

7. Guardianship and Trusteeship

One of the key areas of consideration that will emerge during transition planning is the determination of whether our child is likely to require a Guardian or a Trustee.

What is Guardianship?

A parent is the legal guardian for their son or daughter until the child becomes 18 years of age. When a child turns 18, he or she becomes an independent adult. This means that a parent no longer has the legal right to make choices for their child.

In Alberta, all adults are considered competent decision makers unless a court formally judges otherwise and a guardian is appointed.

A person who turns 18 and is unable to care for themselves and is repeatedly or continuously unable to make personal decisions as a result of a mental disability (developmental disability), mental illness, brain injury, or dementia, may require a guardian.

Guardianship is the legal term used to describe the formal way for adults who need help with decision making to get it. A Guardian can be a Private Guardian or, where there is no other individual who is prepared to act as a Guardian for an individual, the courts may appoint the Public Guardian.

In Alberta, the *Dependent Adults Act* is the law that governs guardianship. The Office of the Public Guardian is an important source of information about Guardianship.

What is the Role of a Guardian?

A Guardian is a person who has the legal authority and responsibility for making or helping to make decisions about personal matters on behalf of a dependent adult.

A Guardian has the authority to observe and weigh the dependent adult's care and condition, make decisions, and act as an advocate on behalf of the dependent adult.

In most cases, a Guardian is a relative or close friend of the dependent adult. A relative or close friend is familiar with the dependent adult's values, preferences, opinions, religious and cultural heritage and cares about the person.

A Guardian is not a service provider. While it is usually the responsibility of the guardian to work with the dependent adult to determine what services are needed and how they will be provided, it is not up to the guardian to actually provide those services.

A Guardian does not control the dependent adult. A Guardian works toward decision making that includes the dependent adult as much as possible, and enhances that person's life. Decisions are to be based on the values, wishes, and beliefs of the dependent adult as much as possible.

The role of Guardian requires a careful balancing. The Guardian will be a friend, a companion, a teacher, a supporters and, in many cases, a voice for the dependent adults' values, beliefs, and desires.

How is a Guardian Appointed?

Guardianship decisions are governed by the *Dependent Adults Act*.

This legislation sets out the necessary legal process for granting powers of surrogate decision making to a guardian. A Guardian is appointed by the court and the order may specify only certain areas where surrogate decision making assistance is needed.

A Guardianship order is made by the Court when it is satisfied that the appointment is in the best interests of, and will result in substantial benefit to, the dependent adult.

What areas can Guardianship Cover?

A Guardianship Order may specify the Guardian's surrogate decision making role in any or all of:

- residential arrangements
- personal contacts
- social activities
- employment
- education and training
- licenses and permits
- legal matters (excluding financial matters)
- health care
- daily living routines

A Guardianship Order may also identify an Alternate Guardian who can, with written authorization, act as a surrogate decision maker in the absence of the guardian.

Guardianship orders are reviewed at least every 6 years. In cases where a family member is not willing able or suited to be appointed as a Guardian, the Public Guardian may make an application to become that person's guardian.

Things to consider

Anyone considering Guardianship should consider a number of things:

- Guardianship involves a court process. There is a cost for registering with the court although this may be waived in certain situations.
- An application may take 6 months to complete so should be started well before the person's 18th birthday
- An application requires medical information similar to that required for AISH so both processes can be started together
- Guardianship is intended to focus on the best interests of the Dependent Adult, not the values or beliefs of the Guardian
- Guardianship may be order for only certain areas of a dependent adult's life. Regular review is required.
- A guardianship order can be challenged by anyone at any time.
- The decision to apply for Guardianship is not necessarily an easy choice. It must be made carefully and with full recognition of what is in the best interests of the dependent adult.

See the [**Guardianship** Fact Sheet for more info](#)

A number of guides and kits are available to assist people in considering Guardianship and in completing the Application process.

***Understanding Guardianship in Alberta
Initial Application for Guardianship Kit
Guardianship Review Kit
Fact Sheets for Guardians of Dependent Adults***

These guides and kits are available from the Office of the Public Guardian or Community Involvement Program offices in Camrose, Olds, Rocky, Lacombe or Red Deer.

More information about Guardianship is available through any office of the Public Guardian or through guides and fact sheets published on line at: http://www.seniors.gov.ab.ca/services_resources/opg/index.asp

Community Support Coordinators and Service Providers can also provide other information about the many aspects of Guardianship and the application process.

Use of a Lawyer

Guardianship information and application can also be discussed with your family lawyer or a lawyer who specializes in guardianship matters. Many families have found that the use of a lawyer to prepare guardianship applications and to see the application through the courts is very helpful and, is of reasonable cost.

