



GUARDIANSHIP CHECKLIST: PROPERTY

The Substitute Decisions Act, 1992 S.O. 1992, c.30 (the “SDA”) is the statute/legislation governing the role, powers, duties and obligations of a guardian of property whether by court appointment or by statutory appointment. While an attorney for property under a continuing power of attorney for property has similar duties and obligations, this checklist focuses solely on guardians.

PROPERTY

- Property as it is used in the substitute decision-making context has a broad definition. It includes all of the real property, monies, investments, income, proceeds of costs awards/other pecuniary entitlements, GICs, RRSPs RIFs, vehicles, personal effects and property of the grantor, including valuables such as, paintings, vehicles, boats, jewellery, and personal and household effects.

POWERS

- A guardian for property can do anything on the incapable person’s behalf, except make a Will, or other testamentary disposition. In other words, the guardian may make financial arrangements, pay bills, cash cheques, direct payments, sell property and make a multitude of other financial decisions for the incapable person.
- The guardian’s powers are also subject to the SDA and to any conditions imposed by a court.

MANAGEMENT PLAN

- A guardian must act in accordance with the management plan established for the property of the incapable person. A management plan includes information about the assets and liabilities of the incapable person, including any land, general household items and vehicles, valuables, savings and bank accounts, securities and investments, the incapable person’s expenses, any legal proceedings that the incapable person is involved in, etc.
- The management plan also requires the guardian of property to outline his or her proposed plans to deal with the assets (keep in current form, sell, convert, close accounts, purchase, pay off debt, etc.) and the reasons for those plans.

DUTIES AND OBLIGATIONS

- A guardian of property must act in accordance with the management plan.
- A guardian of property must explain to the incapable person what the guardian's powers and duties are.
- The guardian is **always** responsible for keeping detailed records and accounts.
- A guardian must encourage the incapable person to participate to the best of his or her abilities in the property decisions.
- The guardian must seek to foster regular contact between the incapable person and supportive family members and friends of the incapable person and must consult from time to time with those supportive family members and friends as well as people who provide personal care to the incapable person.
- The guardian should be careful to make arrangements which are in the best interests of the incapable person. The guardian must take care of the incapable person, in all respects, concerning the property and financial management and investment of his or her affairs. The guardian must take steps to protect, manage and invest the incapable person's property prudently, maximizing the benefit to the incapable person.
- A guardian is a fiduciary, placed in a position of trust, and held accountable to a high standard of ethics and conduct. A guardian's powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith for the incapable person's benefit.
- A guardian must manage property maintaining ownership with the incapable person. Though the guardian may have signing authority over the incapable person's bank account, financial instruments and other financial affairs, the property should not be put into an account in joint names, or under the guardian's name alone.

- The guardian must also ensure that all relevant persons having financial dealings with the incapable person know that the guardian is managing his/her property.
- In addition, the guardian must consider the personal comfort, best interests, well-being of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The view should always be to maximize the quality of life of the incapable person, and in that regard, liaise with the attorneys for personal care where appropriate and proper to do so. The guardian of property therefore must manage the property of the grantor, commensurate with decisions made about the incapable person's personal care.
- A guardian who does not receive compensation must exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs
- A guardian who does receive compensation must exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.
- It is intended that the guardian act honestly, reasonably, and diligently, in all circumstances which is the guardian's protection from any possible liability which may ensue.

REQUIRED EXPENDITURES AND GUIDING PRINCIPLES

A guardian of property *shall* make the following expenditures from the incapable person's property:

- Expenditures that are reasonably necessary for the person's support, education and care;
- Expenditures that are reasonably necessary for the support, education and care of the person's dependants;

- Expenditures that are necessary to satisfy the person's other legal obligations.¹

In making a decision for an incapable person, a guardian of property must follow these guiding principles:

- The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations shall be taken into account;
- Expenditures on the support, education and care of the person's dependants may be made only if the property is and will remain sufficient to provide for the incapable person's own support, education and care; and
- Expenditures that are necessary to satisfy the person's other legal obligations may only be made if the property will remain sufficient to provide for the incapable person (and their dependants) support, education and care.²
- In respect of gifts and loans, and the testamentary intentions of the incapable person, the guardian is meant to make decisions commensurate with the capable wishes of the incapable person.
- In respect of professional assistance, the guardian can seek assistance from professionals including from tax, accounting advisors, as well as advices from a lawyer. It is essential to seek professional assistance when appropriate to do so, because the guardian for property is liable for damages resulting from a breach of the guardian's duty. The guardian should seek legal advice if any of their duties or obligations are unclear or not fully understood.

