

ADULT GUARDIANSHIPS AND TRUSTEESHIPS IN ALBERTA

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In Alberta, the *Adult Guardianship and Trusteeship Act* (“AGTA”)¹ governs the process for appointment of a guardian or a trustee for an individual who is over the age of eighteen and incapable of handling their own personal and financial affairs, and who failed to plan for their incapacity or never had capacity to make a Power of Attorney or Personal Directive.

An individual who is capable of making their own decisions may: (i) sign a Personal Directive allowing another person to make personal care and medical decisions on the maker’s behalf; or (ii) sign a Power of Attorney allowing another person to manage their legal and financial affairs. Without a Personal Directive, someone must apply for an order under the *AGTA* to be appointed as a guardian of the incapacitated adult to make these decisions. Without a Power of Attorney, someone must apply for an order under the *AGTA* to be appointed as a trustee of the incapacitated donor in order to make financial decisions on behalf of the incapacitated donor. For clarity, a guardian is responsible for making personal decisions and a trustee is responsible for making financial decisions for an incapacitated adult.

This article briefly sets out the process by which a guardianship and trusteeship appointment is made in Alberta, discusses special considerations while making these applications, and provides information regarding supported decision making and co-decision making allowed under the *AGTA* legislation which promotes the adoption of less intrusive and less restrictive alternative measures for adults with varying levels of diminished capacity to manage their own personal affairs.

1. Supported Decision Making

Supported Decision making is the least intrusive option available to an individual who wishes to get help making

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1. *Adult Guardianship and Trusteeship Act*, S.A. 2008, c A-4.2 (“AGTA”).

decision(s) about their personal matters, such as healthcare, where to live, who to associate with, participation in educational, vocational and other training, participation in social activities, employment and legal proceedings that do not relate primarily to the financial matters of the adult. This option is available to adults who still have capacity but would benefit from the help of one or more persons while making or communicating decisions about personal matters.

Division 1 of Part 2 of the *AGTA* deals with supported decision-making. A “supported adult” can sign a Supported Decision-Making Authorization² and appoint a supporter to access or assist them in accessing relevant information about the supported adult, and helping make or communicating a decision.³ A supported adult can appoint up to three persons who have attained the age of eighteen as their supporters.⁴ A supporter must keep a record of all decisions they assisted the supported adult in making and act in the supported adult’s best interests, diligently and in good faith.⁵

A supported adult can terminate the Supported Decision-Making Authorization by signing a Termination of Supported Decision-Making Authorization.⁶ An Authorization automatically ends if the supported adult becomes an assisted or a represented adult, or if they lose capacity and their Personal Directive comes into effect.⁷

A supported adult cannot appoint the Public Guardian or the Public Trustee as a supporter.⁸ A supported decision maker cannot assist with making decisions about financial matters.⁹

2. Co-Decision Making

If an adult’s capacity is significantly impaired (determined by a capacity assessment) but they are still capable of making personal decisions with guidance and support,¹⁰ a co-decision-

2. *AGTA, ibid.*, s. 4(3); Adult Guardianship and Trusteeship (Ministerial) Regulation, Alta. Reg. 224/2009 (“*AGTA* Ministerial Regulation”), at s. 7(1).

3. *AGTA, ibid.*, at s. 4(2).

4. *Ibid.*, at s. 4(1).

5. *AGTA* Ministerial Regulation, *supra*, footnote 2, at ss. 4 (1) and 4(2).

6. *AGTA, supra*, footnote 1, at s. 7; *AGTA* Ministerial Regulation, *ibid.*, at s. 7(2).

7. *AGTA, ibid.*, at s. 8.

8. *Ibid.*, at s. 5.

9. *Ibid.*, at s. 3.

making order can be sought from the court. The adult themselves, or an interested person can apply to the court seeking an order appointing a co-decision-maker for the adult.¹¹ The adult who is subject to the order is called the assisted adult and the person who is named in the order to help the assisted adult is called the co-decision-maker.

