



Presentation at the OMSSA Mental Health Forum
June 14, 2019

Services Offered by the PGT Relating to Mentally Incapable Adults



- Property Guardianship
- Guardianship of the Person
- Treatment Decisions
- Guardianship Investigations
- Litigation Guardian or Legal Representative Appointed Under the Rules of Court

Substitute Decisions Act, 1992



- The *Substitute Decisions Act, 1992* (SDA) governs planning for incapacity through powers of attorney (POA) and substitute decision making for incapable adults in two spheres: property and personal care.
- An attorney named in a POA for property has the authority, subject to any conditions set out in the document, to do anything the grantor could do, except make a Will.
- A POA for property is effective immediately unless the document states otherwise. If the document is silent, this means that the attorney has the authority to make property decisions whether the grantor has been declared incapable or not.

Substitute Decisions Act, 1992



- Pre-*SDA*, a substitute decision maker for property could be appointed for a mentally incapable person two ways:
 - Assessment of a patient in a psychiatric facility
 - Court Order
- The *SDA* added a third method:
 - Assessment by a designated capacity assessor



- It is important to note:
 - the designated capacity assessor must explain the effect of a finding of incapacity to manage property to the person being assessed before starting the assessment;
 - if the person to be assessed objects, the assessment cannot proceed.
- Pre-*SDA*, a substitute decision maker for personal care could only be appointed by the court. This remains the same. However certain specified decisions may be made on an individualized basis under another law, the *Health Care Consent Act (HCCA)*

The Finding of Incapacity



- The *SDA* sets out an “**understand and appreciate**” test of incapacity.
- “**Understand**” refers to the ability to understand information that is relevant to making a decision, while “**appreciate**” refers to the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
- There is a presumption of capacity which is only overridden when the legal requirements of the *SDA* are met. Neither vulnerability nor “**poor**” decision making is sufficient to find a person incapable of managing property or personal care.

The Finding of Incapacity



- A finding that a person is incapable under the *SDA* is not a ‘global’ finding of incapacity and does not mean that the person is considered legally incapable for all purposes.
- The law treats incapacity as being issue specific, namely whether the person is capable of making the decision related to the task at hand. Some typical ‘domains’ of decision making are property, personal care, medical treatment, marriage, executing a Will, and making a decision about admission to long term care.

