

Ways to End Statutory Property Guardianship when the PGT is managing the financial and legal affairs of adults

Introduction

This fact sheet is about statutory property guardianship, how it happens and the rights of adults to end it. These rights are outlined in the **Adult Guardianship Act**. The rights also apply to adults who are under statutory property guardianship through the **Patients Property Act** (an old law that is being phased out). In BC, the age of adulthood is 19 years or older.

What is statutory property guardianship?

Statutory property guardianship is also known as 'public' guardianship. It is when the **Public Guardian and Trustee**—a public/government official—takes over financial and legal affairs of adults by way of a *Certificate of Incapability* (after medical assessments).

Public guardianship is different from 'private' guardianship where an individual, usually a spouse or family member, or an institution, such as a Trust Company, applies to the BC Supreme Court to be appointed the adult's guardian.

Private, or Court-appointed guardianship, is governed by the Patients Property Act. Sometimes the Public Guardian and Trustee is appointed by way of the Court to manage the adult's financial and legal affairs, as 'committee of estate.'

Nidus has a fact sheet on 'Adult Guardianship' that provides an overview of public and private guardianship. See Resources on page 5.

What triggers an assessment?

The Public Guardian and Trustee (PGT) materials say an assessment may be needed if:

- There are concerns that you are not able to manage your financial affairs,
- There is no one else available to assist you, and
- There are important financial matters in your life that need to be taken care of.

Sometimes the PGT may receive a report from a third party such as a financial institution. The PGT may then ask a qualified health care provider to do an assessment. Or, if someone is in hospital because of a mental illness, severe stroke or dementia, the treating physician may initiate an assessment.

DON'T DELAY ORGANIZING ALTERNATIVES

"Incapacity assessments should only be conducted as a **last resort** and are unnecessary if there are **alternate ways** of adequately meeting the adult's needs." (From *Principles to Guide the Assessment Process, in Guide to the Certificate of Incapability Process, page 24, by the PGT*)

It is more **difficult to end** statutory property guardianship than taking measures **to avoid** it in the first place.

All adults, 19 years or older, are vulnerable to adult guardianship—in case of incapacity. You can be proactive by making **legal planning documents** now to authorize trusted supporters to help you, if needed. See *Nidus Resources* on page 5.

A Representation Agreement under section 7 (RA7) of the Representation Agreement Act was created to be a **legal alternative** to adult guardianship. Adults may make an RA7 to cover routine financial and legal affairs, even if their capability is in question.

What is the assessment procedure?

The first step in the procedures for statutory property guardianship is an assessment of the adult's capability to manage their finances.

There are two types of assessments required:

1. A **medical assessment** by a physician, and
2. A **functional assessment** by a qualified health care provider as defined in the Statutory Property Guardianship Regulation, such as a registered psychiatric nurse, registered occupational therapist, registered psychologist, registered social worker, or registered nurse.

The test of capability/incapability that the qualified health care provider applies is also set out in the Regulation. It uses a traditional approach to measure capability by assessing 'understanding.' A key factor will be whether the health care provider can understand the adult's communication, as some adults communicate in non-traditional ways.

The adult may request to have someone present at the assessment and this could be important for demonstrating capability. This person can help the adult with communication and to provide support.

The law allows an assessment to be done without the adult, using observation and information from other sources. However, the assessor must be satisfied that the assessment is accurate when completed this way.

The qualified health care provider must provide the adult with a copy of the assessment report and their finding of capability or incapability—unless they believe it will cause the adult serious physical or mental harm or result in significant loss or damage to the adult’s property.

What happens after the first assessment?

After the first assessment is complete, the qualified health care provider(s) must submit their reports and findings to a health authority designate who will review them.

A health authority designate is a person who is authorized to issue a *Certificate of Incapability*.

