

## INTRODUCTION

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### *WHAT IS THIS?*

This Introduction:

- Provides an overview of this Guide
- Introduces the Guide user to the structural content they will need to know when learning the certificate of incapability processes presented in the subsequent Parts. This structural content includes:
  - Points to note and Guide term use
  - Acronyms
  - Legislation referred to in this Guide
  - Roles and responsibilities
  - Certificate of incapability - forms
- Introduces capability, incapability and financial decision making
- Provides an overview of the legislative framework that exists in British Columbia to protect the interests of adults who are mentally incapable or vulnerable

This is important because...

The certificate of incapability process is surrounded by a complex legislative framework, with formally defined roles, responsibilities, terms and forms, many of which are unique to this process. Having a base level of knowledge of these topics will provide the reader with the background required to better understand the certificate of incapability processes outlined in Guide Part II – V.

### *RELATED LEGISLATION NOTED*

- Adult Guardianship Act (AGA)
- Statutory Property Guardianship Regulation (SPG Regulation)
- Patients Property Act (PPA)
- Public Guardian and Trustee Act (PGT Act)
- Mental Health Act
- Representation Agreement Act
- Health Care (Consent) and Care Facility (Admission) Act
- Power of Attorney Act
- Indian Act (Canada)
- Divorce Act (Canada)
- Criminal Code of Canada
- Freedom of Information and Protection of Privacy Act (FOIPPA)



### *RELATED FORMS*

All formal forms defined in legislation and process related forms and packages used in the certificate of incapability process are described in this Introduction.

## OVERVIEW

### GUIDE PURPOSE

The purpose of this Guide is to promote best practices and consistent procedures throughout BC for issuing certificates of incapability based on Part 2.1 of the *Adult Guardianship Act* (AGA) and the Statutory Property Guardianship Regulation (SPG Regulation), and protect the rights of adults involved in this practice. In addition, this Guide should help ensure that the people involved in the certificate of incapability process are aware of their legal obligations under Part 2.1 of the AGA.

As of December 1, 2014, this Guide replaces the Public Guardian and Trustee of British Columbia (PGT) document entitled “Guidelines for Issuing a Certificate of Incapability Under the *Patients Property Act*”, (October 2011).

### GUIDE DEVELOPMENT AND CHANGES

The practices and procedures outlined in this Guide were developed in consultation with the Certificate of Incapability Process Working Group, made up of representatives from the Ministry of Health, the PGT, the Ministry of Justice and health authorities, as well as a clinical geriatric psychiatrist.

The Guide content reflects the new legislative framework for issuing certificates of incapability under Part 2.1 of the AGA. This content does not replace the acts or regulations nor is it legal advice. If in any doubt as to how to proceed, please consult the legislation or obtain legal advice. The Guide will continue to be revised based on changes in legislation and experience with implementing the new practices, procedures and forms.

As well, this Guide should be used in conjunction with health authority and organization specific policies and procedures, and is written in such a way as to allow for flexibility in local variations in practice while at the same time ensuring adherence to best practices and the more formal legislative requirements.

The new requirements for this process are complex from both a legislative and operational perspective, and will require patience and understanding from all parties involved to ensure that the person at the center of this process, the adult who may need help with managing their financial affairs, is treated in a fair and respectful manner.

### GUIDE USERS

The Guide is intended to be used by qualified health care providers (QHCP), health authority designates (HAD), other health care providers working inside and outside of health authorities as well as the PGT. It may also assist others in the community who play a role when there is reason to believe that an adult is incapable of managing their financial and legal affairs and a certificate of incapability may be needed.

## GUIDE STRUCTURE AND CONTENT

This Guide is not intended to stand on its own. It is expected the health care professional will have received formal training, including the successful completion of the Ministry of Health course *A Guide to the Certificate of Incapability Process under the Adult Guardianship Act*, as well as coaching support, as required, prior to conducting an assessment of incapability.

The Guide is intended to be a reference document and is structured in Parts, which allows each topic to be explored separately. This increases the usability of the document and will encourage health care professionals to review and refresh their knowledge as they complete assessments of incapability.

