

GUARDIANSHIP ORDERS AND DEALING WITH LAND

These Guidance Notes are of a general nature . They are not intended to amount to legal advice and cannot replace the advice of a legal practitioner. Professional assistance may be required to determine the most appropriate action in any given case.

BACKGROUND

Under the Mental Health Act and provisions of the Grand Court Act, the Court may appoint a guardian to manage the affairs, estate and property of an adult declared mentally incapacitated. Once noted on the register, a Guardianship Order empowers the guardian to act only within the scope of authority expressly granted in the Order.

Guardians stand in a position akin to Trustees. They are fiduciaries who must act solely in the best interest of the represented adult. They cannot profit personally from their position unless expressly authorized by the Court. Accordingly, transactions involving land are subject to careful scrutiny to ensure compliance with both the law and fiduciary obligations.

IMPORTANT CONSIDERATIONS

SCOPE OF GUARDIANSHIP ORDERS

- a. Guardianship Orders vary in scope. Some orders authorize dealings in with real estate, others do not.
- b. Before any dealing with land can be executed by the Guardian, the Order must specifically authorize the guardian to manage or dispose of real property.
- c. If such authority is absent from the order, the guardian must obtain a further Order from the Court.

REGISTRATION OF GUARDIANSHIP ORDERS

- a. A copy of the Guardianship Order must be lodged with the Registrar of Lands for endorsement on the register
- b. Once noted, no documents executed by the represented adult (or under their former power of attorney) will be accepted for registration.
- c. The entry on the register will state "AB appointed as guardian for CD"

EXECUTION OF DOCUMENTS

- a. Any instrument dealing with land must be executed by the guardian in their representative capacity and properly attested.
- b. The guardian must act strictly within the authority of the Order. In some cases, if additional authority is required (eg. Gift or property or a mortgage/charge) the guardian must obtain a further order of the court.

GIFTS AND TRANSFERS FOR LOVE AND AFFECTION

- a. A guardian may not make a gift of land to themselves, as this constitutes self-dealing and is possibly a breach of fiduciary duty.
- b. Transfers for natural love and affection (gifts) require a further order of the Court specifically authorizing the transaction before registration can proceed.

CESSATION OF GUARDIANSHIP

- a. On the death of the represented adult, the Guardianship Order automatically ceases to have effect.
- b. From that point, no transaction may be carried out under the authority of the guardian.
- c. Any dealings with the deceased's property must proceed by way of a Grant of Probate (if the deceased left a will) or Letters of Administration (if the deceased died intestate), in accordance with the Succession Act.

EFFECT OF INCAPACITY OF AN ADMINISTRATOR

- a. If an Administrator of an estate becomes mentally incapacitated, a guardian appointed for that person cannot automatically assume the Administrator's duties.
- b. Section 9 of the Succession Act provides that the Grand Court must appoint a new Administrator to replace the incapacitated one.
- c. A fresh application to the Court must be made, and the new Administrator must provide the required bond.

DEATH OF AN APPOINTED GUARDIAN

- a. If an appointed guardian dies, a fresh order of the Grand Court is required before any further dealings may be registered.
- b. If more than one guardian was appointed, their authority depends on whether the Order specifically that they act jointly or separately.
- c. Where guardians were required to act jointly, the death of one guardian suspends the authority of the other until the Court issues a further Order.

RESEALING OF FOREIGN ORDERS

- a. Guardianship or trustee orders issued outside the Cayman Islands, have no effect until they are resealed in the Grand Court.
- b. The enforcing party must initiate proceedings in the Grand Court to obtain an order mirroring the terms of the foreign judgment or guardianship appointment.
- c. Once resealed, the Order has the same force and effect as a domestic order and may be registered in the same manner.

Confirmation of identity is required when there is some uncertainty whether the individual executing an instrument is the individual entitled to do so according to the information on the register. It is often required in situations where the name of a transferor, mortgagor or lessor is similar to but not identical to the name of the registered owner shown on the register.

Obvious spelling errors such as "Micheal" for "Michael" are not a cause for rejection. If a discrepancy in names is due to marriage, a formal application for rectifying the register must be followed (see FORM 32).

Amendment of the document and/or amendment to the name in the Register will be required where the document shows that:

- a name has been added to or omitted from the proprietor's name
- the order of names is different
- there is a difference in spelling in the name or names
- the signature of the proprietor indicates another name
- a person has been married since first becoming registered proprietor
- a person has changed name by Deed Poll, or
- a person wishes to revert to the use of their birth or maiden name.

REGISTRATION PROCEDURE

As with all documents submitted for registration, a full examination will be made to ensure compliance with the Registered Land Act and the terms of the Guardianship Order.

- a. **Court Order-** a copy or certified copy of the Grand Court Order appointing the guardian must be lodged.
- b. **Endorsement:** the Registrar will endorse the register with the particulars of the Order, including the unique instrument number, name of guardian, and name of the represented adult.
- c. **Form of Entry:** Jane Doe appointed as guardian for John Smith.

- d. **Fees:** a fee of C\$50.00 is payable registration of the Order.
- e. **Subsequent dealings:** Once endorsed, no document executed by the represented or under their former power of attorney, if applicable, may be accepted. All instruments must be executed by the guardian in accordance with the Order.
- f. **Further Orders:** if the transaction proposed is outside the scope of the guardian's authority (eg mortgage, gift or sale) a further Court Order must be produced before registration can proceed.
- g. **Termination of Death of the Adult:** Where the represented adult has died, the endorsement of the Guardianship will be closed, and further dealings must proceed through the personal representative of the deceased's estate.
- h. **Death of a Guardian:** where the guardian dies, no further dealings may be registered until a fresh Order is issued by the Grand Court (unless the existing order provides for substitution or joint/separate powers).
- i. **Foreign Orders:** Orders made abroad must be resealed in the Grand Court before they can be registered.

PRACTICAL GUARDIAN

1. Check the Guardianship Order carefully to confirm whether authority extends to real property.
2. Court authorization may be required for gifts, or other transaction outside the scope of the Order.
3. Guardianship ceases on death; future dealing must be by way of probate or administration.
4. Fresh Orders required on death of a guardian or where multiple guardians act jointly
5. Resealing of foreign orders required before registration.
6. Court supervision guardians may be required to provide account of their management of the estate.