



**THE ROLE OF THE OFFICE OF THE PUBLIC GUARDIAN AND
TRUSTEE IN PROVIDING PROPERTY GUARDIANSHIP
SERVICES**

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IN PROVIDING PROPERTY GUARDIANSHIP SERVICES

The Role of the Office of the Public Guardian and Trustee as Guardian
of Property

QUESTIONS AND ANSWERS

1. What is the purpose of the Office of the Public Guardian and Trustee’s (OPGT) property guardianship service?

This service protects mentally incapable adults and maximizes their quality of life by managing their financial affairs when no one else can do so. When acting in this role the Office of the Public Guardian and Trustee is called the person’s “guardian of property”. Individuals for whom the OPGT acts as guardian are referred to as “clients”.

2. What is the legal authority for this service?

The *Substitute Decisions Act* and the *Mental Health Act* say that the OPGT must be appointed as the guardian of property for a mentally incapable adult in certain circumstances. The *Substitute Decisions Act* sets out the powers and duties that govern all people — including the OPGT — who have the legal authority to manage the property of an incapable person.

3. When is a person considered to be mentally incapable of managing property?

A person is mentally incapable of managing property if he or she cannot understand relevant information or cannot appreciate what may happen as a result of decisions they make, or do not make, about his or her finances.

4. How does the OPGT become an incapable person's guardian of property?

There are three ways that the OPGT can be appointed:

1. Physicians are required by law to appoint the OPGT whenever a person admitted to a psychiatric facility for treatment of a *mental disorder* is assessed as being incapable of managing property and does not already have a guardian of property.
2. An expert in evaluating mental capacity – called a “capacity assessor” – may, under certain conditions, assess a person's capacity to manage property and appoint the OPGT. This process cannot be used if the person has a power of attorney for property or objects to being assessed.

Capacity assessors are independent health professionals. They charge fees for conducting assessments. Fees vary according to the hourly rate charged by the particular assessor and the length of time the assessment takes. The person who requests the assessment pays the fee. He or she may be reimbursed from the incapable person's funds if the OPGT is appointed and the incapable person can afford it. More information about capacity assessments is contained in the brochure entitled the “Capacity Assessment Office” or by contacting that Office at 416-327-6766 or toll-free at 1-800-366-0335.

3. The court will sometimes appoint the OPGT, as a last resort. This will usually occur only after the OPGT has conducted an investigation that finds that an incapable person is at extreme risk due to self-neglect or financial exploitation and that the appointment of the OPGT is the only appropriate solution.

5. Who initiates the appointment of the OPGT?

Someone such as a health professional, caregiver, friend or family member who is concerned about a person's mental capacity usually initiates the appointment. Before the OPGT can be appointed, a physician, capacity assessor, or a court must find that the person is mentally incapable of managing property. The OPGT usually has no advance notice of the appointment or involvement in the process. The OPGT has no authority to refuse the appointment although it may, in certain circumstances, transfer the guardianship responsibilities to someone else, as noted below.

6. Can a person for whom the OPGT is appointed contest it?

Yes. A person who has been assessed as incapable by a doctor in a psychiatric facility or by a capacity assessor has the right to have the assessment independently reviewed by the Consent and Capacity Board, a tribunal operated by the Ministry of Health. If a court appoints the OPGT, the person has a right to appeal to a higher court.

People who are assessed as incapable of managing property must, by law, be advised of their right to appeal.

7. What if there is already a power of attorney?

If the incapable person had made a valid, unlimited power of attorney (called a "continuing power of attorney for property") before the OPGT was appointed and the person named as the attorney is prepared to accept the responsibility, the OPGT will not act as the guardian of property.

8. What if there is no power of attorney but someone else, such as a family member, is willing to be the guardian?

The OPGT is the guardian of last resort and encourages alternative appointments wherever possible. Relatives who want to be appointed can apply directly to the OPGT or to a court. People who are not relatives must apply to a court.

If the incapable person has no income or assets except for government pensions or benefits such as Ontario Disability Support, Old Age Security or CPP, an application for guardianship may not be necessary. The income source can appoint someone else as a “trustee” to manage the income for the incapable person in place of the OPGT.

9. What powers does the OPGT have as guardian of property?

The OPGT has the power to do anything on an incapable client’s behalf that he or she could normally do in the handling of finances. This includes accessing bank accounts, entering, securing and repairing a residence, making purchases, contracting for services, signing documents, selling assets and taking legal action. It includes the right to receive any information that others have about the client’s property. The OPGT has, for example, the right to obtain a copy of the client’s Will.

These rights do not extend to personal matters such as making health care choices or deciding where the person will live, although approval from the OPGT for related financial expenses would be required. The OPGT cannot make, or change, the client’s Will.

