# Missing Persons and Property Guardianship



**DUNNING PLACE** 



# How to Apply for Guardianship for a Missing Person

People move away from Saskatchewan, change their name, marry, and fail to keep in contact with relatives. They may have chosen, very deliberately, not to be in contact with their family. They may have disappeared, been in a serious accident or died. They may have left assets in their name in Saskatchewan. Who looks after those assets? The answer is a property guardian that can be appointed under *The Missing Persons and Presumption of Death Act, 2009.* One can then ask the question, "How do I apply for guardianship?" This booklet sets out the process in the simplest terms.

If you are planning to make the application yourself, you should get a copy of *The Missing Persons and Presumption of Death Act* and *Regulations*, by downloading it from the Public Guardian and Trustee (PGT) web site. Be prepared to do your own research and study, form completion and serving and filing of documents.

If you choose to use a lawyer, this booklet will set out the basic steps to apply for guardianship. If you require additional information, you should discuss the matter with your lawyer.

This booklet assumes you are considering or have asked a lawyer to make the application for property guardian of a missing person.

#### **How Much Will it Cost?**

Each lawyer has a different hourly rate so you should ask how much it will cost. Although fees will differ, you can expect the cost to be between \$1,500 and \$3,000. This is assuming the application is relatively simple and that family members or others do not oppose it. If there is opposition, the lawyer will usually charge his or her hourly rate for the time spent to resolve the dispute or the added time to obtain a court order.

If you or other family members have not acted unreasonably, the costs of the lawyer may be charged to the estate of the missing person. This should be asked for in the court order.

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## How Long Will it Take?

This is always difficult to estimate. There may be delays while the lawyer is gathering information. He or she will have to determine what attempts have been made to find the missing person and decide what further steps should be taken to find that missing person. The assets have to be located and valued. The lawyer has to discuss the requirements for a bond with the PGT. Interested persons have to be served. If none of the interested persons objects, the entire application should take two to three months. If one or more of the interested persons object to your appointment, it may take longer and cost more.

### What Is A Missing Person?

A missing person is defined in the Act as follows:

- (c) "missing person" means a person who:
- has not been heard from or of, by the persons who would likely hear from the person, for at least three months and whose whereabouts are unknown despite reasonable efforts to locate the person; or
- ii. has been missing for less than three months, but who is otherwise a missing person within the meaning of subclause (i), and who is declared by the Court to be a missing person, on an application accompanied by evidence to the satisfaction of the Court that there is urgent need for a property guardian to be appointed pursuant to this Act for the preservation of the estate or the support of the dependants of that person.

## When Can I Apply?

You can apply after you have made reasonable efforts to locate that missing person. Generally, a person is considered a missing person if they have been missing for at least three months.

## What Should You Bring to the Lawyer's Office?

You should bring all of the following:

- The names of the missing person's lawyer, social worker, doctor and any other health professional;
- A list of all family members including addresses, telephone numbers and relationships;
- A list of all the missing person's friends and neighbours, their addresses and telephone numbers;
- A description of the missing person's relationship with family and friends;
- A list of all the actions taken to find the missing person, the name of the person who performed these actions, indicate when it was done and any documents that show what was done and the results, e.g. advertisement in the newspaper, a Google search or other searches.
- Documents such as birth certificates of the family, death certificates of family members, old driver's licenses, old health cards, wills of the missing person if it exists;
- A list of all assets and their estimated value;
- A history of the adult, particularly the last ten years before he or she went missing and a brief statement of the family history;
- A list of your personal assets plus their value. You will
  have to provide a bond to the Court, and in order to
  obtain approval, the PGT will have to know whether
  you are financially sound;
- A copy of a power of attorney, if it exists; and
- A copy of a health care directive (sometimes called an advanced directive).

### What Does the Lawyer Do?

After the first interview, the lawyer will have to make checks and searches to try to locate the missing person including advertisements. Then the lawyer can begin preparing the application to the Court of Queen's Bench for guardianship.

