

Planning for Incapacity



Canadians are living longer and healthier lives than ever before. But it is still important for everyone to think about what happens if their health fades in the future.

What happens if you have an accident and are in the hospital for some time? What happens if you have an illness that affects your memory or mental abilities? You may not be able to make decisions for yourself at these times. This is “**lacking mental capacity**” or “**mental incapacity**”. There are legal tools you can prepare now to appoint someone to make decisions for you if you lose mental capacity one day.

<i>Mental Capacity</i>	2
<i>Types of decision-making</i>	5
<i>Financial decision-making tools</i>	6
<i>Personal decision-making tools</i>	9
<i>Planning for death</i>	11



You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2021

DISCLAIMER

The contents of this booklet are provided as general information only. It is not legal advice. If you have a legal problem, you should consult a lawyer.

The information contained in this booklet was correct at the time it was produced. Be aware that there may have been subsequent changes which make the information outdated at the time you are reading it. The Legal Resource Centre of Alberta Ltd. will not be responsible for any loss arising from reliance on or action taken (or not taken) as a result of this information.

ACKNOWLEDGEMENT

We would like to thank the **Alberta Law Foundation** and the **Department of Justice Canada** for providing operational funding, which makes publications like this possible.

Photo 213909624 / © Dzmitry Dzemidovich | Dreamstime.com

© 2021 Legal Resource Centre of Alberta Ltd., Edmonton, Alberta
Operating as: Centre for Public Legal Education Alberta

The Legal Resource Centre of Alberta Ltd., operating as the Centre for Public Legal Education Alberta, is a non-profit organization whose mission is to help people understand the law as it affects their everyday lives. We develop plain language booklets, presentations, and other learning materials to help people recognize and respond to their legal rights and responsibilities. We have a variety of programs, and provide legal information and referrals on many legal topics. For more information, please visit www.cplea.ca.



Edmonton, Alberta

Phone 780.451.8764

Fax 780.451.2341

Email info@cplea.ca

Web www.cplea.ca

Mental Capacity

What is mental capacity?

Mental capacity is:

- the ability to understand information that relates to making a decision, and
- the ability to appreciate the reasonably foreseeable consequences of making or not making the decision.

For example, if you are deciding on medical treatment, you must understand the purpose and process of the treatment. You must also understand what will happen if you do or do not have the treatment.

Capacity is usually measured on a spectrum. This means there is a range of options, from having full capacity to having some capacity to having no capacity. A person can have capacity to make some decisions but not to make other decisions. It depends on the decision. For example, the capacity needed to decide where to invest money is different from the capacity needed to decide on taking a crafting class.

A person's capacity can change suddenly or over time. It can happen suddenly if you are in an accident that leaves you in a coma. In this state, you cannot make financial or health care decisions for yourself. Losing capacity can also happen slowly over time, for example, if you are living with dementia.

Capacity may also change throughout the day or day by day. On some days, a person may need a bit of help but may still be able to make most decisions. Other days, they may not be able to make any decisions.

A person's capacity can change due to many things, such as:

- a medical condition
- stress and anxiety from difficult situations, such as the death of a family member
- the effects of medication or forgetting to take medication
- changing blood sugar or blood pressure levels
- alcohol or drug use mixed with illness or medication

When signing legal documents, mental capacity is black or white – either you are capable or you are not. The law is clear. You must have mental capacity to do certain things, such as:

- create a Power of Attorney
- create an Enduring Power of Attorney
- make a Will
- sign a Personal Directive
- deal with jointly owned property
- enter into informal trusteeships
- sign a supported decision-making agreement
- agree to a co-decision-making order
- sign legal contracts and court documents

Who assesses capacity?

It depends on the situation.

If you are signing legal documents with a **lawyer**, they assess whether you have mental capacity to sign the documents. They might ask you questions and make notes for their file.

Other times, a **doctor or other medical professional** may give an opinion about your mental capacity. Your Personal Directive or Enduring Power of Attorney can come into effect if their opinion is that you no longer have mental capacity.

Capacity assessments determine an adult's cognitive and functional capacity. These assessments must occur before applying for a co-decision-making, guardianship or trusteeship order. Only certain qualified professionals can complete capacity assessments.

For more information on capacity assessments, see CPLEA's booklet *Adult Guardianship and Trusteeship Act*. It is available free at www.cplea.ca/publications

Why should you plan for incapacity?

There are several reasons why you should plan for incapacity.

No one can make financial or personal decisions for you when you lose mental capacity unless:

- you have a valid legal document appointing an alternative decision-maker, or
- someone has a court order allowing them to make decisions for you.

