

# Guardianship Appointments & Working with the PGT

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# Presentation Overview

- What is Guardianship Appointment?
- Importance of Guardianship of Property
- Duties of the Appointed Guardian
- Who can Obtain?
- Steps to Obtain Guardianship
- More on the Public Guardian and Trustee
- Guardianship in BC & Saskatchewan

# Guardianship Appointment

## Property vs. Personal Care

### Guardians for Property:

- Are appointed to manage the financial affairs of a person incapable of doing so themselves.
- Done by the court, or via capacity assessment made pursuant to *SDA*.

### Guardians for Personal Care:

- Are appointed to manage the personal affairs of a person incapable of doing so themselves.
- Are appointed by the court.

# Importance of Guardianship of Property

## Loss of autonomy for alleged incapable person

- Almost every aspect of the incapable person's life affected by the guardian's actions
- Person's property/finances are of course central to a viable living

## Can be highly emotional, time consuming, and expensive

- Must consider person's comfort levels
- Incapable people can often be vulnerable in many ways

## Has serious legal and financial implications for the estate

- In charge of financial accounts/transactions
- Managing their property/finances
- Allowed to do anything in relation to property that the person could do if capable, except to make a will

**Most important goal? To maximize quality of life of the incapable person**

# Duties of Guardian of Property

- Stepping into shoes of incapable person for purpose of financial decisions and transactions on their behalf
- Protect the welfare of the incapable person
- Individual given guardianship of property can do the following:
  - Open and close bank accounts
  - Redirect pensions and other income
  - Apply for benefits/ supplementary income
  - Choose pension options
  - Deal with investments
  - Collect debts
  - Pay bills
  - Buy goods and services
  - Start or defend lawsuits
  - Lend, sell, store or dispose of personal belongings
- Entitled to receive, from any person or business, information about property and copies of any documents signed by, or given to, incapable person



# Who can Obtain Guardianship of Property?

- All individuals over the age of 18 are presumed to be capable of managing property (*SDA*, s. 5)
- Alleged incapable individual must be over age of 18 (*SDA*, s. 4)
  - Under age 18? Application must be made pursuant to s. 47 of the *Children's Law Reform Act*

# How to Obtain Guardianship?

## STEP 1: Preliminary Considerations before Applying



### AGE

Must be over age 18



### SEEK LEAST RESTRICTIVE ROUTE

Should seek other options beforehand that doesn't require court decision  
(*SDA*, s.22 (3))



### APPLICANT SUSTAINABILITY

Applicant must be suitable and must have appropriate management plan



### WHERE TO BRING APPLICATION?

Has been the position of some jurisdictions that they will not hear an application brought outside of the jurisdiction in which the alleged incapable person resides



### OBTAIN LAWYER?

May be good to request PGT arrange counsel for alleged incapable person  
(*SDA*, s.3)

Note: PGT not responsible for fees; incapable person is responsible

# How to Obtain Guardianship?

## STEP 2: Requirements

### Affidavit of Service

- Discuss alleged incapable persons story and their basic facts (age, DOB, marital status, place of residence, family, etc.)
- Discuss management plan
- Discuss any reasons as to why court should be satisfied that dispensing with bond will not result in risk to incapable person

### Evidence of Incapacity

- Need sufficient evidence to satisfy court to find person incapable of managing property (*SDA*, s.6)
- Specific third party evidence may be needed if proceeding by hearing (eg. Capacity assessment, report/ letter from physician/ psychologist)
- What if they don't comply? Motion will be required to enforce the assessment order (*SDA*, s.18)

### Rights Advice

- Must include statement that the alleged incapable person has been informed of application, its nature, and the right to oppose it (*SDA*, s.70(1)(c))
- If giving rights advice not possible, must include statement as to why

### Management Plan in Prescribed Form

- The guardian of property is required to act in accordance with a management plan (*SDA*, s. 70(1)(b)).
- Management plan should only set out the property of the alleged incapable person (not spouse, family, etc.)
- make sure all known information is included in management plan, and steps must be set out regarding how unknown information will be obtained

### Consent of Proposed Guardian

- Each application must include the consent of the proposed guardian (*SDA*, s. 70(1)(a)).
- If applicant requesting PGT be appointed as guardian of property, the consent the OPGT must be obtained prior to issuance of the application

