property**

There are four basic ways in which one person (“Abel”) can obtain the legal authority to deal with the property of someone else (“Baker”).

- a) Baker can appoint Abel as their attorney for property by signing a Continuing Power of Attorney for Property, at a time when Baker is mentally capable of doing so.
- b) Abel can be appointed as Baker’s guardian of property by a court order.
- c) Abel can be appointed by the Public Guardian and Trustee as Baker’s statutory guardian of property without court involvement.
- d) Abel can be given limited powers to manage Baker’s income from a government benefits program, such as the Ontario Disability Support Program or the Old Age Security Program.

#### *a) Continuing Power of Attorney for Property*

A Power of Attorney is a written document in which one person (the “grantor”) voluntarily gives another person (the “attorney”) the right to make decisions on their behalf. A Continuing Power of Attorney for Property [CPOAP] authorizes the attorney to

make financial decisions for the grantor. It is effective **immediately** unless the document states otherwise, and is called “continuing” because it authorizes the attorney to continue to act after the grantor becomes incapable of managing their own finances.

A person can make a Power of Attorney only if they have the necessary degree of mental capacity to understand what they are doing. A person is considered mentally capable of granting a CPOAP if the person:

- Knows what property they have, and its approximate value;
- Is aware of their obligations to the people who depend on them financially;
- Knows what they are giving the attorney the authority to do;
- Knows that the attorney is required to account for the decisions they make about the property;
- Know that, as long as they are mentally capable, they can revoke (cancel) the Power of Attorney;
- Understands that if the attorney does not manage the property well, its value may decrease; and
- Understands that there is always a chance that the attorney could misuse their authority.

If a person does not have the mental capacity to grant a CPOAP, it may be necessary to have a guardian of property appointed to act for that person.

#### *b) Court Appointment of a Guardian of Property*

A guardian of property, like an attorney for property, is a person who is authorized to manage the financial affairs of someone else. There are two ways in which a guardian of property can be appointed.

The first way that a guardian of property can be appointed is by a court order. Any person may apply to court to be appointed as guardian of the property of someone who is mentally incapable. There are restrictions on when a guardian of property can be appointed by the court. For this reason and the other procedural requirements of an application it is strongly advisable for a person who wishes to apply to court for guardianship to speak with a lawyer. However, the general procedure is set out in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, which can be found online at [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca).

### *c) Statutory Appointment of a Guardian of Property*

The second way that a person can be appointed as guardian of property is through a process set out in the *Substitute Decisions Act*. This process requires the involvement of the Office of the Public Guardian and Trustee.

Anyone who is concerned about a person's ability to look after their finances may request that the person undergo a "capacity assessment" with a designated capacity assessor. A capacity assessor is a health care professional who has had special training in assessing mental incapacity. The assessment can only take place if the person to be assessed does not object and does not already have an attorney for property.

This type of capacity assessment is requested for the specific purpose of determining whether the Public Guardian and Trustee should become the person's guardian of property. If the person is found to be incapable of managing their own finances, then the Public Guardian and Trustee will become the person's "statutory guardian of property." The Public Guardian and Trustee would then have full authority to manage the person's property and related legal affairs

As capacity assessments may be requested for various purposes, if the intention is to appoint the Public Guardian and Trustee, it is important that the requester understand the nature of the request and the consequences that will arise from the assessment.

When the Public Guardian and Trustee is statutory guardian of property, one or more relatives of the mentally incapable person may apply to this office to replace the Public Guardian and Trustee as statutory guardian(s).

To apply to replace the Public Guardian and Trustee, the applicant(s) must provide a Management Plan explaining how they would manage the person's property if appointed. If the Public Guardian and Trustee is satisfied that the applicant would be a suitable decision maker, and that the Management Plan is appropriate, then the Public Guardian and Trustee will issue a Certificate of Statutory Guardianship to the applicant(s) and turn over the responsibilities of guardianship to them.

The OPGT's public information bulletin, "Helpful Hints in Completing your Application to Replace the PGT as Statutory Guardian," is available online at:

[http://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/brochures\\_and\\_forms.asp](http://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/brochures_and_forms.asp)

For additional information about the capacity assessment process, or to obtain a list of capacity assessors, contact the Capacity Assessment Office at (416) 327-6766, or toll free at 1-866-521-1033.

#### *d) Limited Appointment to Manage Government Benefits*

Another option may be available when a person's only source of income is government benefits. The administrators of some government benefit programs, such as the Ontario Disability Support Program [ODSP], Old Age Security [OAS], and the Canada Pension Plan [CPP], can appoint a family member or trusted friend to receive and manage this benefit income on behalf of a recipient who is not mentally capable. The person appointed to manage the income is called a "trustee" or a "third party administrator."

This option is not available if the incapable person has income from other non-government sources, or has assets which must be managed.

To discuss the process for applying for trusteeship or third party administratorship, contact the benefits program in question (e.g. ODSP or OAS).