10. What obligations does the OPGT have as guardian of property?

The OPGT – like all guardians of property – has an overriding duty to make decisions and conduct transactions that are in the client’s best interest. It has an obligation to manage the client’s finances in a way that promotes the client’s comfort, well-being and quality of life to the maximum extent possible given the client’s financial resources. If the client has surplus funds, these must be invested in a prudent way so that the funds earn a good return without undue risk.

The OPGT — like all guardians of property — must encourage its² clients to be part of this decision making if they can do so. The office must consult with supportive family members, friends and caregivers — but the final responsibility and accountability for decisions always rests with the OPGT as guardian. Sometimes this means that choices must be made or actions taken that are unpopular with the client or others. For example, a client may want more spending money than he or she can afford, or the OPGT may come under pressure from relatives to give them the use of the client’s property for free. Creditors may object when the OPGT challenges a claim on the client’s behalf. Despite these pressures, the OPGT is bound to abide by its legal duty to do only what is best for the client.

11. Does the client’s property continue to belong to the client?

Absolutely. The client’s property continues to be owned by the client and remains in the client’s name. The OPGT, as guardian of property, is a caretaker, manager and trustee but is never the owner of the property.

12. Is the OPGT’s property guardianship role strictly a financial one?

No. There is a significant “social service” component to the role, although the OPGT does not provide any direct care or formal social work services to its clients. The OPGT’s decision-making authority for finances has a direct impact on the client’s day-to-day personal life. Conversely, the personal choices and actions of the client have a direct impact on how the OPGT manages the finances. The OPGT therefore views its² role as one of providing service to the *person* and not simply that of a property manager.

The OPGT's clients are a particularly vulnerable group of people. They often suffer from mental illness, dementia, head injuries and developmental disabilities and are therefore especially vulnerable to abuse, neglect and exploitation. Some are transient. Some have significant behavioral challenges to which the OPGT must be sensitive. Often, because there is no one else to do so, the OPGT must, of necessity, become involved in advocating on their behalf, facilitating services and involving health authorities when clients are in crisis. The OPGT meets with its' clients and, where other social service and health providers are involved, works with them in a partnership role.

13. How are OPGT property guardianship services delivered?

The OPGT has offices in Toronto, Ottawa, Hamilton, London, Sudbury and Thunder Bay each of which is managed by an Area Manager with support from a Team Leader.

Each client has a "Client Representative" who handles his or her day-to-day decision making and transactions. Clients with very complicated situations receive service from Senior Client Representatives. Senior staff must approve certain decisions such as the sale of a house, initiation of a lawsuit, or transactions of a high monetary value. Depending on the situation they may also receive assistance from an OPGT investigator, financial expert or legal counsel.

14. What hours does this service operate?

This service operates from 8:30am – 5:00pm Monday to Friday except on statutory holidays.

15. How does the OPGT get the information it needs to manage the clients' affairs?

Once appointed as guardian, the first step is to try to gather all the critical information that enables the OPGT to begin to properly manage the client's finances. This can be very challenging. The OPGT rarely has any information about the client's affairs at the start and the client is often unable to provide it. Because of this, the OPGT must rely very heavily on others to share any information they have.

OPGT staff also make extensive efforts to track down information. An investigator will usually go to the client's residence to check for financial documents such as bankbooks, tax returns, insurance policies and a Will. The investigator will list the belongings, secure valuables, check on the client's car and arrange to access the client's safety deposit box, if applicable.

If the client is in a hospital or a nursing home, the OPGT may give staff, on the client's behalf, permission to check the client's belongings for valuables or important papers. The client's mail will usually be redirected to the OPGT for a period of time in order to obtain information about the client's debts, income sources, assets and bills. Any leads are followed up with inquiries, including those relating to property or benefits the client may have in foreign countries.

16. How does the OPGT ensure that clients' assets are safe?

The OPGT places assets in safekeeping if clients are not using them. Insurance is placed and maintained on clients' cars, valuables, furniture and real estate as required. Properties such as houses are professionally inspected, appraised and maintained. Tax and mortgage payments are made, providing the client has the funds. If there are people occupying a client's property, steps will be taken to try and ensure that the client is paid the proper rent, that the property is kept in good repair and that bills relating to the property are kept in good standing. Banks and financial institutions are notified so that unauthorized transactions do not take place. Accounts that the client does not need to access for day-to-day spending

money are closed and the money is placed in the client's OPGT trust account. Legal action may, if necessary, be taken to recover or safeguard clients' assets.

