

## PART III: HEALTH AUTHORITY DESIGNATE DECISION

### *WHAT IS THIS?*

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

This is important because...

The HAD has a significant responsibility in this process, as once a certificate is issued, the adult loses their ability to make financial decisions which means a loss of independence and autonomy for the adult. Before making a decision, the HAD needs to be satisfied that the legal criteria for issuing a certificate are met and must have considered all relevant information prior to making a decision. The HAD is also required to provide notice of the intention to issue a certificate to the adult, spouse and/or near relative(s) with the HAD's reasons, following the specific legal requirements for this process, to ensure that the individuals affected by this decision are allowed an opportunity to present additional information to oppose the certificate before it is issued.

### *RELATED LEGISLATION NOTED*

- *Adult Guardianship Act*
- *Statutory Property Guardianship Regulation*
- *Representation Agreement Act*
- *Power of Attorney Act*
- *Patients Property Act*



### *RELATED FORMS AND PACKAGES*

- 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

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## THE ROLE OF THE HEALTH AUTHORITY DESIGNATE

### WHO IS A "HEALTH AUTHORITY DESIGNATE"?

The HAD has a critical role in the certificate of incapability process. The HAD is responsible for reviewing all of the information and deciding whether to issue a certificate of incapability. This important decision has a significant impact on the adult's life. Prior to making a decision the HAD should ensure they have enough information to proceed.

### HOW ARE THEY DESIGNATED?

HADs are people who are designated as having authority to issue certificates of incapability under section 32 of the AGA.

A HAD may be designated in one of two ways:

- directly by the regional health board or the PHSA; or
- 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. *[SPG Regulation s.4]*

## HAD KEY STEPS IN THE CERTIFICATE OF INCAPABILITY PROCESS

There are four elements in the process leading to a HAD decision that are presented in this section as key steps. The key steps are a combination of legal requirements and best practices. It is expected that all HADs will complete these key steps. It is also understood that HADs across health authorities will have additional related tasks and processes which are tailored to their organization's needs and environment, and to the circumstances of each case.

- 1) Review HAD Information Package and determine if additional information is required
- 2) Apply and consider criteria before making a decision to issue a certificate of incapability
- 3) Provide Notice of Intention to issue a certificate of incapability and opportunity to respond
- 4) Decide whether to issue certificate of incapability

### STEP 1: REVIEW HAD INFORMATION PACKAGE AND DETERMINE IF ADDITIONAL INFORMATION IS REQUIRED

In Step 1, the HAD reviews the HAD Information Package and considers whether they have all of the information required to make a decision. If not, the HAD may contact the QHCP and/or the PGT to discuss what additional information is needed.

#### CONSULTATION WITH THE PGT

The HAD must consult with the PGT before issuing a certificate of incapability. *[AGA s. 32 (3.1)(a)]*  
 Consultation between the HAD and the PGT ensures the HAD has all relevant information the PGT

may have, and that the PGT is willing to become the adult’s statutory property guardian. It is expected there will be ongoing consultation between the health authority and the PGT throughout the process.

## STEP 2: APPLY AND CONSIDER CRITERIA BEFORE MAKING A DECISION TO ISSUE A CERTIFICATE OF INCAPABILITY

In Step 2, the HAD must apply and consider the criteria outlined below. The HAD may issue a certificate of incapability if they are satisfied with **ALL** of the following: *[AGA s. 32(3)]*

- The adult needs to make decisions about their financial affairs
- The adult is incapable of making decisions about their financial affairs
- The adult needs, and will benefit from, the assistance and protection of the PGT as statutory property guardian (committee of estate)
- The adult’s needs would not be sufficiently met by alternative means of assistance, and
- Either:
  - The adult has not granted power over all of their financial affairs to an attorney under an enduring power of attorney, or
  - If there is an attorney, he or she is not complying with their duties under the Power of Attorney Act

For the criteria above, matters to be considered are outlined below.

### The Adult Needs to Make Decisions about Their Financial Affairs

The HAD may consider matters such as, but not limited to, whether the adult:

- Has income and/or assets that need to be managed
- Has supports or systems in place to sufficiently manage their finances
- Has financial obligations that need to be met (e.g., dependents, taxes, rent, etc.)
- Is party to, or is likely to become party to, legal proceedings where they require legal representation to protect their interests

### The Adult is Incapable of Making Decisions about Their Financial Affairs

The HAD reviews Form 1 – AGA Report of Assessment of Incapability and Details of Assessment, attached details and any other relevant information provided by the QHCP who has determined that the adult is incapable of managing their financial affairs.