Division 2 of Part 2 of the *AGTA* governs co-decision-making relationships. An assisted adult or an interested person can bring an application by completing the forms prescribed in the Adult Guardianship and Trusteeship Regulation, Alta Reg 219/2009 (the “*AGTA* Regulation”) and a capacity assessment report prescribed in the *AGTA* Ministerial Regulation.¹² Both the assisted adult and the co-decision-maker must consent to the arrangement.¹³ The Application process involves completing background and reference checks for the co-decision-maker.

The application for a co-decision maker order can be made by desk application, in which case the completed forms are submitted to a Review Officer at the Office of the Public Guardian.¹⁴ In case of urgency or conflict, the application can be made by way of scheduling a hearing with the court, in which case the completed forms will be filed with the court directly.¹⁵

The Public Guardian cannot be a co-decision-maker.¹⁶

The co-decision-maker order specifically lists the personal matters that the assisted adult and the co-decision-maker must make decisions about together.¹⁷ A co-decision-maker cannot make decision on any personal matters not listed in the co-decision-making order. A co-decision-maker cannot assist with decisions on any financial matters.¹⁸

Co-decision-makers must exercise their authority diligently, in good faith, and in the best interests of the assisted adult,¹⁹ cannot be paid a fee but can be reimbursed for expenses,²⁰ may

10. *Ibid.*, at s. 13(4).

11. *Ibid.*, at s. 13(1).

12. *AGTA* Ministerial Regulation, *supra*, footnote 2, at s. 34 (2).

13. *AGTA*, *supra*, footnote 1, at ss. 13(4)(b) and 13(4)(c); *AGTA* Ministerial Regulation, *ibid.*, at s. 34(2)(d).

14. *AGTA* Ministerial Regulation, *ibid.*, at s. 34(1).

15. *Ibid.*, at ss. 43(1) and (2).

16. *AGTA*, *supra*, footnote 1, at s. 15.

17. *Ibid.*, at s. 17(1).

18. *Ibid.*, at s. 12.

19. *Ibid.*, at s. 18.

20. *Ibid.*, at s. 19.

seek the advice and direction of the court on a question respecting the assisted adult,²¹ and are not liable if acting in good faith.²²

While these less intrusive forms of assistance are available, due to the limitation in the assistance that can be provided and the fact that they cannot be utilized for financial decision making, they are used more seldomly than guardianship and trusteeship.

3. Guardianships and Trusteeships

(a) Guardianships

Part 2, Division 3 of the *AGTA* governs guardianship. The court appoints a guardian when it is satisfied that the adult does not have capacity to make a decision on a personal matter. This means that the adult is unable to understand the information relevant to the decision, and is unable to appreciate the reasonably foreseeable consequences of a decision or failure to make a decision.²³ The adult who is subject to the guardianship order is called the represented adult and the person who is named in the order to make decisions for the represented adult is called the guardian.

A guardian can make personal decisions about the following matters relating to a represented adult: healthcare, where to live, who to associate with, participation in educational, vocational and other training, participation in social activities, employment and legal proceedings that do not relate primarily to the financial matters of the adult.²⁴ Based on the represented adult's needs, a guardian might make decisions in relation to some or all of these matters. The capacity assessment report provides information about the areas in which the represented adult lacks capacity, and the court decides the types of decisions a guardian can make.

A guardian has a responsibility to act in the represented adult's best interest, act according to the represented adult's beliefs, values and wishes, be diligent and act in good faith, encourage the adult to be as independent as possible, inform the

21. *Ibid.*, at s. 20.

22. *Ibid.*, at s. 23.

23. *Ibid.*, at s. 1(d).

24. *Ibid.*, at s. 1 (bb).

adult of important decisions that are made and keep a record of the decisions that are made.

