



PROTECT YOUR ELDERLY PARENTS: BECOME YOUR PARENTS' GUARDIAN OR TRUSTEE

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I



THE DIFFERENCE BETWEEN A GUARDIAN AND TRUSTEE

1. Understanding the Difference between a Guardian and Trustee

If you are reading this book, you are most likely in the following situation:

- It has become clear to you that an elderly parent needs assistance of some kind, whether it is with personal- and/or health- care matters, financial matters, or both personal and financial matters.
- None of the alternatives such as home care, power of attorney, or Health Care Directives discussed in Chapter 3 are suitable for the elderly relative in question.
- You have decided that the court system, though it is a last resort, is the best choice right now for the elderly relative in question.

This chapter will help you clarify the difference between a guardian and trustee. A person may apply to the court to be appointed as a guardian or a trustee, or both. This book will consider guardianship and trusteeship to be two different roles, even though one person can, and often does, do both jobs at once. If you are applying for both, you only have to make one application. Chapter 2 will help you understand which role is suitable for your elderly relative.

The main difference between guardianship and trusteeship lies in the type of decisions that must be made by the person who is appointed. The type of decisions that need to be made will depend on the unique situation and needs of the person who is being protected. For example, some elderly adults can live on their own reasonably well but cannot manage their finances, while others are just the opposite. The elderly person being protected will

be referred to as a “dependent adult” in this book because he or she is an adult who is now becoming dependent on others for assistance.

In provincial and territorial statutes, the person who is in need of assistance is referred to by different names. In order to make it easier for you to read and understand your own local laws, use Table 1 to determine what such a person is properly called in your province or territory.

You will note that in most cases, the terms used to describe an adult who needs assistance with decision making refer to the concept of being incapable or incapacitated. As more and more parts of Canada modernize their laws dealing with assisting incapacitated adults, the language used in those laws also

becomes more up-to-date. By and large, Canada has done away with language that referred to incapacitated adults in somewhat derogatory terms, though one or two provinces have yet to reform their laws. The modern-day laws recognize that adults who are losing or have lost their capacity should be treated with respect and dignity.

Guardianship and trusteeship should not be undertaken lightly. Keep in mind that Canada’s Charter of Rights ensures each person the right to life, liberty, and security of the person. You must understand that by asking a court to appoint you as someone else’s guardian or trustee, you are asking it to take away another person’s right to run his or her own affairs. For this reason, you are encouraged to ask the court only for the powers you

Table 1
NAME OF PERSON IN NEED OF ASSISTANCE BY PROVINCE AND TERRITORY

Province or Territory	Name of Person in Need of Assistance
Alberta	Dependent adult
British Columbia	Patient
Manitoba	Incompetent person
New Brunswick	Mentally incompetent person
Newfoundland and Labrador	Mentally disabled person
Northwest Territories	Represented person
Nova Scotia	Mentally incompetent person
Nunavut	Represented person
Ontario	Incapable person
Prince Edward Island	Incompetent person
Saskatchewan	Incapable adult
Yukon	Incapable adult

need to assist the dependent adult, and no more. Asking for more is at best interference and at worst, an infringement on another person's rights.

The general attitude that you should take when considering guardianship and trusteeship is that dependent adults should be encouraged to remain as independent as possible for as long as safely possible. Only the help that is requested or needed by a dependent adult should be given. Taking away an individual's independence can be an indignity to the person that is in some cases avoidable. Some elderly people feel angry and violated if unwanted assistance is imposed on them by well-intentioned family members who have too heavy a hand. Guardians and trustees should tread as lightly as possible while giving the assistance that is needed.

Guardianship and trusteeship laws were created for one purpose only, which is to assist a dependent adult. All of the provincial and territorial statutes give the courts the discretion to appoint a guardian and trustee if the court believes it to be beneficial to the dependent adult.

Provincial and territorial legislatures are also doing away with laws that allow a guardian or trustee to have absolute and full control of a person and his or her health care and finances once incapacity has been shown. The more forward-thinking provinces and territories recognize that individuals suffering from loss of capacity do not necessarily need every single area of responsibility taken from them. This is where the difference between guardianship and trusteeship comes in. It is simply a matter of time until all areas of Canada are fully modernized in this way.

1.1 Guardianship

A guardian deals with decisions of a personal nature. This includes health-related decisions such as whether the dependent adult should have a particular surgical operation, take specific medication, or see a doctor. It usually also extends to other personal decisions such as where the dependent adult will live and even small, day-to-day decisions such as what the dependent adult will eat and what he or she will wear. The guardian is the person who would make those decisions on behalf of the dependent adult. As each individual dependent adult is different, so will the decisions needed to be made by each guardian. The general idea is to assist the dependent adult where necessary while allowing him or her to live as independently as possible.

A guardian does not make decisions relating to money, bills, investments, finances, or property. A guardian has no authority to sell or rent a dependent adult's house, pay his or her bills, receive an inheritance on his or her behalf, or invest the dependent person's savings.

