

Planning for Incapacity

While Canadians are living longer and healthier lives than ever before, it is important for everyone to consider the possibility that they may face mental incapacity in the future. Planning for this possibility will help you and your family if it ever happens. There are many legal options that can assist you in preparing for this possibility, but many must be considered and acted upon before mental incapacity becomes a reality. Once mental capacity is lost, most legal options are no longer available.

This booklet is intended for anyone thinking about the possibility that they or a loved one might face mental incapacity in the future. It explains what mental incapacity is, how it is determined, and how the law responds and can help. It discusses the legal options that are available for planning ahead so that you and your family can have peace of mind and some certainty if mental incapacity arises.

What is Mental Capacity?

Mental capacity is the ability to understand and appreciate the consequences of your decisions. In general, it refers to your ability to understand the information that is relevant to a particular decision and to appreciate what could happen as a result of making or not making a certain decision. All legal adults (age 18+ in Alberta) are presumed to have mental capacity. Deciding whether mental capacity has been lost is a significant responsibility and has to be supported by the opinions of doctors, psychologists, and/or a judge's decision.

Loss of mental capacity can be sudden or subtle and gradual. For example, it can happen suddenly if you are in an accident that leaves you in a coma and you cannot make financial decisions or decisions about your medical care. However, a loss of capacity is often less clear and more gradual. For example, a person who is living with dementia will gradually lose mental capacity.

Legally, mental capacity is a black and white concept: either you are capable or you are not. In day-to-day life, however, capacity can fluctuate. People, especially older adults, may have varying degrees of capacity due to factors such as:

- a medical condition;
- stress and anxiety from difficult circumstances, such as the death of a family member;
- the effects of medication or forgetting to take medication;
- exhaustion and the time of day;
- fluctuating blood sugar or blood pressure levels; and/or,
- alcohol or drug use mixed with illness or medication.

In reality, capacity is more of a continuum: between the clear capacity to make a decision at one end and the clear incapacity to make a decision at the other end, there can be a range of more or less capacity. On some days, a person may just need a bit of help. When a person needs a bit of help, he or she may still be able to make some, but not all, decisions. Whether a person has the capacity to make a particular decision may depend on the kind of decision in question: the capacity required to invest money is quite different from the capacity required to decide whether or not to take an exercise class. Similarly, a person's capacity can change over time—especially when a person is suffering from a degenerative condition.

While mental capacity may be a continuum, the law is clear. Once you become mentally incapacitated, a number of legal options are no longer available to you.

You must have mental capacity to:

- create a power of attorney;
- create an enduring power of attorney;
- make a will;
- sign a personal directive;
- deal with jointly held property;
- enter into informal trusteeships;
- enter into a supported decision-making agreement; and,
- enter into a co-decision-making agreement.

Types of Decision-Making

The law divides our decision-making into two different general categories: financial decision-making and personal decision-making.

Financial

Financial decisions are usually related to how you deal with real estate, personal property, investments, and money.

Personal

Personal decisions are those concerning any issue, except financial matters, including:

- your health care;
- where, with whom, and under what conditions you will live (either temporarily or permanently);
- who you will associate with;
- what social and recreational activities you will participate in;
- what educational, vocational or other training you will undertake;
- your employment; and,
- legal proceedings not related primarily to money.

When planning for possible mental incapacity, you should address both financial and person categories of decision-making. There are separate and distinct legal instruments that can be created to deal with financial and personal decisions. They cannot be combined.

Financial decision-making tools

Jointly held property / bank accounts

Property, such as your house, condominium, cottage, or farm can be registered in the name of two people, known as “joint tenants”. This means that the property belongs to both people equally and indivisibly. When one owner dies, the property passes to the other.

The same concept applies to money in a joint bank account. When one joint bank account holder dies, the funds in the account become the sole property of the other person named on the account. There are some obvious advantages to these arrangements, particularly for spouses. However, there are some drawbacks:

- In the case of joint bank accounts, one owner could make withdrawals/write cheques without the other owner's consent or knowledge. If the joint owner was an unscrupulous family member or friend, the possibility of fraud or misuse of funds is possible.
- In the case of jointly held property, problems could arise if, for example, a parent registered his or her home in the name of one child who lives in the same city for reasons of convenience. When the parent dies, the possibility exists that the child on title might claim the property to the disadvantage of other siblings.

Informal Trusteeships

Informal trusteeships are a way of putting someone in charge of managing your financial matters in the event that you have reduced mental capacity. An informal trustee such as a spouse or adult child can be authorized to deposit your government cheques, such as Canada Pension Plan or Old Age Security and pay your bills. Informal trustees have limited authority and cannot manage your investments or sell your property. Generally, you need to fill out separate paperwork at each agency, government department, or financial institution that allows for an informal trusteeship.

