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Guardianship

...what you need to know

Clare E. Burns, Lori M. Duffy and Maralynne A. Monteith review the legalities.

As medical science has improved, so has the prognosis for many of those who are catastrophically injured. Personal injury damage awards have increased commensurate with this new reality and, as a result, it is no longer unusual to see damage awards of more than \$5 million.

These damages are payable to the person injured. This often raises the issue of whether that person is capable to manage their own financial affairs. If they are not, and if they have not previously executed a power of attorney for property that survives incapacity, it is necessary to arrange the appointment of a guardian of their property. In Ontario, this requires a court order pursuant to the *Substitute Decisions Act*, 1992.

From time to time, well-meaning family members seek to have guardianships established for injured persons who either already have powers of attorney in place or who do not require guardianships. How can you avoid such a result?

To avoid the first situation, it is important to ensure that family members, particularly spouses and parents, are aware of the existence of powers of attorney and know who has them. This avoids unnecessary legal fees being expended on the commencement of a guardianship application when none is required. It must be remembered that powers of attorney are generally effective from the moment they are signed, so if you execute one, it must be stored with someone you trust not to use it until events dictate that its use is necessary.

The second scenario can often be avoided by simply allowing well-meaning family members to speak to your treating physician. Privacy legislation generally prevents such discussions and the result can be that family members have a skewed perspective about your ability to handle your own affairs.

If that approach does not work, then a guardianship application can be resisted within the legal process. In Ontario, the *Substitute Decisions Act* provides that a

guardianship order can only be made if you are found by a court not to have the capacity to understand information that is relevant to making a decision in the management of your property or are not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Most important, the Act provides that you are deemed to have capacity to retain and instruct a lawyer when that application is made. Thus, if you find yourself the subject of a guardianship proceeding, and you believe yourself to be capable, you should seek legal advice and take the steps necessary to resist such an order being made.

If the guardianship order is made, this is not the end of your ability to have input into how your financial affairs are arranged. The guardian has a positive obligation to involve you to the extent of your abilities in all decisions. Matters that the guardian will need to address include:

- i) Who will manage the money?**
 - Are they financially astute enough?
 - What is their life expectancy relative to the injured person?
- ii) Will the damage award be structured?**
 - Is an emergency fund to be established to address unforeseen needs or potential treatments? If not, why not?
- iii) How will any non-structured money be invested?**
 - Will there be a need to purchase a new home or modify an existing home?
 - Has a disability architect been consulted?
 - What proportion of the funds will be expended on this?
 - How will taxes, insurance and capital repairs be funded?

iv) What transport will you require?


- How will insurance, maintenance and replacement costs be handled?

v) Is a family member going to care for you? Are they to be paid attendant care costs? If so, how much and may this be modified over time?

vi) Will the guardian(s) need to be bonded? Will they be required to pass their guardianship accounts before the Court periodically?

vii) What are the tax implications of the alternative settlement options?

- Meeting criteria for effective structured settlements?
- Non-structured monies?
- Using trusts?

You are entitled to be consulted about each of these matters and should insist, if necessary through your lawyer, that consultation occur. The end result may then be a positive collaboration between you and your guardian. 

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