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**Issue #6**

## THE ADULT GUARDIANSHIP AND TRUSTEESHIP ACT

[Area of Coverage - [Legislation](#)]

Pursuant to an Order in Council [O.C. 467/2009], the Lieutenant Governor in Council directs proclamation of the *Adult Guardianship and Trusteeship Act* on October 30, 2009 [the "AGTA"].

The AGTA is constructed upon four guiding principles: (1) "The adult is presumed to have capacity and able to make decisions until the contrary is determined"; (2) "The ability to communicate is not a determination of capacity, the adult is entitled to communicate by any means that enables them to be understood"; (3) "Focus on autonomy with a less intrusive and less restrictive approach"; (4) "Decision making that focuses on the best interests of the adult and how the adult would have made the decision if capable".

The Office of the Public Trustee proffers that the AGTA will address the reality that there are varying degrees of assistance that adults require in decision making by establishing a continuum of options:

1. Part 2, Division 1, Sections 3-10 "Supported decision-making authorization"—a "supporter" designated by the adult with capacity will have access to personal and health information and help the adult make decisions;
2. Part 2, Division 2, Sections 11-23 "Co-decision-making orders for personal matters"—a "co-decision making order" as issued by the Courts and agreed to by the adult in question enables individuals who might be seriously impaired to make decisions with a bit more assistance.
3. Part 3, Division 1, Sections 87 to 100 "Specific decision-making provisions"—for an adult without a personal directive or guardian who cannot provide informed consent a health care professional can seek approval from a relative or the Office of the Public Guardian for admitting that adult to a facility temporarily or for medical decisions.
4. Part 2, Division 6, Sections 74-79 "Temporary guardianship and trusteeship orders"—to be utilized in emergency situations ("imminent danger of death or serious harm or financial loss") where it is believed that an adult lacks capacity and this consequence will result if someone does not make a decision for the adult.

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5. Part 2, Divisions 3 and 4, Sections 24-72 "Guardianship and Trusteeship orders"—similar to the option available under the old legislation, but has been improved with better screening and information provisions and assurances that an adults opinions are represented in reports to the Court.

Note that Part 3, Division 2, "Emergency Health Care" provides the requisite conditions that enable a physician to provide emergency health care (to save a life, avoid serious mental/physical harm, or alleviate serious pain) to an adult who appears to lack capacity. If practicable, the physician shall obtain a written opinion of a second physician prior to proceeding with the emergency health care.

The new AGTA will also change trusteeship:

- Under the DAA physicians could issue certificates of incapacity rendering the Public Trustee the trustee for an adult. These will no longer be issued under the AGTA, and existing certificates will be transformed over a period of time into Court-order trusteeships.
- Unlike under the DAA, a non-resident of Alberta can be appointed trustee pursuant to the AGTA given that they provide a bond/security (unless waived by the Court).
- Under the AGTA the practical distinction between the powers afforded to the Public Trustee and those vested in a private trustee are for the most part collapsed. Consequently, both Public and private trustees will essentially be able to do anything regarding finances that the adult could have don't prior to losing capability. Note that Court approval will still be required to sell an adult's house/real property.
- Investment by private trustees is now generally to be performed in accordance with the "prudent-investor rule" as imported from the Trustee Act. The essence of this rule is that investment must be done "with a view of earning a reasonable return while avoiding undue risk."
- A private trustee's ability to gift on behalf of the adult has also been expanded by the AGTA. The private trustee is able to gift from the adult's property so long as it does not violate restrictions (from the regulations or governing order) or affect property needed to meet the adult's needs and the trustee has reasonable grounds to believe the adult would have made the gift.
- Trustee compensation can occur via a fee schedule found in the AGTA; a Court can still alter compensation is the trustee is failing in their duties.
- Accounting has been simplified as the AGTA provides standard accounting forms for a private trustee. The Court can request submission of the forms for review every so often without a hearing unless so requested by the adult/interested party.

Complaints can be made to the Office of the Public Guardian, and assessed on the basis that (1) the individual is not complying with their duty, and (2) as a consequence the adult may be harmed personally or financially. If this test is passed the matter will be passed to an investigator. An investigator's powers include: (1) authority to interview the adult/other individuals; (2) authority to get the production of relevant documentation; (3) authority to go to court to get court ordered access to the place the adult resides and get relevant documentation. If the complaint is founded the investigator can act to remedy in a variety of ways.