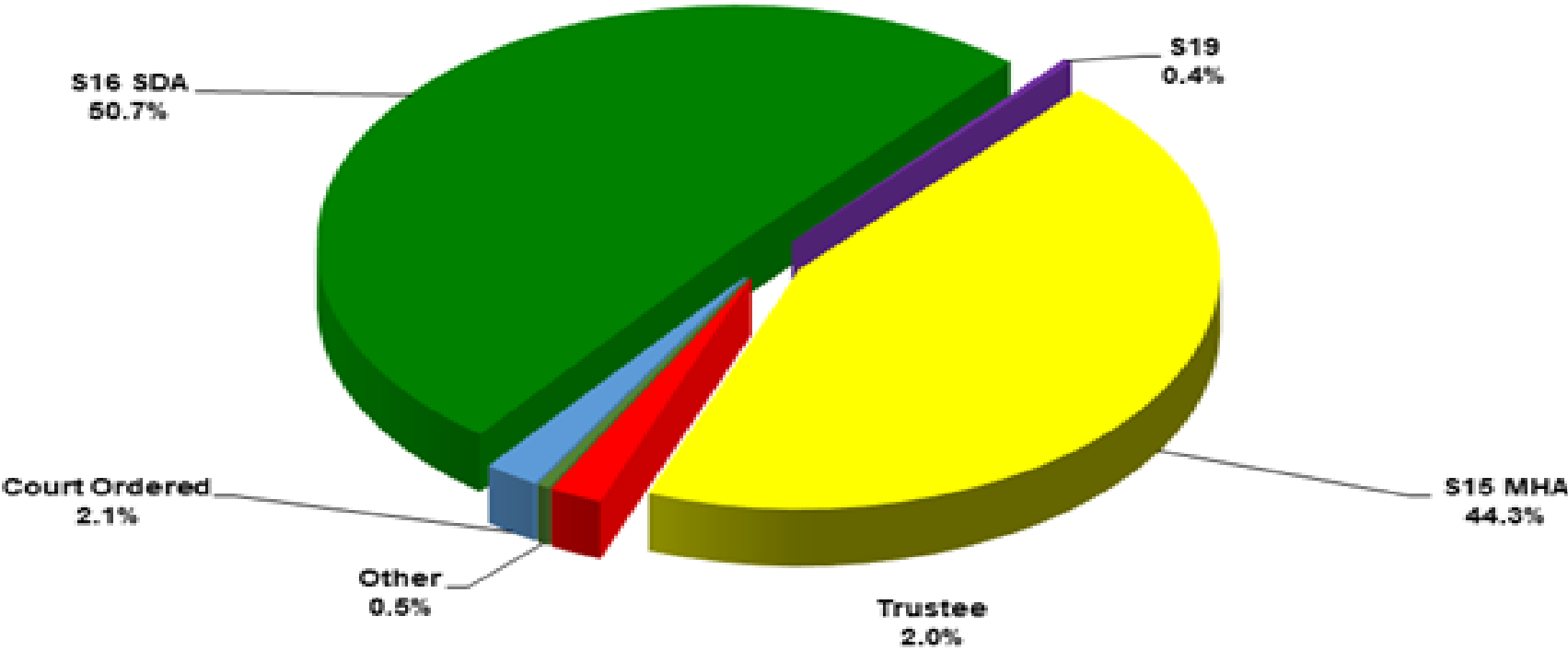
The Finding of Incapacity



- For example, a finding that a person is incapable of managing property does not mean that he or she is legally incapable of carrying out any other activity, such as managing personal care or marrying.
- It is also important to note that a finding of incapacity is not based on a diagnosis. Just because someone has a particular health condition, mental disorder or developmental disability does not mean that he or she is necessarily mentally incapable. The test remains one of '**understand and appreciate**'.

How Does the PGT Become Guardian of Property?

