THE FAMILY LAW SUMMIT:  
A MULTIDISCIPLINARY PERSPECTIVE  

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FAMILY LAW AND ESTATES, TRUSTEE AND GUARDIANSHIP ISSUES

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INTRODUCTION

Breakthroughs in medicine have led to people living longer and in better health. With this reality comes an increase in the incidence of debilitating illness and the ravages of age such as Alzheimer's, senility and dementia. A practitioner must be sensitive to this and plan for such events in dealing with clients. The power of attorney is a useful instrument that allows the client to plan for incapacity. A client may require an attorney to take legal steps on his or her behalf to ensure his or her interests are protected and wishes are carried out. This paper will discuss a number of issues relating to powers of attorney and family law matters. In addition there will be a review of the procedure for the appointment of a litigation guardian in circumstances where there is no power of attorney. Finally this paper will discuss the impact of death on a Family Law Act claim and on the administration of an estate.

A. Family Law Issues for a Person Acting under a Power of Attorney

1. General Background

A well drafted power of attorney is one of the most useful tools in planning for incapacity and to ensure that a client's interests are protected and her wishes carried out. In order to appreciate the breadth and authority of a power of attorney, it is necessary to look at the basic legal principals that underlie the concept of a power of attorney. In terms of a basic terminology, the person who gives the power of attorney is often referred to as the "donor" and the person to whom the power of attorney is given is often called the "attorney" or "donee".

The relationship between the donor and the donee of a power of attorney is one of agency. The donor is the principal; the donee is the agent. Agency has been described generally as "the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property".\(^1\) There are many forms of agency and generally they arise from a contractual arrangement. However, it is not necessary in all cases for a contract to exist for the principal-agent relationship to arise. As Fridman notes, the giving of a power of attorney is unlike the creation of a contract in that it is a unilateral act. Its validity does not depend on "acceptance by the attorney".\(^2\)

Powers of attorney, in addition to being governed by principles of common law, are, however, also governed by statute. In Ontario, at present, there are three kinds of powers of

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attorney: a power of attorney made pursuant to the Powers of Attorney Act\(^3\), a continuing power of attorney for property under the Substitute Decision Act, 1992\(^4\), and a power of attorney for personal care under the SDA. This paper will not be dealing with personal care powers of attorney but only with powers of attorney over property.

In Ontario, properly drafted powers of attorney for property under the SDA (but not under the Powers of Attorney Act) may survive the mental incapacity of the donor. These powers of attorney are called continuing powers of attorney or enduring powers of attorney. Their name connotes the fact that they endure or continue through the incapacity of the donor.\(^5\)

2. **What is the Capacity Required to Give A Power of Attorney?**

In general, the common law rule is that both principal and agent must be capable of acting as such. Infants and mentally incompetent person either have no capacity or only a limited capacity to appoint an agent. For example, a mentally incompetent person can only appoint an agent during a lucid moment and there may be instances where minors can appoint an agent.\(^6\)

While it is clear that a person must be capable to give a valid power of attorney, the test for capacity differs among different provinces. In some cases, the legislation addresses the issue of capacity, but only with respect to continuing powers of attorney. In Ontario, for example, section 8(1) of the SDA provides:

8. (1) A person is capable of giving a continuing power of attorney if he or she,

(a) knows what kind of property he or she has and its approximate value;

(b) is aware of obligations owed to his or her dependants;

(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) knows that the attorney must account for his or her dealings with the person's property;

(e) knows that he or she may, if capable, revoke the continuing power of attorney; appreciates that unless the attorney manages the property prudently its value may decline; and

(g) appreciates the possibility that the attorney could misuse the authority given to him or her.

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4. S.O. 1992, c .30. (the "S.D.A.").
5. Subsection 7(l) of the SDA . As per section 14 of the SDA, powers of attorney made under the Powers of Attorney Act prior to April 3, 1995 may survive the donor's incapacity if they explicitly provide for this.
In those provinces where the legislation is silent, resort must be had to the common law. There appears to be little judicial guidance with respect to the proper test for mental capacity to execute a continuing power of attorney.

In the case of Godelie v. Public Trustee\textsuperscript{7}, it was held that the capacity to give a general power of attorney is not the same as testamentary capacity\textsuperscript{8}. The criteria set out by the court in that case were that the donor of a power of attorney must understand:

\begin{enumerate}
  \item the nature of the document, i.e. that it allows the attorney to assume complete authority over the affairs of the donor;
  \item that the document allows the attorney to do anything the donor can do;
  \item the nature and extent of the assets the attorney will have control over; and
  \item that the loss of capacity results in loss of ability to revoke the power of attorney
\end{enumerate}

In arriving at this list the court relied on a previous UK case which did not include the third criterion.\textsuperscript{9}

Other cases have also differed with respect to whether the third and fourth tests are necessary. As a result, different provinces may have different common law tests for capacity. However, there appears to be a general requirement that it is at least necessary that the donor appreciate the nature of the document he or she is signing and the nature of the authority conferred.

3. **What is the Scope of the Power?**

Powers of attorney can be limited or general. A general power of attorney permits an attorney to do anything that the principal can do by an attorney. A limited power of attorney restricts the authority of the attorney in some way. Most of the statutes governing powers of attorney contemplate that the attorney can do anything the donor can do by an attorney subject to any restrictions contained in the power of attorney document. Restrictions may be of many kinds: they may allow the attorney to conduct the business of the donor only while he or she is on holiday, they may express a time limitation or be effective only until a certain date or event.\textsuperscript{10}

\textsuperscript{7} (1990) 39 E.T .R. 40.
\textsuperscript{8} The classic test for testamentary capacity is set out in Banks v. Goodfellow (1870), L .R . 5 Q .B. 549 at 564 (C .A.) and is as follows:

\begin{quote}
  It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect ; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made .
\end{quote}

\textsuperscript{9} In Re K and in Re F, [1988] 1. Ch. 310 (Court of Protection) and see Theriault, supra, note 6; and Barry Corbin, "Some Practical Considerations Concerning Powers of Attorney," Insight Conference 1994.
In order to determine the scope of his or her authority, the attorney must look to the document under which he or she was appointed. A general unrestricted power of attorney can make the simple statement that the attorney can do on behalf of the principal or incapable principal anything such principal could do if capable. Thus, an attorney could buy, sell, invest and otherwise deal with the property of the principal. Other forms of powers of attorney may explicitly enumerate a number of actions.