When preparing the application, it is suggested the lawyer contact the PGT to discuss the PGT's security requests. The PGT takes the following position on security:

- The PGT will request the Court to order a bond in the amount of the missing person's assets in all instances except where the applicant is a trust corporation. There are no other exceptions in requesting a bond. In some circumstances, the PGT will also require a surety.
- The amount of the bond should be equal to the missing person's assets. The bond amount should be increased if there is a significant income stream to be received in the future. Joint assets of the adult are included in the amount of the bond at 50% of their value.
- If the applicant is a spouse, in a long-term relationship, and all the children consent, no sureties will be requested and no statement of assets from the spouse will be requested by the PGT. In this circumstance, the PGT will request a signed personal bond by the spouse.
- If the applicant has assets greater than the amount of the missing person's assets (the amount of the bond), then no sureties will be requested.
- If the applicant has insufficient assets, then a surety or sureties will be requested, to the extent required, to cover the entire amount of the bond.
- If the applicant lives outside of Saskatchewan, then sureties living in Saskatchewan with sufficient assets must be provided.
- If there are no individual sureties, then a commercial surety will be requested for the full amount of the bond.
- If the applicant has declared bankruptcy in the last five years, then a commercial bond is requested. If a commercial bond cannot be provided, the PGT will advise the Court that it objects to the appointment of the applicant because of the bankruptcy.

Usually, after the bond issue is finalized, the lawyer serves a copy of the application for guardianship on all the interested persons and the PGT and files the application with the Court. Each interested person has ten days from the date the last person has been served to file a Statement of Objection (Form E).

If no objections are filed, a judge of the Court will review the application for guardianship and decide whether to issue the order. He or she needs to be convinced that:

- the person is missing;
- the applicant appears to be an appropriate property guardian; and
- bonding arrangements are in place.

If the judge agrees that you should be the property guardian, the lawyer will prepare an order (See Sample Orders) and forward it to the Court to be signed by the Local Registrar. Once signed, this order gives you the authority to act. You should obtain a number of copies of the order so that you can leave them with financial and health institutions.

If someone objects to your appointment, the judge will probably set a date to hear the parties discuss what should be done. The person filing an objection can hire a lawyer or represent him or herself. You and the other person may sign affidavits providing the judge with additional information. After all additional information is provided, the lawyer for the adult and other lawyers or individuals will present their point of view. After hearing the arguments, the judge will make his or her decision.

The judge might appoint you or some other family member as guardian or the judge might decide there is too much conflict in the family and appoint the PGT.

### Can I Charge Fees?

If you intend to charge fees for being property guardian, you should mention this to your lawyer who should put this in the Court application and it should be stated in the order appointing you.

You are entitled to payment for the work involved. Many people ask what is a reasonable fee. You can set a reasonable fee based on the time you spend, the difficulties encountered and the value of the assets.

### What are My Duties and Obligations?

The court order should be reviewed carefully to determine the duties and obligations. Your duties generally are the same as a property guardian for a dependent adult. You can refer to the booklet "Duties and Obligations of a Property Guardian" by requesting a copy from the Office of the PGT or viewing it on the PGT web site.

#### What if I Have a Conflict of Interest?

Many children have had business dealings with their parents. Their children may owe their parents money or their parents may owe their children money. They may have farmed together or run another business together. It is recommended that these conflicts be cleared up before an application is made, and any loans should be repaid.

If the missing person had a claim against you, it is almost impossible for you to be his or her property guardian. As a property guardian, you are expected to act in the best interests of the adult and, therefore, you cannot act to benefit yourself in any way. If the PGT is reviewing your application for guardianship and determines that you have a conflict of interest, it will advise the Court and object to your appointment. It is best to attempt to resolve the conflict of interest before the Court application is made.

### Where Do I Send My Court Order?

You should send or deliver your court order to every financial institution that the adult has conducted business. In addition, copies will have to be sent or delivered to Old Age Security (OAS), Canada Pension Plan (CPP), and Canada Revenue Agency (CRA).