Before issuing a Certificate the health authority designate must be satisfied, based on the assessments and any other information, that:

- The adult needs to make decisions about the adult’s financial affairs,
- The adult is incapable of making those decisions,
- The adult needs, and will benefit from, the assistance and protection of a statutory property guardian,
- The needs of the adult would not be sufficiently met by alternative means of assistance, and either:
 - The adult has not granted power over all of the adult’s financial affairs to an attorney under an enduring power of attorney, or
 - An attorney has been granted power as described above but is not complying with the attorney’s duties under the Power of Attorney Act or under the Enduring Power of Attorney.

The health authority designate must not sign a *Certificate of Incapability* until they have:

1. Consulted with the PGT, and
2. Sent a notice of their intent to sign a Certificate and the reasons for it:
 - To the adult, and
 - To the adult’s spouse or a near relative of the adult, if they have contact information.

The adult and others have **10 days to respond** after receiving the notice and the reasons (or when expected to have received it—up to 7 days if sent by regular mail).

The health authority designate does not have to inform the adult or others if they think it will cause harm to the adult or the adult’s property.

Once the health authority designate issues a **Certificate of Incapability** they must give it to the Public Guardian and Trustee. The PGT automatically becomes the adult’s **statutory property guardian** as of the date on the Certificate. The PGT Adult Services will assign a case manager for the adult.

The health authority designate must also give a copy of the Certificate to the adult and their spouse or a near relative.

The PGT must advise the adult and the adult’s spouse or a near relative that:

1. The PGT is now acting as the adult’s statutory property guardian, and
2. The adult has the right to request a second assessment, and if found incapable, the right to apply to the BC Supreme Court for a review of the finding of incapability.

Nidus received an email from an individual because her spouse of many years (a senior) had a serious stroke and was in hospital. The psychiatrist started the initial statutory guardianship assessment, even though the patient’s spouse was available to assist. Despite spending months on assessments and discussions, no one mentioned the Representation Agreement section 7 (RA7)—a legal alternative to adult guardianship.

The individual contacted Nidus when she learned a **second assessment** was underway and found out how she can help her spouse **make an RA7** and avoid the need for the PGT to take over.

It adds hardship when physicians and other health care providers have not had education on Representation Agreements as a legal alternative to adult guardianship.

What are the adult’s rights for requesting a second assessment?

If the first assessment finds the adult incapable of managing their financial affairs, the adult or a person acting on the adult’s behalf (e.g. spouse, near relative, representative, attorney) can request a **second assessment**.

The **request must be made within 40 days** from the time that the PGT sent information that they are the statutory property guardian. Don’t delay requesting a second assessment and organizing alternatives such as making an RA7.

The PGT says that best practice is for a second assessment to be done by different qualified health care providers than those who did the first assessment. It is like a 'second opinion.'

There are **two outcomes** of a second assessment:

1. The adult is determined **capable**. The qualified health care provider notifies the health authority designate. The designate reviews the results and consults the PGT.
 - If the health authority designate accepts the finding, the statutory guardianship ends and they notify the adult and the PGT. The PGT will issue a *Cancellation of Certificate of Incapability* and work with the adult to transfer control of the adult's property back to the adult;
 - If the health authority designate does not accept the finding of capability, they must document reasons and determine the next steps. This might include a re-evaluation of all or some of the assessments.
2. The adult is determined **incapable**. The qualified health care provider notifies the health authority designate. The designate reviews the results and consults the PGT. The PGT must advise the adult of the right to ask the BC Supreme Court to review the finding of incapability.
 - The Court can reject the finding of incapability or confirm it.
 - If the Court rejects the finding, they can also order that the statutory property guardianship is ended.
 - The Court might require the adult to have another assessment before deciding whether to reject or accept a finding of incapability.

The adult is responsible for any legal fees for pursuing a challenge in Court. The PGT says their staff will provide a list of legal services.

Applying to Court is a new option and requires specialized knowledge. Please contact the **Community Legal Assistance Society (CLAS)** to discuss the case and if they can provide legal help. See *Resources page 5*.