### Service of Parties and Enumerated Family Members

- Service in parties is to be by personal service or alternative to personal service (r. 16 of *Rules of Civil Procedure*)
- Alleged incapable person must be served personally (failure to do so could result in any order being set aside)
- Application materials must be served on the parties in accordance with r. 38.06(3): a minimum of 10 days' notice if served in Ontario and minimum of 20 days' notice if outside of Ontario



# How to Obtain Guardianship?

## STEP 3: The Application



Guardian for property cannot be appointed unless court makes a finding that person is mentally incapable of managing their property or their personal care

Courts make decision on basis of an application

1. Address the PGT's response:
  - PGT will typically respond to application by letter to lawyer for applicant, copying the court
  - May be useful (and at times necessary) for applicant to file supplementary materials to address issues identified in PGT's letter
2. Draft order:
  - PGT now requests that draft orders be provided for its review prior to the hearing of matter
3. File affidavits of service
4. Confirm the hearing

# How to Obtain Guardianship?

## STEP 4: The Hearing

- Hearings regarding the appointment of a guardian of property similar to all other hearings
- Reference should be made to any practice directions in the jurisdiction.

### COSTS:



- ❖ In accordance with r. 57.01, costs on a proceeding are to be fixed by the court or assessed
- ❖ Counsel should be prepared to offer particulars (preferably a draft costs outline) to presiding judge so costs can be fixed
- ❖ Fee is currently \$250 plus HST
- ❖ An order may be included regarding the PGT's fee being paid from the property of the incapable person. Since the fee is authorized by statute, however, this is not strictly necessary.

# How to Obtain Guardianship?

## STEP 5: Summary Disposition

- The *SDA* provides that an application for guardianship of property may proceed by way of summary disposition (without necessity of a hearing)
- Should be noted that not all jurisdictions or members allow guardianship matters to proceed in this fashion, as is a serious and tedious matter
- Must include the following:



### Evidence of Capacity:

- Capacity assessment and statement of person who is not assessor, with prescribed statement

OR

- Two capacity statements with prescribed statements



### Service requirement:

(same as if the matter was processing by hearing)



### Certification by Applicant:

- Applicant must include for court a statement certifying that no one has delivered a notice of appearance, all documents required have been submitted, etc. (*SDA*, s. 77))

# More on the Public Guardian & Trustee (PGT)

- In some circumstances, the PGT may become the guardian of property. When filling this role, the PGT is a “statutory guardian”. This is considered a measure of “last resort”.
- The PGT will apply to be appointed as statutory guardian if:
  - (i) if a person who is a patient of a psychiatric facility is found to be incapable of managing property (*SDA*, s 15); or
  - (ii) if a person is assessed by a capacity assessor as being incapable of managing property (with a Certificate of Incapacity (Form A) being issued) and there is no knowledge of an existing power of attorney for property or of a spouse/relative who intends to apply to the court to be appointed guardian of property (*SDA*, ss 16 and 22).
- In cases where a statutory guardian has already been appointed, courts may still review applications for court-appointed guardians (*SDA*, s 22(2)).
  - Relatedly, the PGT may be appointed as a guardian of property on a temporary basis, depending on the circumstances.

# More on the Public Guardian & Trustee (PGT)

- In many jurisdictions (including Ontario), an individual can apply to have the PGT become a court-appointed guardian. *However*, in such cases, the PGT is likely not a guardian of last resort, and therefore has the discretion to reject such appointments.
- Relatedly, if the PGT has applied to be appointed as statutory guardian, this application may be challenged by others on the basis that they are themselves intending on becoming court-appointed guardians.
  - Such situations can often lead to a protracted dispute regarding whether a statutory guardian is necessary, and whether those intending to become guardians are fit for the role (e.g. free from conflicts, not incapable).



# More on the Public Guardian & Trustee (PGT)

- In Ontario and most other provincial jurisdictions, the PGT also acts as a public body with the power to review ongoing court applications for guardianship. The PGT can also monitor guardians' conduct after they have been appointed.
- Relatedly, when a court appoints a guardian, it may do so subject to several statutory or court-imposed conditions, some of which often include the providing of an accounting to the court or to the PGT on a periodic basis.
- Outside of the context of court-appointed and statutory guardians, the PGT may also be contacted by any interested party when they have become aware that another person may be subject to undue influence, or to other forms of physical, emotional, or financial abuse.
  - In such cases, the PGT may consider opening an investigation even though they have not been appointed as guardian.