Authority Type



PGT as Guardian of Property



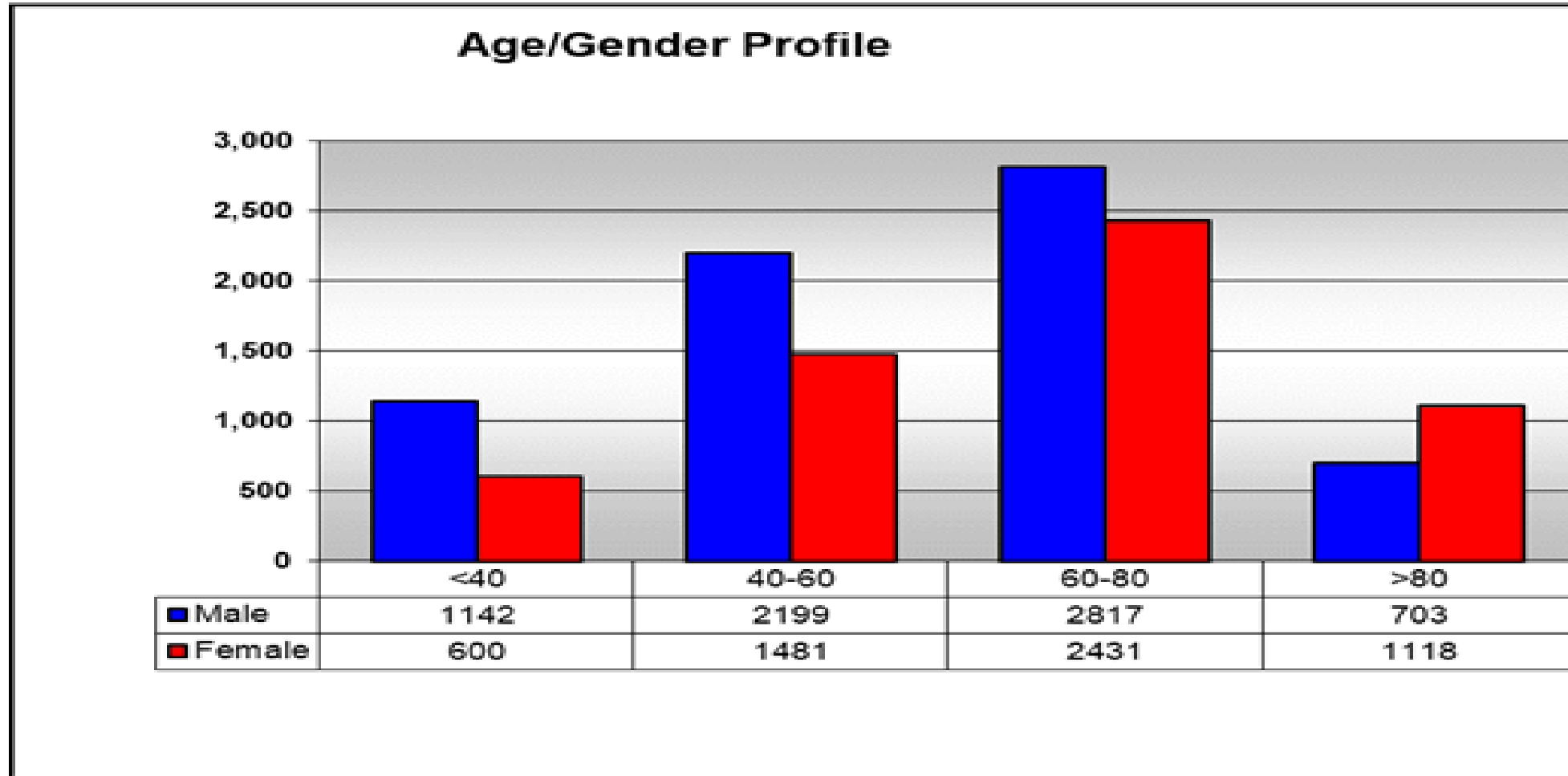
- The PGT currently manages the finances of approximately 12,500 people who have been found to be incapable of managing their own property.
- Services are delivered through six offices located in London, Hamilton, Ottawa, Sudbury, Thunder Bay and Toronto.

Who Are PGT Property Clients?



- While we do not keep statistics on the reasons why our clients have been found incapable, as our jurisdiction is based on incapacity rather than a diagnosis or label, we know that our clients lack capacity for a wide variety of reasons.
- Our clients include persons with a mental illness, persons who have lost capacity due to age-related cognitive decline, persons with a developmental disability, persons with a dual diagnosis, and persons with an acquired brain injury.

Who Are PGT Property Clients?



Powers, Duties and Responsibilities a Guardian of property



- 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.
- As substitute decision maker, the guardian is responsible for ensuring appropriate management and control of the incapable person's finances.
- These rules apply to the PGT, a private guardian or an attorney acting under a power of attorney on behalf of an incapable person.

Powers, Duties and Responsibilities a Guardian of property



- The *SDA* requires the guardian of property to make financial decisions for the benefit of the individual first, then for the benefit of the individual's dependants, and finally to satisfy any other legal obligations.
- The guardian is required to explain to the incapable person what the guardian's powers and duties are, and must encourage the person to participate, to the best of his or her abilities, in the guardian's decisions about the property.

Powers, Duties and Responsibilities a Guardian of property



- A guardian must seek to foster regular personal contact between the incapable person and his/her supportive family members/friends.
- The guardian must consult from time to time with supportive family members and friends who are in regular personal contact with the person, as well as the person(s) from whom the incapable person receives personal care.

