

Being an Agent



This booklet is for Albertans who want to learn more about what is involved in being named an Agent under someone's Personal Directive. If you need more detailed help or legal advice, see the Resources section at the back of this booklet.



You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2019

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.

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What is an Agent?

A **Personal Directive** is a written, signed, dated and witnessed document that appoints someone else to look after your personal matters (non-financial only).

The **Maker** is the person who makes a Personal Directive.

Mental capacity is the ability to understand information that is relevant to making a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

A **Power of Attorney** is a written, signed, dated and witnessed document that gives someone else (your Attorney) the right to act on your behalf with respect to your financial affairs while you are still alive. A Power of Attorney can be for a specific act, a definite period of time or general in nature.

An Agent is the person named in a **Personal Directive** who will make personal decisions on behalf of the **Maker** when the Maker no longer has the **mental capacity** to do so.

Personal decisions include the giving of consent, the refusal to give consent, or the withdrawal of consent about any personal matter.

A personal matter is anything of a non-financial nature that relates to a person including:

- health care;
- accommodation;
- who the person may live and associate with;
- participation in social, educational and employment activities;
- non-financial legal matters such as providing consent for the release of medical records; and
- any other personal and legal decisions.

An Agent does not make decisions about financial issues. A **Power of Attorney** is used for financial decision making.

Agent Requirements

Any person can be an Agent if they:

- are over the age of 18;
- have the mental capacity to make decisions for the Maker;
- are responsible and trustworthy;
- know the Maker well enough to understand and interpret instructions; and
- have the time and willingness to do the job.

It is most convenient if the Agent lives in the same city, or at least the same province, as the Maker.

You do not have to agree to be an Agent if you do not want the job.

Agent Responsibilities

An Agent:

- confirms that the Personal Directive is in effect;
- consults with the Maker before making decisions;
- makes the personal decisions of the Maker for as long as the Maker remains incapacitated;
- monitors the Maker for change in capacity so that if the Maker regains mental capacity the proper paperwork is completed;
- keeps a record of personal decisions, which must be retained for the entire duration of the Maker's incapacity and for two years thereafter;
- provides a copy of the Personal Directive and the record of decisions to the Maker, the Maker's lawyer, other legal representatives and any other Agent.

When an Agent acts with reasonable effort and in good faith, there is no liability.

Agents are also encouraged to consult with people who are knowledgeable in the area of concern, as well as those affected by the decision.

An Agent can be paid for their time if stated in the Personal Directive. Usually a family member or friend acts as the Agent and does not receive payment. The Maker pays any expenses, such as photocopying and long distance phone calls.

Before a Personal Directive comes into effect, the Agent should gather or note:

- a notarized copy of the Personal Directive;
- the location of the original Personal Directive;
- details about how the Maker's loss of mental capacity will be diagnosed;
- whether anyone will be reviewing your decisions as Agent;
- clarification on whether you will be paid a fee for your services as Agent;
- the names and contact details of other people who have a copy of the Personal Directive;
- the names and contact details of people that you are to inform when the Personal Directive comes into effect; and
- the name and contact details of who has been named as an Attorney under any Power of Attorney made by the Maker.

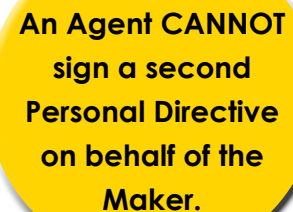
The Agent should also:

- recommend that the Maker register the Personal Directive with the Alberta Personal Directive Registry;
- discuss the instructions in the Personal Directive with the Maker;
- talk to family members, the beneficiaries, or anyone who may be affected by your appointment as Agent;
- stay up to date on any changes to the Personal Directive;
- recommend that the Maker carries a note with them at all times (such as in their wallet) indicating that you are the Agent; and
- if the Maker regularly spends time outside Alberta, recommend that the Maker complete a similar document that will be valid in that jurisdiction.

Agent Powers

The Agent's decisions include giving of consent, the refusal to give consent, or the withdrawal of consent about any personal matter. A personal matter is anything of a non-financial nature that relates to a person including:

- health care;
- accommodation;
- who the Maker lives with;
- participation in social and employment activities;
- non-financial legal matters such as providing consent for the release of medical records; and
- any other personal or legal decisions.



**An Agent CANNOT
sign a second
Personal Directive
on behalf of the
Maker.**

The **Personal Directive Act** specifies that the Maker cannot approve certain things, including:

- psychosurgery;
- sterilization that is not medically necessary;
- removal of tissue from the Maker's living body for transplant of medical research purposes; or
- participation by the Maker in research or experiments if there is little or no help to the Maker.