Guardianship and Trusteeship

Guardianship is different from Trusteeship. Guardianship refers to an individual's responsibility to assist in making or to make personal life decisions for a dependent adult, not including finances. Trusteeship refers to an

individual's responsibility to handle a dependent adult's financial matters.

What is Trusteeship?

If an adult with a mental disability does not have the ability to manage his or her estate, the Court may appoint an adult Albertan, a trust company, or the Public Trustee to manage that estate. It is important to note that while the word "estate" more commonly refers to the property owned by a deceased person, living people also have estates consisting of personal property, realty, money, investments, and income.

What is a Trustee?

A trustee is a person that handles the financial and legal affairs that may affect the estate of a person with a developmental disability. The Trustee does not make decisions about the individual's personal life, but is charged with handling the person's financial and legal affairs.

There are two kinds of trustees – **Informal and Formal**

Informal Trustee

An **informal** trustee is for those individuals who may need help in managing monthly income and expenses. Rather than applying to the Court, it may be preferable to arrange for informal trusteeship with the entity issuing funds. Under an informal trustee records are private and there is no need to apply to court.

Provincial and federal benefit programs allow all "informal trustees" to be appointed, usually by having the proposed informal trustee sign a form known as an undertaking. An informal trustee can be appointed to manage the benefits under the following programs - *Old Age Security, Canada Pension Plan, Canadian*

Pension Commission, Veterans Affairs, Assured Income for the Severely Handicapped (AISH), and Supports for Independence (SFI)

Formal Trusteeship

A **formal** Trustee is an individual that has applied to the Court and been appointed as a trustee under the *Dependent Adults Act*. A formal trustee assumes control for all of the property of the dependent adult and is required to report to the court at least every 2 years. An account of records is file with the clerk of the court for review. There is a cost attached to the initial application and for filing of records and these accounts become part of the public record.

The *Dependent Adults Act* provides that a trustee "... has the right to and may take possession and control of all of the real and personal property of the dependent adult, and may manage, handle, administer, sell, dispose of or otherwise deal with the estate to the same extent as the dependent adult could have done if he were an adult able to make reasonable judgments in respect of his or her estate". This may appear to give a trustee broad powers, but there are legal limits on what a trustee is allowed to do with a dependent adult's property.

On being appointed as trustee, the person assumes control of a dependent adult's property which may include real estate, vehicles, investments, and personal property. Arrangements are also made to file tax returns, apply for benefit entitlements, insure property, and to sell or store unused property. The trustee also redirects sources of revenue and income including pensions, disability benefits, dividends, interest payments, and rent. To the extent that a dependent adult's

assets allow, arrangements are made to pay expenses including rent, mortgage payments, maintenance payments, taxes, insurance premiums, loan payments, and other lawful claims. If revenue exceeds expenses, the surplus is accumulated by the Trustee in a trust account which generates interest.

By assuming control of an individual's property, the Trustee is expected to manage the property for the benefit of a dependent adult, taking into consideration the requirements of the person, the needs of any dependants, and the nature of claims on the estate.

It is important to understand that the Trustee is not a welfare agency and has no funds to provide as a benefit to clients. The Trustee is limited to only those assets and sources of income to which the dependent adult is entitled.

How does the role of the Trustee differ from that of a Guardian?

A Guardian can assist an individual in making personal decisions regarding health care, living arrangement, diet and dress, personal associations, licensing, education and training, social activities, employment, or non-estate legal concerns. A Trustee has no authority to make personal decisions on behalf of a dependent adult, only to assist with the individual's financial affairs.

Obtaining Trusteeship

Obtaining informal trusteeship can be done at the same time that AISH Old Age Security or other benefits are applied for.

Formal Trusteeship can be applied for through the courts at the same time that Guardianship is being determined.

See the **Trusteeship** Fact Sheet for more info

More information about Trusteeship is available through the Office of the Public Trustee at http://www.justice.gov.ab.ca/public_trustee/default.aspx

Wills and Estate Planning

Spending time considering and planning for the distribution of a persons assets after their death is a very important part of a family's planning.

*People do not lack strength; they lack a will
Victor Hugo*

Having a will allows you to specify how you want your assets distributed after you die. The opportunity to make desired choices can be lost if a person dies without a will.

If you do not have a will, distribution of your estate and other decisions are made under provincial laws. There can be significant costs and delays in the process of concluding the distribution of an estate where there was no will.

You can prepare, or review, a will at any time. In Alberta, however, many dependent adults cannot legally make a will. Therefore, parent or guardian estate planning should also include consideration of what will happen to the assets of a child with a disability when that child dies.

Because of the many complexities and options involved in estate planning, obtaining estate

planning advice from a lawyer or other financial or estate planning specialist can be an important part of the overall Transition Planning process.