Property Guardianship



- As guardian of property, the PGT deals with all aspects of the client's finances. Examples of typical PGT activities include:
 - Applying for benefits and maximizing income
 - Collecting assets
 - Budgeting for day to day needs
 - Paying clients' bills and taxes
 - Managing real estate, businesses, vehicles and other assets
 - Handling legal matters
 - Where appropriate, making investments on client's behalf through specialized financial planning unit



- The OPGT:
 - Made over 640,000 payments on behalf of our clients in the last fiscal year
 - Disbursed approximately \$250 million dollars for client expenses in the last fiscal year
 - Filed about 15,000 tax returns for the 2018 tax year
 - Manages over 6800 bank accounts for clients
 - Maintains over 700 trusts, created by the PGT to ensure ODSP eligibility
 - Has opened approximately 2,840 RDSPs to date

Guardianship as Last Resort



- The PGT is intended to be a guardian of last resort. Upon becoming statutory guardian of property, the PGT looks to see if there is anyone else willing and able to manage the incapable person's finances.
- This may include informing an attorney how to terminate the guardianship, appointing a new guardian of property or resigning in favour of a statutory trustee.
- Supportive family members are encouraged to replace the PGT as statutory guardian of property by applying to the PGT through an administrative process.

Applications to Replace the PGT



- The PGT will appoint another person to replace him if the applicant is suitable to manage the property and the applicant's plan for managing the property is appropriate.
- This requires a balancing of the PGT's legal obligation to appropriately protect the incapable person's property and the PGT's role as guardian of last resort. It can be difficult because the PGT has no personal knowledge of the applicant, and we do, unfortunately, see situations where family and friends have taken advantage of an incapable person.

Termination of Guardianship



- In the fiscal year 2018-19:
 - 260 guardianship files were closed because the finding of incapacity was overturned or reversed.
 - 276 files were closed because someone else assumed management of the incapable person's finances (183 private guardians, 93 attorneys acting under a POA).

Guardianship of the Person



- As noted above, the PGT may be appointed guardian of the person in order to make personal care decisions, such as shelter and safety, only by court Order.
- The court is not permitted to appoint a guardian of the person if the person's needs can be met through a less intrusive method that does not require a finding of incapacity.
- The PGT's consent to the appointment is required by law.

Guardianship of the Person



- As of March 31, 2019, the PGT was the court appointed guardian of the person for 41 people.
- The decision-making needs for these individuals is completely unique, based on the authority granted in the court Order and the person's specific needs.

Treatment Decisions



- The *Health Care Consent Act* (“*HCCA*”) provides a mechanism for substitute decision making regarding medical treatment and admission to long-term care.
- *HCCA* sets out a hierarchical list of decision makers. That list includes any relatives of the person for whom a decision is required.
- A request for a substitute decision is made only after a medical professional or evaluator has determined that the person cannot make the decision him or herself.

Treatment Decisions



- The PGT may be asked to be the substitute decision maker under *HCCA*.
- In keeping with the PGT's role of substitute decision maker of last resort, *HCCA* authorizes the PGT to make decisions only when there is no one higher ranked who is willing and able to make the decision or where equally ranked decision-makers disagree.
- In the last fiscal year, the PGT made approximately 8,770 treatment/placement decisions

Community Treatment Orders (CTO)



- The PGT has been making decisions regarding CTO's since they were first enacted in 2000. Initially the office did not receive many requests to make CTO decisions. However there has been a steady increase in the number of requests for the PGT to make these decisions, across all areas of the province.
- Given the complexity and the serious nature of a CTO, PGT staff are required to visit with the individual for whom we have been asked to make the decision.