A general power may also be subject to statutory restrictions. In the SDA, for example, subsections 7(2) and 7(6) provide as follows:

Same-s. 7(2)

(2) The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.

Conditions and restrictions -s. 7(6)

(6) The continuing power of attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act.

4. What are the Duties and Responsibilities under a Power of Attorney?

The relationship between the donor and the donee is fiduciary in nature. The basic duties are therefore similar to those imposed on fiduciaries, namely, the duty to account, the duty to act in the best interests of the donor and to avoid conflicts of interest and secret profits and to exercise reasonable care. As a general rule, the provinces and the courts have not mandated the details of how an attorney is to carry out his or her duties. In fact, one of the problems with respect to powers of attorney is that there are fewer guidelines for attorneys than for trustees. When the donor of the power is competent to give instructions, the attorney must follow those instructions. The problem, however, becomes particularly acute when the principal is no longer able to instruct the agent because the principal is no longer competent. In that situation, the question arises as to what extent the attorney is assuming a trustee function. Some provinces, notably Ontario, have attempted to codify the rules in this regard.

Section 32 of the SDA sets out specific responsibilities and duties of attorneys. Where the reference in the section is to "guardians of property, subsection 38(1) makes these powers applicable to persons acting under a power of attorney. These duties and responsibilities range from keeping the competent person informed and involved, to connecting with family members and friends.\footnote{Duties of guardian-s.32(1)}

\begin{footnotesize}
\begin{itemize}
\item \textbf{Duties of guardian}\-s.32(1)
\item 32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.
\item \textbf{Personal comfort and well-being}\-s. 32(1.1)
\item (1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit.
\item \textbf{Personal care}\-s. 32(1.2)
\end{itemize}
\end{footnotesize}
The attorney also has an obligation to make reasonable efforts to determine if the incapable person has a will and what the provisions of the will are and has the right to obtain the will. Section 35.1 of the SDA prohibits the disposition of property subject to a specific testamentary gift in the will, subject to certain exceptions.

Additional guidance with respect to the types of expenditures that may be made is provided in subsection 37(3) of the SDA. These expenditures include those which are reasonably necessary for the support, education and care of the incapable person, the person's dependants, or to satisfy the person's other legal obligations.

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(1.2) A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions.

**Exception**—s. 32(1.3) (1.3)

Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care.

**Explanation**—s. 32(2)

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are.

**Participation**—s. 32(3)

(3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property.

**Family and friends**—s. 32(4)

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.

**Consultation**—s. 32(5)

(5) The guardian shall consult from time to time with,

(a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care.

**Accounts**—s. 32(6)

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property.

**Disposition of property given by will**—s. 35.1

35.1 (1) A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.

**Application**—s. 35.1(2)

(2) Subsection (1) does not apply in respect of a specific testamentary gift of money.

**Permitted dispositions**—s. 35.1(3)

(3) Despite subsection (1),

(a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or

(b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37.
Gifts or loans to the person's friends and relatives and charitable gifts are also permitted under s. 37(3) but are restricted by principles set out in subsection 37(4).  

5. **What are the Restrictions on the Acts of an Attorney or Guardian**

The common law imposes general limitations on the powers that can be delegated to an attorney. These include the following.  

(a) An attorney is a fiduciary who may not exercise the power of attorney for personal benefit unless authorized to do so by the document or unless the attorney acts with the full knowledge and consent of his or her principal.

(b) A principal cannot do by an attorney an act where the competency to do the act arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise. For example, an attorney cannot swear a verifying affidavit on behalf of his or her principal, or exercise on behalf of that principal discretionary powers arising by virtue of the principal's role as a fiduciary (i.e., act as a director or as a trustee in the place of the principal. However, once a principal who is a fiduciary has exercised his or her discretion, the signing authority to carry out the act into effect may be validly delegated.

(c) An attorney cannot make, change or revoke a will on behalf of the donor.

(d) Unless the instrument provides otherwise, an attorney cannot assign or delegate his or her authority to another person.

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15 **Guiding principles - s.37(4)**

(4) The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).

2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.

3. Charitable gifts may be made only if,
   i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or
   ii. there is evidence that the person made similar expenditures when capable.

4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.

5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.

6. The total amount or value of charitable gifts shall not exceed the lesser of,
   i. 20 per cent of the income of the property in the year in which the gifts are made, and
   ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable.

A court may, however, authorize the guardian to make a larger charitable gift, see s. 37(5).

16 **Theriault, supra** note 6, at 238-9.
(e) An attorney must not allow personal interests to conflict with those of the donor of the power of attorney. This restriction reflects item (a) above.

One of these restrictions, namely, the inability of an attorney to do acts which are personal to the donor will be considered in greater detail below.

(a) Acts Which Are Personal to the Donor

It was noted earlier that a donor cannot do certain acts by an attorney. It is a well known rule of equity that persons occupying fiduciary positions are not able to delegate their fiduciary responsibilities and duties. The Latin maxim is clear: "delegatus non potest delegare" (a delegate may not delegate). The rationale for the proposition is that trustees who take on themselves the management of property for the benefit of others cannot shift their duty to other persons. \(^{17}\)

The strict rule has been softened since the 19\(^{th}\) century, so that while a fiduciary cannot delegate decision making functions (e.g., the exercise of discretion), he or she may delegate administrative functions (e.g. signing authority), where it is reasonably necessary or in conformity with common business practice to do so.

