A GUIDE TO THE SUBSTITUTE DECISIONS ACT

Ontario

0-7794-2147-7

Index

This Guide summarizes the main points of *The Subsitute Decisions Act*. It should not be used as a substitute for the legislation, and it is not a substitute for legal advice. To make the legislation easier to understand, the Guide avoids legal terminology wherever possible. Some of the detail, including qualifications and exceptions to some of the provisions in the legislation, has been omitted. Please consult the Act itself for more detailed information. A consolidated version of the Act and the Regulations made under the Act is available. It may be obtained from:

Publications Ontario
880 Bay Street, Toronto, Ontario
1-800-668-9938
or through the Ontario Government website: www.gov.on.ca

An Introduction to the Guide

The Subsitute Decisions Act (SDA) was passed unanimously by the Ontario Legislature in December 1992 after many years of study and public consultation. The law came into force on April 3, 1995. Amendments to the law came into force on March 29, 1996, upon proclamation of the *Advocacy, Consent and Substitute Decisions Statute Law Amedments Act, 1995*, which repealed the *Advocacy Act*, made amendments to the SDA, and replaced the *Consent to Treatment Act* with the *Health Care Consent Act*.

This Guide has been created especially for caregivers, advocates, nurses, doctors, agency and association staff and other interested individuals, to promote a clear understanding of what the Act covers and how it works. The Guide provides a summary of the main points of the legislation. Specifically, the Guide:

- provides background on why new legislation was needed;
- explains how the SDA relates to the *Health Care Consent Act*, 1996, which covers decisions about treatment, long-term care facility admission, and personal assistance services provided in those facilities;
- provides definitions of common terms;
- outlines the two kinds of decision-making that come under the SDA: decisions about property or finances, and decisions about personal care;
- explains the rules for how people give a continuing power of attorney for property and a power of attorney for personal care, and what these decision-makers (attorneys) do;
- describes the role of the Office of the Public Guardian and Trustee;
- explains the purpose of a provincial register for those people who have a guardian of property or personal care.

The Guide describes the legislation as clearly and plainly as possible. Providing the most accurate and reliable information possible requires some level of explanation and detail. Even so, much has been omitted. The following provides suggestions on how to use this Guide most easily and effectively as a valuable and informative resource.

- Read “A Summary of the Legislation” (Page 2): The summary provides a brief overview of the Act, and provides a sense of the meaning and intent of the legislation.
- Review the Index: The index will help you quickly and easily find what you're looking for.
- Refer to “Some Important Definitions” (Page 9): This Guide contains a glossary of legal and technical terms.
- Read through the Guide: It's a good idea to read the Guide cover to cover or envision situations that you or your clients may encounter. Think about how the legislation would apply in each case.
- Keep the Guide as a reference:

If you have any questions or require further information, use the resources listed at the back of this Guide.

A Summary of the Legislation

The SDA governs what may happen when someone is not mentally capable of making certain decisions about their own property or personal care.

Generally, the law is designed to:

- give individuals more control over what happens to their lives if they become incapable of making their own decisions;
- respect people's life choices, expressed before they become mentally incapable, and take into account their wishes;
- recognize the important role of families and friends in making decisions for loved ones;
- clarify and expand the rights of adults who are mentally incapable, and the responsibilities of substitute decision-makers;
- provide safeguards and accountability to protect mentally incapable people from harm;
- limit public guardianship and other government interventions to situations where there are no other suitable alternatives.

The SDA describes how a decision-maker may be appointed for a mentally incapable person. The procedures to be followed depend on the type of decision the person is unable to make. One set of procedures and rules applies when a person is incapable of making decisions about their property or finances; another applies if the incapacity relates to personal matters such as health care or housing.

Decision-making for Property

If a person is incapable of making property decisions, there are three possible ways for a decision-maker to be appointed:

1. Through a document called a “continuing power of attorney.”

   This is a written authorization in which a person specifies the decision-maker of his or her choice. The power of attorney must be made before the person becomes incapable. No additional procedures are necessary to activate the power of attorney unless the individual making the document states them in the power of attorney.

2. Through a process called “statutory guardianship.”

This usually occurs only if a person has not made a continuing power of attorney concerning all of his or her property and is assessed as incapable. The Act defines what "incapacity to manage property" means. It also allows assessments for this purpose to be conducted only by qualified assessors. If the assessor finds that a person is mentally incapable then "statutory guardianship" will take place. There are different procedures for appointing a statutory guardian of property for patients of psychiatric facilities. These procedures are described in the *Mental Health Act*. The statutory guardian of property will be the Public Guardian and Trustee unless a family member or other authorized person applies to the Public Guardian and Trustee to assume this role.

3. Through the appointment of a guardian of property by the court.

   The Act describes the material that must be submitted to the court. It also specifies who may be appointed and under what circumstances.

Decision-making for Personal Care

If the individual is incapable of personal decision-making, there are two ways to appoint a decision-maker:

1. Through a “power of attorney for personal care.”

   Like the continuing power of attorney for property, this written document must be made before the person becomes incapable. The power of attorney designates a personal care decision-maker called an "attorney." The document may also give specific instructions to the decision-maker.