The Guardianship and Trusteeship Act of the Northwest Territories, though it only applies to Northwest Territories and Nunavut, contains valuable guidance for anyone who is going to act as a guardian, regardless of where they live. Similar guidelines are expressed in the laws of other parts of Canada as well.

The following is a paraphrased summary of what the Northwest Territories' act says. In deciding what decision is in the best interests of the dependent adult, the guardian shall take the following into consideration:

- If the guardian knows of a wish or instruction that was expressed by the dependent adult when the dependent adult was still mentally capable, the guardian shall make decisions in accordance with that wish or instruction.
- If the dependent adult's current wishes can be determined, then the guardian shall make decisions in accordance with the dependent adult's current wishes.
- A guardian shall encourage the dependent adult to participate, to the best of his or her ability, in the guardian's decisions.
- A guardian shall foster regular personal contact between the dependent adult and his or her supportive friends and family.
- A guardian shall consult from time to time with the dependent adult's supportive friends and family as well as the dependent adult's caregivers.
- A guardian shall foster the dependent adult's independence as much as possible.

Guardian is the term used in most Canadian provinces and territories, but some provinces call a court-appointed guardian by a different name. See Table 2 for the names used in each province and territory.

Table 2
COURT-APPOINTED GUARDIAN NAMES BY PROVINCE AND TERRITORY

Province and Territory	Court-Appointed Guardian Names
Alberta	Guardian
British Columbia	Committee of person
Manitoba	Committee for personal care
New Brunswick	Committee of person
Newfoundland and Labrador	Guardian
Northwest Territories	Guardian
Nova Scotia	Guardian
Nunavut	Guardian
Ontario	Guardian
Prince Edward Island	Guardian
Saskatchewan	Personal guardian
Yukon	Guardian

Chapters 5 and 6 will tell you more about what is involved in being a guardian.

1.2 Trusteeship

A trustee makes decisions about money, real estate, and personal property. Often there must be cooperation between the guardian and trustee if they are different people, such as the case in which a dependent adult is moved from his or her residence to live in a long-term care facility. The guardian chooses which facility is appropriate. The trustee arranges for the paying of the facility's bills. The trustee may also, depending on the situation, arrange to sell the dependent adult's home, clear out and distribute the contents of the house, and invest the sale proceeds on behalf of the dependent adult. In this way, both guardianship and trusteeship roles are called upon.

In law, a trustee is anyone who holds onto or looks after money or property for someone else. If you are the trustee, you have control of the money or property, but you do not own it. As the trustee, you are not holding the money or property for your own benefit or for the benefit of your family or friends. You are not entitled to use it for anyone but the dependent adult and his or her dependants. You are holding on to the property and money and managing them on behalf of the dependent adult. You are called a trustee because you have been entrusted to be the caretaker of someone else's property.

You should note that in legal documents, when the phrase *money or property* is used, the word *property* does not just mean real estate. This can sometimes be confusing, because when the word property is used in a non-law context, it usually means a house or land.

When talking about trusteeship, property can mean both real estate (e.g., land, house, revenue property, summer cottage, or mineral lease) and personal property (e.g., money, vehicle, mobile home, jewellery, furniture, clothing, tools, machinery, livestock, inheritance, investments, mutual funds, bonds, collections, artwork, corporate shares, intellectual property, and almost anything else that is not real estate). Throughout this book, the word property will mean both real and personal property.

It is essential to note that being appointed as a trustee does not give you permission to do whatever you want with the dependent adult's property. There is a widespread impression among Canadians that a trustee, once appointed by the court, can do whatever he or she wants with the money. Nothing could be further from the truth. As a trustee you must carefully read the court order that appoints you so that you know the limits of your authority. In addition, there are laws in place that put restrictions on what all trustees can do, even though those laws may not be mentioned on the specific court order. If you intentionally or carelessly cause a financial loss to a dependent adult, you can be held personally liable for that loss. Chapter 8 will tell you more about the restrictions placed on a trustee by law.

A trustee is a *fiduciary*. This word describes a legal relationship in which the trustee must always, without fail, act in the best interests of the dependent adult, even if doing so means he or she acts *against* his or her own interests. This is not always easy to understand or to do. By agreeing to act as trustee, the trustee is willingly taking on a role in which he or she always acts in a way that is intended to benefit the dependent adult.

Across Canada, the role of a court-appointed trustee is called by one of three names, those being trustee, committee, or guardian. Table 3 lists the names for each province and territory.

Regardless of what this role is called in your province or territory, this book will, for ease of reading, refer to someone appointed to look after another person’s property as a trustee. However, the forms on the CD use the correct term for each province and territory.

Chapters 7 through 10 will tell you more about trusteeship.

2. Provinces and Territory with Special Situations

Manitoba, Nova Scotia, and Nunavut have special situations when it comes to guardianship and trusteeship. The following sections explain the special situations you may encounter if you are dealing with the law in those provinces and territory.