In the case of Clauss & al v. Pir\(^{18}\), the court had to determine whether an agent could swear an affidavit on behalf of her principal. In finding that she could not do so, the court held that a party cannot do by an attorney some act the competency to do which arises by virtue of some personal nature requiring skill or discretion for its exercise".

(b) Continuing and Commencing Divorce Proceedings

In the context of family law, the question has arisen as to whether an attorney can bring an action for divorce or whether the attorney can bring a claim under statutes such as Ontario's Family Law Act\(^{19}\). In the case of Toth v. Toth\(^{20}\), a daughter had been appointed committee for her mother and then attempted as committee to sue for divorce on her mother's behalf. Krindle J. held as follows\(^{21}\):

> The powers conferred on Helen Loepky by the order of Deniset J., relate solely to the management and administration of Mrs. Toth. They do not empower Mr. Loepky to deal with the personal status of Mrs. Toth.

In the case of Fontaine v. Fontaine\(^{22}\), a petitioner in a divorce action became incompetent after instructing counsel to commence divorce proceedings. The Public Trustee was appointed committee and the issue was whether he had authority to instruct counsel to continue the action. The court considered the rights of the Public Trustee which stemmed from the relevant

\(^{17}\) Turner v. Corney (1841), Beav. 515; 49 ER 677. See also D. Waters, The Law of Trusts in Canada, 3\(^{rd}\) ed. (Toronto: Carswell, 1984) at 696.

\(^{18}\) [1987] 2 All E.R. 752 (Ch.)

\(^{19}\) R.S.O. 1990, c. F. 3 . (the "FLA").


\(^{21}\) Ibid. at 331.

legislation (the Patients Property Act\textsuperscript{23}), which provided that the committee had "all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind\textsuperscript{24}. The court was presented with Canadian cases in which an agent was permitted to proceed on behalf of an incompetent person to complete the divorce. Nevertheless, the court held that the rights given to the Public Trustee limited the Public Trustee to dealing with the estate of the incompetent person (i.e., her property interests) as he had not also been appointed guardian of the person of the petitioner.

In the case of Beadle v. Beadle\textsuperscript{25}, the issue before the British Columbia Court of Appeal was whether a committee of the estate for a person who had been declared incapable of managing her affairs would have the power to continue divorce proceedings commenced by the person before she became incompetent. The case involved a couple that had been separated for some twenty-two years before a petition for divorce was presented. Subsequent to the beginning of proceedings, the wife became incapable of managing her own affairs and the Public Trustee was appointed as committee of her estate. The Public Trustee continued the divorce proceedings, but was unsuccessful before the provincial Supreme Court, where the judge relied on Fontaine for the authority that the committee's power is limited to dealing with the petitioner's property.

The British Columbia Court of Appeal dismissed the lower court's order, and permitted the Public Trustee to continue the divorce proceedings. Macfarlane J.A. was of the opinion that Fontaine was wrongly decided, and in commenting on the power of the committee to bring a divorce action, stated:

\begin{quote}
I do not think there is anything in the Patients Property Act which limits that power. It is true that a committee, when appointed to act for a person who has been found incapable of managing her own affairs, is empowered to manage the estate and not to have custody of the person, but it seems to me that such an appointment contemplates in proper circumstances the full management of the affairs of the patient who is incapable of doing so herself. That includes, in my opinion, the management or conduct of any litigation which the patient has undertaken, or which might need to be undertaken in the best interest of the patient. To hold otherwise would put a severe limitation upon the proper management of a patient's affairs while she is incompetent.\textsuperscript{26}
\end{quote}

Lambert J.A agreed with Macfarlane J.A., and added that:

\begin{quote}
... where any proceedings are instituted by a committee in which matters of status and morals are involved, there is an obligation on the committee to bring before the court evidence that will satisfy the court that the proceedings are in the best interest of the person who is represented by the committee.\textsuperscript{27}
\end{quote}

The requirement that the committee or personal representative show that proceedings are in the best interest of the person being represented, was applied in the case of MacKay Estate v.

\begin{footnotes}
\item[24] \textit{Ibid.} at subsection 15(1)(b).
\item[26] \textit{Ibid.} at 764.
\item[27] \textit{Ibid.} at 766.
\end{footnotes}
MacKay. In this case, a son-in-law was appointed committee of the estate and person of his father-in-law, a husband who had been married for some six years before separating. The parties had entered into a settlement agreement, and they continued to live separated from each other for over twenty years. The committee for the husband petitioned for divorce and argued that the wife had received her due for more than twenty years since the separation agreement was executed, and that the husband was now entitled to a divorce.

On the issue of the authority of the committee of the estate and person to bring the divorce petition, Kirkpatrick J. stated that the decision of Beadle was determinative and that there is no question that the committee can bring a divorce petition. The focus of the rest of the analysis was on the requirement that the petitioner demonstrate that the proceeding was in the best interest of the patient. Unlike the previous cases discussed above, the patient in this case did not commence divorce proceedings prior to the appointment of the committee. Kirkpatrick J. stated "that the parties' intention to divorce cannot, in my view, be inferred from the fact of the separation or the existence of a separation agreement." From the facts of this case, it may be that the parties never intended to divorce, and were prepared to remain separated, as they had for the prior twenty years. Further, working against any argument of the divorce being in the best interest of the patient, there was some evidence that divorce may impact a pension that the husband was receiving, and this may have led to a financial loss by both parties.

One difference between Beadle and Mackay Estate was whether the incompetent spouse donors had the intention to seek divorce proceedings prior to his incapacity. In Beadle, the attorney was continuing divorce proceedings, while in Mackay Estate, the court found that no divorce proceeding or intention to divorce had been commenced before incapacity. The issue of intention to divorce was important in relation to the requirement that the committee proceed with the divorce only when it is in the incompetent spouse's best interests.