ACCOUNTS AND RECORDS

The legal responsibilities of a guardian of property with respect to the form of accounts and records are set out in Regulation 100/96 of the SDA. A guardian of property must:

¹ SDA, section 37.

² SDA, section 37.

- Make a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;
- Keep an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;
- Keep an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;
- Keep an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;
- Keep an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;
- Keep a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;
- Keep an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;
- Keep an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation; and
- Keep a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any.

- In addition to proper accounts, a guardian of property must also keep a copy of the certificate of statutory guardianship or court order constituting the authority of the guardian, a copy of the management plan, if any, and a copy of any court orders relating to the guardian's authority or to the management of the incapable person's property.

The guardian of property must retain the accounts and records until he or she ceases to have authority and one of the following occurs:

- The guardian of property obtains a release of liability from a person who has the authority to give the release. This applies with necessary modifications, to former guardians.
- Another person has acquired the authority to manage the incapable person's property and the guardian delivers the accounts or records to that person.
- The incapable person has died and the guardian delivers the accounts or records to the incapable person's personal representative.
- A guardian of property is discharged by the court on a passing of accounts under section 42 of the SDA and either the time for appealing the decision relating to the discharge has expired with no appeal being taken or an appeal from the decision relating to the discharge is finally disposed of and the guardian is discharged on the appeal.
- A court order is obtained directing the guardian to destroy or otherwise dispose of the accounts or records.

CONFIDENTIALITY & DISCLOSURE OF ACCOUNTS

A guardian of property is not permitted to disclose any information contained in the accounts and records of the incapable person, unless directed or required to do so, in order to make transactions on the incapable person's or grantor's behalf, or otherwise fulfill his/her duties, or is ordered to do so by the court. However, a guardian of property must produce copies of the accounts and records upon request to the following people:

- The incapable person;
- The incapable person's attorney for personal care or guardian of the person;

- If the Public Guardian and Trustee is the guardian of property, the incapable person's spouse, except a spouse from whom the incapable person is living separate and apart within the meaning of the *Divorce Act* (Canada), or the incapable person's partner, child, parent, brother or sister; and
- The Public Guardian and Trustee, if he or she is not the incapable person's guardian of property or guardian of the person.

COMPENSATION

Guardian of property compensation is provided for under the SDA and is subject to court scrutiny:

- A guardian of property may take annual compensation from the property in accordance with the prescribed fee scale.
- The compensation may be taken monthly, quarterly or annually.
- The prescribed fee consists of:
 - (a) 3 per cent on capital and income receipts;
 - (b) 3 per cent on capital and income disbursements; and
 - (c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.
- The prescribed amount per page to be paid for photocopies is 50 cents.
- The guardian may take an amount of compensation greater than the prescribed fee scale allows,
 - (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or

(b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.³

APPLICATION FOR ADVICE, OPINION, AND DIRECTION OF THE COURT

A guardian of property may from time to time have questions about the management of the property that he/she deems appropriate for resolution and direction by a court. A guardian may apply to the court for the opinion, direction, and advice of the court, and may consult a lawyer for assistance in doing so.