Preparing for incapacity ahead of time also brings peace of mind in stressful situations. If you are in an accident or are diagnosed with a medical condition, decisions might need to be made quickly. If you have not planned ahead, someone will need to go to court to get permission to make decisions for you. This takes time and money. It can also be stressful for family members and cause disagreements about who should be making decisions for you.

Finally, planning for incapacity gives you more control about who will make decisions for you. You can appoint a person you trust. You should discuss your wishes with them beforehand so that they can make the decision you would have in the situation.

Types of Decision-making

The law divides decision-making into two types:

- financial decision-making
- personal decision-making

When you plan for mental incapacity, you should address both financial and personal decisions. There are different legal documents to deal with financial decisions versus personal decisions. You cannot deal with these two types of decisions in the same legal document, but you can name the same person in each document.

Financial Decision-Making

Financial decisions are about anything related to buying, selling, managing or protecting property. A financial decision relates to anything you can own (including money).

Personal Decision-Making

Personal decisions are decisions about things that are not financial issues, including:

- health care
- where, with whom and under what conditions to live
- with whom to associate
- participation in social activities
- participation in any educational, vocational or other training
- employment
- any legal proceedings that do not primarily relate to financial issues

The rest of this booklet describes legal tools for personal and financial decision-making.

Financial Decision-making Tools

Jointly Owned Property and Bank Accounts

Joint tenancy is a way for two or more people to own property together. The property is registered in everyone's name, as **joint tenants**. Each joint tenant owns the property equally and indivisibly. If one owner dies, the property passes to the other owner(s). This is called the "right of survivorship".

You can own many kinds of property as a joint tenant with other people, such as house, bank account, investments, etc.

There are many advantages to joint tenancy, especially for partners and spouses. If one owner loses mental capacity, the other owners can still make decisions about the property. If one owner dies, the property automatically passes to the other owner(s).

There are some drawbacks too:

- Sometimes parents will add their children to their bank accounts. Because each owner can make decisions about the property, this can lead to misuse of funds or fraud. For example, one owner of a joint bank account can withdraw money or write cheques without the other owner's consent or knowledge.
- Other times parents will add a child as owners of their home for convenience's sake. This can lead to confusion when the parents die. Did the parents intend for the child to keep the house and disadvantage their other children?

If you are thinking of adding someone as a joint owner to your property, make sure you understand what they can do and think about whether you trust them.

Joint tenancy is different from tenants in common. Tenants in common each own a share of the whole property and can decide what to do with their share. For example, two tenants in common might each own 50% of the property. Each person can decide what happens with their 50%, including selling it or giving it away in their Will.

Informal Trusteeships

Informal trusteeships are a way of putting someone in charge of your finances if you have reduced mental capacity. The person helping you is an **informal trustee** and can be a spouse or adult child. They can do things such as:

- deposit your government cheques, such as Canadian Pension Plan or Old Age Security, and
- pay your bills.

An informal trustee has limited authority. They cannot manage your investments or sell your property. To name an informal trustee, you need to fill out separate paperwork for each agency that allows for an informal trusteeship.

For more information about informal trusteeships and which government agencies allow them, see the Government of Alberta's website:

<https://bit.ly/3dNEYBE>

Powers of Attorney

A Power of Attorney is a written, signed, dated and witnessed legal document. It gives the person you appoint the right to act on your behalf with respect to your financial affairs while you are still alive. There are different types of Powers of Attorney, each with different purposes.

An **Enduring Power of Attorney** is made while you have mental capacity. It can come into effect while you still have mental capacity or once you lose it – it depends on what the document says. An Enduring Power of Attorney differs from other Powers of Attorney in that it continues to be effective once you lose mental capacity. Its purpose is to allow someone to make financial decisions for you when you no longer can.

Powers of Attorney that are *not* Enduring Powers of Attorney can only be used while you still have mental capacity. You might give someone power of attorney to pay make payments or deal with other financial issues while you are away on vacation. Or you might give someone power of attorney for a very specific purpose, such as signing purchase documents for a house if you are not available. Once you lose mental capacity, these other Powers of Attorney become invalid.

You can make your own Enduring Power of Attorney or ask a lawyer to make one for you.

For more information on Powers of Attorney, see CPLEA's booklets **Making an Enduring Power of Attorney**, **Being an Attorney** and **General Powers of Attorney**. They are available free at www.cplea.ca/publications

Personal Decision-making Tools

Personal Directives

A Personal Directive is a written, signed, dated and witnessed legal document. It gives the person you appoint (your **Agent**) the right to make decisions for you about personal, non-financial issues while you are still alive. This can include decisions related to health care, housing and medical treatment. Sometimes this document is called a “Living Will” but the correct legal term in Alberta is Personal Directive.