Given the gradual development of the effects of dementia and related illnesses on a person's mental capacity, a question may arise as to whether the donor ever had the necessary mental capacity to form the intention to separate or divorce. The mental capacity required to separate, to divorce, or to instruct counsel was discussed in the case of Calvert (Litigation Guardian of) v. Calvert.

In Calvert, Ms. Calvert left her husband after 15 years of marriage, and consulted a lawyer with a view to getting a divorce. A year earlier she began to show the early signs of Alzheimer's disease. At the time the present proceedings commenced, Ms. Calvert had Alzheimer's disease, and was being represented by a litigation guardian. However, it was a finding of fact that at the time the litigation guardian became involved, there was no issue as to Ms. Calvert's capacity to form the intention to separate or divorce. Prior to the current proceeding, the litigation guardian moved for summary judgment on the divorce. The summary judgment motion was withdrawn when the issue of Ms. Calvert's capacity was raised, and a trial was ordered. One issue argued by Mr. Calvert was that his wife did not have the mental capacity

29 Ibid. at paragraph 23.
at the relevant time to form the intention to separate, and therefore she would not be entitled to an equalization payment.

The question of intention to separate was central to the case, as under the FLA the date of separation is an important date for determining the valuation date for the equalization of net family property.\textsuperscript{31}

Bennotto J. identified the three levels of capacity relevant to the action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.

The capacity to separate required the lowest level of understanding from the individual. Bennotto J. set the standard at the level, that "a person has to know with whom he or she does or does not want to live."\textsuperscript{32} The standard of capacity to divorce is slightly higher, and requires the person to desire to remain separate and to be no longer married to one's spouse. Bennotto J. described divorce as "the undoing of the marriage contract", and since the marriage contract did not require a high degree of intelligence to comprehend, the requirement for a divorce should be equally simple.\textsuperscript{33} The capacity to instruct counsel requires significantly more of the individual, and involves the ability to understand financial and legal issues.

Bennotto J. approved of a useful analysis provided by an expert called to testify in the case. In order be competent to make a decision, a person must:

1. understand the context of the decision;
2. know his or her specific choices; and
3. appreciate the consequences of these choices.\textsuperscript{34}

As the threshold for understanding under this criterion is low regarding intention to separate and divorce, Bennotto J. found that Ms. Calvert met this threshold. This finding was based on overwhelming professional evidence that confirmed at the time, Ms. Calvert had the capacity to understand what she was doing. Bennotto J. rejected the approach to capacity of one of the experts, which set the standard at whether Ms. Calvert had thought out the ramifications of the divorce. This was seen as too high a standard and inappropriate for a petitioner to meet.

\textsuperscript{31} Section 4(1) of the \textit{FLA} provides: "valuation date" means the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.
3. The date a marriage is declared a nullity.
4. The date one of the spouses commences an application based on subsection 5(3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

\textsuperscript{32} supra fn. 30 at 294.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid. at 298.
The Ontario Court of Appeal\(^{35}\) dismissed the appeal of the decision of Bennotto J. On this appeal Mr. Calvert raised a new issue not presented at trial. Mr. Calvert argued that in order to support the granting of a divorce, there had to be distinct findings regarding Ms. Calvert's mental capacity to separate at the time of filing the petition for divorce as well as for the one-year period prior to granting the divorce. The Court rejected this argument and looked to the wording of the Divorce Act\(^ {36}\). The relevant sections discussed were:

8(2) Breakdown of marriage is established only if

(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding.

8(3) For the purposes of paragraph (2)(a),

(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable.

The Court stated that there was no issue that separation had been uninterrupted, and it was a finding of fact by Bennotto J. that Ms. Calvert did not waver from her desire to separate. Mr. Calvert argued that s.8(3)(b)(i) could not be relied on by Ms. Calvert because there was an absence of specific findings as to when she became incapable of forming an intent to separate, or as to her intent at the time of the petition and for one-year prior to judgment. This argument was rejected by the Court, where it was held that there was no interruption by virtue of s.8(3)(b)(i), and requiring proof of the respondent's intention at each relevant point would defeat the purpose of this provision.

In summary, there is case law that indicates a committee/attorney can, in the right circumstances, continue divorce proceedings commenced by the donor when he or she had capacity. In order to pursue the proceedings, it must be shown that the proceedings are in the best interest of the incompetent person.


Part I of the FLA, at section 6, provides that when a spouse dies leaving a will, the surviving spouse must elect to either take under the will or to receive the entitlement under section 5 of the FLA. If the spouse dies without a will, then the election is between the entitlement under the intestacy rules (Part II of the SLRA) and the entitlement under the FLA. It should also be noted that the term spouse refers to two persons who are married to each other or who have entered into marriage that is voidable or void in good faith. The definition of “spouse” does not contemplate a common law relationship.


\(^{36}\) R.S.O. 1990, c. 3.
Subsection 5(2) of the FLA provides that when a spouse dies, if the net family property ("NFP") of the deceased spouse exceeds the NFP of the surviving spouse, the surviving spouse is entitled to one half of the difference between them. It should be noted that the right to the equalizing payment only arises in the death situation if the surviving spouse’s NFP is less than that of the deceased spouse. The valuation date for the purposes of determining equalization on death is the date before the date on which one of the spouses dies leaving the other spouse surviving, assuming that none of the other valuation dates has occurred (such as the date of the separation of the spouses or the date that both spouses die simultaneously).

An application to determine entitlement to an equalization payment that was commenced before the death of the applicant spouse may be continued by or against the deceased spouse’s estate. Subsection 7(2) of the FLA provides that entitlement under subsections 5(1), 5(2) and 5(3) is personal as between the spouses, but an application based on subsections 5(1) or 5(3) commenced before a spouse’s death may be continued by or against the deceased spouse’s estate, and an application based on subsection 5(2) may be made by or against a deceased spouse’s estate.