A power of attorney for personal care authorizes the attorney to make decisions:

- about treatment, admission to a long-term care facility, or personal assistance services provided within such a facility if the *Health Care Consent Act*, 1996 allows the attorney to make the decision; or

- about other personal care if the attorney has reasonable grounds to believe that the grantor is incapable of making the decision. The attorney may also make decisions if the power of attorney document does not state any additional procedures that must be followed to confirm incapacity before the attorney may act.

2. Through the appointment of a guardian by the court.

The process of applying to the court is similar to that for property. In both cases, court-ordered guardianship is considered a last resort, and there are strict limits on when it can be imposed.

Powers and Duties of Attorneys and Guardians

The range of personal care decisions that may be made by the guardian or attorney will depend on the extent of the person's capacity. The Act describes six personal care functions – health care, accommodation, safety, nutrition, hygiene and clothing. Decisions may be required in one or more of these areas.

Attorneys and guardians of property will generally be able to do anything with respect to finances that the person could normally do except make a will. The duties of attorneys and guardians in managing property or making personal care decisions are described in detail in the Act. Of particular significance is the requirement that the attorney or guardian for personal care follow any advance instructions or wishes made by the person, unless it is impossible.

Office of the Public Guardian and Trustee

Attorneys and guardians are accountable for their actions. If a problem is identified, a guardian or attorney may be removed or replaced. If there is no one else able to take these steps, the Public Guardian and Trustee may do so. This office has a number of functions including:

- appointing private individuals as statutory guardians of property;
- investigating reports of serious abuse or neglect of incapable persons;
- acting as a last resort decision-maker for medical treatment and related decisions for incapable people under the *Health Care Consent Act*;
- keeping a register of who in Ontario has a guardian of property or for personal care.

The Public Guardian and Trustee may also be appointed by the court as the guardian of an incapable person. The court can only do this, however, if there is no one else willing, suitable, and available to take on the responsibility.

The Subsitute Decisions Act

The Subsitute Decisions Act (SDA) is a law that governs what may happen when someone is not mentally able to make certain kinds of decisions. The Act covers financial or property management decisions, and decisions about personal care, which include health care, food, housing, and safety.

A person who makes decisions for another person is called a "substitute decision-maker." Sometimes, after other alternatives have been tried, the only answer is to have someone

else get legal authority to make decisions on behalf of a loved one or friend. The need to take such a step could be caused by illness, accident or disability, a temporary condition or a permanent one. Prior to the adoption of the Act, Ontario laws dealt mainly with how the finances of an incapable person were to be managed. In addition to finances, the SDA covers personal care, which includes a person's health and safety. For many years, people have been able to designate someone, through a power of attorney, to look after their financial decisions if needed. But there was no similar right for personal care. Under the SDA, such a right now exists.

The Act pulls together a number of rules and procedures that were sprinkled across several pieces of old legislation. Where the previous laws were vague or silent about, for example, what it means to be incapable or what are the duties of substitute decision-makers, definitions and guidelines are now in the Act.

A key feature of the Act is that people can designate someone they trust to make personal care or financial decisions for them if they become unable to make those decisions themselves. They can do this using a legal document called a power of attorney.

The law also provides a process for the appointment of a guardian. Essentially, a mentally incapable person may have a guardian for their property or personal care because they have not named an attorney, or there are other circumstances that make appointing a guardian necessary. The legislation sets procedures for how guardians are appointed and what they do.

The Act also brings the law into line with current thinking on protection of individual rights.

The Office of the Public Guardian and Trustee administers the Act. The Office has a number of functions, including investigating reports of serious abuse or neglect of incapable people. The Office may sometimes become the guardian of an incapable person, but it will do so only when there is no one else who can act on the person's behalf when a guardian is needed. The Office also keeps a register of who in Ontario has a guardian of property or for personal care. People may contact the Office if they need to know whether someone who appears to be incapable of making decisions has had a guardian appointed.

The SDA is one of two laws that work together to provide methods to arrange substitute decision-making for those who are incapable of making decisions for themselves. The *Health Care Consent Act*, 1996, covers decisions about treatment, admission to long-term care facilities, and personal assistance services to people in those facilities.

The *Health Care Consent Act*

The *Health Care Consent Act* confirms the right of capable individuals to make informed decisions about health treatment. It spells out the elements of consent to health care services. It applies to treatment provided in all health care settings by health care professionals.

This Act also provides a way to obtain a decision about health care from a substitute, such as a family member, for someone who is not mentally capable of consenting on their own behalf. This includes decisions about medical treatment, admission to care facilities, and services provided in those facilities. It recognizes that it is not always necessary to have a decision-maker who has been formally appointed through the legal procedures of the SDA. For example, the person's mental incapacity may be only short-term, or other types of personal care decisions (such as accommodation or safety) may not be needed. Sometimes a formal substitute – an attorney or guardian – under the SDA will already be in place and have the authority to make the type of decisions covered by the *Health Care Consent Act*. The *Health Care Consent Act* continues to recognize the right of guardians and attorneys for personal care to make these decisions ahead of anyone else. This means that a person may use the SDA to designate, in advance of incapacity, the substitute decision-maker of their choice.

