

GUARDIANSHIP OF ADULTS



If an adult is unable to manage their own affairs, a family will sometimes apply to the court to have a guardian appointed. A guardian has legal responsibilities and duties related to the person's finances.

What is guardianship?

Guardianship allows an appointed person to be responsible for the personal and financial interests of an individual who is mentally incapable of caring for their own interests. Only a judge can appoint a guardian for an adult.

The person who applies for guardianship is called a guardian. The person for whom the guardian is responsible is called an incompetent person.

Who is an incompetent person?

An **incompetent** person is anyone who is not capable of managing their own affairs because of mental infirmity. A person might be incompetent because of:

- a coma following an accident
- an illness such as Alzheimer’s disease or a psychiatric condition that affects their mental ability
- a mental disability that prevents them from managing their affairs
- a mental disability as the result of accident or injury

The procedure for a guardianship application is different for children and adults. This section only deals with the guardianship of adults.

Are there different types of adult guardianship?

Yes. There are two types of adult guardianship: guardianship of the person and guardianship of the **estate**. Usually, the same person is appointed to do both jobs.

As a guardian of the person, you are responsible for making decisions about the incompetent person’s personal care, living arrangements, and general welfare. You may also have power to consent to medical treatment for that person.

As a guardian of the estate, you are responsible for managing the incompetent person’s property, that is, everything they own. This may include handling money to provide for care, arranging for an allowance, and managing investments.

Who can be a guardian?

A guardian must be 19 years of age or older and mentally competent. Usually the guardian is a relative or friend. A spouse or partner can be named as guardian. A trust company usually only agrees to be appointed as guardian of the estate to deal with the person’s finances.

The public trustee only consents to be the guardian for a person's estate. It never consents to be appointed as guardian of the person. Getting the consent of the public trustee is not a simple or straightforward process. For more information, see the section *Public Trustee*.

Who appoints a guardian?

The guardian for an adult can only be appointed by a judge of the Supreme Court of Nova Scotia. Before appointing a guardian, a judge will hold a hearing to decide if someone is mentally incompetent and unable to manage their own affairs.

Can a guardian be appointed against a person's wishes?

Yes. If a judge is satisfied that a person is not able to care for and manage their affairs because of mental infirmity, a guardian can be appointed.

A person has the right to dispute an application for guardianship. They have the right to have a lawyer. If there is not money to afford a lawyer, they may qualify for legal aid.

For more information, see "What does a guardianship application cost?"

How is a guardian appointed?

The guardian for an adult is appointed by a judge. The legal process of applying for guardianship is set out in the *Incompetent Persons Act* and Nova Scotia Civil Procedure Rule 71.

A guardianship application takes time and is complicated and technical. This section only provides general information. If you want to apply for guardianship, you should talk with a lawyer.

Medical evidence

Before starting an application for guardianship, two medical practitioners must examine the person. They can be a family physician, psychologist or other health professional. They must each prepare a separate written statement giving an opinion about the incompetent person's present state of health. This statement is called an **affidavit**.

Notice

The person is entitled to 14 days notice of the time and place of the guardianship hearing. Anyone caring for that person and any next-of-kin also gets 14 days notice. The judge may require other special notice requirements.

The notice must include copies of the two affidavits from the medical

practitioners and a copy of the order that the judge is being asked to make for guardianship.

Order

A document must be prepared that a judge will sign to create the guardianship and to set out the terms of the guardianship. This document is called an order of the judge. It must contain certain details that your lawyer can explain to you.

Court Hearing

At the hearing, the judge will look at the application. Based on the information in the application, if the judge is satisfied that the person is not capable of taking care of themselves, the judge will appoint a guardian.

If there are problems with the documents or if there is any dispute over the application, the judge will decide how to deal with the matter.

Appeal

The judge's decision can be appealed to the Nova Scotia Court of Appeal. Before you decide to appeal, you should talk with a lawyer.

Are there protections if the guardian fails in their duties?

The court will require the guardian to purchase or arrange a **bond**, which is a type of insurance policy. There are two types of guardianship bonds: a personal bond and a **surety** company bond. The person(s) giving the bond are called the surety. A personal guardianship bond must have two sureties.

The surety guarantees to pay money or perform acts if the guardian fails in their duties. This protects the incompetent person and their heirs from any financial misconduct by the guardian.

The annual insurance premium for a surety company bond is paid out of the incompetent person's estate. If they are not able to pay the premium, the guardian is responsible for paying it. The two sureties in a personal guardianship bond are not paid a premium. They must have sufficient net worth to guarantee the bond.

If the value of the incompetent person's estate decreases, the guardian can go back to the court and ask for the amount of the bond to be reduced. The bond remains in force until the guardian provides the court with the final accounts for the estate and is discharged from their duties by the court.

▶ What are the responsibilities of a guardian?

The responsibilities of a guardian are set out in the *Incompetent Persons Act*. A guardian must:

- file an inventory of all the possessions of the incompetent person
- account for the inventory
- pay all debts the incompetent person owes
- collect money owed to the incompetent person, represent them in suing for money owed, and provide releases for payments received
- obtain a licence from the court if they need to sell the incompetent person's land
- manage the incompetent person's estate without waste
- use the incompetent person's funds to provide suitable care for the incompetent person and their family

▶ What is included in an inventory?