The question of whether to elect or not is not a straightforward one. In addition to having to determine NFP, consideration has to be given to the fact that in addition to any property received pursuant to an election, a surviving spouse is entitled to

(i) any property outside the estate which may fall to him or her;

(ii) any gifts made pursuant to the terms of the will in addition to any entitlement under section 5 of the FLA, but only if the will expressly so provides. (see subsection 6(5) of the FLA) If the will does not so provide, then the spouse must effectively choose to take the benefits under the will or the entitlement under section 5 of the FLA. The FLA provides is that if the surviving spouse elects to take his or her equalization payment, the will is to be read as if that surviving spouse had predeceased the testator. If the provisions of the will leave a life interest in the estate of the deceased spouse to the surviving spouse, it is often difficult to determine whether it is better to elect to take the FLA entitlement or be a beneficiary under the will.

(iii) insurance proceeds of a policy of life insurance on the life of the deceased spouse and owned by the deceased spouse or which was taken out on the lives of a group of which he or she was a member, or a lump sum payment under a pension or similar plan on the death of the deceased spouse so long as a written designation by the deceased spouse provides that this is in addition to the entitlement under section 5. If that written designation is not made, the payment must be credited against the surviving spouse’s entitlement under section 5 (See subsection 6(6) of the FLA).

The election must be filed within 6 months of the date of death of the deceased spouse unless an extension of time is granted. The election must be in prescribed form and filed with the office of the Estate Registrar for Ontario. Failure to file the election will result in the spouse
being deemed have elected to take under the will, the SLRA or both, unless the court orders otherwise. It should be noted that subsection 2(8) of the FLA provides that a court may extend a time prescribed by the Act (i.e. the six month election limitation period) if it is satisfied that:

(i) there are apparent grounds for relief;
(ii) relief is unavailable because of delay that has been incurred in good faith; and
(iii) no person will suffer substantial prejudice by reason of the delay.\(^{37}\)

**ISSUES**

1. **Can a person acting under a power of attorney file an election?**

   Questions have arisen as to whether a person acting under a power of attorney of a surviving spouse has the authority to file an election on behalf of the surviving spouse. In the case of *Anderson v. Anderson Estate*\(^{38}\) the plaintiff surviving spouse executed a power of attorney in favour of her daughter and son-in-law after her husband’s death. She became incompetent after she signed the power of attorney but within the 6 month limitation period. The attorneys elected, within the limitation period, to receive the plaintiff’s entitlement under the FLA rather than the benefits under the will. The court upheld the ability of the attorneys to make the election for the following reasons:

   (i) the legislature could not possibly have intended that an incompetent surviving spouse should be deprived of his or her right to elect simply because he or she was under a disability;

   (ii) it is not the right to elect that is personal but rather the right to entitlement that is personal; and

   (iii) an election by an attorney acting under a valid power of attorney upon the mental incompetency of the donor is indistinguishable from the case of an election by the Public Trustee (now the Public Guardian and Trustee) on behalf of a mentally incompetent person.\(^{39}\)

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\(^{37}\) See *Varga v. Varga Estate* (1987) 26 E.T.R. 172 (Ont H.C.), where a widow made a document purporting to elect for one-half of the estate under the FLA rather than the provisions of the Will of her deceased husband. The widow’s lawyer mailed the document to the lawyer for the estate with instructions to file it with the court. It was mailed to the court clerk but was then returned as no affidavit of execution was included. The document was later mailed to court and retained by the office but was never recorded in the usual way. The court eventually held that election not properly filed and recorded and thus no election made.

\(^{38}\) (1990) 74 OR (2d) 58 (Ont HCJ).

\(^{39}\) See *Cronkwright Estate v. Maltby* 1988 O.J. No. 686 (Ont CH), in which it was held that the Public Trustee acting as committee of a spouse under the *Mental Health Act* had authority to make an election. See also *Ward v. National Trust Company* (1990) (Ont. Gen Div.) in which it was held that a committee appointed under the *Mental Incompetency Act* had the authority to make an election.
In the case of Rosenberg v. Romberg, the issue was whether a personal representative of a surviving spouse who dies within the 6 month limitation period without having elected is entitled to file the election and make application for the equalization payment. The court held that the right to make an election is personal between the spouses and could not be exercised by the personal representative. Thus, the court held that the surviving spouse’s right to elect died with that spouse.

The court in the Anderson case distinguished the Rosenberg case on the grounds that in the Anderson case the surviving spouse was still alive and therefore her right to elect was also still alive. The fact that she was incompetent to make the election personally did not diminish that right.

Another issue is whether it is possible to incorporate a provision in a power of attorney to restrict the attorney from the obligation to bring a FLA claim in the above situations. Consistent with the fiduciary duty of an attorney acting under a power of attorney, there is a duty to consider whether the FLA claim is in the best interests of the donor. An individual who is appointed as an attorney may be in a conflict of interest regarding the estate of the donor. For example, he or she may be acting as an attorney for a surviving spouse and also be a named beneficiary under the will of the deceased.

So, the question arises. Can the power of attorney restrict the donee of the power from making such an election? The Substitute Decisions Act (the “SDA”) contemplates that the scope of a power of attorney can be limited or general and that conditions and restrictions can be provided for in a power of attorney. Thus it appears that there is no provision in the SDA preventing such a restriction. The flip side of the issue is to consider whether, if discretion is given to the attorney to either elect or not elect under the FLA, it may be prudent to also provide that the donor recognizes the conflict the attorney may be under and that there is still authorization for him or her to make the decisions he or she is empowered to make as donee of the power of attorney.

2. Is the Election Revocable?

There is nothing in the FLA to indicate that an election once filed with the office of the Estate Registrar for Ontario is capable of being revoked. However, it would appear that the Estate Registrar for Ontario has at times accepted such revocations and has even permitted

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40 (1989) 70 OR (2d) 146 (Ont CA).
42 Ibid. at s. 7(6).
43 See Grunerud v Grunerud Estate (2002) 2 SCR 417, where the Supreme Court of Canada determined that the Public Trustee of Saskatchewan could not bring an equalization claim on behalf of an incompetent surviving spouse who was living in a publicly funded institution and owned only her personal belongings and a small bank account on the basis that: it was in her best interests to remain in the public facility; that her wishes with respect to the family farm were protected by the provisions in her husband’s will; and that he had left her sufficient funds to take care of her needs. The estate of the husband had a value of $1.5 million and his will left the bulk of the estate to the son and a $100,000 fund for the wife.
amendments to elections. However see also Re Bolfan, where the court held that an election once made could not be revoked.