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# Guardianship in British Columbia (BC)



- The framework is effectively the same of that in Ontario.
- Provincial legislation sets out formal procedures to allow another person or the PGT to take over the adult's affairs and act on his or her behalf. In BC, "Committeeship" is the term used to refer to the formal procedures leading to adult guardianship.
- There are two ways committeeship can happen: (1) a person can apply to court to be appointed private committee (guardian) of the estate (finances/property/legal) under the *Patients Property Act*; or (2) The PGT can become statutory guardian (formerly, "public committee") of a person's finances pursuant to a set procedure in the Statutory Property Guardianship Regulation to the *Adult Guardianship Act*.
  - This is done through a bureaucratic process and not via a court process. A key document in this process is the completion/execution of a Certificate of Incapability.

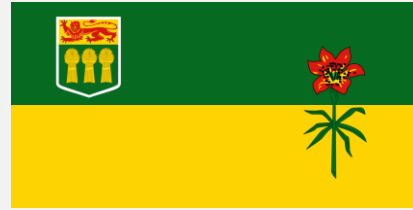


# Guardianship in British Columbia (BC)



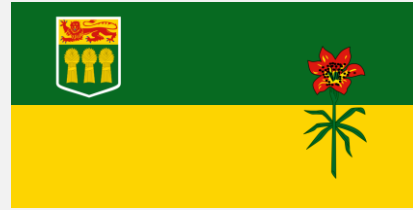
- Under the *Patients Property Act*, to be appointed as Committee of Estate, the application must include, among other things, supporting affidavits, as well as the sworn statements of two qualified medical doctors verifying that the adult is incapable of managing property.
  - Of course, not every application is approved, and all applications are subject to a judge's finding that the applicant is suitable to act as Committee of Estate.
- Once committeeship is effected, just as is the case in Ontario, anything done by the committeeship is binding on the adult in the same manner and to the same extent as if the adult had done so while mentally competent.
  - While committeeship can be reversed or terminated, this can be difficult.
- If appointed as Committee of Estate, you are required to report periodically to the Public Guardian and Trustee regarding your management of the adult's funds and assets.
  - The Public Guardian and Trustee may also set a reasonable fee for you to receive for your services, payable out of the adult's funds.

# Guardianship in Saskatchewan



- The framework is effectively the same of that in Ontario. If you are 18 years of age or older and have an interest in the financial welfare of an adult, you may apply to a Saskatchewan Court of Queen's Bench to be appointed as a guardian or “co-decision-maker” for the adult.
  - A “co-decision-maker” is someone who has the authority to assist an adult in making decisions and to make joint decisions with the adult. A property co-decision-maker specifically makes decisions with the adult about finances and property, ensuring that the adult has and understands all the information needed to make a decision, and knows the alternatives and likely results of any choice.
- If you are a paid care provider or are in some other conflict of interest situation, you may not be eligible for appointment, *unless* the court considers you to be the most appropriate person to act as guardian or co-decision-maker.
- In Saskatchewan, you may apply to the court for appointment as:
  - A property guardian for individuals who are incapable of managing their own financial affairs;
  - A property “co-decision-maker” for adults requiring assistance in decision-making but who do not require guardians; or
  - Temporary property guardian in emergency situations.

# Guardianship in Saskatchewan



- To make an application to the court to be appointed as a property guardian or property co-decision-maker, you will need to fill out several forms, including: a formal application; an affidavit in support of the application; an assessment of capacity; a statement of inventory; a bond; a draft order; and consents to the appointment from the adult's nearest relatives. Upon appointment, a property guardian in Saskatchewan has the very same powers as guardians of property in Ontario (i.e. make any financial decisions for the incapable person, except make a will).
  - Anything done by a property guardian is binding on the adult in the same manner and to the same extent as if the adult had done so while mentally competent.
- The courts and *The Adult Guardianship and Co-decision-making Act* have imposed strict obligations on property guardian when they manage a person's affairs. They are fiduciaries who are to act diligently in the best interests of that person, and in a way that limits their interference in the person's life as much as possible.
- In addition, at least once every year the property guardian or property co-decision-maker must provide an "accounting" to the Public Guardian and Trustee and the appropriate Queen's Bench court house.

# Questions?

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