For more information on Personal Directives, see CPLEA's booklets **Making a Personal Directive** and **Being an Agent**. They are available free at www.cplea.ca/publications

A Personal Directive only comes into effect once you lose mental capacity and once your Agent and physician complete a **Declaration of Incapacity form**. Your Personal Directive can say who decides when you have lost mental capacity. Remember, you can also gain back mental capacity. If you become mentally *capable* again, your Agent and service provider can sign a **Determination of Regained Capacity form**.

The Government of Alberta has a Personal Directive template you can fill out. It is available online. Or you can pay a lawyer to make one for you.

Find a Personal Directive template on the Government of Alberta's website www.alberta.ca/personal-directive.aspx

Supported Decision-Making

Sometimes adults who still have capacity can benefit from the help of a person they trust when making or communicating decisions about personal matters. This arrangement may be helpful where:

- a capable adult faces difficult decisions and wants a supporter's help in working through the decision-making process
- a capable adult has difficulty communicating in English and wants a supporter to help communicate their decisions to other people
- a capable adult has other communication difficulties
- a capable adult has mild disabilities
- a capable adult needs help for a little while due to a temporary condition

A supported adult can name up to three **supporters**. There is no need to go to court. The supported adult must complete a form, called a **Supported Decision-Making Authorization**.

A Supported Decision-Making Authorization automatically ends if the supported adult's Personal Directive comes into effect. If the supported adult does not have a Personal Directive, the Authorization ends when the court appoints a co-decision maker or a guardian.

Find the Supported Decision-Making Authorization form on the Government of Alberta's website
www.alberta.ca/supported-decision-making.aspx

Co-Decision-Making

An adult who has lost some capacity but can still make personal decisions with support can agree to a co-decision-making order. The adult named in the order is the **assisted adult**. The person named in the order to help the assisted adult is the **co-decision-maker**.

For more information on supported decision-making and co-decision making, see CPLEA's booklet *Adult Guardianship and Trusteeship Act*. It is available free at www.cplea.ca/publications

This arrangement may be helpful where the assisted adult:

- cannot make personal decisions on their own but can with the help and support of another person, and
- has a close relationship with someone willing to give decision-making support, and
- does not have a guardian or Personal Directive.

The assisted adult must agree to the arrangement before the court makes the co-decision-making order.

Find the application forms on the Government of Alberta website
<https://www.alberta.ca/co-decision-making.aspx>

Planning for Death

Now is also a good time to make plans for what happens to your property after you die. A **Will** is a legal statement of how you want your Personal Representative to deal with your estate after your death.

You must have **testamentary capacity** to make a Will. This means you must understand the purpose of the document, what property you own, and who you are giving that property to. You must also understand to whom you have legal obligations (such as partners and children) and the consequences of giving your property to some persons over others.

Your Will does not deal with all property. This means some property does not form part of your estate and your Personal Representative does not deal with it. This property includes:

- Property you own as a joint tenant with others, such as a house, land or bank account.
- Assets where you have designated a beneficiary other than your estate, such as investment accounts, insurance policies or pension plans.

If you do not have a Will, you die intestate. The law says what happens to your estate in these cases – who manages and inherits it.

For more information on Wills, see CPLEA's booklets **Making a Will** and **Being a Personal Directive**. See also the booklet **Beneficiaries: Dying Without a Will** for more information on who inherits your estate if you do not have a Will. They are all available free at www.cplea.ca/publications

Planning for Incapacity

This booklet is one of many publications produced by the Centre for Public Legal Education Alberta. All publications can be viewed and downloaded for free by visiting www.cplea.ca/publications or you may order pre-printed publications to be sent to you by visiting www.cplea.ca/store

Other publications related to this topic that may interest you include:

- Making a Will
- Making a Personal Directive
- General Powers of Attorney
- Adult Guardianship and Trusteeship Act
- Making an Enduring Power of Attorney
- Mental Capacity
- Medical Assistance in Dying

Special thanks to the Alberta Law Foundation and the Department of Justice Canada for providing operational funding, which makes publications like this possible.



Phone 780.451.8764
Fax 780.451.2341
Email info@cplea.ca
Web www.cplea.ca

© 2021 Legal Resource Centre of Alberta Ltd.
Operating as: Centre for Public Legal Education Alberta

 You should **NOT** rely on this booklet for legal advice. It provides general information on **Alberta law only**.