#### What About Bank Accounts?

You might be able to use the adult's existing bank accounts by changing the name to indicate you are acting as property guardian. If you have to open a new account, you should advise the financial institution that you are acting as property guardian for the missing person and not set these accounts up in your own name.

You should not change the missing person's accounts to joint accounts. A joint account implies that upon death the surviving joint account holder gets the funds. This can change the effect of the missing person's will or his or her intentions.

### **Annual Accountings**

Once appointed as property guardian, you will need to organize your records and prepare and send annual accountings to the Court and to the PGT. You should keep your records as property guardian separate from your personal records.

For further information on preparing an accounting, see the booklet "Accountings" (under the "Publications" link on the PGT web site).

If the missing person appears or there is an order presuming death, you will also have to prepare a final accounting and file it with the Court and the PGT.

### How Long Do I Act?

You will have authority until the missing person appears, is determined to be dead or the Court declares the missing person to be dead.

### An Order of Presumption of Death

An application for an order of presumption of death can be made at any time, regardless of the number of years that have passed so long as "reasonable grounds exist."

The Court may consider a person missing for seven years as reasonable ground to suppose that person is dead.

### Can I Sell Property?

You can only sell or lease real property if the Court authorizes the sale or lease. This authority could be requested in the original application or may be requested at a later date. You need to read the court order. Instead of the order prohibiting sale or lease, under section 10, the Court must specifically allow it and you are expected to sell or lease for market value. The best way to determine market value may be done by a tender, an auction or listing the property with a realtor. In your negotiations to sell or lease, if you do not already have Court authority, you should indicate that any negotiations are subject to Court appeal.

### Can I Sell Property to Myself?

You cannot sell property to yourself, as this is a conflict of interest. If there were very unique circumstances as to why you should own the property, you may ask the Court for an order allowing you to purchase the property.

### Can I Lend Money To Myself?

You should not lend the missing person's money to yourself or your children as you may be at the risk of others asking for the money back plus interest at a later date.

### Sample Orders

The Regulations do not specify the order that the Court might issue. Below is a sample of what an order might look like.

# Order Appointing Property Guardian for Missing Person

On the application of Jane Doe, and on hearing read the application and documents filed as part of and in support of the application, all filed:

It is hereby declared that Mary Doe is a missing person pursuant to *The Missing Persons and Presumption of Death Act*.

It is therefore ordered that:

- 1. Jane Doe be appointed as property guardian for Mary Doe pursuant to section 6 of *The Missing Persons and Presumption of Death Act*.
- 2. The authority of the property guardian is subject to the following terms and conditions:
  - a. the property guardian shall file an inventory of the missing person's assets within six months of the date of this order and file it with the Court and the Public Guardian and Trustee.
  - b. the property guardian cannot sell any real property without the approval of the Court.
  - c. the property guardian shall file an accounting with the Court and the Public Guardian and Trustee annually.
  - d. the property guardian shall file a personal bond with the Court and the Public Guardian and Trustee in the amount of \$XXX.
- 3. The costs of this application shall be paid out of the missing person's estate.

## Order Declaring Presumption of Death

On the application of Jane Doe, and on hearing read the application and documents filed as part of and in support of the application, all filed:

#### The Court finds that Mary Doe:

- a. has been absent and not been heard from or of by the applicant, or to the knowledge of the applicant by any other person since October 1, 2009;
- b. Jane Doe has no reason to believe that Mary Doe is living; and
- c. reasonable grounds exist for supposing that Mary Doe is dead.

It is therefore declared that Mary Doe is presumed to be dead for all purposes as of October 1, 2009.

It is further ordered that the costs of this application shall be paid out of Mary Doe's estate.

#### Form

This booklet has referenced Form E of *The Missing Persons and Presumption of Death Regulations*. This form can be found on the PGT web site.

This booklet is a summary and a guide based on the law. It is not as comprehensive as the law itself. It is not legal advice. If, after reading this booklet, you have questions or are uncertain about how to interpret the information, you should consult with a lawyer.

#### **Contact Information**

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