### The Adult Needs and Will Benefit from the Assistance and Protection of the PGT as Statutory Property Guardian (Committee of Estate)

To be satisfied that an adult needs and will benefit from the assistance and protection of a statutory property guardian, the HAD may consider matters such as, but not limited to, whether:

- The adult faces likely and serious harm to their well-being, or to their financial affairs, if a statutory property guardian is not appointed
- There are sufficient informal supports in place, or whether formal legal authority is required for the management of their financial affairs (e.g., the adult needs someone to contract for services on their behalf, or sale or purchase of real property is required).

- The adult will sufficiently benefit from having a statutory property guardian to justify the associated costs (i.e., fees/expenses).
- The benefit outweighs any harm the appointment of the PGT might make (i.e., stigma, distress)
- Statutory property guardianship is being pursued because management of their financial affairs is required and not for the purposes of directing or controlling the adult’s behaviour.
- A Section 7 representation agreement is in place with sufficient authority to cover the financial needs of the adult, and there are no concerns with the representative

The focus should be on the merits of the appointment of a statutory property guardian for the benefit of the adult as opposed to solely the interest of a third party (e.g., a creditor).

### The Adult’s Needs Would Not Be Sufficiently Met by Alternative Means of Assistance

To be satisfied that an adult’s needs would not be sufficiently met by alternative means of assistance, the HAD may consider matters such as, but not limited to, whether:

- Community supports are in place, or available to be put in place, to meet the adult’s needs
- An adult’s financial affairs can be arranged in a manner to meet their needs
- The adult has a supportive and appropriate relative or close friend in their life that could apply to court to become committee of estate (Review Appendix B - Options to Consider)

### Enduring Power of Attorney

A certificate of incapability should only be issued if the HAD is satisfied that either:

- The adult has not granted power over all of their financial affairs to an attorney under an enduring power of attorney (EPOA) or
- If there is an attorney, the attorney is not complying with their duties under the *Power of Attorney Act* or
- If there is an EPOA, the EPOA is not sufficient for the adult’s needs (e.g., an EPOA with authority for banking only is not sufficient to deal with other assets or to sell real property)

If there is a known EPOA in place, the PGT will have investigated the actions of the attorney and determined whether the attorney is unable to comply with the statutory duties or whether the EPOA is not sufficient for the adult’s needs. The PGT will provide this information to the HAD in the PGT summary of investigation.

### STEP 3: PROVIDE NOTICE OF THE INTENTION TO ISSUE A CERTIFICATE OF INCAPABILITY AND OPPORTUNITY TO RESPOND

The HAD must not issue a certificate of incapability unless they have first notified the adult and, if contact information is known to the HAD, the adult’s spouse or near relative of the adult of the intention to issue a certificate and the reasons for issuing it.

The purpose of the HAD Notice of Intention to Issue a Certificate is to explain the decision the HAD intends to make and the reasons for it, and to provide the adult with an opportunity to respond if they have concerns before the decision is made. [AGA s. 32 (3.1)(b) and (c)]

The AGA does not permit the HAD to notify anyone other than the adult, spouse and near relative (s). The HAD may choose to notify both a spouse and near relative(s) and may notify as many near relatives as they consider appropriate.

In deciding who to notify, the HAD may consider whether:

- Contact information is known
- The spouse or near relative is involved in the adult’s life and/or is supportive of the adult
- The spouse or near relative is incapable, or If there are concerns the spouse or near relative may be abusing or neglecting the adult

#### EXCEPTION TO NOTIFICATION REQUIREMENT

The HAD is not required to provide the HAD Notice of Intention to Issue a Certificate if they have reason to believe that notification may result in serious physical or mental harm to the adult, or significant damage or loss to the adult’s property. [AGA s. 32 (3.2)] Examples of serious physical or mental harm include self-harm or threats of suicide, or physical danger due to abuse. Significant damage or loss to the adult’s assets is situation specific – even small amounts of money to adults who are living on limited incomes is significant. If the HAD decides not to provide notice to some parties, the HAD should consider whether it is still possible to notify other parties, for example an involved near relative .

If the HAD decides to waive the requirement to provide notice of the intention to issue a certificate of incapability, the HAD should document the applicable exception(s).

#### REASONS FOR ISSUING THE CERTIFICATE OF INCAPABILITY

The HAD Notice of Intention to Issue a Certificate should be in writing. Although a specific form is not required, a suggested form is included in Appendix E (See HAD Notice of Intention to Issue a Certificate). When providing the HAD Notice of Intention to Issue a Certificate, the HAD is required to provide reasons, in writing, for issuing the certificate of incapability.

The purpose for providing reasons is so the adult, spouse and near relatives are aware of the basis for the decision being made, and can respond if any of them have concerns or disagree with the information on which the decision is being made.

The reasons provided should provide sufficient detail for the adult, spouse and near relatives to understand why the HAD reached the conclusion that a certificate of incapability should be issued. What will constitute sufficient reasons will depend on the circumstances of the particular case.