Following the Overview, the Guide is written in five Parts. These Parts align with certificate of incapability processes.

### **PART I: DETERMINE THE NEED – REFERRAL AND INVESTIGATION**

- Describes how adults that may need help managing their finances are identified
- Explains the roles of designated agencies and the PGT in the investigation of concerns about adult abuse, neglect and self-neglect or management of finances
- Explains how to identify the beginning of the certificate of incapability process
- Explains how emergency situations are addressed by the PGT and designated agencies

### **PART II: ASSESSMENT**

- Outlines principles to guide the assessment process
- Explains the required assessment components
- Outlines information required to be provided to the adult before an assessment
- Outlines and explains the test of incapability
- Covers assessment issues including collecting collateral information, having a support person present, use of an interpreter, and conducting an assessment without the adult's participation
- Provides guidance for conducting the medical and functional components of the assessment
- Explains the steps to completing the assessment, determination of the adult's incapability, filling out forms, advising the adult of the results and informing the HAD and the PGT

### **PART III: HEALTH AUTHORITY DESIGNATE DECISION**

- Explains the role of the HAD and how they are designated
- Outlines the Four Key Steps the HAD follows
  - Reviews the HAD Information Package and determines if additional information is required
  - Applies legal criteria to make a decision about whether to issue a certificate of incapability
  - Provides notice of the intention to issue a certificate of incapability and opportunity to respond
  - Decides whether to issue a certificate of incapability

- Explains the role of the PGT as committee of estate when a certificate of incapability is issued

#### **PART IV: SECOND ASSESSMENT, REASSESSMENT, COURT REVIEW AND ENDING PGT AUTHORITY**

- Explains the process and timing for requests for second assessments
- Outlines situations in which an adult must be reassessed and the exceptions
- Describes roles of health authorities and the PGT in coordinating second assessments and reassessments
- Explains the consequence of determination on second assessment or reassessment
- Describes the process for requesting court review of a determination of incapability
- Explains the ways that PGT authority as statutory property guardian may end

#### **PART V COLLECTION AND DISCLOSURE OF INFORMATION AND RECORD KEEPING**

- Explains the legislation that governs the collection, use and disclosure of personal information in the certificate of incapability process
- Explains the authority for collecting and disclosing information during the certificate of incapability process
- Explains the requirement to protect the identity of the reporting party by not disclosing their name or information that would identify them
- Describes the expectation for health authorities to maintain appropriate records

#### **ELECTRONIC VERSION OF GUIDE**

To obtain an electronic version of this Guide and the forms in Appendix E, visit the PGT Website at:

<http://www.trustee.bc.ca/reports-and-publications/Pages/certificate-of-incapability-guidelines.aspx>

## **POINTS TO NOTE**

#### **REFERENCE TO SPECIFIC AGA AND SPG REGULATION**

Much of the content of the Guide is drawn directly from the AGA, SPG Regulation and PPA. Direct references to each of these are noted at the end of a sentence, paragraph or series of bulleted statements in the form *[Act s. section (subsection)]* for example: *[AGA s. 32(3.1)]*.

For those readers that wish to confirm the specific wording in the legislation, a copy of the AGA Parts 1, 2.1, 3 and 4 and the SPG Regulation are included in Appendix D.

#### **BEST PRACTICE**

Best Practice statements are indicated with a ★.

## ACRONYMS

The following acronyms have been approved for use in the Guide and Forms

Acronym	Description
<b>AGA</b>	<i>Adult Guardianship Act</i>
<b>ADL</b>	Activities of Daily Living
<b>BC</b>	British Columbia
<b>FOIPPA</b>	<i>Freedom of Information and Protection of Privacy Act</i>
<b>HAD</b>	Health Authority Designate
<b>IADL</b>	Instrumental Activities of Daily Living
<b>PHN</b>	Personal Health Number
<b>QHCP</b>	Qualified Health Care Provider
<b>PGT</b>	Public Guardian and Trustee of British Columbia
<b>PGT Act</b>	<i>Public Guardian and Trustee Act</i>
<b>PPA</b>	Patients Property Act
<b>SPG Regulation</b>	<i>Statutory Property Guardianship Regulation</i>