2.1 Manitoba

In Manitoba, there are two laws that have to do with being appointed as the guardian and/or trustee of an adult. One is the Mental

Table 3
COURT-APPOINTED TRUSTEE NAMES BY PROVINCE AND TERRITORY

Province and Territory	Name for Trustee
Alberta	Trustee
British Columbia	Committee of estate
Manitoba	Committee for property
New Brunswick	Committee of estate
Newfoundland and Labrador	Guardian
Northwest Territories	Trustee
Nova Scotia	Guardian
Nunavut	Trustee
Ontario	Guardian of property
Prince Edward Island	Committee
Saskatchewan	Property guardian
Yukon	Guardian

Health Act and the other is the Vulnerable Persons Living with a Disability Act. The procedures and forms are very different for the two laws and anyone who wants to make a court application to become someone's guardian or trustee must figure out which procedure he or she is to follow.

The Vulnerable Persons Living with a Disability Act only applies to an adult who loses his or her capacity if that incapacity manifests itself *before* the adult reaches adulthood. This would not appear to be relevant to the people we are most concerned about in this book. Given that this book focuses on elderly people who are losing their capacity due to aging, it is highly unlikely that this act will apply. Therefore, residents of Manitoba will find that this book focuses only on applications that may be made under the Mental Health Act.

In the event that you are not sure which procedure applies to your situation, you may wish to discuss it with the very helpful and approachable staff of the Office of the Vulnerable Persons' Commissioner in Winnipeg. Contact information is available on the CD.

2.2 Nova Scotia

In Nova Scotia, most applications for the appointment of guardians are made under the Incompetent Persons Act. However, Nova Scotia also has a second way of being appointed as the guardian of an adult person who has lost capacity, that being the Inebriate's Guardianship Act. The procedure is the same. As may seem obvious, the latter act specifically refers to a loss of capacity that is brought around by a person's habitual drunkenness and is not specifically related to aging. As the focus of this book is on incapacity due to aging, all of the forms and information in this

book will refer to the Incompetent Persons Act only.

2.3 Nunavut

When Nunavut became Canada's newest territory in 1999 by splitting off from the Northwest Territories, it retained some of the laws of the Northwest Territories and adopted them as their own. One of the laws of the Northwest Territories that still applies in Nunavut is the Guardianship and Trusteeship Act, which sets out the rules, procedures, and forms for the appointment of guardians and trustees for adults. Therefore, all of the information in this book that applies to the Northwest Territories also applies to Nunavut.

You will note that there are a few changes to the forms that are used for making your application. For example, you must refer to the Nunavut Court of Justice rather than the Northwest Territories court. These changes have already been made on the forms for Nunavut readers.

3. In the Best Interests of the Dependent Adult

There are not a lot of legal guidelines as to what does and does not constitute acting in the best interests of a dependent adult and it may not be easy for you to determine what is in the best interests of your elderly relative. Obviously acting in his or her best interests cannot mean that you only do what the dependent adult wants, as some of the wishes expressed by a dependent adult may be unreasonable. After all, you would not be in the position of guardian and trustee in the first place if the dependent adult was fully capable of making all his or her own decisions.

For example, many elderly people are understandably distraught at the thought of leaving their homes and moving into long-term care facilities or at the need to give up driving their own vehicles. This is often seen by the dependent adult as more of a punishment than anything as it represents a severe loss of freedom, independence, and even identity. However, you, as the guardian, may have no choice but to take steps to move the dependent adult or to have his or her driver's licence revoked if the dependent adult simply cannot manage safely on his or her own any longer. In a case like that, what the dependent adult wants and what is in his or her best interest are not the same.

The wishes and intentions of a dependent adult should always be taken into consideration whenever it is possible to do so. Not all dependent adults suffer from a problem so severe that they can have no input whatsoever into things such as selection of birthday gifts for grandchildren, plans for vacation, or whether they need to see a doctor. Where the dependent adult is able to offer input that is reasonable in the circumstances, it is in the best interest of the dependent adult for that input to be heard and acted upon. Remember that you, as a guardian and trustee, have agreed to act in the least restrictive manner possible and you should remain open to opinions expressed by the dependent adult.

A mistake that is frequently made by children who become guardians of their parents is to set up matters in a way that is convenient for themselves, regardless of whether it is enjoyable, comfortable, or agreeable for the parents. This can lead to neglect and even abuse.

It is absolutely essential that you work with your elderly relative to try to determine his or her wishes and to work within them whenever possible.

In determining whether having a guardian or trustee appointed for your elderly relative is in the elderly relative's best interests, consider the following questions:

- Can the elderly relative make all personal and financial decisions for himself or herself safely and happily right now?
- If so, how long is that situation likely to continue?
- How would the elderly relative's life be improved in the short term and in the long term by having a guardian or trustee appointed?
- What risk is the elderly relative running by refusing decision-making help?
- Is there an urgent situation existing right now that must be addressed quickly?
- Are there any solutions available that are less intrusive than a court-appointed guardianship or trusteeship? (See Chapter 3 regarding alternatives.)
- Has the elderly relative ever made any suggestions or given any instructions about who he or she would like to live with or who he or she would like to have in charge of his or her affairs?

Chapter 2 may help you answer these questions.