There can be two or more guardians appointed with separate areas of authority or with joint authority.²⁵ Guardians are not entitled to compensation, but can be reimbursed for expenses incurred in carrying out their authority and responsibilities.²⁶

The Office of the Public Guardian can apply to the court for an order requesting to be appointed as a guardian for the represented adult, if it is of the opinion that a represented adult is in need of a guardian, and no person is willing, able and suitable to make an application for the appointment of a guardian.²⁷ The court may appoint the Public Guardian as a guardian for a represented adult only with the consent of the Public Guardian.²⁸

(b) Trusteeships

Part 2, Division 4 of the *AGTA* governs trusteeships. The court appoints a trustee when it is satisfied that the adult lacks capacity to make financial decisions and the adult has assets or financial interests that are in need of protection. A court does not appoint a trustee solely on the basis of evidence that the adult is making decisions about a financial matter in a manner that a reasonably prudent person would not adopt.²⁹ The court may make a trusteeship order in respect of any adult who is ordinarily a resident in Alberta, or in respect of any adult who is not ordinarily resident in Alberta if the order applies only to real property owned by the non-resident adult in Alberta.³⁰ The adult who is subject to the trusteeship order is called the represented adult and the person who is named in the order to make decisions for the represented adult is called the trustee.

A trusteeship order may not be required if an “informal” trusteeship is available. As an example, when the represented adult’s only source of income is the Assured Income for the Severely Handicapped or Canada Pension Plan, informal trusteeship is available as the government departments responsible for these programs have an informal trustee program. The same applies to represented adults receiving Old

25. *Ibid.*, at s. 31.

26. *Ibid.*, at s. 37.

27. *Ibid.*, at s. 26(2).

28. *Ibid.*, at s. 29.

29. *Ibid.*, at s. 46(6).

30. *Ibid.*, at s. 45.

Age Security, Guaranteed Income Supplement, Alberta Seniors Benefit, among others.

The Public Trustee can inquire into allegations that an adult needs a trustee. The allegations must be in writing. If the Public Trustee believes that the criteria for appointment of Trustee is met, the adult is likely to suffer serious financial loss if a trustee is not appointed within a reasonable time, and no other person is likely to apply, the Public Trustee must apply to be appointed.³¹

The court can appoint a trust corporation that consents to act as a trustee as the trustee.³²

A Trustee has a responsibility to act in the adult's best interest and make decisions according to the trusteeship plan submitted to the court at the time of appointment.³³ The *AGTA* requires trustees to maintain accounts according to the *AGTA* Regulation.³⁴ Accounts must include a record of all transactions.³⁵ The Trusteeship order may specify a time when trustee must submit accounts for examination and approval by the court.³⁶ The court has discretion whether to require periodic accounting or not, which depends on the nature and value of an adult's property, but which does not negate the need for record keeping as a trustee can be asked to bring in and pass accounts should an interested party raise concerns with the court.

(c) Desk Applications

An application to be appointed as a guardian or trustee can be made by way of a desk application, or the applicant may wish to proceed by hearing.

The *AGTA* Regulation prescribes that a desk application for guardianship or trusteeship is initiated by submitting the following application materials: an application, affidavit, a completed capacity assessment report, a guardianship plan and/or a trusteeship plan, consent of the proposed guardian and/or trustee, an inventory of the represented adult's financial position or an undertaking to file an inventory within six

31. *Ibid.*, at s. 47.

32. *Ibid.*, at s. 49(1)(b).

33. *Ibid.*, at s. 56(1).

34. *Ibid.*, at s. 63(1).

35. *Ibid.*, at s. 15.

36. *Ibid.*, at s. 63(2).

months of appointment, two personal references, and a draft form of Order sought, all in the prescribed forms.³⁷

A capacity assessment report is a report completed by a designated capacity assessor in the province of Alberta, which is completed after the capacity assessor has had an opportunity to conduct assessment of an adult's capacity to make decisions respecting personal matters or financial matters.³⁸ In Alberta, capacity assessors are members of a health profession who are designated as being qualified to conduct capacity assessments.³⁹ Most often, the capacity assessor is the physician who is most familiar with the adult.