## LEGISLATION REFERRED TO IN THIS GUIDE

There are a number of different acts and regulations that are referred to in this Guide. These include the:

- *Adult Guardianship Act*
- *Statutory Property Guardianship Regulation*
- *Patients Property Act*
- *Public Guardian and Trustee Act*
- *Mental Health Act*
- *Representation Agreement Act*
- *Health Care (Consent) and Care Facility (Admission) Act*
- *Power of Attorney Act*
- *Indian Act (Canada)*
- *Divorce Act (Canada)*
- *Criminal Code of Canada*
- *Freedom of Information and Protection of Privacy Act*
- *Personal Information Protection Act*

## WHO IS INVOLVED?

The formal names used in the legislation to describe the people and roles involved in the certificate of incapability process include medical practitioner, qualified healthcare provider (QHCP) and healthy authority designate (HAD).

Within health authorities, the people who have been chosen to act as QHCPs or designated as HADs may be in roles like:

- QHCP: Case managers in all settings, social workers in acute, community or residential, home health, mental health settings, occupational therapists in acute, community or residential settings, nurses, psychiatric nurses, psychologists in tertiary facilities or mental health settings
- HAD: Community managers, community administrators, health service administrators, physicians, residential managers, practice leaders, team leaders, clinical program directors, clinical program managers, psychiatry department heads

### ROLES FORMALLY DEFINED IN THE AGA AND/OR THE SPG REGULATION

There are a number of organizations and individuals in various roles that are directly or indirectly involved in the certificate of incapability process including investigation, assessment and determination of financial incapability and in the decision and issuing of a certificate of incapability.

The following specific roles relate to the people and organizations involved in the certificate of incapability process, most of which are defined in the AGA, SPG Regulation or PPA.

Role	Description
<b>Adult</b>	This person is the subject of the certificate of incapability process. The person who has reached 19 years of age <b>[AGA s. 1]</b>
<b>Spouse</b>	The spouse may be involved in the investigation and assessment as a support person and, in addition to the adult may receive notice of matters relating to the certificate of incapability process. A spouse is a person who is: <ul style="list-style-type: none"> <li>▪ Married to another person, and is not living separate and apart, within the meaning of the <i>Divorce Act</i> (Canada), from the other person</li> <li>▪ Living with another person in a marriage-like relationship <b>[AGA s. 1]</b></li> </ul> The amount of time the couples must be living together in a marriage like relationship to be considered a spouse is not specified.
<b>Near Relative</b>	Near relatives may be involved in the investigation and assessment as a support person and may receive notice of matters relating to the certificate of incapability process. Near relatives are adult children, parents, adult brothers or sisters,

Role	Description
	grandparents or any other adult related by birth or adoption. <i>[AGA s. 1]</i>
<b>Medical Practitioner</b>	Medical practitioners are referred to throughout this guide as physicians and/or QHCPs. Medical practitioners are the only health care providers who are able to complete the full assessment (both medical and functional components) independently.
<b>Qualified Health Care Provider</b>	<p>A QHCP is responsible for conducting the functional component of an assessment of incapability and for making a determination about an adult’s financial incapability. QHCPs are physicians and registered members of the following colleges who have met the standards, limits and conditions established by their college to act as QHCPs:</p> <ul style="list-style-type: none"> <li>▪ Registered Nurses (of British Columbia)</li> <li>▪ Registered Psychiatric Nurses (of British Columbia)</li> <li>▪ Registered Occupational Therapists (of British Columbia)</li> <li>▪ Registered Psychologists (of British Columbia)</li> <li>▪ Registered Social Workers (of British Columbia)</li> </ul> <p><i>[SPG Regulation s. 3]</i></p>
<b>Lead Qualified Health Care Provider</b>	<p>The Lead QHCP is identified at the beginning of the certificate of incapability process. The Lead QHCP is responsible for:</p> <ul style="list-style-type: none"> <li>▪ Reviewing all assessment information</li> <li>▪ Making the determination about the adult’s financial incapability</li> <li>▪ Signing the <u>Form 1 – AGA Report of Assessment of Incapability</u> and attaching the <u>Details of Assessment</u></li> </ul>
<b>Health Authority Designates</b>	<p>HADs are people designated as having authority to issue certificates of incapability under section 32 of the AGA.</p> <p>A HAD may be designated in one of two ways:</p> <ul style="list-style-type: none"> <li>▪ Directly by the regional health board or the Provincial Health Services Authority (PHSA); or</li> <li>▪ If the regional health board has passed a bylaw approved by the Minister of Health authorizing an employee, such as the Chief Executive Officer, to designate HADs on behalf of the board, then by that employee.</li> </ul> <p><i>[AGA s.1], [SPG Regulation s 4.]</i></p>
<b>Ministry of Health</b>	<p>The Ministry of Health has overall responsibility for ensuring that quality, appropriate, cost-effective and timely health services are available for all British Columbians. The Ministry is responsible for province wide health system policy, legislation and professional regulation, funding and accountability. The Ministry developed this Guide and the corresponding training in collaboration with the Public Guardian and Trustee and the health</p>