17. What happens if the client cannot afford the upkeep of an asset or doesn't need it any more?

In this situation, the client's asset will usually be sold. If, however, the debts on an asset exceed its value, it may be relinquished to creditors. If others, such as family members, want to retain the asset and are willing to pay for the upkeep, they will usually be allowed to do so.

Before the OPGT decides to sell an asset of significant value, such as the client's house, the office will consult with the client, if possible, and any family members who are supportive and involved with the client. The OPGT also reviews the client's Will. Specific assets that are named in the Will cannot be sold unless it simply cannot be avoided because the client needs money.

If assets are sold, the OPGT always makes best efforts to obtain a fair price.

18. How does the OPGT deal with the client's personal belongings?

These items remain with the client if possible. In many cases, however, the client cannot live independently and needs to move to a residence where he or she can get care and support. If so, the OPGT will consult the client if his or her condition permits, and talk to caregivers and family to see what items the client may wish to keep. Things that are of sentimental value, such as family photos and memorabilia, are treated with respect and will be stored if the client cannot keep them at the residence. Family or friends sometimes agree to store certain belongings as well. Unwanted items are sold, usually at public auction.

19. How does the OPGT make sure that the person gets all the financial benefits they are entitled to?

The OPGT must, by law, redirect all income owing to the client to the office. Staff are also well informed about all the current entitlements available under various private and public programs and benefit plans. They make extensive efforts to ensure that each client's personal circumstances and entitlements are regularly reviewed and that all income and benefits are obtained as they become due to the client. The OPGT will also try to obtain benefits from foreign countries that may be due to the client.

20. How does the OPGT manage the client's expenses?

This varies depending on the particular client's financial resources and needs. The OPGT tries to accommodate each client's wishes and chosen lifestyle if it is possible and reasonable to do so. Bills such as telephone and rent are paid directly by the OPGT as long as they are in the correct amount and the client has the funds. Clients are given spending money according to their needs and the amount of money they have left after other basic necessities are paid.

When clients can't look after their own shopping or spending money, the OPGT sometimes entrusts a family member, caregiver or friend with money from the client's account so they can help the client. The OPGT must, however, be advised in advance how the money will be spent. Sometimes people spend their own money or provide services and ask for reimbursement. This is fine as long as the OPGT approves the expense first. It is the OPGT's legal duty to make sure that the client can afford the expense, will directly benefit from it, and will be getting good value.

The *Substitute Decisions Act* has specific rules about the priorities of expenditures. The client's basic needs come first, followed by his or her legal obligations to dependents such as a spouse or children, and then payment of debts. In managing the property the OPGT is in exactly the same position that the

client would be if he or she were capable. The OPGT does not subsidize clients who lack the money to meet all their needs or all the costs involved in maintaining their property.

The office relies on, and strongly encourages, the client, caregivers, and family to contact the applicable Client Representative if the client needs money for purchases, services or recreational activities. OPGT staff will also make inquiries and visit with the client in order to check on the client's needs.

21. How does the OPGT handle investments for clients?

Investments that clients already have — such as stocks, bonds and term deposits — are usually retained until it is financially prudent to liquidate them. The proceeds, together with savings that clients do not need for their day-to-day expenses, are invested prudently so that the funds grow but are not subject to undue risk.

22. What if the client has legal problems?

The OPGT will retain and instruct a lawyer on the client's behalf if legal work relating to the client's finances needs to be done and the client can afford the legal fees. Typical examples of legal work include dealing with a real estate issue, negotiating a separation agreement or representing the client in a lawsuit. The law prohibits anyone else from retaining a lawyer on the client's behalf in these matters unless a court has authorized it.

The OPGT does not have any role in legal affairs that relate to a client's personal matters such as immigration, criminal charges or a custody dispute. The OPGT will, however, help locate a suitable lawyer and will have to approve the proposed legal fees in advance. The OPGT does not represent clients in applications to contest guardianship but will help the client with arranging a lawyer.

23. Does the OPGT file the client's income tax return?

Yes. As the guardian this is the OPGT's responsibility. It is very important that anyone who is considering doing this for a client check with the OPGT first so that complications

resulting from duplicate returns is avoided.

24. Can the OPGT manage just one part of the client's financial affairs and let the client or someone else do the rest?

No. The law does not allow this. If the OPGT — or anyone else — is a guardian of property, it is accountable for, and must make all the financial decisions. Clients, family or caregivers may, however, be given responsibility for funds used to pay day-to-day expenses.

25. What if a client wants to end the guardianship?

Any client who wants to resume control of his or her finances can be reassessed. Statutory Guardianship (guardianship that is not created by court order) will automatically end if the reassessment finds the client capable. Clients who disagree with the results of a reassessment are entitled to have this issue reviewed periodically by the Consent and Capacity Board.