PASSING OF ACCOUNTS

A guardian of property may be required, during the course of their guardianship, to pass the records and accounts for court review, which application is governed by the *Rules of Civil Procedure* (Rules 74.17-74.18). Please note that the following Rules reflect the amendments as of January 1, 2016:

FORM OF ACCOUNTS

- Rule 74.17(1) states that guardians shall keep accurate records of the assets and transactions, and accounts filed with the court *shall* include,
 - (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
 - (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
 - (c) an account of all money received, but excluding investment transactions recorded under clause (e);
 - (d) an account of all money disbursed, including payments for the guardian's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

³ SDA at ss. 40 (1), 40(2), 40(3)

- (e) where the guardian has made investments, an account setting out,
 - (i) all money paid out to purchase investments,
 - (ii) all money received by way of repayments or realization on the investments in whole or in part, and
 - (iii) the balance of all the investments in the estate at the closing date of the accounts;
 - (f) a statement of all the assets of the incapable person that are unrealized at the closing date of the accounts;
 - (g) a statement of all money and investments of the incapable person at the closing date of the accounts;
 - (h) a statement of all the liabilities of the incapable person, contingent or otherwise, at the closing date of the accounts;
 - (i) a statement of the compensation claimed by the guardian and, where the statement of compensation includes a management fee based on the value of the assets of the incapable person, a statement setting out the method of determining the value of the assets; and
 - (j) such other statements and information as the court requires.
- (2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account.
- (3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

MATERIAL TO BE FILED

- Rule 74.18 (1) deals with the material to be filed on an application to pass accounts. The guardian must file:
 - (a) The accounts for the relevant period verified by affidavit of the guardian. This is **Form 74.43**;
 - (b) A copy of the order appointing the guardian;

- (c) A copy of the latest judgment, if any, of the court relating to the passing of accounts.

NOTICE OF APPLICATION

- Rule 74.18(2) states that on receiving the material referred to above, the court must issue a notice of the application to pass accounts which is **Form 74.44**.

SERVICE

- Rule 74.18 (3) states that the person seeking to application to pass the accounts (the applicant) must serve the notice of application and a copy of a draft of the judgment sought on every person who has a contingent or vested interest in the estate (or presumably the accounts of the incapable person in a guardianship passing) by regular lettermail.
- Rule 74.18 (3.1) states that where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate (or accounts of the incapable person), the Public Guardian and Trustee or the Children's Lawyer must also be served with the documents referred to in subrules (1) and (3).
- Rule 74.18 (3.2) states that where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate [or presumably the accounts of an incapable person], the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).
- Rule 74.18(4) states that where the person is served in Ontario, the documents shall be served at least **60 days** before the hearing date specified in the notice of application.
- Rule 74.18 (5) states that where the person is served outside Ontario, the documents shall be served at least **75 days** before the hearing date specified in the notice of application.

PERSON UNDER DISABILITY OR UNKNOWN

- While likely more relevant to a passing of accounts application by an estate trustee (rather than a guardian) rule 74.18 (6) states if a person referred to in

subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,

(a) neither the Public Guardian and Trustee nor the Children’s Lawyer is authorized under any Act to represent the person; and

(b) there is no litigation guardian to act for the person on the passing of the accounts.

NOTICE OF OBJECTION TO ACCOUNTS

- Rule 74.18 (7) states that a person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts, which is Form 74.45.

REQUEST FOR FURTHER NOTICE

- Rule 74.18 (8) states that a person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts which is **Form 74.45.1**.
- Rule 74.18 (8.1) states that unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,
 - (a) receive notice of any further step in the application;
 - (b) receive any further document in the application;
 - (c) file material relating to costs under subrule (8.6), (11) or (11.2); and
 - (d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11)

NO RESPONSE

- Rule 74.18(8.2) states that unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,
 - (a) receive notice of any further step in the application;
 - (b) receive any further document in the application;
 - (c) file material on the application; or
 - (d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

RESPONSE TO APPLICATION – PGT OR CHILDREN’S LAWYER

- Rule 74.18 (8.3) states that if the Public Guardian and Trustee or the Children’s Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children’s Lawyer, shall, at least 30 days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,
 - (a) a notice of objection to accounts (Form 74.45);
 - (b) a request for further notice in passing of accounts (Form 74.45.1);
 - (c) a notice of no objection to accounts (Form 74.46); or
 - (d) a notice of non-participation in passing of accounts (Form 74.46.1).

WITHDRAWAL OF OBJECTION

- Rule 74.18 (8.4) states that a person who wishes to withdraw a notice of objection to accounts shall, at least **15 days** before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48).

WHEN HEARING NOT REQUIRED

- Rule 74.18 (8.5) states that an applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,
 - (a) no notices of objection to accounts are filed; or
 - (b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule.

