

When Consent and Capacity Get Complicated:

Involving the Investigation Department of the Public Guardian and Trustee in Situations of Risk

- Prepared For: Centre for Clinical Ethics (CCE) 2021 Conference: Ethics Issues in Caring for Older Adults
- Presented by:
 - Sandi Parker, Investigations Team Leader, Office of the Public Guardian and Trustee
 - Philippa Geddie, Investigations Counsel, Office of the Public Guardian and Trustee




The Office of the Public Guardian and Trustee

- A division of the Ministry of the Attorney General
- Charged by legislation with a wide range of duties:
 - Acts as **guardian of property** for people who are mentally incapable of making their own financial decisions
 - Approx. 13,000 property guardianship clients
 - Acts as **guardian of personal care** for people who are mentally incapable of making their own personal care decisions
 - Approx. 52 personal care guardianship clients
 - Makes **treatment decisions** for people who cannot give/refuse consent
 - 10,900 + individual treatment decisions per year
 - Investigates **allegations that a mentally incapable person is at risk to determine if the PGT should seek guardianship**
 - 3000 + allegations per year
- Provides the public with legal information and referrals about substitute decision-making.



QUESTIONS:

- **Who can call the PGT Investigations Unit if they believe someone is incapable and at risk of harm?**
- **Does a healthcare worker, or an agent of a health information custodian, require consent from anyone to call the PGT?**



Substitute Decisions Act, 1992, as amended: PGT shall investigate allegations that a person is at risk of suffering **serious adverse effects** because of incapacity to make property/personal care decisions.

- Person must be at least 18 years old (if alleged risk is to finances) or 16 years old (if alleged risk is to the person)
- The PGT is not required to take any steps that, in their opinion, are unnecessary for the purpose of determining whether an application to the court is required.

Authority to Disclose

- *Personal Health Information Protection Act, 2004:*
 - Section 43(1): A health information custodian may disclose personal health information about an individual
 - (a) for the purpose of determining, assessing, or confirming capacity under the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992*, or this Act;
 - (e) to the Public Guardian and Trustee, the Children’s Lawyer, a children’s aid society, a residential placement advisory committee established under subsection 63(1) of the *Child, Youth, and Family Services Act, 2017* or a designated custodian under section 223 of that Act so that they can carry out their statutory functions.



QUESTION:

- Can callers remain anonymous?
- If so, is there any down side to remaining anonymous?

Anonymity, Disclosure, and Freedom of Information Requirements

- We cannot compel a caller to provide their name or other identifying information, but not having this information will make it difficult for us to:
 - Ask relevant questions;
 - Assess what options are available for addressing risk;
 - Confirm that the information provided is accurate.
- Once personal information has been disclosed to us, we are bound by the *Freedom of Information and Protection of Privacy Act* concerning its use and disclosure:
 - May be compelled to disclose in certain situations- e.g.: by court order
 - Some grounds for discretionary disclosure if permission is given by the head of the institution- e.g. in compelling circumstances affecting health and safety
- Where there are reasons to shield the identity of an allegator (e.g. to preserve a relationship of trust), we will strive to do so- but may be compelled to disclose this information by the Office of the Privacy Commissioner or by a court order.

QUESTION:

- What are some things that a person should consider, try to find out, or try to resolve before calling the PGT?

What OPGT may consider in opening an investigation?

- PGT as last resort - alternatives to PGT investigation and guardianship are often preferable.
- Guardianship should not be sought unless effective/beneficial.
- Presumption of capacity – unless reasonable grounds to suggest otherwise.
- Incapacity should not be concluded solely as a result of risky behavior or poor decision making.
- Lifestyle choices and cultural diversity should be considered.
- Recognition that guardianship necessarily entails a significant loss of personal autonomy.
- Consider prior capable and current wishes of person.
- Could an application to court be required? (purpose of investigation)

Is there a role for the PGT?

As guardian, *cannot*:

- Jump the person to the front of a waiting list for services or housing
- Force the person to stop behaving in a manner perceived as undesirable or risky (e.g. stop the person from drinking alcohol or hoarding), or to live in particular apartment
- Make the person's family get along
- Create additional resources
- Provide crisis intervention services.

As guardian, *can*:

- Apply for the resources, income, or supports the person is entitled to receive.
- Safeguard person's existing assets, address ongoing financial abuse, apply the person's income/assets to their needs, implement paid support services if the person can afford them.
- As guardian of personal care - Make applications for services including housing, choose between available options for housing, services, etc.

Appointment of PGT as statutory guardian...by capacity assessment

SECTION 16 CAPACITY ASSESSMENT

Who can arrange it?	Anyone.
What are the preconditions?	<ul style="list-style-type: none">• Allegedly incapable person [AIP] does not have a CPOAP (unless AIP requests assessment)• No-one applying to be AIP's guardian• AIP does not refuse to undergo assessment• Person requesting assessment pays cost.
What's the process?	Contact capacity assessor and complete request form. Arrange assessment interview. If AIP is found incapable, PGT becomes guardian of property.
Who can help?	Capacity Assessment Office. Can provide information, a list of assessors, and funding for low income requesters.

