

**PERSONAL GUARDIANSHIP AND  
PROPERTY GUARDIANSHIP:  
THE DIFFERENCE AND WHY IT MATTERS**

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## Introduction

When we think of the idea of guardianship of children, we usually think of the responsibilities that parents have to provide and care for their children. This is in fact the subject matter of guardianship. There is often no need to look beyond this basic notion of guardianship - but sometimes, there is.

The law recognizes two separate categories of guardianship - personal guardianship and property guardianship. They are two separate roles that aim at safeguarding different interests of children. In most cases these two roles are simply combined and carried out by a child's parents. But, when a child comes into the care of the province, the functions of personal guardianship and property guardianship are separated. When a child comes into the care of the province, the Ministry of Children and Family Development (MCFD) takes on the role of personal guardian, but not the role of property guardian. Depending on the facts and circumstances of a particular situation, the role of property guardian may remain with a child's biological parents or existing guardian, or be transferred to the Public Guardian and Trustee (PGT).

## The Family Law Act helps to define the roles of a guardian

The Family Law Act provides some insight on the distinct roles of personal guardianship as performed by MCFD and property guardianship as performed by the PGT.

The Family Law Act, in Part 4, Division 2, defines parenting arrangements. Section 39 states that except in certain circumstances, a child's parents are generally the guardians. Section 40 states that only a guardian may have parental responsibilities, and that those responsibilities may be divided between guardians.

Parental responsibilities are set out in section 41 as follows:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
  - (i) starting, defending, compromising or settling any proceeding relating to the child, and
  - (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

As set out below, most of these responsibilities relate to the day to day affairs of the child, such as living arrangements, education, health care, and so on. These day to day affairs are the responsibilities related to the “person” rather than the “property” of the child.

## Property Guardianship

The duties taken on by the PGT as property guardian are the parental responsibilities that are not related to care of the person. The responsibilities related to the property of a child are set out in subsection 41(k) of the Family Law Act. They are: starting, defending, compromising or settling any [legal] proceeding relating to the child; and identifying, advancing and protecting the child's legal and financial interests. This description in the Family Law Act is consistent with section 51 of the Child Family and Community Service Act, which refers to the PGT as property guardian having duties and powers with respect to the management of the child's property and the protection of the child's legal interests.

## Personal Guardianship

The other parental responsibilities as set out in section 41 of the Family Law Act are generally undertaken by MCFD. These include making day-to-day decisions affecting the child; making decisions respecting where the child will reside; the child's education; with whom the child will live and associate; the child's education and participation in extracurricular activities, including the nature, extent and location; the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity; and giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;. The personal guardian is also responsible for requesting and receiving from third parties health, education, or other information respecting the child

## Why the Difference Matters

One of the main reasons for separating personal and property guardianship roles when a child is in the care of MCFD is that the property guardian's duty to look after the child's legal and financial affairs, requires the property guardian to act solely in the child's best interest. Children can have many property rights, including the rights in relation to the government. In some cases, protecting the legal and financial interests of a child will require taking legal action against the government or otherwise representing the child's interests in dealings with the government. Furthermore, when MCFD (a government ministry) is the personal guardian, it has duties to the children in its care. Failure to meet those duties can result in a child in care having a legal

claim against MCFD, which is a claim against the government. It would be a clear conflict of interest for MCFD to have the duties of a property guardian when the property guardian is required to consider claims against the government generally or the personal guardian specifically.

In order to avoid any apparent or real conflict of interest, MCFD, as a provincial government ministry responsible for acting as personal guardian cannot be on both sides of such issues. Separating guardianship duties into two distinct roles, personal and property, is done to avoid any such conflict of interest.

While it is true that the PGT is created by provincial legislation, it is not a government ministry. The PGT is specifically structured as a corporation sole, which allows the PGT to act independently of government when providing property guardian services to children. In this way, the PGT can act as litigation guardian for children in the care of MCFD and bring all necessary claims to protect the legal and financial interests of those children without any conflict of interest.

Keeping property guardianship separate from the personal guardianship duties taken on by MCFD and leaving property guardianship with the biological parents or other properly appointed guardian, or assigning it to the PGT, ensures that there is no conflict of interest in dealing with the child's legal and financial matters.