Government programs that allow for informal trusteeships include:

- Canada Pension Plan (CPP);
- Old Age Security (OAS);
- Veterans Affairs;
- Alberta Seniors' Benefit; and
- Assured Income for the Severely Handicapped program (AISH).

For more information, visit Alberta Human Services' webpage on Informal Trusteeships:
<http://humanservices.alberta.ca/guardianship-trusteeship/informal-trusteeship.html>

Powers of Attorney

A power of attorney is a legal document that lets you choose someone you trust to make financial decisions for you. There are different kinds of powers of attorney and each one functions a little differently. You must have mental capacity to create and sign off on a power of attorney. This means you:

- know what property you have and its approximate value;
- are aware of your obligations to the people who depend on you financially;
- know what you are giving your attorney the authority to do;
- know that your attorney is required to account for the decisions that he or she makes about your property;
- know that, as long as you are mentally capable, you can revoke (cancel) your power of attorney;
- understand that if your attorney does not manage your property well, its value may decrease; and,
- understand that there is always a chance that your attorney could misuse his or her authority.

All powers of attorney must be in writing, dated, and signed by both the donor (maker) and a witness, in the presence of each other. Witnesses must be over 18 years of age.

Powers of attorney cannot be witnessed by:

- the person being named as the attorney;
- the spouse or adult interdependent partner of the person being named as the attorney;
- the spouse or adult interdependent partner of the donor;
- a person who has signed the power of attorney on behalf of the donor (if the donor is physically unable to sign);
- the spouse or adult interdependent partner of the person who signed the power of attorney on behalf of the donor.

Immediate Power of Attorney

An immediate power of attorney takes effect as soon as it is signed or on a specific date set out in it. When you create this document, you are called the “donor” and the person you appoint is called your “attorney”. The document should have an end date and/or specific task to be carried out by the attorney, such as paying your bills while you’re on an extended vacation. It is important to know that any immediate power of attorney you create becomes invalid if:

- you lose mental capacity;
- once the end date has passed;
- when the task identified in the document has been completed; and,
- you revoke the power of attorney in writing (provided you are mentally capable of understanding the nature and effect of your revocation).

It is not necessary to use a lawyer to make a power of attorney. There is no one standard form, but registry offices, stationery stores, and online legal form companies have power of attorney forms that you can purchase and complete. If you choose to make your own power of attorney, you must be careful to follow all of the rules regarding witnesses and other formalities.

Some banks have their own power of attorney forms and may ask that you sign their form rather than creating your own. A bank’s power of attorney form allows the person named as attorney to manage assets held with that bank, but only that bank. Sometimes banks will ask for a Certificate of Legal Advice. In this case, it you will have to see a lawyer to obtain this certificate. You can ask that your lawyer prepare the power of attorney for you and include a certificate of legal advice. You should then take the power of attorney to your bank to make sure it will accept it.

Enduring Power of Attorney

An enduring power of attorney allows you to plan for the possibility that you may become mentally incapable in the future. It takes effect either immediately upon being signed or upon a future specified event (usually the mental incapacity of the maker). An enduring power of attorney specifically states that it continues if and when you become incapacitated.

If your enduring power of attorney takes effect as soon as you sign it, then you and your attorney both have control over your finances. You and your attorney can sign your cheques and documents, manage your investments, sell your property, and apply for your financial benefits, such as Old Age Security. In all cases, your attorney must keep clear records of financial transactions. If you own real estate (your home, recreation land, farmland) and you want your attorney to be able to sell it for you, there are special requirements about what your power of attorney must say and you should consult a lawyer.

“Springing” Power of Attorney

A springing power of attorney takes effect only you are deemed incapable of taking care of your financial affairs. This is the event that causes the power of attorney to “spring” into action. Once in effect, your attorney begins to make all financial decisions on your behalf.

A Declaration of Incapacity is required for a springing power of attorney to take effect. This declaration confirms that you no longer have the mental capacity to make financial decisions on your own behalf. These forms are available from hospitals, care facilities, and doctors.

Your power of attorney should name the person who will sign the Declaration of Incapacity, should it become necessary. If it names one or more people to make the determination, then that person or persons must sign the Declaration. If your power of attorney does not say who is to make the Declaration, then two medical practitioners must complete the form.

Personal decision-making tools

Personal Directives

A personal directive allows you to determine, in advance, who will make personal decisions on your behalf if, due to illness or injury, you lose the mental capacity to make these decisions yourself. It is a written, signed, dated, and witnessed document that appoints someone to look after your personal (i.e. non-financial) matters. When you create this document, you are called the “maker” and the person named to make personal decisions for you is called your “agent”. A very helpful template for making a personal directive can be found at: www.humanservices.alberta.ca/guardianship/trusteeship/opg-personal-directives.html

Your agent can make almost any decision of a personal nature. It is important that you inform your agent of your wishes, beliefs, and values. Your instructions can be about any and all personal matters such as:

- medical treatment, including chiropractors, naturopaths, massage therapists, dentists and doctors;
- where you would like to live;
- with whom you would like to live;
- choices about personal activities such as recreation, employment or education; and,
- any other personal decisions about matters such as food, clothing, hygiene, and safety.