Appointment of PGT as statutory guardian...under the *Mental Health Act*

CAPACITY ASSESSMENT UNDER MENTAL HEALTH ACT

What are the preconditions?	<ul style="list-style-type: none">• Allegedly incapable person [AIP] is a patient at a psychiatric hospital (Schedule 1 facility)• AIP is receiving “care, treatment, or observation” for a mental disorder
What’s the process?	<p>Doctor must examine patient and issue Certificate of Incapacity if incapable of managing property. PGT becomes guardian of property.</p> <p>Doctor must re-assess within 21 days of discharge and decide whether to continue certificate. If continuance issued prior to discharge, PGT remains guardian after discharge.</p>
Does the doctor have a choice?	No. Under <i>Mental Health Act</i> , doctor must perform assessment if the prerequisites are met, unless doctor has reasonable grounds to believe patient has a CPOAP

QUESTION:

- Should the potential allegators be mindful of any ways in which calling the PGT might cause potential harm (e.g., police involvement, family conflict, etc)?



● Police

- At this time, police remain woven through the law of mental health/substitute decision-making, especially when a person is in crisis
 - Enforce *Mental Health Act* forms (MHA SS. 16(2), 17)
 - NB: a Form 1 issued *by a physician* can be enforced by someone other than police (S.15(5)).
 - Enforce apprehensions under the *Substitute Decisions Act* (SDA S.59(3),62(10))
 - Enforce court orders for capacity assessments (SDA s.81)
 - Enforce power-of-entry warrants issued to PGT (SDA s.82)
- PGT does not have its own urgent response services- our options for addressing a crisis are the same as yours.
- Early intervention/reporting can be key to avoiding a crisis involving the possibility of a police response.
 - Repeated discharges from hospital without a plan in place may mean multiple encounters with emergency services.



● Family Conflict/Relationships with Abusers

- Advise the PGT at time of allegation if there are concerns that family will retaliate against allegedly incapable person.
- If allegedly incapable person is in hospital/LTC/etc, the institution needs to be involved in creating a safety plan.
- Allegedly incapable person may be isolated, emotionally dependent on an abuser, scared of the relationship ending.
- The flip side: Abuser may be isolating allegedly incapable person from other, more supportive relationships.
 - Squeezing out family members who disapprove of the abuser's behaviour or are intimidated by the abuser.
 - Preventing the person from accessing support services (paid or free)

QUESTION:

- What does the Investigations Unit do when investigating?



Substitute Decisions Act, section 83(1):

The Public Guardian and Trustee is entitled to have access, for the purpose of an investigation required by section 27 or 62, to any record relating to the person who is alleged to be incapable that the Public Guardian and Trustee reasonably believes to be relevant to the investigation and that is in the custody or control of,

- (a) the person's guardian of property or guardian of the person;
- (b) the person's attorney under a power of attorney that confers authority in respect of the person's property or under a power of attorney for personal care;
- (c) a member of the College of a health profession as defined in the *Regulated Health Professions Act, 1991*;
- (d) a facility;
- (e) a person who operates a controlled-access residence;
- (f) a bank, loan or trust corporation, credit union or other financial institution;
- (g) an administrator of a pension fund;
- (h) a real estate broker or agent

Covered under section 83: bank records, medical records, title searches, credit rating, vehicle ownership



QUESTION:

- If the Investigations Unit does not open an investigation, are there other things it can do to help a caller support an allegedly incapable person?
- Are there steps the Investigations Unit can take to assist a person short of applying for appointment as guardian of property or personal care?

Possible outcomes of an allegation or investigation

- Insufficient evidence or guardianship not appropriate
- Informal supports to help with risk (family, community organizations)
 - PGT may play a role in coordinating between support agencies, sharing information
- Treatment decision made under HCCA
- Power of Attorney
- MHA Assessment (Schedule 1 Facility) appointing OPGT for property ONLY if incapable
- SDA S.16 Capacity Assessment by designated capacity assessor may appoint OPGT as property guardian ONLY if incapable
- Statutory Trusteeship of pensions by third party or OPGT
- Court ordered guardianship by family/friend
- Other court application (e.g. court directions or passing of accounts)
- Court ordered guardianship by the OPGT as a LAST RESORT

Substitute Decision-Makers: Property



Decision-maker	Source of authority	What can they manage?	Who can act?
Attorney for Property	Continuing Power of Attorney for Property (CPOAP)	All of incapable person's property (unless CPOAP sets limits)	Anyone (family member, friend, <i>sometimes</i> PGT)
Statutory guardian of property	Certificate of Incapacity/Notice of Continuance	All of person's property	PGT- but can be replaced by family member
Court-appointed guardian of property	Court order	All of incapable person's property (unless court orders sets limits)	Anyone (family member, friend, PGT)
Third-party administrator/ ODSP Trustee	Appointed by gov't income program (ODSP, OAS...)	Only income from a specific source (e.g. ODSP)	Anyone (family member, friend, <i>sometimes</i> PGT)