Some Important Definitions

Assessor

A person qualified to determine a person's capacity to make decisions about their finances or personal care. The classes of person(s) permitted to act as assessors are specified in the regulations to the SDA.

Capacity assessors are independent of the government. To be qualified to conduct capacity assessments, one must be a member of:

- The College of Nurses of Ontario;
- The College of Occupational Therapists of Ontario;
- The College of Physicians and Surgeons of Ontario;
- The College of Psychologists of Ontario; or
- The Ontario College of Social Workers and Social Service Workers.

Capacity assessors are also required to successfully complete a specialized training program as well as fulfilling requirements of the regulations that apply to them.

Assets

All things that have some positive monetary value. These could include real estate, furniture, stocks, bonds, promissory notes, vehicles, pensions, etc.

Attorney

A person appointed by another person to make decisions on that other person's behalf. In this context, an "attorney" does not mean a lawyer. An attorney for property is authorized to make decisions about property and manage finances on behalf of another person.

Continuing Power of Attorney for Property

A legal document in which a person gives someone else the legal authority to make decisions about their finances even if they become unable to make those decisions themselves. The person who is named as attorney does not have to be a lawyer. The power of attorney is called "continuing" because it can continue to be used after the person who gave it is no longer mentally capable.

Court-Appointed Guardian for Personal Care

A person who is appointed by the court to act on another person's behalf in regard to decisions about personal care. The court may delegate all personal care decisions to a guardian, or the court may specify which personal care decisions may be made by a guardian and which decisions the individual may continue to make for themselves.

Court-Appointed Guardian of Property

A person who is appointed by the court to act on another person's behalf with regard to decisions about property and finances.

Dependant

A person such as a minor child or spouse, to whom another individual, such as the grantor of a power of attorney, has an obligation to provide financial support.

Fiduciary Obligations

Obligations based on the principles of good faith. They operate in situations in which trust and confidence is placed in one party by another to act in accordance with that trust. For example, the grantor of a power of attorney places trust and confidence in the attorney.

Grantor

A person, who by signing a power of attorney, appoints another person to make decisions on their behalf.

Guardian

A person who is appointed to act on another person's behalf. The guardian has many of the same duties as an attorney. Unlike an attorney, whose right to act on behalf of another person is given to him or her by that other person while still mentally capable, a guardian is appointed by the court, or by another process as set out in the legislation, after the person whose affairs are to be managed has become mentally incapable.

Incapacity

Under the SDA, "incapacity" refers to mental incapacity.

Jointly

In the context of the SDA, this term means that attorneys or guardians must act together. For example, if required to act jointly, all attorneys or guardians must sign every cheque written on the bank account of the incapable person.

Mentally Incapable of Managing Property

This term applies to a person who is unable to understand information that is relevant to making a decision or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision about his or her property. Processes for certifying an individual as being mentally incapable of managing property are prescribed in the SDA, and in the *Mental Health Act*.

Notarized

A legal process to confirm a true copy of a document by having a notary public (usually a lawyer) read the document and the copy, and place a notarial seal on the copy.

Personal Care

Personal care includes health care, nutrition, shelter, clothing, hygiene and safety.

Property Management

This means decision-making about someone's financial affairs. This can include any type of financial decision or transaction that a person would make in the course of managing their income, spending, assets and debts. For example, budgeting, paying bills, filing tax returns, safeguarding valuables, selling real estate, and making loans. It does not include making a will.

Public Guardian and Trustee (PGT)

A position in the Ministry of the Attorney General with responsibility for the administration of the SDA. The PGT acts as a last resort to make property and personal care decisions if appointed on behalf of Ontario residents who are mentally incapable and have no one else to make decisions for them.

Severally

In the context of the SDA, this term means that in cases where there is more than one attorney or guardian, they may each act independently of each other. For example, only one signature would be required on a cheque written on a bank account. Often the phrase "jointly and severally" is used, which means that the attorneys or guardians can either act together or separately.

Statutory Guardian of Property

A statutory guardian is a person who is appointed to act on another person's behalf with regard to decisions about property and finances. The appointment of a statutory guardian is made without going to court. The statutory guardian can be the Public Guardian and Trustee (PGT) or someone approved by the PGT. There is no "Statutory Guardian of Personal Care." Under the SDA, persons who have the right to make personal care decisions on behalf of another person are given that right by the individual receiving the care by means of a Power of Attorney for Personal Care, or as a guardian appointed by the court.

Substitute Decisions Act (SDA)

A law that governs procedures for the appointment of substitute decision-makers. The Act covers decisions about both personal care and financial management. A consolidated version of the Act and the Regulations is available from Publications Ontario.

Decisions About Property

The Subsitute Decisions Act (SDA) sets out what may happen if someone is mentally incapable of making their own decisions about their property or finances.

The Act says a person is incapable of managing property if the person:

- is unable to understand information that is relevant to making a decision in the management of their property; or
- is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Continuing Power of Attorney for Property

The Act allows people to make a continuing power of attorney for property. A continuing power of attorney is a legal document in which a person gives someone else the authority to make decisions about their property if they become unable to make those decisions themselves.