An inventory is a list of all the possessions of the incompetent person. This includes land, vehicles, investments, cash, jewellery, and other valuables. It must include a short description of each item of property, the value of each item, how that value was decided, and the total value of all property

▶ What does it mean to account for inventory?

To account means the guardian must show what they have been doing with the incompetent person's estate. The law requires a guardian to account within one year after being appointed guardian, at the end of the guardianship, and at other times set by the judge.

A guardian must keep a written record of what the incompetent person owns when the guardianship starts, what is received and what is paid during the guardianship, and what remains when the guardianship is finished. At the end of the guardianship, the guardian must transfer whatever remains of the incompetent person's property to the people lawfully entitled. For example, if the incompetent person dies and has named an **executor** in their will, the guardian would transfer the remaining property to the executor.

For more information on what happens if a person dies without a will, or **intestate**, see the section *Wills*.

How does a guardianship end?

Guardianship ends when the incompetent person dies or regains competence.

A judge may end guardianship if the guardian is unable to carry out duties because they:

- are not fulfilling their responsibilities satisfactorily;
- have a mental or physical disability;
- move out of the province permanently;
- resign; or
- die.

If the incompetent person still needs a guardian, instead of ending the guardianship, the judge will remove the original guardian and appoint a new guardian.

What happens if an incompetent person regains competence?

If an incompetent person regains competency, they can apply to the court to have the guardian removed.

If you are a guardian and you learn that the incompetent person has regained competency, you must tell them how to go to court to end the guardianship.

The process for ending the guardianship requires medical evidence, notice, and a hearing. The person applying to end the guardianship must satisfy the judge that they are no longer mentally incompetent. If the application is successful, the guardian would have to account and return all remaining possessions to the person who has regained competency.

What does a guardianship application cost?

Some of the usual costs are:

- Court fees: These are paid when you make the application for guardianship.
- Lawyer's fees and expenses: These will vary with the particular lawyer and the type of case. Fees cover the time the lawyer spends meeting with you, getting affidavits from doctors and other witnesses, preparing the case, filing documents in court, and presenting the case in court. Usually, lawyers require payment of some of their fee (called a **retainer**) and expenses at the beginning of the process. Before you hire a lawyer, you should ask the lawyer for an estimate of the cost and how long the process will take.

- Incompetent person's opposition costs: These must be paid if the incompetent person objects to the guardianship application. They have the right to a lawyer. If there is not money to afford a lawyer, they may qualify for legal aid.
- Professional witness fees: You may need to pay for persons such as doctors, who may charge a fee to prepare an affidavit or come to court.

There are annual costs such as the surety bond premium. Usually these costs are paid from the incompetent person's estate. The law does not say who must pay these expenses if the incompetent person does not have the money, but likely the guardian will be required to pay costs the incompetent person cannot afford if they want guardianship of the incompetent person.

If there is not enough money to cover the surety bond premium, the guardian is personally responsible for paying it.

Guardian's fees: There may be ongoing fees for guardianship services. A trust company charges an ongoing fee for acting as a guardian. Any other guardian may also charge a fee. The Supreme Court sets guidelines for the payment of guardians. A trust company may negotiate higher rates. You should discuss any guardian fees with a lawyer.

Can I take care of someone's affairs without applying to court to be the guardian?

Yes. Sometimes when a person becomes incapable of managing their own affairs someone else will be able to manage them. This is usually done by the person's spouse, child, other close family member, or even a close friend.

Informal arrangements work for many people; however, there can be problems if the person has land or financial assets that need to be managed. For example, in an informal arrangement, you will not be able to deal with investments held only in the person's name unless they have appointed you as **attorney** in an **Enduring Power of Attorney**. For more information, see the section *Powers of Attorney*.

Are there alternatives to guardianship?

Yes. While you are still mentally competent, you can arrange for someone to manage your affairs. This legal document is called an Enduring Power of Attorney.

For more information, see the sections *Powers of Attorney* and *Health Care Treatment and Consent*.

Where can I get more information?

Public Trustee Office
PO Box 685
Suite 405, 5670 Spring Garden Road
Halifax, NS B3J 2T3
Tel. 902-424-7760 (not toll free)

Canadian Mental Health Association, NS Division
(offices at various locations throughout the province)
63 King Street
Dartmouth, NS B2Y 2R7
Tel. 902-466-6600
cmhans@eastlink.ca
www.novascotiadmhans.ca

Nova Scotia Department of Seniors
1740 Granville Street, 4th floor
PO Box 2065
Halifax, NS B3J 2Z1
Tel. 424-0065
1-800-424-0065 (toll free in NS)
whitevj@gov.ns.ca
www.gov.ns.ca/scs

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902.455.3135
1.800.665.9779

Online information is available at the LISNS website at www.legalinfo.org.
Under "Legal Information,"
go to "Planning your Life."
Click on "Guardianship of Adults."