Role	Description
	<p>authorities.</p> <p>The Minister of Health is responsible for approving health authority bylaws that appoint an employee to designate health authority designates.</p>
<p><b>Public Guardian and Trustee of British Columbia</b></p>	<p>The PGT has a statutory role to protect the interests of British Columbians who lack legal capacity to protect their own interests.</p> <p>The PGT has a role in investigating concerns about vulnerable adults whose finances may be at risk, and becomes statutory property guardian and committee of estate for an adult when a certificate of incapability is issued.</p> <p>In the certificate of incapability process, the PGT is the only one that can become an adult’s statutory property guardian. Once appointed, the PGT carries out its duties as committee of estate.</p>

## CERTIFICATE OF INCAPABILITY – FORMS

There are several forms used in the certificate of incapability process. The use of some of these forms is defined in legislation, while other forms are administrative and support the related processes.

For each form, the official name, shortened name, description of intended use and a sample is included in Appendix E.

In the Guide, the form shortened names were used in order to improve readability.

The forms referenced for use in each of the Parts of the Guide include:

### Part I: Determine the Need

- No forms referenced

### Part II: Assessment

- Adult Information Sheet
- Medical Component of Assessment Form
- Functional Component of Assessment Form
- Form 1 - AGA Report of Assessment of Incapability and Details of Assessment
- HAD Information Package Cover Sheet
- HAD Checklist for Issuing a Certificate

### Part III: Health Authority Designate Decision

- Form 1 - AGA Report of Assessment of Incapability and Details of Assessment
- HAD Information Package Cover Sheet
- HAD Information Package



- HAD Checklist for Issuing a Certificate
- HAD Notice of Intention to Issue a Certificate
- Form 2 - Adult Guardianship Act Certificate of Incapability
- HAD's Concluding Letter

**Part IV: Second Assessment, Reassessment, Court Review and Ending PGT Authority**

- Form 1 – AGA Report of Assessment of Incapability and Details of Assessment
- HAD Acceptance of Determination of Capability
- Cancellation of Certificate of Incapability

**Part V: Collection and Disclosure of Information and Record Keeping**

- Form 1 – AGA Report of Assessment of Incapability and Details of Assessment
- Medical Component of Assessment Form
- Functional Component of Assessment Form



## **ADULT GUARDIANSHIP ACT GUIDING PRINCIPLES**

*The Adult Guardianship Act sets out Guiding Principles and a presumption of capability which govern all activities under the Act.*

*The Adult Guardianship Act s. 2 provides that the Act is to be administered and interpreted in accordance with the following principles:*

- *All adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters.*
- *All adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs.*
- *The court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.*

## **ADULT GUARDIANSHIP ACT PRESUMPTION OF CAPABILITY**

*The Adult Guardianship Act s. 3 provides that:*

- *Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.*
- *An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about these matters.*



## CAPABILITY AND DECISION MAKING

Every day adults may make decisions about things like finances, personal matters, health care, housing, and family. Adults are presumed to be capable of making decisions until the contrary is demonstrated. Mental capability refers to an adult's ability to make decisions and is decision-specific. Capability is no longer thought to be 'all or nothing'. An adult may be capable of making decisions in some areas of their life, while incapable of making decisions in other areas. The law differentiates between health care, personal, financial and legal decisions.