If the adult is found incapable, the PGT should also advise the adult that they have the right to request a reassessment once every 12 months.

How to end statutory guardianship when the adult has been found incapable?

If the second assessment was not requested or it was done and the adult is again found to be incapable, the PGT will proceed as the adult's statutory property guardian.

As of December 1, 2014, the Adult Guardianship Act provides new rights that adults may use to try and end the PGT's authority as statutory property guardian. These are:

1. A reassessment of the adult's capability.
2. The PGT can decide the adult no longer needs them to act as the adult's statutory property guardian.
3. The Court can reject the finding of incapability and order that a statutory property guardian (the PGT) is not needed.
4. Someone (such as a family member) can apply to the BC Supreme Court to take over the adult's financial and legal affairs through private guardianship. Read more about this in the Nidus fact sheet called *Adult Guardianship*. See *Nidus Resources page 5*.

What are the procedures for reassessment?

Reassessments are done by qualified health care providers. The reassessment must take into account any possible changes in the adult's capability to manage their finances since previous assessments. At the same time, consideration must be given to the fact that, by having a statutory property guardian, the adult has not been in charge of managing their own financial affairs.

Adults can be **reassessed** in the following situations:

- At the adult's request, if they have not been reassessed within the past 12 months. The adult may be charged for the cost of a reassessment.
 - The PGT materials encourage the adult to seek help from the PGT case manager with this. The adult may also speak directly to their physician. If the adult made a Representation Agreement that includes health and personal care, the adult should speak to their representative for help.
- If the PGT has information that the adult may now be capable, the PGT can request a reassessment. In this case it does not matter when the adult was last reassessed.

There are **two outcomes of a reassessment**—a finding of capability or finding of incapability. *See the details under the outcomes of a second assessment, left column of page 3.*

A reassessment can also happen by an order of the BC Supreme Court (if the adult asks the Court for a review of the finding of incapability after a reassessment). *See details under #2 at outcomes of a second assessment on page 3.*

When might the PGT decide the adult no longer needs the PGT as guardian?

The adult or PGT staff may initiate a discussion about ending the PGT's authority as statutory property guardian.

The PGT provides a list in their information materials of some factors they would consider:

- The wishes of the adult.
- What has changed about the adult's circumstances and how it has changed.
- Whether the original need or reason continues.
- The adult's ability to manage their financial affairs on their own.
- Whether informal arrangements such as direct deposits would be sufficient.
- Current diagnosis and prognosis of any relevant medical illnesses.
- Likelihood of need for service in near future.
- The presence of a trusted person in the adult's life who could be authorized by the adult to make decisions or assist with decisions for routine management of financial affairs under a Representation Agreement section 7.*
- The presence of a trusted person who could act as pension trustee if a physician completes the necessary paperwork to say the adult is incapable of managing their finances.
- Risks to adult's assets if the PGT does not stay involved.

* Bob's financial and legal affairs were managed by the PGT for many years. Read Bob's story about how a Representation Agreement helped him to be discharged from the PGT. His story is in the Nidus fact sheet on Adult Guardianship. *See Nidus Resources on page 5.*

Before making a final decision, the PGT will also consult with other supports and services in the adult's life. This could include the adult's physician. The PGT may decide to refer the adult for a reassessment to confirm that a qualified health care provider finds the adult capable.

If the adult is found capable, what happens?

If the adult is found capable after a second assessment or a reassessment, the PGT is notified and statutory property guardianship ends. In the case where the PGT decides the adult no longer needs them to act, statutory guardianship ends when the PGT notifies the adult.

The PGT issues a **Cancellation of Certificate of Incapability** and contacts the health authority that signed the Certificate of Incapability.

Internally, the PGT Estate Liaison Department takes over the file and will inform third parties, such as financial institutions, that the PGT is no longer acting on the adult's behalf.

If the PGT acts as the statutory property guardian for some period of time, they may have transferred the bank account(s) to an institution they use. They may have sold real estate property and/or any vehicle(s).