Who May Give a Continuing Power of Attorney for Property

A person may give a continuing power of attorney for property if he or she is at least 18 years of age and is mentally capable of giving it. People are considered capable of giving a continuing power of attorney for property if they:

- know what kind of property they have and its approximate value;
- are aware of obligations to dependants;
- know what authority their attorney will have;
- know that the attorney must account for his or her dealings with the property;
- know that, if capable, they may revoke or undo the power of attorney;
- appreciate that unless the attorney manages the property prudently, its value may decline; and
- appreciate the possibility that the attorney could misuse the authority.

Somebody who is not mentally capable of making property management decisions themselves may still be capable of giving a continuing power of attorney to someone else.

Who May Be an Attorney for Property

A person may name anyone 18 years of age or older as their attorney for property. More than one person may share the responsibility as attorney. A number of people may be named as the attorney and others as alternatives or backups.

There is nothing in the Act that forces a person who is named as attorney to accept this role. Once an attorney has begun to act, he or she can resign. The Act specifies how this is done.

How Authority is Given

The continuing power of attorney must state that it is a continuing power of attorney or express the person's intention that it can be used after they become mentally incapable. There must be two witnesses to the signature of the person giving the power of attorney. The following people cannot be witnesses:

- the person to whom the power of attorney is given or their spouse or partner;
- the spouse or partner of the person giving the power of attorney;

- a child of the person who gives the power of attorney or someone that person has shown an intention to treat as their child;
- a person whose property is under guardianship or who has a guardian of the person; or
- a person who is under 18 years of age.

The continuing power of attorney need not be in any particular form.

How Authority is Revoked

While still mentally capable of giving a power of attorney, a person may revoke or undo a power of attorney they have made. A power of attorney is revoked in the same way that it is given: in writing, with two witnesses. The rules on who cannot be a witness are the same as those for how authority is given.

What an Attorney for Property Can Do

The attorney may be given the authority to make any type of decision related to the person's property that the person could make themselves, except make a will. The power of attorney may limit the authority the attorney may have. For example, the power of attorney could say the attorney cannot deal with certain types of property. The power of attorney may put conditions on how the property is to be managed. For example, it might say that loans to individuals or certain types of investments cannot be made.

Duties of an Attorney for Property

The duties of attorneys for property include:

- to act diligently, with honesty and integrity, and in good faith;
- to explain the attorney's powers and duties to the incapable person;
- to encourage the person to participate, to the best of his or her abilities, in decisions about their property;
- to seek to foster regular personal contact between the incapable person and supportive family members and friends; and
- to consult from time to time with supportive family and friends of the incapable person, and with those who provide personal care to the person.

Attorneys must put the financial needs of the incapable person first. If there are funds left over, the needs of the person's dependants are the next priority. After that, if there is money still available, it may be spent to satisfy the person's other legal obligations.

Attorneys must keep accounts of all transactions. The regulations made under the Act explain all the rules about accounts. The Act provides guidelines for how money may be spent on gifts, loans, and charitable donations.

Compensation for an Attorney for Property

An attorney is entitled to take payment at a rate set out in the law, unless the power of attorney for property says otherwise. The amounts are the same as those allowed to "guardians" of property (people who are appointed under the SDA by the court or by the Public Guardian and Trustee). The rates permitted to guardians and attorneys for property are 3% on monies received and paid out and 3/5 of 1% on the average annual value of the assets. An attorney for property who receives compensation is required by law to exercise the degree of care, diligence and skill that a person in the business of managing property must exercise.

How a Continuing Power of Attorney for Property Comes into Effect

There are different approaches:

- A power of attorney may say that it will not take effect until something specific happens. This is called “postponed effectiveness” (for example, the person may say it cannot be used until they become mentally incapable of making financial decisions);
- A continuing power of attorney may be effective immediately.

Postponed Effectiveness

If a person decides to delay the power of attorney from coming into effect until they are incapable, there has to be a way to determine their capacity. The power of attorney may also state how the attorney is to determine if the person has become incapable, in case there is any question. The power of attorney could, for example, name someone such as a relative, a friend or a family doctor to decide.

If the power of attorney can’t be used until the person becomes incapable, but does not say how incapacity will be decided, the Act says the power of attorney is effective when:

- the attorney is notified by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*.

Immediate Effectiveness

The second option – making the power of attorney effective immediately – avoids the need for the above procedures. No determination of incapacity is required. The attorney will not necessarily take over decision-making right away, but he or she has the authority to do so if it is necessary. As a precaution against misuse, some people may choose to

leave such a document with a trusted third party – their lawyer, for example. If a power of attorney is silent about when it comes into effect, it is effective immediately.

A Guardian of Property

A guardian of property is appointed after a person has become incapable, rather than being chosen by the individual in advance. There are two kinds of guardianship for property: statutory guardianship and court-ordered guardianship.

Statutory Guardianship of Property

Statutory guardianship means that a guardian is appointed to manage property without going to court. There are two ways that statutory guardianship can occur.

In Psychiatric Facilities

The first way is clearly limited to patients in psychiatric facilities. The *Mental Health Act* defines a psychiatric facility as "a facility for the observation, care and treatment of persons suffering from mental disorder and designated as such by the Minister."

