

# Guardianship and the Law

Tracey M. Bailey  
Executive Director  
Health Law Institute  
[www.law.ualberta.centres/hli](http://www.law.ualberta.centres/hli)  
[tbailey@law.ualberta.ca](mailto:tbailey@law.ualberta.ca)

## Overview

- Law of guardianship
  - Historical background; equity; statute; common law
  - Exercise of authority by guardian
    - Duties
    - Bases of decision making
    - Limits on authority
    - Case examples re exercise of authority
- AGTA
  - Some potential issues

## Historical Background

- Court's jurisdiction over mentally incompetent
  - *Parens patriae*
  - Unlimited
  - Extant

## Law of equity – fiduciary duty

- Certain relationships have been characterized as fiduciary by the courts
- Guardian – ward is one of those
- Duty to act with utmost good faith and loyalty
- Duty to act in best interests of dependent
- Law of equity (not common law)

## Duties of guardians in legislation

- Additional duties have been set out by government in legislation
- What does legislation say re duty of guardian vis-à-vis dependent person?

## How WAS a guardian to exercise his/her authority?

- *Dependent Adults Act*
  - s. 19(1) A guardian shall exercise the guardian's power and authority
    - (a) in the best interests of the dependent adult,
    - (b) in such a way as to encourage the dependent adult to become capable of caring for himself or herself and of making reasonable judgments in respect of matters relating to his or her person, and
    - (c) in the least restrictive manner possible

## How IS a guardian to exercise his/her authority?

- AGTA
  - S. 35(1) A guardian shall exercise the guardian's authority
    - (a) In the represented adult's best interests,
    - (b) Diligently,
    - (c) In good faith,
    - (d) In a way that encourages the represented adult to become, to the extent possible, capable of caring for himself or herself and of making decisions in respect of matters relating to his or her person, and
    - (e) In the least intrusive and least restrictive manner that, in the opinion of the guardian, is likely to be effective

## Additional duties under AGTA

- Guardian must inform adult of guardian's authority; and must inform adult of important decisions made by the guardian (s. 35(4)(5))
- What limits exist?
  - Guardian must follow any clear and relevant instructions in a personal directive (s. 35(2))
  - Guardian must comply with any conditions, limits or requirements set out in order (s. 35(3))

## Case examples of exercise of guardianship authority

- Insertion of feeding tube
  - Elderly woman with early - moderate stage of dementia;
  - Showing further signs of deterioration;
  - 3 children appointed decision makers BUT they are deferring to Dad;
  - Husband/Dad insisting on insertion of feeding tube
  - Woman doesn't want feeding tube inserted
  - Health care team doesn't think it should be inserted
  - Health care team concerned about past history of abuse

## Can/must 3<sup>rd</sup> parties challenge decision of guardian?

- Assessment of capacity of woman
- application to court based on decision-makers not exercising authority in accordance with their duties
- AND/OR a complaint made to a complaints officer if reason to believe that guardian failing to comply with order or duties, and failure is likely to cause harm to the physical or mental health of the adult
- PG may make application to court for temporary protection

## Case example re sterilization

- Guardians may have authority to make health care decisions
  - One limit in AGTA: "health care" does NOT include "sterilization that is not medically necessary to protect health"
  - Case of Re Eve (1986) (SCC)
  - Has been criticized – but essentially enshrined in AGTA
  - A change from the DAA

## Some related issues - what about birth control?

- AGTA seems clear that many birth control methods could be consented to as long as basis of decision is best interests of the adult
- Case law in Alberta appears to support this: *C.M.L (Re)*

## Guardian and adult disagree?

- “Abortion and Capacity to Consent” Sobsey, Leier and Bailey for Royal College of Physicians and Surgeons of Canada
- Guardian wants abortion; adult does not
- AGTA: as long as guardian has authority to make this decision, it is the guardian’s decision to make. Must make decision in accordance with duties discussed

## Refusal by adult to comply with decision of guardian

- Guardian may apply to court for order where adult failing or refusing to comply (or another person obstructing)
  - IF “there would be a serious risk to the health or safety of the represented adult if the decision were not given effect”
  - Court may make any order necessary – including authorizing police to assist
- Guardian may apply to court for advice, direction

## Adult seeking a treatment that guardian has declined?

- Back to points already covered
- Grounds to review guardian?
- If not, guardian’s decision rules the day

## When should one consider a guardianship application?

- And is legal advice necessary? When?
- 88 year old woman found unconscious at home—home grossly uncared for—has lost weight (failure to eat well?), not practicing many aspects of personal hygiene; admitted to hospital; once stabilized – insisting on returning home
- respect for autonomy important; incapacity not necessarily indicated; but concern

## Court will appoint guardian...

- Adult lacks capacity
- Less intrusive measures tried/considered and have not been/likely not to be effective AND
- In best interests of adult
- Part of consideration of best interests:
  - Whether lack of capacity likely to expose the adult to harm
  - Whether appointment likely to produce benefits that will outweigh adverse consequences for adult

## Adult refuses capacity assessment related to guardianship application?

- A patient refuses a capacity assessment—what do you do?
  - Presumption of capacity
  - Right to refuse
  - Must inform adult of nature/purpose of assessment, right to refuse, and potential implications, etc
  - Assessor can only go ahead with informed consent OR if apparent lack of capacity and in best interests
  - Court may order assessment
  - Court may make finding on capacity
  - *Charter* challenge??

## Refusal of capacity assessment re specific decision

- Adult may lack capacity? hcp can assess capacity
  - Must inform of right to refuse and likely effect refusal would have on ability to provide health care
  - What effect???? A presumption
  - Informed consent requirements here as well
- Assessment = lack of capacity? May ask "nearest relative" to make decision
- Must inform adult of this; that they have right to request capacity assessor; that they have right to apply for review of assessment done by hcp

## Other issues re specific d-making

- No more 2 physician/dentist OK for "essential treatment"
- Eldest of:
  - Spouse or adult interdependent partner
  - Adult son or daughter
  - Father or mother
  - Adult brother or sister
  - Grandfather or grandmother
  - Adult grandson or granddaughter
  - Adult uncle or aunt
  - Adult nephew or niece

## Other issues re specific d-making

- Limits on authority
  - Can't decide if agent or guardian
  - Psychosurgery under MHA
  - Sterilization not medically necessary to protect health
  - Removal of tissue for inter-vivos transplant, medical education, or research
  - Health care involving research or experimental activity if little or no potential benefit to adult
  - Health care subject to treatment decision re formal patient under MHA
  - Health care where decision re provision or withdrawal or withholding of health care would be likely to result in imminent death of adult

## Withholding/Withdrawing Life-Sustaining Treatment

- *Child and Family Services of Manitoba v. R.L.*
- *Golubchuk v. Salvation Army Grace General Hospital*
- *Re LIC*

## Adult and co-d-maker disagree

- What do you do as a hcp?
- Emergency? Can treat
- No emergency? In limbo until filing of withdrawal or consent? Or until court application?

## When should HCPs feel uncomfortable with the adequacy of co- or supported decision-making?

## Emergency only applies to physicians

- Others may well need to resort to common law criteria re emergency
  - "physician" only

## The AGTA will have a significant impact on obtaining consent

Will there be instances where treatment should be provided but cannot be?

## Other Questions?