In providing reasons the HAD may address the following:

- The adult needs to make decisions about their 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
- Either the adult has not granted power over all their financial affairs to an EPOA or they have an attorney who is not complying with their duties

### HOW NOTICE AND REASONS MUST BE GIVEN AND TIME FRAMES

The notice and reasons may be given to the adult, spouse and near relative in one of the following ways: *[SPG Regulation s. 11(2)]*

- In person
- By mail, other than electronic mail, in which case the notice and reasons are deemed to have been received 7 days after mailing date
- By leaving them at the person's residence with an adult whom the HAD has reason to believe resides with the adult, in which case the notice and reasons are deemed to have been received on the date they were left

The adult, spouse and near relatives do not need to be notified by the same method so it is possible they may receive the notice at different times. The method by which each of these is notified may depend on the circumstances. The following are factors to consider when determining the appropriate way to give notice:

- Whether the adult, spouse or near relatives are accessible
- Where the near relative lives (for example, the closest near relative may live out of the country)
- The vulnerability of the adult, such as mental stress or confusion if the notice is received without an explanation, or the potential for a breach of privacy if the documents are left in a public space

### OPPORTUNITY TO RESPOND AND TIME FRAME

The HAD is required to give each person who received the notice a reasonable opportunity to respond. *[AGA s. 32 (3.1)]* The adult, spouse and near relative must be given at least 10 calendar days after receiving or being deemed to have received the notice and reasons to respond to the notice and reasons. *[SPG Regulation s.11(3)]* Best practice is for the HAD to follow up with the adult, spouse and near relative(s) to confirm they received the notice. If the HAD does not receive a response by the later of the time periods given to the adult, spouse and near relatives, the HAD can proceed to issue the certificate of incapability.



The opportunity to respond is the chance for the adult, spouse or near relative to raise any concerns with the process, the information on which the HAD is basing the decision, or the reasons for the decision, before the certificate is issued.

The HAD must consider any response received before making a final decision as to whether the certificate of incapability will be issued. The HAD may need to follow up, for example, to obtain additional information, clarify information, or revisit part of the process. If new information is obtained, further consultation with the PGT should take place before a decision is made. Examples of information that could delay or result in a decision not to issue the certificate include:

- A procedural error appears to have occurred (e.g., required notifications not done)
- A family member or friend may be identified that could provide informal support to the adult or act as substitute decision maker for the adult
- New information becomes available

- There is new evidence that the adult has a treatable or reversible condition that could result in the adult not being assessed as incapable
- The adult's situation has changed and they no longer need to make financial decisions, or the risk to them has been resolved

### COUNTING DAYS

In calculating days for deeming receipt and for providing an opportunity to respond, the HAD should follow the following general rules. If there is doubt in calculating the days, the key is to be as reasonable as possible and to err on the side of giving more time.

- In calculating days exclude the first and the last day
- If the day for deeming receipt or responding to the notice of intention to issue a certificate falls on:
  - A holiday, the time is extended to the next day that is not a holiday
  - A day when the office is not open, the time is extended to the next day that the office is open
  - Saturday or Sunday, the time is extended to Monday (unless Monday is a holiday)

### STEP 4: DECIDE WHETHER TO ISSUE A CERTIFICATE OF INCAPABILITY

The HAD must decide whether or not to issue a certificate of incapability:

#### FORM 2 – ADULT GUARDIANSHIP ACT CERTIFICATE OF INCAPABILITY

If the HAD decides to issue a certificate of incapability, the HAD must do so using Form 2 – Adult Guardianship Act Certificate of Incapability from the SPG Regulation. The HAD should take care to ensure that the form is filled out correctly and completely.

#### EFFECTIVE DATE

The PGT is the adult's statutory property guardian as of the date on which the certificate of incapability was signed by the HAD who issued it. *[AGA s. 32(5)]*



#### FORWARDING CERTIFICATE OF INCAPABILITY TO PGT

In all cases, if the HAD issues a certificate of incapability, they must forward the certificate to the PGT. There are no exceptions to this requirement. *[AGA s. 32(4)(a)]*

As the PGT automatically becomes statutory property guardian on the date the certificate of incapability is signed, time is of the essence when communicating with the PGT. In order to ensure the PGT is notified as soon as possible, the HAD should immediately:

- Fax the Form 2 – Adult Guardianship Act Certificate of Incapability, on the same day that it is signed, to Assessment and Investigation Services at the PGT (see HAD Information Package Cover Sheet for contact information)
- Forward, by mail to the same office at the PGT:
  - The original Form 2 – Adult Guardianship Act Certificate of Incapability
  - A copy of the signed HAD Checklist for Issuing a Certificate
  - The names and contact information of the persons who were advised the certificate has been issued

- Any other package material reviewed that was not in the HAD Information Package

If there are concerns about the certificate’s validity, the PGT will consult with the person coordinating the certificate process at the health authority to resolve the situation.