The completed application materials along with the court filing fee are submitted to a Review Officer at the Office of the Public Guardian and Trustee (the "Review Officer").⁴⁰ The Review Officer attends to the service and filing of the application materials, and may request a hearing of their own accord or after receiving a request from the represented adult or an interested person who was served with the application in accordance with the *AGTA* Regulation. The role of Review Officer is discussed later in this article.

If proceeding by way of a desk application, it usually takes at least six months from the time completed application is submitted before the court makes a decision. As a result, if there is urgency or special circumstances, we often recommend proceeding by way of a hearing.

(d) Application by Hearing

In cases where the applicant has a reason to believe that there is some urgency to have a guardian or trustee appointed, or if the applicant expects someone to disagree with their application, the applicant may initiate the application for guardianship or trusteeship or both by way of a hearing. In this instance, the applicant completes the same application materials as they would have prepared if the application was proceeding by way of desk, completes a notice of application and hearing, and files the materials with the court. The applicant attends to the service of the application materials on the Review Officer and the

37. *AGTA* Ministerial Regulation, *supra*, footnote 2, at ss. 34(3) and 34(4).

38. *AGTA*, *supra*, footnote 1, at ss. 1(e), 102.

39. *Ibid.*, s. 1(g).

40. *AGTA* Ministerial Regulation, *supra*, footnote 2, s. 34(1).

proposed represented adult, and service of the notice of application and hearing on persons prescribed to be served.⁴¹

(e) Order in Urgent cases

The court can grant a guardianship order on an urgent basis if it is satisfied that an adult lacks capacity to make a decision about a personal matter, and is in immediate danger of death or serious physical or mental harm.⁴² The court can grant a trusteeship order on an urgent basis upon being satisfied that an adult lacks the capacity to make a decision about a financial matter, and is in immediate danger of suffering a serious financial loss.⁴³

The application for an urgent order may be commenced by filing with the court a notice of application and hearing and a supporting affidavit in forms prescribed in the *AGTA* Regulation.⁴⁴

The court can dispense with or modify any requirements of the *AGTA* and the *AGTA* Regulation, such as supporting documents, service, and evidence, if the urgency of the situation so warrants.⁴⁵ The urgent orders are granted for a period up to 90 days in the first instance⁴⁶ and up to 6 months on review.⁴⁷

(f) Role of the Review Officer

The Office of the Public Guardian and Trustee plays a crucial role in the guardian and trustee appointments by providing a report to the court about the suitability of the applicants.

After receiving an application for appointment of guardian or trustee or both, the Review Officer has a duty to meet with the represented adult to explain the nature and purpose of this application and ascertain the views and wishes of the represented adult.⁴⁸ The Review Officer is also responsible for the completion of credit, criminal and background checks for the applicants. Thereafter, a Review Officer must provide a report to the court including a summary of the view and wishes

41. *AGTA* Ministerial Regulation, *supra*, footnote 2, at s. 44.

42. *AGTA*, *supra*, footnote 1, at s. 27(1).

43. *Ibid.*, s. 48(1).

44. *AGTA* Ministerial Regulation, *supra*, footnote 2, at s. 75.

45. *AGTA*, *supra*, footnote 1, at ss. 27(2) and 48(2).

46. *Ibid.*, ss. 27(4) and 48(6).

47. *Ibid.*, ss. 27(5) and 48(7).

48. *AGTA* Ministerial Regulation, *supra*, footnote 2, at ss. 45 and 46.

of the adult or the reasons why it was not possible for ascertain the adult's views and wishes and a summary of any information relating to the suitability of the proposed guardian or trustee. The courts rely heavily on the Review Officer's report while making guardianship and trusteeship appointments.

