

Office of the Public Guardian and Trustee

Becoming a Guardian of Property

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Becoming a Guardian of Property

QUESTIONS AND ANSWERS

1. What is a "Guardian of Property"?

A "guardian of property" is someone who is appointed to manage the financial affairs of a person who is mentally incapable of doing so for themselves.

2. When are individuals considered to be mentally incapable of managing property?

People are mentally incapable of managing property if they cannot understand the relevant information or appreciate what may happen as a result of decisions they make, or do not make, about their finances.

3. What is the difference between an "Attorney" under a "Continuing Power of Attorney" and a "Guardian of Property"?

An "attorney" is someone – such as a trusted family member or friend – that a person appoints while capable, to look after their finances in the event of mental incapacity. A "guardian of property" is someone appointed after a person has become incapable, usually because the incapable person never made a power of attorney.

The duties and powers of an attorney and guardian are essentially the same. The major difference is in how they are appointed.

4. Are there any circumstances in which a guardian of property would be appointed when a person has a power of attorney?

Yes. This might happen, for example, if an attorney isn't looking after the incapable person's money properly or is taking the money for themselves. In this situation, the court can have the attorney removed and appoint a guardian to take over.

5. Is the appointment of a guardian of property the only option if a mentally incapable person doesn't have a power of attorney?

No. A "trusteeship" is another option to consider. The administrators of some government benefits such as Old Age Security, Canadian Pension Plan (CPP) and Ontario Disability Support can appoint a "trustee" to manage this income on behalf of a recipient who is incapable. A family member or trusted friend, for example, may request such an appointment. This option is not appropriate, however, if the incapable person has income from other sources, or has assets or legal matters that need to be managed.

6. Who appoints a guardian of property?

When the Office of the Public Guardian and Trustee (OPGT) is acting as a guardian for an incapable person it can, in turn, appoint certain people to act in its place. A relative, spouse or partner of the incapable person may, for example, be appointed by the OPGT. This type of appointment is called "statutory guardianship" because the statute (law) allows the appointment to be made without a court order.

The court may also appoint a guardian of property. Unlike the OPGT, the court is not limited in who it can appoint, although a person who is paid to provide services to the incapable person is generally prohibited from being the guardian. The court also has the exclusive authority to appoint a guardian to replace a power of attorney.

All proposed guardians must consent to being appointed.

The details about the appointment process are contained in the *Substitute Decisions Act*.

7. How does the OPGT become involved as "statutory guardian" of property?

A health professional who has received special training in assessing mental capacity may, in some cases, appoint the OPGT. These professionals are referred to as "capacity assessors". Anyone who is concerned about a person's ability to look after their finances may ask a capacity assessor to conduct an assessment providing there is no power of attorney and the person involved does not object. If

the person is incapable, the OPGT will become the guardian of property and a family member may then apply as discussed above. More information about capacity assessments may be obtained by calling the Capacity Assessment Office at 416-327-6766, TTY: 416-314-2687 or toll-free at 1-800-366-0335.

There are special rules that apply to patients who are in psychiatric hospitals and receiving care for a mental disorder. These patients must, by law, be assessed by a doctor to determine whether they are incapable of managing finances. If so, the OPGT is appointed as the guardian of property and, again, a family member may apply to perform this role.

In both of these situations, the person who is found to be incapable has the right to have the finding independently reviewed at a hearing by the Consent and Capacity Board.

8. How does the OPGT or the court decide if someone applying for guardianship is suitable for this role?

The application is reviewed to try and determine whether the proposed guardian is trustworthy, cares about the incapable person's welfare and is likely to manage the person's finances responsibly. This includes looking at the closeness of the relationship and the views of other people who are involved in the incapable person's life. The proposed guardian must present a detailed plan that shows that the person's income, assets, expenses and debts will be handled in a careful and appropriate manner. Anyone applying to be a guardian of property must be at least 18 years of age.

9. Does the person for whom guardianship is proposed have any say in the application process?

Yes. The OPGT will consult the person about the application, if possible. If the application is to the court, the law requires the applicant to tell the person about the application and what it means. The person for whom guardianship is proposed is entitled to participate in the process and to be represented by a lawyer.

10. Does a person who is applying for guardianship have to hire a lawyer?

There is no legal requirement to hire a lawyer, but some applicants choose to do so. This is especially the case when the application is to the court rather than to the OPGT. A court application must be completed and filed in accordance with the standard court rules and the requirements of the *Substitute Decisions Act*^{1644c}. It is recommended that you consult with your own lawyer about this process. The time required to conclude a court application varies according to the court's schedule and the complexity of the particular case.

The Law Society of Ontario has a Lawyer Referral Service which will put you in touch with a lawyer for a half-hour telephone consultation at no charge to help determine your rights and options. For more information about this service, please contact the Law Society at 1-855-947-5255.

If the application is successful, the guardian is usually allowed to use the incapable person's money to pay the legal fees.