The Public Guardian and Trustee will become the statutory guardian of patients in psychiatric facilities who are assessed as incapable of managing their property. The *Mental Health Act* describes the process for issuing a Certificate of Incapacity. The patient has the right to a review of their capacity. This is done by the Consent and Capacity Board. The person who is assessed in the psychiatric facility and found to be incapable of managing property will be advised of their right to ask for a review of this finding. This type of statutory guardianship is not new. Before the SDA, outpatients of psychiatric facilities and residents of facilities for persons with developmental disabilities were also covered by this process. However, since the SDA, these two groups are not treated any differently than the general population.

In the Community or in Other Facilities

People who are not patients in a psychiatric facility may come under statutory guardianship through a different process. The Public Guardian and Trustee will become the statutory guardian if the person is assessed as incapable of managing property, and an independent assessor issues a Certificate of Incapacity to the Public Guardian and Trustee.

The Act specifies a process that must be followed to let the person know what is happening and what their rights are:

- an assessment for statutory guardianship cannot be performed until the assessor explains to the person its purpose, the effect of the finding about the person’s capacity and the person’s right to refuse to be assessed; and

- when an assessor issues a Certificate of Incapacity to the Public Guardian and Trustee, the Public Guardian and Trustee must ensure that the person is informed, in an appropriate manner, that the Public Guardian and Trustee has become the person's statutory guardian, and that the person is entitled to apply to the Consent and Capacity Board for a review of the assessor's finding that the person is incapable of managing property.

There is no requirement that any person in the community or in other facilities be assessed for their capacity to manage property. The only people who must be assessed are inpatients of psychiatric facilities.

Replacing the Public Guardian and Trustee

There is a process in the Act that allows an incapable person's attorney, spouse, partner, relative, or, in certain circumstances, trust corporations, to apply to take over statutory guardianship from the Public Guardian and Trustee. A "relative" is defined in the Act as someone who is related by blood, marriage, or adoption.

Attorneys under Continuing Powers of Attorney for Property

If the Public Guardian and Trustee becomes the person's statutory guardian, a previously granted continuing power of attorney for property takes priority over the statutory guardianship.

In this situation, the statutory guardianship can be terminated if the incapable person has previously granted a continuing power of attorney for property giving the attorney authority over all of the person's property. Once the Public Guardian and Trustee receives a copy of the power of attorney and a written undertaking signed by the attorney to act in accordance with the power of attorney, the statutory guardianship by the Public Guardian and Trustee is terminated. The attorney then manages the property of the incapable person under the power of attorney document.

Applications by Relatives

There is not always a power of attorney in existence which can be used to terminate the Public Guardian and Trustee's statutory guardianship. In these cases, a spouse, partner, relative, attorney under a power of attorney made before incapacity that does not grant authority over all the person's property, or trust corporations, in certain circumstances, may be appointed statutory guardian. These applications must include a management plan for the property. The Public Guardian and Trustee must also consider the incapable person's current wishes and the closeness of the applicant's relationship with the incapable person when reviewing the application. The Public Guardian and Trustee may require the applicant to provide security as a condition of approving the application.

If the Public Guardian and Trustee refuses the application and the applicant disputes the decision, then the Public Guardian and Trustee must ask the court to decide.

Court-Ordered Guardianship

Sometimes, the court will play a role in deciding guardianship. For example, an application to the court for the appointment of a guardian might be brought in situations in which neither a power of attorney or a statutory guardianship is available or appropriate. These situations could include the following:

- a person believed to be incapable and in need of guardianship refuses to be assessed;
- an applicant who wishes to take over after the Public Guardian and Trustee has become statutory guardian is not the person's attorney and is also not their spouse, partner, relative or a trust corporation; and
- there are grounds to believe there has been mismanagement by the attorney or the statutory guardian.

Before the court can make an order appointing a guardian of property, the judge must find that:

- the individual is incapable of managing their property; and
- the incapable person needs to have decisions made about their property.

In addition, the court will not appoint a guardian if it is satisfied that the need for making decisions can be met by an alternative course of action that:

- does not require the court to find the person to be incapable of managing property; or
- is less restrictive of the person's decision-making rights than the appointment of a guardian.

The court will also consider the suitability of the proposed guardian and the management plan. The person applying to court to become the guardian must inform the incapable person that the application is being made to the court and that they have a right to oppose the application.

Who May Be a Guardian of Property

Although anyone, including the Public Guardian and Trustee, may ask the court to appoint a guardian of property for someone incapable of making financial decisions, there are restrictions on who may be appointed as a guardian.

First, a guardian must be at least 18 years old. Second, with certain specific exceptions, people who provide health care or residential, social, training or support services to an incapable person for pay cannot be appointed as the financial guardian.
The exceptions to this rule are:

- the incapable person's spouse, partner or relative;
- the person's attorney for personal care; or
- the attorney under a continuing power of attorney for property.

The Court may appoint more than one guardian. If more than one guardian is appointed, they may share the job or be given different responsibilities.

A Streamlined Process

In some cases, undisputed court applications will not require a formal hearing. A judge will make a decision based on material provided in writing for the court application.