### **Appointment of a Substitute Decision-Maker for Personal Care**

There are three basic ways in which "Abel" can obtain the legal authority to make personal care decisions on behalf of "Baker":

- a) Baker can appoint Abel as their attorney for personal care by signing a Power of Attorney for Personal Care, if Baker is mentally capable of doing so;
- b) Abel can be appointed as Baker's guardian of personal care by a court order;
- c) If Abel and Baker are family members, Abel may be able to make medical decisions or decisions about long term care placement for Baker under the *Health Care Consent Act*. If Abel is not a family member, they may nevertheless be able to be appointed by an entity called the Consent and Capacity Board as Abel's representative, enabling them to make medical decisions for Baker under the *Health Care Consent Act*.

#### *a) Power of Attorney for Personal Care*

A Power of Attorney for Personal Care [POAPC] allows someone to make personal care decisions on behalf of the grantor if the grantor is incapable of making the personal care decision, or if the attorney has reasonable grounds to believe that the grantor is incapable of making the personal care decision. A person has the capacity to grant a POAPC if they:

- Have the ability to understand whether the proposed attorney has a genuine concern for their welfare;

- Appreciates that they may need to have the proposed attorney make decisions for them.

If a person does not have the capacity to grant a POAPC, and if the decisions falls outside the scope of the *Health Care Consent Act*, it may be necessary to have a guardian of personal care appointed to act for that person.

#### *b) Court Appointment of a Guardian of Personal Care*

Almost any person may apply to court to be appointed as guardian of the personal care of someone who is mentally incapable. However, a person who provides personal care to the incapable person for compensation shall not be appointed as guardian of the person, unless they are a family member of the incapable person, or the incapable person's guardian of property or attorney for property. The procedure, again, is set out in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, and in particular at sections 55-65 and sections 69-77.

Only a court can appoint a guardian of personal care- there is no statutory process for appointing a guardian of personal care without court involvement.

#### *c) Limited Decision-Making Powers under the Health Care Consent Act*

If a person is unable to make health care decisions or decisions about long term care placement and does not have a guardian of personal care, attorney for personal care, or representative appointed by the Consent and Capacity Board, family members can make the decision on the person's behalf through a procedure set out in the *Health Care Consent Act*. The Act sets out a list of potential decision-makers in prioritized order. The substitute decision maker must be at least 16 years old, capable of making the decision, and available and willing to do so.

This is the list of persons who have authority to make health care decisions or decisions about long term care placement for a person who is incapable of making them, in order of priority:

- The person's guardian of personal care (if the person has a guardian, and if the guardian has the authority to make health care decisions);
- The person's attorney for personal care (if the person has an attorney, and if attorney has the authority to make health care decisions);
- The representative appointed by the Consent and Capacity Board to make decisions for the person (if such a representative has been appointed);
- The person's spouse or partner;

- The person's parent or child;
- The person's brother or sister;
- Any other relative of the person.

Equally ranked family members (e.g. two adult children of an elderly widow with dementia) who meet the criteria noted above must agree on the decision.

If no person listed is available to make a health care decision or long term placement decision for the incapable person, then, as a last resort, the Public Guardian and Trustee would be asked to do so.

This process allows family members to make medical and treatment decisions on behalf of a mentally incapable person without any formal process of appointment. It does not allow family members to make decisions about the other areas of personal care, namely shelter, safety, clothing, nutrition, and hygiene.

In some cases, family members find that the scope of their limited authority under the *Health Care Consent Act* is sufficient for them to make any necessary personal care decisions for their loved one, meaning that the formal appointment of a guardian of personal care is unnecessary.

Further details on the *Health Care Consent Act* and its operation can be found in our brochure entitled "The Role of the OPGT in Making Substitute Health Care Decisions". This brochure can be located at the following link:

[http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures\\_and\\_forms.asp](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/brochures_and_forms.asp)

### ***Obtaining Legal Help***

As noted above, you may wish to obtain legal advice about your specific situation. If you do not have a lawyer, the Law Society Referral Service (LSRS), which is available to residents of Ontario, will put you in touch with a lawyer for a half-hour at no charge to help determine your rights and options. Information about how to be referred to a lawyer through the LSRS is available at [www.lsr.info](http://www.lsr.info). If you would like to be referred to a lawyer, you may submit a request to the LSRS by completing the online request form at [www.lawsocietyreferralservice.ca](http://www.lawsocietyreferralservice.ca).

A crisis line is available Monday to Friday, 9:00 am to 5:00 pm. The crisis line is intended for people who are unable to use the online service, such as those without access to the internet. The phone number for the crisis line is 416-947-5255 (toll free 1-855-947-5255).

If you are not in Ontario, you can consult the Lawyer and Paralegal Directory maintained by the Law Society of Upper Canada to find lawyers who specialize in estates law, which includes adult guardianship law. The Directory is available online at <http://www2.lsuc.on.ca/LawyerParalegalDirectory>.