Community Treatment Orders (CTO)



- A decision to consent to a CTO can only be made by the PGT, a Deputy PGT, the Director of Client Services, or the Manager of the Treatment Decisions Unit
- Decisions to renew a CTO can be made by one of these same individuals or by the Team Leader of the Treatment Decisions Unit.
- In the 2018-19 fiscal year, the PGT made 1095 CTO decisions (consent to new CTO; refuse new CTO; consent to renewal; refusal of renewal). This is a 75% increase in the number of decisions made in 2013-14.

Guardianship Investigations Unit



- Under the *SDA*, the PGT is required to investigate an allegation that a person is mentally incapable of managing property or personal care and is suffering from, or at risk of, serious adverse effects as a result of his or her incapacity.
- If, as a result of the investigation, the PGT has reasonable grounds to believe that the person is incapable and that the prompt appointment of a temporary guardian is required to prevent the adverse effects, the PGT shall apply to court.



- The PGT is not required to take any steps in an investigation that are unnecessary for the purpose of determining whether a court application is required.
- The allegation may relate to incapacity to manage property, or personal care or both.
- In the last fiscal year, this unit received approximately 1,778 inquiries regarding alleged incapable people and opened 149 investigations.

PGT as Litigation Guardian or Legal Representative



- The PGT may be appointed by the court to represent the interests of a mentally incapable person involved in litigation, where the mental incapacity relates to the litigation in some way.
- Generally speaking, the PGT is appointed as either litigation guardian or legal representative for approximately 400 people each year.

Private Guardians in Ontario



- The PGT maintains a register of private guardians appointed in Ontario.
- According to the register as of June 7, 2019, there were:
 - 7,728 private property guardians
 - ❖ Of these, 3,033 are statutory guardians and 4,695 are court appointed guardians of property
 - 2,886 court appointed guardians of the person

Key Issues and Challenges



1) Ensuring that we meet our fiduciary duty often puts us into conflict with our client, and his/her family and friends.

Some examples:

- We restrict access to the client's bank account
- We require the client to live on a budget
- We require pre-approval of purchases and require receipts from the person making the purchase
- We cancel credit cards
- We take legal action against family and friends where required



2) Many families do not perceive an application to replace the PGT as guardian of property as a satisfactory option.

- Applications to replace the PGT are viewed as too difficult and too time consuming.
- There appears to be a perception that the application process does not acknowledge the work and care being provided by parents or other family members.



3) Misunderstanding of the PGT's role as guardian

- As substitute decision maker for finances, we are not an agency providing social work type services.
- We do not have access to additional government funding that is otherwise unavailable to a non-PGT client.
- Guardianship is not always a solution. For example, if a person is going to be evicted due to behavioural issues, it is unlikely that a guardian will be able to prevent this.



4) Balancing competing interests

- There appears to be a growing dichotomy among divergent stakeholder interests.
- There is an inherent conflict between calls for the provision of more autonomy and the protection of incapable people (preventing financial abuse and/or elder abuse).

Future Directions – Modernization project



- In spring 2018, OPGT concluded a strategic planning exercise that identified priorities and activities to be completed over the next three-to-four years for developing a more effective business model and client-centered approach to delivering service. The exercise included input from management, staff, clients, stakeholders and government partners.
- The five strategic priorities are: Our Clients and Partners, Our People, Branding, Business Process and Technology and Policy and Legislative Reform. The end goal is to achieve enhanced efficiency, reduced costs and business processes that result in faster and better service delivery to our clients.
- The organization continues working to improve its website and public education efforts to raise awareness of how important it is for every Ontarian to have powers of attorney in place.

Future Directions – ODSP Pilot Project



- We are looking at a project where the PGT enters into agreements with social service agencies to administer ODSP payments of PGT clients who have significant assets. The PGT would remain guardian of property but day to day spending would be done by the agency working closely with the client.
- The goal is to provide better service to incapable persons. We also expect this to reduce the frustration of our clients' front line supports and duplication of work.

Questions?



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