(g) Adult's views and wishes and the adult's right to be represented

In making guardian and trustee appointments, the court considers, among other things, the best interests of the represented adult, the views and wishes of the represented adult, if ascertainable, and the apparent ability of the proposed guardian to effectively exercise authority about the personal matters to be referred to in the order or the apparent authority of the individual proposed as trustee to effectively manage the financial matters of the adult.⁴⁹

It is interesting to note that despite there being a capacity assessment rendering the adult, with respect to whom the application is being made, incapable of handling their own personal or financial affairs, the courts consider the views and wishes of the adult while making appointments.

In *Crowe v. Alberta (Public Guardian)*,⁵⁰ the court not only confirmed that a represented adult is entitled to legal counsel, but mandated that the adult have counsel. The court relied on the principles of fundamental justice in reaching this conclusion. In *Alberta (Public Guardian) v. C. (K.)*,⁵¹ the court permitted a represented adult to retain counsel, albeit for the limited purpose of putting forth the adult's views in the proceedings. The role of counsel, as prescribed by Justice D. Gates, was quite narrow; it was limited to making submissions to the court with regard to the represented adult's views and wishes.

We have been retained in similar situations in the past, to assist with expressing the views and wishes of the adult. Often in these situations, as all parties don't appreciate the right of a represented adult to retain counsel, counsel has to obtain a court order approving the retainer and confirming the scope of the retainer.

(h) Special Powers that can be asked for in Trusteeship

49. *AGTA*, *supra*, footnote 1, at ss. 28 and 49.

50. 2010 ABQB 240 (Alta. Q.B.).

51. 2015 ABQB 369 (Alta. Q.B.).

The *AGTA* prescribes that a trustee: (1) may not sell, transfer or encumber the real property of or purchase real property on behalf of the represented adult;⁵² and (2) may not make gifts out of the represented adult's property,⁵³ without specific court authority. Subject to some exceptions, a trustee is not allowed to use the adult's funds for anyone other than the adult, and this precludes a Trustee from making donations on behalf of the adult as well. A trustee may in their discretion use the funds of an adult to benefit the adult's dependants, such as spouse, adult interdependent partner, minor or dependant children.⁵⁴ However, in order to benefit any other person, court consent would be required. If an adult owns a land or real property, it is advisable that a discussion be initiated with the applicant whether they intend to sell the real property of the adult in the near future as if it is not specifically addressed in the order, they do not have authority to sell the land. In the past, a number of our clients have communicated that the represented adult always made gifts to their family members on special occasions and have expressed that they wish their trustee to continue doing so. Similar comments are made with respect to donations as well. It is important that these matters be discussed with applicants and special authority regarding these matters be sought from the court, if required.

(i) Limiting Access by Public

The *AGTA* hearings are generally held in open court; however, a party can apply to limit the persons present at a hearing, seek that all or part of hearing be held in private, or seek to prohibit or restrict access to information or filed documents in cases involving sensitive information. The applicant who applies for such remedy pursuant to the *AGTA* must satisfy the court that it would be in the best interests of the adult who is the subject of the application, or in the interests of the proper administration of justice, that such Order is issued.⁵⁵

The area of adult guardianships and trusteeships has become quite complex, which is why it is important for individuals who find themselves involved in situations involving the *AGTA* to

52. *AGTA*, *supra*, footnote 1, at s. 55(2).

53. *Ibid.*, at s. 60.

54. *Ibid.*, at s. 56(3).

55. *Ibid.*, at s. 113.

retain counsel who has experience in this area. The *AGTA* presumes that an adult has capacity to make decisions until the contrary is determined, and when an adult lacks capacity to make decisions, their autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision making is provided. The represented adult's best interests are of paramount concern to the court and they are determined by considering the known and expressed wishes of the adult and any known values and beliefs of the adult while they had capacity. Given that the *AGTA* allows for varied degrees of assistance to individuals with varying degree of capacity, it is important that instead of blanket guardianship and trusteeship orders, counsel be consulted to obtain the appropriate order tailored to individual needs and circumstances.