Existing Orders under the Mental Incompetency Act

Court orders which were made appointing a "committee of the estate" (this means a guardian of property) under the Mental Incompetency Act continue to be valid if they were registered with the Public Guardian and Trustee prior to April 3, 1997 or have been approved by the court since then. Under the SDA, the person already appointed under the order has to abide by the terms of the court order and by the rules in the Act concerning the duties and obligations of a guardian. The "committee of the estate" has to provide information to the Public Guardian and Trustee so that the Office has a record of who is acting as guardian and what their powers are.

Assessment Orders

In some cases, the court may order that a person's mental capacity be assessed if there are reasonable grounds to believe the person is incapable of making financial decisions. Under certain circumstances – and under certain conditions – the court may authorize the use of force to obtain the assessment.

Duties of a Guardian of Property

Guardians have the same duties as attorneys (see p.4). Guardians and attorneys must keep accounts and records about the property they manage, and the transactions they make on behalf of the person they are appointed to act for. The rules about these accounts and records are set out in a regulation made under the SDA.

The only additional duty a guardian has that an attorney does not have is that a guardian must prepare a management plan for review by the Public Guardian and Trustee at the time of assuming guardianship (where the guardian is appointed by the court, the judge

also reviews the management plan). A management plan is an outline of the steps the guardian intends to take in managing the person's property.

Accounts and records kept by the guardian must be made available to certain people on request, including the Public Guardian and Trustee.

Other Duties of the Public Guardian and Trustee

In addition to its role as statutory guardian, the Office has a number of other roles:

Screening – The Public Guardian and Trustee:

- must review all applications for statutory guardianship or court-appointed guardianship;
- may approve changes in management plans of guardians; and
- may ask a judge to review the accounts of an attorney or guardian, or to remove or replace an attorney or guardian.

Keeping the Register – The Public Guardian and Trustee maintains a register of statutory and court-appointed guardians of property. A person who wants to know if a guardian has been appointed and what authority the guardian has may call the Office of the Public Guardian and Trustee to get this information.

Guardianship Investigations – The Public Guardian and Trustee has an obligation to investigate any report that a person is incapable and is suffering or is at risk of suffering serious financial harm as a result. In these kinds of serious situations, the Office has powers to carry out an investigation, including the right to review certain types of records, and to enter certain facilities to meet with an incapable person. In most cases, entry to a private dwelling requires a warrant unless the person living there does not object. If the Public Guardian and Trustee investigates and believes that a person is incapable of managing their property and guardianship is required to prevent or stop serious financial harm, the Public Guardian and Trustee must apply to the court to be appointed to act as temporary guardian of property.

Decisions About Personal Care

The Subsitute Decisions Act (SDA) sets out how legal authority to make substitute decisions may be obtained if a person is incapable of personal care. Personal care includes health care, food, living arrangements or housing, clothing, hygiene, and safety. The Act says a person is incapable of making personal care decisions if the person:

- is unable to understand information that is relevant to making a decision concerning their own health care, nutrition, shelter, clothing, hygiene, or safety; or
- is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision in these matters.

If a person is incapable of making personal care decisions, that person may need someone else with legal authority to make decisions for them. The rules and procedures in the Act that apply to substitute decision-making for personal care are different from those that apply to property.

Power of Attorney for Personal Care

A power of attorney for personal care is a legal document by which a capable individual gives someone else the authority to make personal care decisions on their behalf. The power of attorney only comes into effect if the grantor becomes incapable of making decisions on their own.

Who May Give a Power of Attorney for Personal Care

To give a power of attorney for personal care, a person must be at least 16 years of age and mentally capable of giving it.

People are considered capable of giving a power of attorney for personal care if they can:

- understand whether the attorney has a genuine concern for their welfare; and
- appreciate that the attorney may need to make personal care decisions on their behalf.

Even if a person can't make their own personal care decisions, they may still be capable of giving someone a power of attorney.

Who May Be an Attorney for Personal Care

A person may name anyone who is at least 16 years old as their attorney for personal care as long as the attorney is not someone providing them with health care or with residential, social, training or support services for pay. This rule was made to try to ensure that the attorney does not have a conflict of interest when it comes to personal care decisions. This rule does not apply to a spouse, partner, or relative.

More than one person may share the responsibility as attorney. Or one person may be named as the attorney, and another as an alternative or backup, in case the first choice cannot act when the time comes. It is also possible to divide decision-making authority among different attorneys. For example, one attorney might make decisions about housing and another about health care. Nothing in the Act forces a person who is named as attorney to accept this role. Once an attorney has begun to act, he or she can resign. There are rules in the Act about how this is done.

What an Attorney for Personal Care Can Do

The power of attorney may give full authority or may limit the attorney to certain areas of personal care. Among other things, the power of attorney can give the attorney the authority to give or refuse consent to treatment on the person's behalf. If the person becomes incapable of making their own treatment decisions, the *Health Care Consent Act* will recognize the authority of the attorney for personal care.

Giving Instructions

The power of attorney may include instructions to the attorney. If instructions are included, the person making them must have the capacity to make personal care decisions when they make the power of attorney. For example, the person who gives the power of attorney may have strong feelings about where they want to live, or under what conditions they would consent to certain kinds of medical treatment. If the incapable person gives specific instructions in a power of attorney, the attorney must follow those instructions unless it is impossible to do so.