REQUEST FOR COSTS

- Rule 74.18 (8.6) states that subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least 10 days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49 or 74.49.1) and file the request with proof of service.

JUDGEMENT ON PASSING GRANTED WITHOUT A HEARING

- Rule 74.18 (9) states that the court may grant a judgment on passing accounts without a hearing if, at least five days before the hearing date of the application, the applicant files with the court,
 - (a) a record containing,
 - (i) an affidavit of service of documents served under subrule (3), (3.1) or (3.2),
 - (ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children’s Lawyer and Public Guardian and Trustee, if served,
 - (iii) an affidavit (Form 74.47) of the applicant or applicant’s lawyer stating that a copy of the accounts was provided to each person who was served with

the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record;

(b) a draft of the judgment sought, in duplicate; and

(c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be.

COSTS

- Rule 78.14 (10) states that where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4).

REQUEST FOR INCREASED COSTS

- Rule 74.18 (11) states that where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),
 - (a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and
 - (b) a costs outline (Form 57B).

- Rule 74.18 (11.1) states that unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least 15 days before the hearing date of the application:
 1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.
 2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).
 3. The Public Guardian and Trustee or Children’s Lawyer, as the case may be, if the Public Guardian and Trustee or the Children’s Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.

- Rule 74.18 (11.2) states that any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 10 days before the hearing date of the application.

- Rule 74.18 (11.3) states that where a request for increased costs is served under subrule (11), the person making the request shall, at least five days before the hearing date of the application, file with the court a supplementary record containing,
 - (a) the documents served under that subrule, together with an affidavit of service of those documents; and
 - (b) an affidavit containing,
 - (i) a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and
 - (ii) the factors that contributed to the increased costs.

JUDGEMENT ON INCREASED COSTS GRANTED WITHOUT HEARING

- Rule 74.18 (11.4) states that the court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs

without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies.

CONTESTED PASSING OF ACCOUNTS (HEARING)

- Rule 74.18 (11.5) states that if one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least 10 days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,
 - (a) a consolidation of all the remaining notices of objection to accounts; and
 - (b) a reply to notice of objection to accounts (Form 74.49.4).
- Rule 74.18 (11.6) states that the documents referred to in subrule (11.5) shall be served on,
 - (a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;
 - (b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and
 - (c) the Public Guardian and Trustee or Children’s Lawyer, as the case may be, if the Public Guardian and Trustee or the Children’s Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.
- Rule 74.18 (11.7) states that if the application to pass accounts proceeds to a hearing, the applicant shall, at least five days before the hearing date, file with the court a record containing,
 - (a) the application to pass accounts;
 - (b) the documents referred to in subrule (11.5);
 - (c) any responses to the applicant’s reply to notice of objection to accounts by the persons on whom the reply was served;

- (d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);
 - (e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children’s Lawyer, if served;
 - (f) any requests for further notice in passing of accounts (Form 74.45.1);
 - (g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);
 - (h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and
 - (i) a draft order for directions or of the judgment sought, as the case may be.
- Rule 74.18 (11.8) states that if the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order.
 - Rule 74.18 (11.9) states that if the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,
 - (a) the applicant shall indicate that it is the applicant’s draft order; and
 - (b) any person referred to in clause (11.6) (a) may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing.
 - Rule 74.18 (12) states that no objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise.
 - Rule 74.18 (13) states that at the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts.

TRIAL MAY BE DIRECTED

- Rule 74.18(13.1) states that on the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,
 - (a) respecting the issues to be tried and each party's position on each issue;
 - (b) respecting the timing and scope of any applicable disclosure;
 - (c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and
 - (d) respecting the procedure to be followed at the trial, including methods of adducing evidence.

DIRECTIONS REGARDING MEDIATION

- Rule 74.18 (13.2) states that in making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,
 - (a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or
 - (b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4).

FORM OF JUDGMENT

- Rule 74.18 (14) states that the judgment on a passing of accounts shall be in Form 74.50 or 74.51.
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This memorandum is intended for the purposes of providing information and guidance only and is to be used only for the purposes of guidance. This memorandum is not

intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, WEL PARTNERS

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