Some care must be taken in considering whether to elect in circumstances where no Certificate of Appointment of Estate Trustee with a Will has been issued. Consideration should be given to deferring the filing of the election until after the Certificate of Appointment is issued. Where there is litigation over the validity of a will or difficulty in locating a will, it may be appropriate to apply for an extension of time for filing the election beyond the six-month period.

Of particular concern is in the situation where a prior will provides for greater benefits than the will which is signed later and which appears to be the last will of the deceased. In the case of Re van der Wyngaard, the solicitor for the surviving husband, faced with this fact situation, tried to cover all the bases by having the election to take the equalization payment filed with the court but also filing a caveat challenging the later will on the grounds that the deceased lacked testamentary capacity. The court permitted the caveat but indicated that the better approach would be to file for an extension of time until the question of the validity of the will was determined.

One writer has suggested that where the surviving spouse wishes to take the rights under the will or on intestacy, the right approach might be to file no election. In that case the FLA deems the spouse to have elected to take under the will or on intestacy. Presumably the court would have the jurisdiction to reverse the deemed election at a later date if a later will surfaces or if the later will is declared invalid and an earlier will is reinstated with the effect that the surviving spouse would have had greater rights under the FLA and might have made a different decision.

3. Effect of an Election

If the surviving spouse elects to take under the FLA, unless the will provides that the benefits under the will are in addition to the benefits under section 5(2) of the FLA, the gifts made under the deceased spouse’s will are revoked and the will is to be read as if the surviving spouse had predeceased the testator. In addition, the spouse shall be deemed to have disclaimed an entitlement under Part II of the SLRA (the rights under the intestacy rules).

44 See Money & Family Law Vol 3 No. 8 and Vol 3 at 69-70 and R Harrison Smith v Harrison (May 24, 1989) Ont HC.
45 (1992) 87 DLR (4th) 119. 45 ETR 23 (Ont Ct (Gen Div).
47 (1987) 59 OR (2d) 195 7 RFL (3d) 81 (Sur Ct).
48 See Corbin, supra note 34.
49 FLA at s. 6(11).
50 FLA at s. 6(8).
4. **Elections and Executorship**

For many years there was uncertainty as to whether a surviving spouse, named as an executor under the Will of a deceased spouse, automatically forfeited the position of executor by filing an election. However, the decision of *Reid Martin v. Reid*[^51^] confirmed that subsection 6(8) of the FLA, which provides that when a surviving spouse files an election, the will of the deceased spouse is to be interpreted as if the surviving spouse was predeceased, should be given its plain meaning and that therefore a surviving spouse who elects for equalization cannot act as executor. It is possible to draft a will in order to allow a surviving spouse to both elect for equalization and continue to serve as executor, but as one author has commented, in order to get around the application of subsection 6(8) of the FLA, rather complex Will drafting is required. For example, the will of the deceased spouse must provide for bequests to the surviving spouse conditional upon his or her election, while also providing that such bequests are in addition to any equalization entitlement they may receive.[^52^]

Estate administration issues can also arise when a surviving spouse who is also a named executor of the estate files an election for equalization. For example, what is the proper procedure for removing a surviving spouse who has applied for a Certificate of Appointment prior to electing for equalization? Is the procedure analogous to that when a trustee dies in office or is an application to remove the surviving spouse required? This is not necessarily a theoretical issue in some cases, as it may be necessary for a Certificate of Appointment to be acquired before the surviving spouse has an opportunity to determine whether to elect for equalization. For example, the deceased spouse may have passed away immediately prior to the closing of real estate transaction, and in order for the deal to be finalized; a Certificate of Appointment has to be acquired. This may take place before the surviving spouse has had an opportunity to even consider whether or not he or she wishes to elect for equalization under the FLA.

5. **Elections and Intestacy**

As noted earlier, the effect of an election in favour of equalization by a surviving spouse in a situation of intestacy, whether partial or total, is that the surviving spouse forfeits his or her rights to entitlement under Part II of the SLRA. If there is a partial intestacy, even if the will provides that its benefits are to be in addition to equalization this forfeiture of SLRA entitlement will still occur. In a situation of intestacy, the SLRA does not necessarily apply to the surviving spouse’s right to property outside of Ontario. Therefore, dependent on the laws of the jurisdiction in which the assets are situated, it is possible that a surviving spouse who files an election in a situation of intestacy may still be able to access certain assets of the deceased spouse located outside of Ontario.

6. **Effect of an Election on Dependants’ Relief Claims**

The surviving spouse’s right to dependent relief under Part V of the SLRA is not affected by his or her decision to elect in favour of equalization. It is important to note the possible interaction of the SLRA and the FLA, since as noted above, a condition of a dependant’s right to


[^52^]: See Corbin, *supra* note 34.
support under the SLRA is that the deceased spouse did not make adequate provision for him or her. In the event a surviving spouse determines to elect to take his or her entitlement under the FLA and in so doing makes a serious error (i.e. his or her equalization entitlement was far less than what the deceased spouse had provided in the Will), is it possible for such a surviving spouse to still claim that the deceased did not make provision for adequate support for the purposes of a dependant’s relief application? Subsection 58(4) of the SLRA provides that adequate support is to be determined on the date of the hearing of the application, thereby suggesting that the fact that the surviving spouse forfeited his or her entitlement is not relevant but the consequences of the election in regard to his or her need is relevant.