If the incapable person does not include any specific instructions, or if the instructions don't apply to the decision that must be made, the attorney must try to find out if the person expressed any other wishes when they were mentally capable. Those wishes could have been spoken or written down. The attorney's decisions must be based on those wishes, unless it is impossible to do so. If the person did not express specific wishes, or if it is impossible to carry them out, the attorney must make a decision that is in the person's best interests. In deciding what those best interests are, the attorney must consider:

- any current wishes the incapable person may have;
- the values and beliefs the incapable person held while they were capable;
- whether the decision is likely to improve the incapable person's quality of life or prevent it from becoming worse; and
- the expected benefits of the decision compared to the risks of making another decision.

Using a Power of Attorney for Personal Care

Unlike the continuing power of attorney for property (which can become effective immediately), a power of attorney for personal care can only be used during the period of time that the grantor is incapable of personal care decisions.

Once a power of attorney for personal care has been signed, no special procedure is required to use it if:

- the *Health Care Consent Act* applies to the decision to be made and that Act authorizes the attorney to make the decision; or

- the attorney has reasonable grounds to believe the person is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from acting unless the grantor's incapacity has been confirmed. If the power of attorney document includes this condition, it may also state how the attorney is to determine if the person has become incapable.

If the power of attorney says it can't be used until the grantor's incapacity has been confirmed, but does not say how incapacity will be decided, the Act says the power of attorney comes into effect when the attorney receives a notice from an assessor stating that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of personal care.

Special Powers of Attorney

Some people want to make a power of attorney for personal care, which can be used even if they later, during a period of incapacity, challenge the attorney's authority to make decisions for them.

Why would anyone do that? Some people with certain types of illness are aware that they may go through periods when they need help and treatment but will resist attempts to provide it. During those periods, they may object to having decisions made for them because of their mental condition, and not because those decisions are bad for them. The decisions may involve treating an incapable person or taking them to a safe place.

To address this concern, the Act allows people to make a special power of attorney that allows the attorney to proceed with decisions for personal care over the objections of the grantor. For example, if a person wants to give their attorney specific authority to use necessary and reasonable force to get the person's mental capacity assessed or to take the person to a treatment centre against their will, those instructions may be written into the power of attorney. The power of attorney may also contain a specific provision that gives up the grantor's right to apply to the Consent and Capacity Board to review a finding of incapacity. Making this special type of power of attorney involves a deliberate choice by a person who, at the time, is capable of personal care decisions. The person chooses to waive their right to challenge having their decision-making powers removed during their incapacity. The Act is very careful to put in place safeguards to ensure that people realize what they are giving up.

Two things must happen before these special types of provisions in a power of attorney can be effective:

- at the time the power of attorney was signed, or within 30 days, the grantor must sign an additional statement that he or she understands the special provisions in the power of attorney, and that the power of attorney may only be revoked if an assessor confirms that the grantor is capable of personal care; and

- within 30 days of signing the power of attorney, an assessor must confirm that after the power of attorney was signed, an assessment was performed and that the grantor was capable of personal care and capable of understanding the consequences of signing the power of attorney with these special provisions in it.

Duties of Attorneys for Personal Care

Duties of attorneys for personal care include:

- to act diligently and in good faith;
- as far as possible, to try to foster the person's independence;
- to choose the least restrictive and intrusive course of action that is available and appropriate;
- to explain the attorney's powers and duties to the incapable person;
- to encourage the person to participate, to the best of his or her abilities, in personal care decisions about them;
- to seek to foster regular personal contact between the incapable person and supportive family members and friends; and
- to consult from time to time with supportive family and friends who provide personal care for the person.

Revoking a Power of Attorney

An ordinary power of attorney for personal care may be revoked or cancelled by the person who gave it if that person is capable. A person is capable of revoking a power of attorney if they are capable of giving one. A power of attorney is revoked in the same way as it is given: in writing, with two witnesses. The rules on who cannot be a witness are the same for continuing powers of attorney for property.

A power of attorney containing the special provisions described above can only be revoked if an assessor confirms that the grantor is capable of personal care. The assessment must be done not longer than 30 days before the revocation is signed.

Health Care Consent

The *Health Care Consent Act* describes who may act as the substitute decision-maker if the decision to be made for the incapable person is about treatment or about admission to a nursing home or home for the aged and certain services provided in those long-term care facilities. A person who holds a power of attorney for personal care that authorizes these decisions has priority over everyone except a guardian of the person appointed by the court.
Certain protections are built into the *Health Care Consent Act* to ensure that the person is given the opportunity to challenge the finding that he or she is incapable, including the right to have this opinion reviewed by the Consent and Capacity Board.

If the person does not seek such a review, or if it is unsuccessful, the attorney may make the decision following the rules set out in the *Health Care Consent Act*.

A Guardian of The Person

As a last resort, a court may appoint a "guardian of the person." For example, this could occur when no power of attorney for personal care has been made, or the power of attorney for personal care cannot be used or is not appropriate.

Typical situations could include:

- an attorney who has resigned or has himself or herself become incapable; or
- an attorney who is not acting properly.

The only way of becoming a guardian of the person is by court appointment. The court may appoint a guardian of the person only under certain conditions. The court must be satisfied that:

- the person is incapable of making decisions in at least one aspect of personal care; and
- the incapable person needs to have decisions made.