When a legal determination of incapability is made another person is given the responsibility for making decisions for the incapable adult. When a certificate of incapability is issued for an adult who has been determined to be incapable of managing their financial affairs, the PGT is appointed to manage the adult's finances.

Type of Decision	Examples
Health care	Giving consent to treatment
Personal	Admission to a care facility
Financial	Selling a house

In BC, adults can plan for a time when they might need help making decisions by appointing another person to make decisions through an enduring power of attorney or a representation agreement. However, as this is not always the case, some adults may be left vulnerable to abuse, neglect or self-neglect.

There are a number of laws in BC that aim to assist and protect adults who may be vulnerable or incapable and in need of support.

### FINANCIAL DECISION MAKING

This Guide outlines the process for issuing a certificate of incapability under Part 2.1 of the *AGA*, which came into effect on December 1, 2014, and pertains only to the area of financial decision making. Through this process, the PGT may be appointed as statutory property guardian/committee of estate of an incapable adult to manage their financial affairs. It is not related to a certificate or certification under the *Mental Health Act* and the *Mental Health Act* appeal mechanisms do not apply.

A certificate of incapability is issued only after investigations by health authorities and the PGT reveal that the certificate of incapability process is the best option for assisting an adult who has been assessed as being mentally incapable regarding their financial decision making. It is important to note that in the majority of investigated reports, options are found to support the adult's independence and autonomy by offering the necessary support to help them successfully manage their financial affairs.

## CERTIFICATES OF INCAPABILITY SHOULD ONLY BE ISSUED AS A LAST RESORT

The right to manage one's own financial and legal affairs is a significant right and should only be given up when other less intrusive options have been considered or tried. See Appendix B - Options to Consider.

At any stage in the certificate of incapability process, the PGT or HA may receive new information, and in collaboration cease the process and implement a less intrusive intervention.

## IF THE ADULT HAS A COMMITTEE OF ESTATE

If the adult already has a committee of estate appointed by the court under the PPA, a certificate of incapability is not an option and should not be pursued. [AGA s.32(7)]

## LEGISLATIVE FRAMEWORK

In BC, the AGA, PPA, PGT Act, *Power of Attorney Act*, *Representation Agreement Act*, and *Health Care (Consent) and Care Facility (Admission) Act* provide the framework for protecting the interests of adults who are mentally incapable or otherwise vulnerable.

Under the authority of Part 3 of the AGA and the PGT Act, the health authorities and Community Living BC (CLBC) and the PGT may investigate concerns involving vulnerable adults who may be at risk. If the need, regarding management of financial affairs is identified, a certificate of incapability may be issued by a HAD.

There are two pieces of legislation in British Columbia that govern the guardianship (or "committeeship") of incapable adults. Selected provisions of Part 2.1 of the AGA relating to the certificate of incapability process by which the PGT becomes statutory property guardian for an adult became effective on December 1, 2014. The PPA continues as the legislation governing the process for the court-appointment of a guardian (or "committee") for an incapable adult.

## PATIENTS PROPERTY ACT

After hearing an application, the Supreme Court can issue an order deeming an adult to be incapable of managing their affairs and appointing a committee. The court can appoint either or both a committee of estate (for legal and financial affairs) and a committee of person (for health and personal care matters). A committee of person can only be appointed by court order.

Under the PPA, the incapable person is called a "patient", and the person with authority to act for the patient (i.e., the person appointed by the court or the PGT), is a "committee". The definition of "committee" includes a statutory property guardian under Part 2.1 of the AGA. When the PGT is a statutory property guardian, the PGT is considered committee of estate and the relevant provisions of the PPA apply.

Regardless of who is appointed or how they are appointed, the authority of a committee of estate/statutory property guardian is limited to financial management and legal representation. The table below shows what a statutory property guardian can and cannot do.