7. **The Priority of an Equalization Claim**

Pursuant to subsection 6(12), a surviving spouse’s entitlement to an equalization claim has priority over the following:

(i) the gifts made in the deceased spouse’s will, if any, subject to subsection (13);

(ii) a person’s right to a share of the estate under Part II of the SLRA;

(iii) an order made against the estate under Part V of the SLRA, except an order in favour of a child of the deceased spouse.

However, according to subsection 6(13) of the FLA, the surviving spouse’s entitlement does not have priority over a gift by will made in accordance with a contract that the deceased spouse entered into in good faith and for valuable consideration, except to the extent that the value of the gift, in the court’s opinion, exceeds the consideration.

In addition, it should be noted that the spouse’s equalization claim does not necessarily stand behind all of the claims of creditors of the deceased. Although the spouse’s claim presumably ranks below those of secured creditors and creditors preferred by law, it is debateable where it stands in relation to unsecured creditors.53

8. **Effect of Equalization on the Distribution of the Estate**

Subsection 6(14) of the FLA provides that no distribution shall be made in the administration of a deceased spouse’s estate within six months of the spouse’s death, unless:

(i) the surviving spouse gives written consent to the distribution; or

(ii) the court authorizes the distribution.

In the event that a personal representative of the deceased receives notice that an application for equalization has been made pursuant to Part I of the FLA, no distributions can be made out of the estate unless:

53 See Corbin, *supra* note 34.
(iii) the applicant gives written consent to the distribution; or

(iv) the court authorizes the distribution.

If the court extends the time for a spouse’s application for equalization under subsection 5(2) of the FLA, any property of the deceased spouse that is distributed before the date of the order and without notice of the application shall not be brought into the calculation of the deceased spouse’s net family property.

It should be noted that the foregoing restrictions on distribution do not, pursuant to subsection 6(17) of the FLA, prohibit reasonable advances to dependants of the deceased spouse for their support.

Pursuant to subsection 6(19) of the FLA, if the personal representative makes a distribution that contravenes these restrictions against distributions, the court will make an order against the estate. If the undistributed portion of the estate is not sufficient to satisfy the order, the personal representative is personally liable to the applicant for the amount that was distributed or the amount that is required to satisfy the order, whichever is less.

In addition, on motion by the surviving spouse, the court may make an order suspending the administration of the deceased spouse’s estate for the time and to the extent that the court decides.

C. Procedures for Appointing a Litigation Guardian

Where there is no power of attorney or the person or persons named in a valid power of attorney have died or are otherwise unable to unwilling to act, it is necessary to consider whether a litigation guardian has to be appointed for a party under disability who is involved in litigation.

1. When is a litigation guardian necessary?

A litigation guardian (formerly “next friend” or “guardian ad litem”) is necessary in a civil or family law proceeding when a party is considered to be a “party under disability” or a “special party”, respectively.

The purpose of a litigation guardian is to ensure that the party under disability or special party, the court and the entire legal process are protected from abuse or unfair treatment. A litigation guardian is a person who can supervise the interests of the party under disability or special party and instruct counsel on his or her behalf.

A litigation guardian is not necessary if the person under disability is a respondent in an application under the Substitute Decisions Act, 1992.

In civil proceedings, and possible family law cases, counsel is duty bound to seek the appointment of a litigation guardian for a client who is under disability.

54 The author wishes to thank Alex Nikolic, Student-at-Law, Fasken Martineau DuMoulin LLP, for his contribution to this section of the paper.
2. Parties Under Disability in Civil Proceedings

Who is a party under disability?

Rule 1.03 of the Rules of Civil Procedure defines the term “disability” as:

“disability, where used in respect of a person, means that the person is,
(a) a minor,
(b) mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not, or
(c) an absentee within the meaning of the Absentees Act.”

A minor is defined by the Age of Majority and Accountability Act as a person under the age of 18 years.

Generally, a person is considered to be “mentally incapable” if they are incapable of retaining and instructing legal counsel.

For purposes of this paper, we will not be dealing with absentees.

3. Who can be a litigation guardian for a party under disability?

A litigation guardian can be any person who is not under disability and who does not have an interest in the proceedings that is adverse to the party under disability. If the person under disability already has a guardian or attorney under a power of attorney with authority to act as litigation guardian, that guardian or attorney shall act as the litigation guardian (Rules 7.02 and 7.03)

Under Rule 7.04 of the Rules of Civil Procedure, the Public Guardian and Trustee can be appointed to act as a litigation guardian for a party under disability who is unable to find a suitable candidate. In the case of a minor, the Children’s Lawyer can be appointed by the court to represent the minor’s interests. If the party is both a minor and under disability, either the Children’s Lawyer or the Public Guardian and Trustee may be appointed.

In any civil proceeding by or against a party under disability, a litigation guardian must direct counsel to commence, continue or defend the action. Rule 7.05(2) of the Rules of Civil Procedure requires that a litigation guardian “diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests”.

4. Procedure to appoint a litigation guardian

Rule 7 of the Rules of Civil Procedure governs the procedures that must be followed for actions involving parties under disability and the appointment of litigation guardians. The requirements and procedures for appointment of a litigation guardian are different for plaintiffs/applicants and defendants/respondents.
Only the Children’s Lawyer or Public Guardian and Trustee can represent a party under disability directly and without counsel. All other litigation guardians must represent the party under disability’s interests by instructing a lawyer. In this manner, the policy objectives of diligent and unbiased representation for a party under disability are protected from a well meaning but legally untrained litigation guardian.