Substitute Decision-Makers: Personal Care



Decision-maker	Source of authority	What can they make decisions about?	Who can act?
Attorney for Personal Care	Power of Attorney for Personal Care (POAPC)	Some or all of health care, shelter, safety, clothing, nutrition, hygiene. Powers defined by POAPC.	Family member, friend, age 16+, and <i>not</i> someone providing paid services
Court-appointed guardian of personal care	Court order	Some or all of: health care, shelter, safety, clothing, nutrition, hygiene. Powers defined by court order.	Family member, friend, (rarely) PGT, <i>not</i> someone providing paid services
S.33 Representative	Appointed by Consent and Capacity Board	Can give/refuse consent to medical treatment	Anyone
<i>Health Care Consent Act</i> decision-maker	Section 20 of <i>Health Care Consent Act</i>	Can give/refuse consent to a specific proposed medical treatment	Person highest on HCCA priority list

Treatment Decisions under the *Health Care Consent Act*

- *Health Care Consent Act*, section 20: If a person cannot consent to a medical treatment, consent can be given/refused by the highest-ranked capable person on this list who is available:
 - Guardian of Personal Care
 - Attorney for Personal Care
 - Representative appointed by Consent and Capacity Board
 - Spouse/partner
 - Child or parent
 - Brother/sister
 - Any other relative
 - Public Guardian and Trustee
- Applies *only* to treatment decisions!
 - Admission to long-term care facility = treatment decision
 - Admission to a retirement home/group home ≠ treatment decision

QUESTION:

- What happens if the allegedly incapable person does not participate in the investigation or asks for the investigation to be halted?

Taking wishes and preferences into account

- Court prohibited from appointing a guardian of property or personal care if there is a less restrictive way to meet the need for decisions to be made on behalf of the person.
 - SDA ss. 22(3)(b), SDA s.55(2)(b)
- S.16 assessment cannot take place if the person to be assessed refuses to participate
- *Health Care Consent Act* representative cannot be appointed if the incapable person objects
- Continuing Power of Attorney for Property/Power of Attorney for Personal Care considered an expression of the person's wishes, and can be terminated by a court only if there is persuasive evidence of incapacity to grant the POA or fraud, misconduct, or neglect on the part of the attorney
- Wishes of person (if they can be ascertained) must be considered by the court in deciding whether a proposed guardian is appropriate (SDA s.24(5)(b), 57(3)(b))



- But: allegedly incapable person cannot require investigation to be halted
- PGT has a statutory obligation to conduct an investigation when our criteria are met, AND to apply to court when our criteria are met
- More participation by the allegedly incapable person = more options for addressing the situation of risk = greater chance of avoiding a court application.
- Allegedly incapable person may be pressured or coerced by an abuser into saying that they are fine with the abusive conduct. PGT may try to shield the person from coercion by acting as “lightning rod”, emphasizing that the allegedly incapable person cannot veto or call off our investigation.

QUESTION:

- Can you provide an example of a case in which a healthcare worker/team reached out to the Investigations Unit to report a concern and where, as a result, the PGT successfully intervened in the case?
- Was there anything notable about how, when, or why the worker/team reached out to the PGT in that case?

Making an allegation

- *To make an Allegation:*
 - Call: (416) 327-6348 or 1-800-366-0335;
 - Fax: (416) 314-5301
 - E-mail: jus.g.fjs.pgt.guardianshipinvestigation@ontario.ca
 - Mail:
Office of the Public Guardian and Trustee, Guardianship
Investigations Unit
595 Bay St., Ste. 800
Toronto, ON M5G 2M6
 - Provide information about:
 - Alleged incapable person's name, address, and date of birth
 - Alleged incapacity
 - Financial and or personal care risk
 - Alternatives that have been tried

Other OPGT phone numbers:

- OPGT Toronto - Main Number (416) 314-2800 or 1-800-366-0335
- Treatment Decisions Unit
 - Toronto Region: (416) 314-2788 or 1-800-387-2127.
 - Hamilton Region: 1-800-891-0502 or (905) 546-8300
 - Ottawa Region: 1-800-891-0506 or (613) 241-1202
 - Sudbury Region 1-800-891-0503 or (705) 688-3185
 - London Region 1-800-891-0504 or (519) 660-3140
- Capacity Assessment Office (416) 327-6766 or 1-866-521-1033
- Guardianship Register/Intake Unit (416) 327-6683
- Estates Administration (416) 325-8854

OPGT Brochures

- For further information and brochures, visit our website at:
<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>
- BROCHURES available (download or request hard copies)
 - Becoming a Guardian of Property
 - Duties and Powers of a Guardian of Property
 - Guide to the *Substitute Decisions Act*
 - Power of Attorney: Questions and Answers
 - Power of Attorney Kit
 - **Role of the PGT in Guardianship Investigations**
 - Role of the PGT in Providing Property Guardianship Services
 - **The Capacity Assessment Office**