The court will not appoint a guardian if the need for making decisions will be met by an alternative course of action that:

- does not require the court to find the person to be incapable of personal care; and
- is less restrictive of the person's decision-making rights than the appointment of a guardian.

The court will also consider the suitability of the person applying to be guardian and the guardianship plan that has been filed with the court. The person applying to court to become guardian must also provide a statement confirming that he or she has informed the incapable person of the application and the right to oppose the application.

What a Guardian of the Person Can Do

The court may make an order for full guardianship, covering all personal care decisions, only if the person is incapable of all those kinds of decisions (health care, food, housing, clothing, hygiene and safety). If the person is capable of some kinds of personal care decisions but not others, the court may make an order for partial guardianship covering only the areas in which the person is incapable. For example, a person might be capable of deciding what to eat and wear, but be unable to make a decision about health care. In that case, the court may make a partial guardianship order covering decisions about health care.

If more than one guardian is appointed, they may be given different responsibilities. For example, one guardian might look after decisions about housing and another about health care. If a court authorizes a guardian to make decisions about health care, the *Health Care Consent Act* ensures that a guardian has first right to make health care decisions on the incapable person's behalf, ahead of everyone else.

The court may terminate a guardianship or replace a guardian if an application is brought before the court to do so.

A Streamlined Process

In some cases, undisputed court applications may not require a formal hearing. A judge may make a decision based on material provided in writing. This approach may reduce the cost of a court application.

Existing Court Orders

Court orders which were made appointing a "committee of the person" (this means guardian of the person) under the Mental Incompetency Act continue to be valid if they were registered with the Public Guardian and Trustee before April 3, 1997 or have been approved by the court since then.

The person who is appointed under the order has to comply with the terms of the court order and with the rules, duties, and restrictions that apply to guardians of the person under the SDA. They are required to provide information to the Public Guardian and Trustee so that the Office has a record of who is acting as guardian and what their powers are.

Assessment Orders

In some cases, the court may order that a person's mental capacity be assessed if there are reasonable grounds to believe that the person is incapable of making personal care decisions and needs a guardian. Under certain circumstances and conditions the court may authorize the use of force to obtain the assessment.

Duties of Guardians

Guardians have the same duties as attorneys for personal care (see Duties of Attorneys for Personal Care, p. 27). Guardians must also file a guardianship plan to indicate how they will carry out their responsibilities. This plan must be approved by the court.

Guardians and attorneys for personal care must keep records of the decisions they make for the incapable person. The rules about these records are set out in a regulation made under the SDA.

Limits on Authority for Personal Care

The Act puts certain limits on the authority and powers of personal care attorneys and guardians of the person. These restrictions are for the protection of mentally incapable people. For example:

- consent to the use of electric shock for control purposes is prohibited in the Act unless it is treatment, and consent is given under the rules in the *Health Care Consent Act*;
- an attorney for personal care or guardian of the person cannot consent to the incapable person being confined, subjected to monitoring devices, or restrained physically or by means of drugs unless the practice is essential to prevent bodily harm to the person or to others, or allows the person greater freedom or enjoyment.

A person making a power of attorney for personal care may put other limits on the authority of their attorney. A court order may put additional limits on what a guardian can do.

Other Duties of the Public Guardian and Trustee

The Office of the Public Guardian and Trustee has a number of other duties:

Screening – The Public Guardian and Trustee:
- reviews all applications for guardianship;
- may approve changes in guardianship plans; and
- may ask a judge to remove or replace an attorney or guardian.

Mediation – The Public Guardian and Trustee may agree to mediate disagreements between an incapable person's guardian for personal care and their guardian of property, or their attorney for property and their attorney for personal care. The Public Guardian and Trustee may also agree to mediate disagreement between joint attorneys, or between joint guardians.

Keeping the Register – The Public Guardian and Trustee maintains a register of all guardians who have been approved by the court to make personal care decisions for incapable people.

Guardianship Investigations – The Public Guardian and Trustee has an obligation to investigate any report that a person is incapable and is suffering, or is at risk of suffering serious personal harm as a result of their incapacity.

The Office has powers to carry out investigations, including the right to review certain types of records and to enter certain facilities to meet with an incapable person. In most

cases, entry to a private dwelling requires a warrant unless the person living there does not object.

If the investigation reveals that the person is incapable and guardianship is required to prevent or stop serious personal harm, the Public Guardian and Trustee must apply to the court to become temporary guardian of the person.

Conclusion

This Guide provides a summary of the major features of *The Subsitute Decisions Act*. For more detail, please refer to the Act and Regulations. Copies of *The Subsitute Decisions Act*, its regulations, and other legislation are available from:

Publications Ontario
880 Bay Street
Toronto, Ontario
M7A 1N8

Telephone
(416) 326-5300 or
toll-free in Ontario
1-800-668-9938

If you have questions or you need additional copies of this Guide in English or French, please write, fax or call:

Ministry of the Attorney General
Office of the Public Guardian and Trustee
595 Bay Street
Suite 800
Toronto, Ontario
M5G 2M6

Telephone: (416) 314-2800
Facsimile: (416) 314-2619
Toll-free: 1-800-366-0335
Website: www.gov.on.ca