Your personal directive gives a great deal of power and discretion to your agent. You should consider:

- Is the person willing to take on the task? A lot of work can be involved and the law expects very high standards.
- Is the person trustworthy and responsible? Does he/she know you well enough to understand and interpret your instructions? Will he or she make sure you have everything you need? Will your privacy be protected?

- Does your potential agent treat you respectfully, and has he or she always done so? Can this person be trusted to follow your instructions and make decisions in your best interests? Can the person be trusted not to abuse you in any way?

Your personal directive comes into effect once you are declared mental incapable. This is done with a document called a Declaration of Incapacity, which is available online: www.humanservices.alberta.ca/documents/opg-personal-directives-form-opg5522.pdf

- You may state in your personal directive who will make the determination that you have lost mental capacity. You should choose a person in whom you have the utmost trust that he or she will act in your best interests and will not abuse this trust.
- That person must sign the Declaration after consulting with a medical doctor or psychologist, who must also sign the form.
- If your personal directive does not state who will make the determination, then the form must be completed by two medical practitioners, at least one of whom is a physician or psychologist.

The *Personal Directives Act* also addresses the possibility that you might regain mental capacity and no longer need to have the help of an agent.

- If it appears to your agent that there has been a significant change in your capacity, he or she must consult with a person who provides health care services to you to assess your capacity.
- The Act defines “significant change” as “an observable and sustained improvement that does not appear to be temporary.”
- If the agent and health care service provider agree that you have regained the ability to make personal decisions, they can sign a Determination of Regained Capacity form.
- If they do not agree, your agent must then have two health care providers, at least one of whom is a physician or psychologist, assess your capacity.

Supported Decision-Making

Supported Decision-Making is very helpful for:

- individuals whose capacity is not impaired, but who face complex personal decisions;
- people with language barriers;
- people with mild disabilities, such as hearing or vision loss; and,
- people who – because of a temporary condition – may only need help for a little while, and have a close relationship with someone willing to provide decision-making support.

You can put this arrangement in place by completing a supported decision-making authorization form. A supported decision-making form is available online at <http://humanservices.alberta.ca/documents/opg-guardianship-form-opg5557.pdf> and from the Office of the Public Guardian. There is no need to obtain a court order. A supported decision-making arrangement comes to an end if you lose further capacity and a judge orders a co-decision-making order, or if you lose capacity altogether. If you have a personal directive, then it will come into effect.

Co-decision-making

A co-decision-making order is another option that is available to you through the *Adult Guardianship and Trusteeship Act*. It is a formal arrangement issued through a court order in which you, as an “assisted adult” and your “co-decision-maker” are required to make decisions together. Both the assisted adult and the co-decision-maker must agree and the co-decision maker cannot unilaterally make decisions on behalf of the assisted adult. Co-decision-making orders are only available for personal decisions, not financial decisions.

A co-decision-making order may be helpful for adults who:

- have significant capacity impairment but who can still make their own decisions about personal matters with the guidance, assistance, and support of another person; and,
- have a close relationship with someone willing to provide decision-making support.

It is important to note that this arrangement can be made for an adult who has diminished mental capacity, but can still make decisions about personal matters with support.

In the event that you develop significantly diminished capacity, safeguards are in place to protect you. For example, you must take part in a Capacity Assessment Report, or CAP. This report is completed by a medical doctor, psychologist, or other health care professional trained to be a capacity assessor. This report is submitted to a Review Officer (RO) who is on staff at the Office of the Public Guardian. The RO meets with proposed assisted adults, notifies certain family members about an application, and prepares a report for the court. The RO cannot share this report with others. The report is reviewed by a judge, who then will decide about granting an Order. The judge must be satisfied that you consent to the appointment of the co-decision-maker and to the order being made, and that the order is in your best interests. The Judge may also place limits on what the co-decision-maker can do and set dates for review of the order.

A co-decision-making order comes to an end if you lose capacity. In this event, your personal directive comes into effect. You may also withdraw your consent to a co-decision-making order by filing a withdrawal of consent form with the Clerk of the Court of Queen's Bench. If you do not have a personal directive, then a family member or some other person can apply for a Guardianship Order. A Guardianship Order is an order from a Court of Queen's Bench Justice that names a person as your guardian and sets out the types of personal decisions he or she can make for you.