Committee of Estate/Statutory Property Guardian does:	Committee of Estate/Statutory Property Guardian does not make decisions about:
<ul style="list-style-type: none"> <li>▪ Secure assets</li> <li>▪ Confirm eligibility for benefits</li> <li>▪ Receive income</li> <li>▪ Pay bills</li> <li>▪ Contract for services</li> <li>▪ Maintain, purchase, and sell real estate</li> <li>▪ Manage investments</li> <li>▪ Prepare tax returns</li> <li>▪ Appropriately provide for legal dependents</li> </ul>	<ul style="list-style-type: none"> <li>▪ Health care *</li> <li>▪ Personal decisions *</li> <li>▪ Placement and living arrangements *</li> <li>▪ Marriage or divorce **</li> <li>▪ Adoption **</li> <li>▪ Voting **</li> <li>▪ Executing a will **</li> <li>▪ Criminal proceedings **</li> <li>▪ Immigration matters **</li> </ul>

\* These decisions require either the appointment of a committee of person under the PPA or a representative under the Representation Agreement Act.

\*\*No substitute decision maker can make decisions on these matters

## ADULT GUARDIANSHIP ACT, PART 2.1

Part 2.1 of the AGA deals with the process by which the PGT becomes statutory property guardian for an adult when a certificate of incapability is issued for the adult. A certificate of incapability may be issued by a HAD, giving the PGT authority to make the adult’s financial and legal decisions.

### NOTE ON TERMINOLOGY – COMMITTEE OF ESTATE AND STATUTORY PROPERTY GUARDIAN

The PPA uses the term “committee” to refer to the person with authority to manage the financial and legal affairs of the incapable adult. The AGA uses the term “statutory property guardian” to refer to the PGT. Since the focus of this Guide is on the certificate of incapability process under Part 2.1 of the AGA, the term ‘statutory property guardian’ is the term most commonly used throughout. It is important to keep in mind that once the PGT becomes statutory property guardian under the AGA Part 2.1, the PGT manages the adult’s financial affairs as committee of estate under the PPA.

## INDIAN ACT, SECTION 51

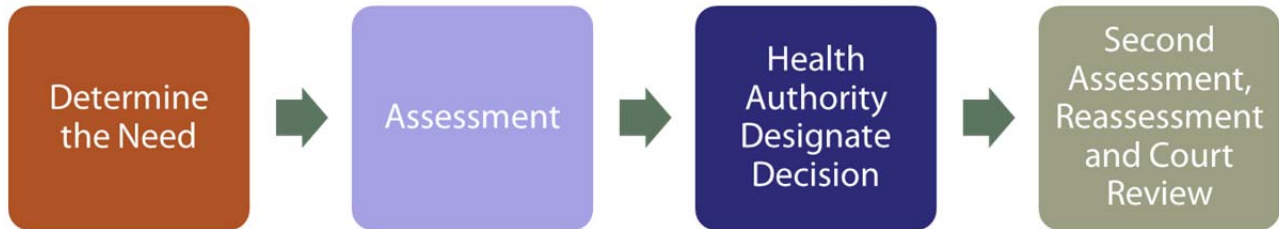
When a certificate of incapability is issued, the PGT has authority to manage the adult’s financial affairs unless the adult is a First Nations person living on reserve. When a First Nations adult who is ordinarily a resident on reserve is found to be incapable of managing their financial affairs and a certificate of incapability is issued by a health authority, Indigenous and Northern Affairs Canada becomes responsible for ensuring that the adult’s property is managed for their benefit. *[Indian Act s. 51]*

Indigenous and Northern Affairs Canada only becomes involved after a certificate of incapability is issued and plays no role in assessing the adult or determining whether the adult is incapable. For a First Nations person living on reserve, the process that leads to the certificate being issued is the same as described in this Guide, but the process following issuing the certificate of incapability is different.

For more information, contact the Assessment and Investigations team at the PGT or an Estates Officer in Indigenous and Northern Affairs Canada.

## THE CERTIFICATE OF INCAPABILITY PROCESS – FOUR CORE STEPS

The certificate of incapability process involves four core steps:



The first three steps are summarized in the following graphic.