If the guardianship was made by court order, the Court must be asked to terminate the guardianship.

Client Representatives make sure that clients are aware of these rights and will assist them in making the necessary arrangements if requested.

26. If a guardianship client dies, will the OPGT administer the estate?

The OPGT's guardianship appointment automatically ends when the client dies. Responsibility for the administration of a client's estate, including the funeral and burial arrangements, then passes in the normal manner to the executor (now called the "estate trustee") named in the client's Will. If there is no Will or if the estate trustee cannot act, then the beneficiaries, or the next-of-kin who live in Ontario, may apply for the right to administer the estate. In cases where there are no next-of-kin in Ontario the OPGT's Estates Administration Program will usually administer the estate and try to locate potential heirs.

27. What does the OPGT charge for property guardianship

services?

It depends on the client's financial situation. Clients who have very little money pay only a small fee. In these circumstances, the fee never amounts to more than the value of the interest the client earns on his or her trust account with the OPGT.

Clients who can afford it pay the fees specified by law, which apply to all guardians of property. This fee is 3% of any payment made or received by the OPGT on the client's behalf. For example, if a bill of \$100.00 is paid, \$3.00 goes toward OPGT fees. If \$100.00 of income is received, \$3.00 is paid toward OPGT fees.

There is also an annual charge of 3/5 of 1% on the value of the client's investments. Fees for legal work, property management, tax filings and disbursements are charged at standard market rates.

28. What if a client, or someone else involved with a client, does not agree with the way that the OPGT is providing guardianship services?

The OPGT is required to provide clients and their immediate family members with information, including a financial statement, if one is requested. If there are concerns, these should be brought to the attention of the Client Representative, who will try to resolve the issue. If this is unsuccessful, the Area Manager for the applicable office may be contacted at the appropriate number noted below.

Under the *Substitute Decisions Act*, the court can be asked to review the OPGT's actions as guardian of property. This process is called a "passing of accounts" and is the appropriate way to resolve concerns if they cannot be addressed informally.

29. How do I get more information?

You can access the OPGT's website at www.attorneygeneral.jus.gov.on.ca/english/family/pgt

A copy of the *Substitute Decisions Act* can be obtained from Publications Ontario on-line at www.gov.on.ca/MBS/english/publications/index.html 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

To access general information on mental health and to a publication entitled Rights and Responsibilities – Mental Health and the Law, you can link to the Ministry of Health and Long Term Care website at:

www.health.gov.on.ca/english/public/pub/pub_menus/pub_mental.html

Information about how to apply to the Consent and Capacity Board can be obtained from the Board's website at:

www.ccboard.on.ca or by calling the Ministry of Health Information Line at 1-800-461-2036.

To request an information session with OPGT staff, please contact the Area Manager in the OPGT regional office closest to you. Telephone numbers and addresses are listed below.

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 of Upper Canada operates a Legal Referral Service and can be reached by calling 1-900-565-4577. Telephoning this number generates a \$6.00 charge on your phone bill in the month following your call. Lawyers participating in the Service will offer you up to a half-hour free consultation that may be over the phone or in person.

30. How to Contact the OPGT:

Greater Toronto, Central Western Ontario, Central Eastern Ontario

595 Bay Street, Suite #800
Toronto, ON
M5G 2M6
Tel: (416) 314-2800
Toll-free: 1-800-366-0335
Fax: (416) 327-0366

Hamilton Region

119 King Street West, 9th Floor
Hamilton, ON
L8P 4Y7
Tel: (905) 546-8300
Toll-free 1-800-891-0502
Fax: (905) 546-8301

London Region

199 Dundas Street, 1st Floor, Suite 100
London, ON
N6A 1G4
Tel: (519) 660-3140
Toll-free 1-800-891-0504
Fax: (519) 660-3148

Ottawa Region

244 Rideau Street, 3rd Floor
Ottawa, ON
K1N 5Y3
Call: (613) 241-1202
Toll-free: 1-800-891-0506

Sudbury Region

199 Larch Street, Suite 602
Sudbury, ON
P3E 5P9
Tel: (705) 564-3185
Toll-free: 1-800-891-0503
Fax: (705) 564-3193

Sudbury Satellite—Thunder Bay Region
189 Red River Road, Suite 101
Thunder Bay, ON
P7B 1A2
Tel: (807) 343-7230
Fax: (807) 343-7223

This brochure provides a very general overview of the mandate and operation of the OPGT's property guardianship services. It does not include all of the details of the law, policies, procedures or exceptions that may apply in a particular case. For information about the law please refer to the applicable statutes and contact your lawyer.

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