11. How do I apply to the OPGT for guardianship, and how long does it take?

Applications to the OPGT involve completion of certain forms specified by law. These forms can be obtained by contacting any OPGT office or printing from the OPGT's website. It is important to fill these forms out correctly and to provide all the necessary information.

A detailed list of instructions is provided along with the forms to help with completion.

12. How much does an application cost?

An application to the OPGT costs \$382.00 plus applicable taxes. The cost of a court application will vary depending on how much time and work is involved and how much the particular lawyer charges per hour.

If the application is successful the guardian is usually allowed to use the incapable person's funds to pay these costs.

13. What safeguards are in place to protect the incapable person's money?

The incapable person is in a vulnerable position because the guardian has significant power in relation to the person's finances. It is therefore quite common for certain conditions to be placed on the appointment. A typical requirement is a "surety bond". This is a special form of insurance that protects the incapable person's money in case of theft or fraud. Another common condition is a requirement that the guardian have his or her accounts reviewed periodically.

14. What authority does a guardian of property have?

A guardian of property can do anything the incapable person could normally do in relation to his or her property. This includes collecting and depositing income, paying bills, making purchases, selling assets, handling investments, managing real estate and looking after legal matters. The only thing of a financial nature that a guardian of property cannot do is make, or change, a Will on behalf of the incapable person.

A guardian of property has no authority to make decisions of a personal nature for the person whose finances he or she manages. He or she cannot, for example, require the incapable person to live in a particular place, restrict his or her activities or make medical decisions on the person's behalf. If the person can't make these decisions then a "guardian of the person" or an attorney named in a Power of Attorney for Personal Care may do so. The Health Care Consent Act authorizes specific people – usually a family member – to make substitute health care decisions, if there is no guardian or attorney with this authority.

15. What obligations does a guardian of property have?

A guardian of property has an overriding duty to act in the incapable person's best financial interest. They must manage the person's finances in a way that gives the person the best quality of life possible in the circumstances. A guardian is like a trustee and must be careful not to use the incapable person's money to improperly benefit the guardian or someone else.

The incapable person's money must be kept separate from the guardian's. All transactions must be written down so that there is a full and accurate record available. Bills, debts and legal obligations must be paid if they are legitimate and the incapable person has the money. Assets should be carefully maintained or sold if they are not needed. Surplus funds should be invested in a prudent way so that they earn a good return without undue risk. Efforts must be made to collect all the income and benefits that the incapable person is entitled to.

The incapable person should be encouraged to participate in the financial decisions that are made on his or her behalf, if this is possible. Supportive family members, friends and caregivers should be consulted as well. But the final responsibility and accountability for decisions always rests with the guardian.

16. Is a Guardian of Property entitled to be paid?

Yes. The law sets the fees that a guardian of property is allowed to charge. The current fees are 3% of money received and 3% of money paid out on the incapable person's behalf plus a charge of 0.6% of the average annual value of the person's assets.

17. Under what circumstances does the guardianship end?

If the appointment was made by the OPGT, the guardianship will end if:

- a capacity assessor, or in some circumstances, a doctor at a psychiatric facility, reports that the incapable person has regained his or her capacity
- the Consent and Capacity Board overturns the finding of incapacity
- the incapable person dies
- the guardian resigns, dies or becomes incapable

If the appointment was made by the court, the guardianship will end if the court makes an order terminating it or if the incapable person or the guardian dies.

18. Is a guardian of property responsible for administering the incapable person's estate?

No. A guardian's authority ends if the incapable person dies. The estate trustee (formerly called "executor") named in the person's Will is authorized to administer the estate. If there is no Will, next-of-kin can ask the court for this authority.

19. Where can I get more information?

You can access the OPGT's website at:

www.attorneygeneral.jus.gov.on.ca/english/family/pgt/

You can obtain a copy of the Substitute Decisions Act online at www.e-laws.gov.on.ca or by mail or phone at:

Publications Ontario
50 Grosvenor Street
Toronto, ON
M7A 1N8

1-800-668-9938 Toll Free in Ontario or (416) 326-5300
TTY: 1-800-268-7095 Toll Free in Ontario or 416-325-3408

Information about the Consent and Capacity Board can also be obtained from the OPGT or by contacting the Board's website at: www.ccboard.on.ca.

Please be advised that the OPGT cannot give individuals, professionals, facilities or organizations legal advice about specific cases or their own legal obligations. These questions should be directed to a lawyer. The Law Society has a Lawyer Referral Service which will put you in touch with a lawyer for a half-hour telephone consultation at no charge to help determine your rights and options. For more information about this service, please contact the Law Society at 1-855-947-5255

This brochure provides a very general overview of the law and procedures relating to the appointment of guardians of property. It does not include every detail contained in the law or the specific legal provisions that may apply in a particular

case. For information about the law, please refer to the applicable statutes and consult your lawyer.

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