The PGT information says they will promptly **return control of property** (money and other financial matters) to the adult. They will redirect income and bill payments back to the adult to manage.

The Estate Liaison Department will deal with the transfer and notification to the adult of any immediate issues that need attention such as mortgage payments and other financial or legal obligations. They will provide information and answer questions.

We understand the PGT provides a detailed **accounting** of their financial management. It is also a duty of the PGT, as statutory property guardian, to 'foster the independence of the adult and encourage the adult's participation in decision making affecting the adult.' Nidus is not sure how the PGT reports on this.

The PGT may ask the adult to sign a 'release form' before sending the final accounting and balance of funds. A release is a letter saying the adult (or their heirs, beneficiaries, or executor) will not make a legal objection in the future about how the PGT managed the adult's affairs as the statutory property guardian. The PGT says they will not request a release from adults with 'modest' estates. There is no clear definition of a modest estate.

Adults do not have to sign a release. The PGT will not withhold the adult's funds if they do not sign it. The PGT suggests the adult get legal advice before signing the release—this is a good idea. *See legal help under Resources on page 5.*

What fees does the PGT charge when they are statutory property guardian?

By law, the PGT must charge fees to the adult for managing the adult's finances. There is a minimum fee of \$100.00 per month. Fees are charged on the value of the property (for example, investments and real estate) and for transactions related to income and paying bills.

The PGT will also charge for any additional tasks they have to undertake such as:

- Will searches.
- Mail redirection.
- Preparation of annual income tax returns.
- Property inspection and/or security services if a property is vacant.
- Cleaning and packing fees if the adult moves to a residential facility.
- Property management company fees to oversee rental properties.
- Real estate agent commissions for the sale of property.

RESOURCES

Legislation

Go to www.bclaws.ca > Laws of British Columbia
Click 'A' to find the Adult Guardianship Act and the Statutory Property Guardianship Regulation.

Resources from Nidus

Go to www.nidus.ca and find these resources:

- General information on [Adult Guardianship](#)—click **Information** > Adult Guardianship > Overview or Fact Sheet or More Resources
- Learn about **legal planning documents** to prevent the need for adult guardianship.
 - Watch **videos**—click the [YouTube](#) icon in the footer at the Nidus website.
 - **Future Path** for adults who understand the nature and effect of planning documents (EPA & RA9) when making them. Click [middle photo/heading](#) on homepage.
 - **Need Help Today Path** for adults whose capability is in question (RA7). Click [first photo/heading](#) if adult has a disability from birth or childhood. Click [third photo/heading](#) if adult's capability is in question due to illness or injury during adulthood (e.g. severe stroke, advanced dementia).

Legal information and help from CLAS

Information on rights to end statutory property guardianship, advice on signing a release form, help to apply to Court for a review.

Community Legal Assistance Society (CLAS) at 604.685.3425 or 1.888.685.6222

Resources from Public Guardian and Trustee

Go to www.trustee.bc.ca and click on heading 'Reports and Publications'

- Scroll down to **Services to Adults**—click on link for [When the Public Guardian and Trustee is Committee](#). This material includes information on ways the role of the PGT ends.
- Scroll down to **Adult Guardianship**—click on link [A Guide to the Certificate of Incapability Process under the Adult Guardianship Act](#)

PERSONAL PLANNING REGISTRY

The Personal Planning Registry was developed and is operated by Nidus to provide the public with secure storage and 24/7 access for important information and documents.

The PGT is an authorized Access User of the Registry. If they search and find the adult has made plans, the PGT can help support the adult's plans and make sure the PGT is the last resort. The PGT is a safeguard if there is no plan or it is not working and the adult needs help. The Registry makes communication easy, simple and accessible. Go to www.nidus.ca/registry

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NOTE: A representative for health and personal care can help even when the PGT is the statutory property guardian. Under section 18 of the Representation Agreement Act, a representative has authority to access any information and records concerning the adult's incapability.