Planning for death

Every adult should have a will. You should make a will if you marry or enter into some other type of committed relationship, start a family, divorce, or leave a committed relationship. Even if you think that you do not have enough financial assets to warrant making one, you might be surprised. Accidental death insurance proceeds, death benefits, and other sources of money might be payable upon your death. Parents can name the person who they would like to be guardians of their children, although this is not binding. Time, money, and energy can be saved if you make a will.

A will is the legal statement of your last wishes about how to divide your property. You must have mental capacity to make a will. This is also known as testamentary capacity.

Having the mental (testamentary) capacity to make a will means that you must:

- know that you are making a will and understand what a will is;
- know what property you own; and,
- be aware of the people (such as your spouse and children) you would normally provide for.

You must have testamentary capacity at the time that you make your will. If you become mentally incapacitated after you make a will, it is still a valid will.

Testamentary capacity can be an issue for individuals who have a mental infirmity or are very ill. The mental capacity of a very ill person can be affected by medication or pain. Making your will while you are in good health may avoid the possibility of having your mental capacity questioned after your death.

Lawyers will sometimes ask their clients questions to satisfy themselves that the person has the testamentary capacity to make a will, but they are not able to make definitive determinations of testamentary capacity.

Where to get help

Alberta Support Centres - Guardianship and Trusteeship

Help with applications and forms – Personal matters

<http://humanservices.alberta.ca/guardianship-trusteeship/personal-matters-application-help.html>

Alberta Supports Centres provide assistance with guardianship and trusteeship applications. To contact them call 1-877-427-4525 (toll-free), or visit your local Alberta Support Centre to speak with someone in person. A province-wide listing of agencies who provide help at no charge to apply for guardianship or trusteeship, write a personal directive, or apply for co-decision-making can be found here.

Office of the Public Guardian and Trustee (OPTG)

Telephone: 1-877-427-4525 (toll-free)

Staff at the OPGT can answer your questions and provide details about information sessions being offered in your area.

AISH Benefits Administration Program

This free program helps people who get a monthly AISH cheque to budget their money and pay their bills.

<http://www.humanservices.alberta.ca/guardianship-trusteeship/AISH-benefits-administration-program.html>

Law Society of Alberta – Lawyer Referral Service

Telephone: 1-800-661-1095

If you wish to seek legal advice and do not know a lawyer, the Law Society will provide you with the names of three lawyers. There is no charge for the first half-hour interview, after which you can decide whether or not to engage the lawyer at the full fee rates.

Centre for Public Legal Education Alberta (CPLA)

OakNet: Older Adult Knowledge Network
www.oaknet.ca

Elder Abuse: Let's Talk
www.cplea.ca/publications

Government of Alberta Resources

Office of the Public Guardian and Trustee – Services and Program
<http://humanservices.alberta.ca/guardianship-trusteeship.html>

Your Personal and Financial Decisions Matter
<http://humanservices.alberta.ca/documents/your-personal-and-financial-decisions-matter.pdf>

Tips for Newly Appointed Trustees
<http://humanservices.alberta.ca/documents/opt-represented-adults-tips-newly-appointed-trustees.pdf>

Co-Decision-Making – How it Works
<http://humanservices.alberta.ca/guardianship-trusteeship/co-decision-making-how-it-works.html>

Supported Decision-Making – How it Works
<http://humanservices.alberta.ca/guardianship-trusteeship/supported-decision-making-how-it-works.html>

Informal Trusteeship - How it Works
<http://humanservices.alberta.ca/guardianship-trusteeship/informal-trusteeship.html>

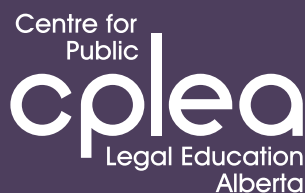
Enduring Power of Attorney – How it Works
<http://humanservices.alberta.ca/guardianship-trusteeship/enduring-power-of-attorney.html>

Personal Directives

- Understanding Personal Directives: <http://humanservices.alberta.ca/documents/opg-personal-directives-publication-opg1646.pdf>
- Form and Instruction Sheet: <http://humanservices.alberta.ca/guardianship-trusteeship/write-a-personal-directive.html>
- Personal Directives Registry: <http://humanservices.alberta.ca/guardianship-trusteeship/register-a-personal-directive.html>

Capacity Assessment

- Capacity Assessment: <http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5631.pdf>
- Guide to Capacity Assessment under the *Adult Guardianship and Trustee Act (AGTA)*: <http://humanservices.alberta.ca/documents/opg-personal-directives-publication-opg1642.pdf>
- Find a Capacity Assessor: <http://humanservices.alberta.ca/guardianship-trusteeship/find-a-capacity-assessor-how-it-works.html>



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Tel 780 451 8764
www.cplea.ca
www.oaknet.ca

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