#### ADVISING ADULT, SPOUSE OR NEAR RELATIVE, AND PROVIDING COPY OF CERTIFICATE

In all cases, if the HAD issues a certificate of incapability (Form 2 – Adult Guardianship Act Certificate of Incapability), the HAD must advise the adult and, if contact information is known, the spouse and near relative(s) that a certificate of incapability has been issued, and provide the adult, spouse and near relative(s) with a copy. There are no exceptions to this requirement. *[AGA s. 32(4)(b)]* The HAD should use the HAD’s Concluding Letter to the Adult/Family as a cover letter attached to the certificate of incapability.

- ★ Best practice is for the HAD to:
  - Advise the same near relative(s) that received notice of the intention to issue a certificate, unless there is a reason not to
  - Provide an indication to the adult, spouse and near relative that any information provided in response to the notice of intention was considered, and
  - Provide any additional reasons for issuing the certificate of incapability

#### IF THE HAD DECIDES NOT TO ISSUE A CERTIFICATE OF INCAPABILITY

If the HAD reviews the information provided by the adult, spouse or near relative and decides not to issue a certificate, the HAD should advise the adult, spouse and near relative(s) who received the notice of intent of the decision not to proceed with a certificate.

- ★ If the HAD decides not to issue a certificate of incapability, they should consult with their health authority’s regional lead and the PGT to decide how best to communicate the reasons for not issuing the certificate of incapability to the adult and spouse and/or near relatives. This consultation is important because the certificate of incapability process would not have started without serious concerns about the adult’s ability to manage their financial affairs.

## PGT AS COMMITTEE OF ESTATE

### WHEN THE CERTIFICATE IS ISSUED

The PGT becomes the adult’s statutory property guardian on the date the HAD signs a certificate of incapability. *[AGA s 32(5)]* According to the PPA, the PGT, as statutory property guardian, is considered the adult’s “committee of estate”.

Upon receipt of a copy of the certificate of incapability from the HAD, the PGT reviews the certificate to ensure all information appears to be accurate (e.g., spelling of name, date of birth, etc.) and opens a client file.

## EFFECT ON POWER OF ATTORNEY OR REPRESENTATION AGREEMENT

If the PGT becomes statutory property guardian, any enduring power of attorney or representation agreement dealing with routine management of financial affairs is suspended. *[PPA s. 19(1)]*

## COMMUNICATION

On becoming the statutory property guardian, the PGT must advise the adult and spouse or near relative(s), if contact information is known, that:

- The PGT is the adult's committee of estate and may make decisions respecting the adult's financial affairs
- The adult has a right to a second assessment and a court review *[AGA s.33(2)(b)]*

The PGT also provides information to the adult, spouse or near relative (s) about the role of the PGT as committee of estate and the adult's right to reassessment.

Subject to information from the HAD or other special considerations, the PGT will provide the information to the same people who received notice from the HAD about the intention to issue the certificate and/or who received a copy of the certificate. The package is to be sent promptly unless there is a concern for the adult's health or safety. The assigned PGT case manager also follows up with the adult and arranges a visit where this information may be further explained.

## POWERS AND DUTIES OF PGT AS COMMITTEE OF ESTATE

All actions and decisions made by the PGT must be for the benefit of the adult and will take the adult's personal circumstances and unique family situation into account. The PGT is guided by the principles of the AGA, and the duty to foster the adult's independence and involve the adult in decision making, to the greatest extent possible. *[PPA s. 18(2)]*

As committee of the adult's estate, the PGT has the responsibility and authority to manage the incapable adult's financial and legal affairs. (See table under Legislative Framework in the Introduction of the Guide).

On the death of the adult, the committee of estate retains authority necessary only to maintain the estate until transfer to the executor or other person authorized to administer the estate.

A committee of estate does not have authority to make decisions related to the adult's health care, placement/living arrangements or other personal decisions. In situations where there are both financial and personal/health care decisions needing to be made for an adult who has the PGT as committee of estate, recognizing that they are often closely interrelated, the PGT works collaboratively with others to ensure the best decisions possible in consideration of the adult's wishes and best interests.

## FEES AND EXPENSES WHEN ACTING AS COMMITTEE

The PGT charges for the services it provides when acting as committee of estate. These charges are established by legislation. See fees information at: <http://www.trustee.bc.ca/fees/Pages/fees.aspx>. In addition, when acting as committee, there are a number of expenses paid for by the adult to ensure the safety and security of their assets. These include:

- 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

For more information on when the PGT is committee, refer to the PGT website and the publication: “When the PGT is Committee”.