Agents should only make personal care decisions that the Maker cannot make. The Maker may be able to decide on breakfast but be incapable of deciding to have surgery.

An Agent can quit at any time if the Personal Directive is not yet in effect. After the Personal Directive is in effect, a co-agent or alternate agent can take over. If no alternate agents are named, or all agents refuse to act, the Personal Directive will cease to be in effect. Someone must apply to the courts to become the guardian of the Maker under the **Adult Guardianship and Trusteeship Act** (application for **guardianship order**).

Your responsibilities as an Agent end:

- when the Maker regains mental capacity;
- if the Personal Directive includes a date or circumstance where it can be revoked or changed;
- if the Maker dies;
- if a court determines the Personal Directive ceases to have effect;
- any time you no longer wish to be an Agent; or
- when you die.

How a Personal Directive Works

A Personal Directive is a written, signed, dated and witnessed document that appoints someone else to look after your personal matters in the event that you are incapable of doing so.

A Personal Directive comes into effect once the Maker has been determined to be incapable of making their own personal care decisions. The Personal Directive is used until the Maker can make their own personal care decisions again.

The Personal Directive should define who determines mental incapacity. If this is not defined in the Personal Directive, the law requires that two service providers make the decision. One of the service providers must be a physician or psychologist.

Print and electronic copies of the **Adult Guardianship and Trusteeship Act** and the **Personal Directives Act** can be accessed at:

qp.alberta.ca

A **guardianship order** of an adult is an order of the court made under section 26 of Alberta's **Adult Guardianship and Trusteeship Act** in response to an application by a person requesting to be named the adult's guardian.

Complaints must be made in writing to the **Office of the Public Guardian**.

The form is available at:

www.alberta.ca/complaints-about-decision-Makers.aspx

or by calling

1.877.427.4525

A "Declaration of Incapacity" must be written once the decision is made that the Maker no longer has mental capacity. A copy of the Declaration of Incapacity must be given to the Maker, physician or psychologist, the Agent, and any other persons named in the Personal Directive.

The Agent must inform the Maker's nearest relative (unless the Personal Directive says not to) as well as the Maker's legal representative that the Personal Directive is in effect.

A Personal Directive must be:

- dated;
- signed by the Maker in the presence of a witness; or another person on behalf of the Maker in the presence of both the Maker and the witness if the Maker is physically incapable of signing; and
- signed by the witness in the presence of the Maker.

If there is more than one Personal Directive, the most recent one is used.

A Personal Directive from another province must meet the requirements of Alberta's *Personal Directives Act* to be valid in Alberta. If the Maker is out of province, the Personal Directive may not be valid.

Reviewing Agent Decisions

The *Personal Directives Act* does not include a method of reviewing decisions made by the Agent. A provision can be added to the Personal Directive to review agent decisions. If such a provision exists, the Maker can ask for a review at any time.

Any interested party can apply to the Court of Queen's Bench to question the capacity of the Maker at the time the Personal Directive was made.

The Alberta **Office of the Public Guardian** can investigate complaints about the actions or inactions of an Agent. The Office of the Public Guardian only investigates complaints involving an Agent failing to follow the Personal Directive or fulfill the duties of an Agent leading to physical or mental harm to the Maker. All other complaints can still be resolved through a court application.

If the investigation finds the complaint is valid, the Office of the Public Guardian will:

- try to resolve the matter,
- make a referral to an alternative dispute resolution process, or
- apply to the Court for one or more orders, including revoking of an Agent's authority.

Service Providers

Agents should consult with service providers who are knowledgeable in the area of concern, such as doctors or psychologists.

Service providers for the Maker must:

- follow clear instructions of the Agent that are relevant, or
- follow clear instructions in the Personal Directive if the Agent is unavailable or unwilling to make a decision.

In the event of significant change in the capacity of the Maker, the service provider must:

- consult with the agent; and
- complete the "Determination of Regained Capacity" form.

If the agent and service provider do not agree, two service providers (one must be a physician or psychologist) must assess the Maker's capacity.

Making decisions for an adult declared incapable:

<https://www.alberta.ca/specific-decision-making.aspx>

Information for capacity assessors:

<https://www.alberta.ca/resources-for-capacity-assessors.aspx>

Emergencies

In the case of an emergency, doctors can help a person who appears to lack mental capacity when:

- the Personal Directive cannot be found;
- an Agent cannot or will not make a decision;
- the Agent cannot be found and the Personal Directive does not have clear instructions; or
- the Personal Directive does not appoint an Agent and does not have clear instructions.

After providing emergency medical help, the health care provider must contact:

- the Maker's Agent or Guardian;
- if there is no Agent or Guardian, the Maker's nearest relative;
- if there is no nearest relative, the Maker's legal representative; and
- if there is no legal representative, the Public Guardian.