**Plaintiff or Applicant**

A litigation guardian for a plaintiff or applicant can be anyone who is not a minor or who is not under a disability. Court appointment is not necessary to become a litigation guardian for a plaintiff or applicant under Rule 7.02(1) of the Rules of Civil Procedure. However, under Rule 7.02(2) an affidavit must be filed stating that the litigation guardian consents to act in such capacity, has retained counsel, the litigation guardian’s relationship, if any, to the party under disability, demonstrates that as litigation guardian, he or she has no adverse interest in the proceedings to the party under disability and acknowledges his or her possible personal liability for the costs of the proceedings. Additional requirements of the affidavit are that the litigation guardian must provide evidence concerning the nature and extent of the disability, indicate whether the litigation guardian or the person under disability is a resident of Ontario and, in the case of a minor, provide the minor’s date of birth. There is no requirement under the Rules of Civil Procedure for a litigation guardian to be a resident of Ontario but the court may, in certain cases, order security for costs if the litigation guardian is not an Ontario resident.

If there is no volunteer to act as litigation guardian for a party under disability, the court can appoint a litigation guardian under Rule 7.04. The court appointment is either to the Children’s Lawyer in the case of a minor or the Public Guardian and Trustee for a person who is mentally incapable.

A litigation guardian is considered to be an officer of the court and does not become a party to the proceeding. A litigation guardian may be liable to the defendant for the costs of an unsuccessful action under Rule 7.02(2)(h) of the Rules of Civil Procedure. The Children’s Lawyer and the Public Guardian and Trustee are never responsible for the costs associated with representing a party under disability.

**Defendant or Respondent**

Generally, a person under disability cannot defend an action or respond to an application until the court appoints a litigation guardian. Rule 7.03 of the Rules of Civil Procedure governs the appointment process of a litigation guardian for defendants and respondents.

A litigation guardian for a defendant or respondent is appointed by way of a motion brought either by the person who seeks to be appointed or, if no such motion is brought, by the plaintiff or applicant before taking any further step in the proceeding. If the appointment is sought by the plaintiff or applicant, the plaintiff or applicant must serve, at least 10 days before the motion, a request for appointment of litigation guardian (Form 7A) on the party under disability. The request may be served with the originating process. Rule 7.03(8) provides that a motion for the appointment of a litigation guardian may be made without notice. If the plaintiff or applicant seeks to appoint the Children’s Lawyer or the Public Guardian and Trustee as litigation guardian,
the plaintiff or applicant must serve the motion material on the Children’s Lawyer or the Public Guardian and Trustee.

A person seeking an order appointing a litigation guardian for a defendant or respondent must provide evidence concerning the nature of the proceedings, the date on which the action arose and the date on which the proceeding was commenced, details as to the service on the party under disability of the originating process and the request for appointment of litigation guardian, the nature and extent of the disability, in the case of a minor, the minor’s birth date and whether the person under disability ordinarily resides in Ontario. If the proposed litigation guardian is someone other than the Children’s Lawyer or Public Guardian and Trustee, the person seeking the order must also provide evidence concerning the relationship, if any, of the proposed litigation guardian to the party under disability, whether the proposed litigation guardian resides in Ontario and confirmation that the proposed litigation guardian consents to act, is a proper person to be appointed, has no interest in the proceedings adverse to the party under disability and acknowledges that he or she has been informed of the potential liability for costs.

5. Special Parties in Family Law Proceedings

Under Rule 2 of the Family Law Rules, “special party” is defined as:

“a party who is a child or who is or appears to be mentally incapable for the purposes of the Substitute Decisions Act, 1992 in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection, adoption or child support case.”

A child under the Family Law Rules means a child as defined in the Act governing the case or, if not defined in that Act, a person under the age of 18 years, and in a case under the Divorce Act (Canada) includes a “child of the marriage” within the meaning of that Act.

Rule 4(2) of the Family Law Rules permits the court to authorize a person to represent a “special party” if the person is appropriate for the task and willing to act as representative. The representative (i.e. litigation guardian) can represent the special party directly, without counsel.

Under Rule 4(3) of the Family Law Rules, the court can appoint the Children’s Lawyer or the Public Guardian and Trustee to act as representative if no appropriate person is found to act for the special party, but only with the consent of the Children’s Lawyer or Public Guardian and Trustee.

An order appointing a representative must be served immediately by the person who asked for the order or by any other person named by the court on the representative and on every party in the case (Rule 4(4) of the Family Law Rules).

D. Role of the Public Guardian and Trustee

The publications put out by the Office of the Public Guardian and Trustee (the “OPGT”) discuss the various services that are offered by that office. Among those services are Property Guardianship Services which ”protect mentally incapable adults and maximize their quality of
life by managing their financial affairs when no one else can do so." The authority to appoint the OPGT is found in the Substitute Decisions Act and the Mental Health Act.

The OPGT can be appointed in one of three ways:

1. If a person is admitted to a psychiatric facility for treatment of a mental disorder and is assessed as being incapable of managing property and does not already have a guardian of property, a physician is required by law to appoint the OPGT;

2. A "capacity assessor" may in certain conditions assess a person's capacity to manage property and appoint the OPGT. If a person has a valid power of attorney for property or objects to being assessed then this process is not available;

3. The court will sometimes appoint the OPGT as a last resort.

If the incapable person had previously made a valid, unlimited power of attorney (continuing power of attorney for property) and the person named as the attorney is prepared to accept the responsibility, the OPGT will not act as the guardian of property. As the OPGT sees itself as the guardian of last resort, if there is a relative who wishes to be appointed they can apply to the OPGT. If a person who is not a relative wishes to be appointed this must be done through an application to the court.

As Guardian of the Property of an incapable person, the OPGT has the power to do anything on the incapable client's behalf that he or she could normally do in the handling of finances and to manage the finances of the incapable person in the best interests of that person. If there are legal issues, the OPGT will retain and instruct a lawyer on the incapable person's behalf. The publications from the OPGT provide that

"typical examples of legal work include dealing with a real estate issue, negotiating a separation agreement or representing the client in a lawsuit. The law prohibits anyone else from retaining a lawyer on the client's behalf in these matters unless a court has authorized it. The OPGT does not have any role in legal affairs relating to a client's personal matters such as immigration, criminal charges or a custody dispute. the OPGT will, however, help locate a suitable lawyer and will have to approve the proposed legal fees in advance."