When Problems Arise

Disagreements with Another Agent


The decision of the majority of Agents must be followed if the Personal Directive does not offer a method of resolving disagreements. Disagreeing Agents should consult with family members or service providers. Agents can apply to the courts for direction.

When Agents are named jointly, the *Personal Directives Act* states that the Agent listed first communicates decisions to doctors, caregivers, family or friends.

Disagreements with Family or Service Providers

An Agent must follow the wishes of the Maker as expressed in the Personal Directive. Sometimes loved ones are not happy with the decisions the Agent is making. The Agent is obligated to follow the instructions in the Personal Directive, regardless of others.

Limit disagreements with family or service providers by communicating a strategy with the affected parties.



**Any disputes
can be settled
in court.**

When the Maker Loses Capacity

1. Locate the Personal Directive and read it as soon as possible.

Most people keep their original Personal Directive in a safety deposit box. To look in the safety deposit box, contact the bank and take the safety deposit key, your copy of the Personal Directive and your identification. Tell the bank that you are the Agent and looking for the original Personal Directive. If the Personal Directive is there and names you as an Agent, they should let you take the document. The lock can be drilled open for a fee if the key cannot be found.

Once you have the original, you should make many notarized copies, as most service providers will want to see and keep a **notarized copy**.

2. Ensure there is a proper Declaration of Incapacity.

A Declaration of Incapacity is a document that confirms that the Agent no longer has the mental capacity to make personal decisions on their own. The form is available from hospitals, care facilities, and doctors.

The Personal Directive may state who is to sign the Declaration of Incapacity. The named person(s) must sign the document after consulting with a doctor or psychologist, who also must sign the document. If the Personal Directive does not say who makes the Declaration, then the form must be completed by two medical practitioners. One must be a physician or psychologist.

Ensure the document is clearly filled out and that it is dated, signed, and consistent with the Personal Directive.

A **notarized copy** is a document that has been certified by a notary as a true copy of the original.

In Alberta, a notary is a person given powers by the *Notaries and Commissioners Act* to certify documents.

An **adult interdependent partner** is a person with whom you are in an adult interdependent relationship.

An **adult interdependent relationship** is a term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

It is a "relationship of interdependence" between two people who:

- have lived together for three years or more; or
- live together and have a child together, by birth or adoption; or
- have signed an adult interdependent partner agreement.

A "relationship of interdependence" exists where two people:

- share one another's lives;
- are emotionally committed to one another; and
- function as an economic and domestic unit.

3. Immediately inform everyone who needs to know.

Once the Declaration of Incapacity is issued inform all relevant parties. The Personal Directive may contain a list of who to notify, or the Maker may have told the agent verbally.

If not included in the list, the Agent must inform the Maker's nearest relative. The ordered list of nearest relative is:

1. spouse or **adult interdependent partner**;
2. son or daughter;
3. father or mother;
4. brother or sister;
5. grandfather or grandmother;
6. grandson or granddaughter;
7. uncle or aunt; and
8. nephew or niece.

Within this list:

- a whole blood relative is preferred to a half-blood relative of the same description,
- in any category, the elder is preferred to a younger relative, and
- gender is irrelevant.

If the Personal Directive indicates that the person who would qualify as the nearest relative is not to be notified, do not notify that person and notify the next person on the list.

Each notice should:

- be dated;
- be in writing;
- state that the Personal Directive is in effect;
- state that a Declaration of Incapacity has been issued, and that the Maker can challenge this by application to a court.

4. Find out if there is a Power of Attorney.

The Agent can also be the Attorney under the Power of Attorney. If not, the Agent will have to work with the Attorney where decisions are both personal decisions and financial decisions.

5. Find out if there is a Will.

If you are the Personal Representative under the Will, you will want to address any conflicting issues about your roles and actions. The Will may contain information that can help you make decisions.

6. Determine the decisions that need to be made immediately.

An Agent's job can be brief or it can go on for many years. Go through the Maker's documents and make a list of decisions including timelines. Determine which decisions should include input from the Maker or their family.

7. Make the necessary decisions.

The Agent should make the necessary decisions as they come up, in the order that makes sense.

When making decisions the Agent must:

- consult with the Maker;
- follow any clear instructions set out in the Personal Directive;
- if there are no clear instructions, make the decisions you believe the Maker would have made based on your knowledge of their wishes, beliefs and values;
- if there are no clear instructions and you do not know the Maker's wishes, beliefs or values, then make decisions you believe are in the Maker's best interests.



An Agent can consult the Maker's family and seek advice from the Office of the Public Guardian or the court.

8. Stay aware of changes in the capacity of the Maker.

Agents should only make those personal care decisions that the Maker cannot make themselves. Service providers must make reasonable efforts to determine whether the Maker continues to lack capacity. The Maker might be incapable of making a serious health care decision but still be able to make their own choices about routine day-to-day matters.

If it seems to the Agent that there has been a significant change in the Maker's capacity, the Agent must:

- consult with a health care service provider; and
- assess the Maker's capacity.

If the Agent and service provider agree the Maker has regained capacity to make decisions, complete a “**Determination of Regained Capacity** Form”. If the Agent and service provider do not agree, the Agent must have two service providers (one must be a physician or psychologist) assess the Maker's capacity.

9. Keep proper records.

One of your duties as Agent is to keep complete and detailed records of the decisions you make.

Keeping complete and detailed accounts includes:

- documenting the date of your first decision;
- keeping a list of all decisions made while the Maker is incapacitated;
- keeping all documentation relating to all attempts for a Determination of Regained Capacity;
- keeping a copy of the Personal Directive, court orders, decisions of the Office of the Public Guardian and any other documents that relate to your authority; and
- keeping these records for the duration of the Maker's incapacity and for at least two years after your authority ceases.

Glossary

adult interdependent partner

A person with whom you are in an adult interdependent relationship.

adult interdependent relationship

A term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

It is a "relationship of interdependence" between two people who:

- have lived together for three years or more; or
- live together and have a child together, by birth or adoption; or
- have signed an adult interdependent partner agreement.

A "relationship of interdependence" exists where two people:

- share one another's lives; and
- are emotionally committed to one another; and
- function as an economic and domestic unit.

Agent

A person designated in a Personal Directive to make personal decisions on behalf of the Maker.

Declaration of Incapacity

A written document that confirms that a Maker of a Personal Directive no longer has the mental capacity to make personal decisions on their own behalf.

Determination of Regained Capacity

A written document that confirms that a Maker of a Personal Directive has regained mental capacity to make some or all personal decisions on their own behalf.

Donor

A person who makes a Power of Attorney or an Enduring Power of Attorney.

Guardian (of an adult)

A person who has been appointed to make non-financial decisions for an adult who no longer has the mental capacity to make those decisions.

Guardianship Order (of an adult)

An order of the court made under section 26 of Alberta's *Adult Guardianship and Trusteeship Act* in response to an application by a person requesting to be named the adult's guardian.

health care

Any examination, procedure, service, or treatment for a therapeutic, preventive, palliative, diagnostic, or other health related purpose.

Maker

A person who makes a Personal Directive.

mental capacity

The ability to understand information that is relevant to making a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

personal decision

A decision that relates to a personal matter and includes, without limitation, the giving of consent, the refusal to give consent, or the withdrawal of consent to health care.

Personal Directive

A written, signed, dated and witnessed document that appoints someone else to look after your personal matters (non-financial only).

personal matter

Anything non-financial including:

- health care;
- accommodation;
- with whom the person may live and associate;
- participation in social, educational, and employment activities;
- non-financial legal matters; and
- any other matters prescribed by the regulations of the *Personal Directives Act*.

Power of Attorney

A written, signed, dated and witnessed document that gives someone else (your Attorney) the right to act on your behalf with respect to your financial affairs while you are still alive. A Power of Attorney can be for a specific act, a definite period of time or general in nature.

psychosurgery

Any procedure that removes, destroys, or interrupts the continuity of normal brain tissue or that inserts electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat intractable physical pain or epilepsy where those conditions are clearly demonstrable.

service provider

A person who carries on a business or profession that provides a personal service to an individual that requires a personal decision from that individual. A nursing home is an example of a service provider.

Will

A legal statement of how a person wants their property to be dealt with after their death.

Resources

Resolution and Court Administration Services (RCAS)

Resolution and court support services across Alberta.

Contact Centre: 1.855.738.4747

<https://www.alberta.ca/rcas.aspx>

Office of the Public Guardian and Trustee (OPGT)

Services and support for vulnerable Albertans and their families.

Toll-free: 310.0000 then 780.422.1868

www.alberta.ca/office-public-guardian-trustee.aspx

Service Alberta

Information on Personal Directives:

<https://www.alberta.ca/personal-directive.aspx>

Personal Directive Registry:

<https://pdr.alberta.ca/web/Default.aspx>

Making decisions for an adult declared incapable:

<https://www.alberta.ca/specific-decision-making.aspx>

Information for capacity assessors:

<https://www.alberta.ca/resources-for-capacity-assessors.aspx>

Publication containing information on Personal Directives, Capacity, etc. "Saying farewell: a guide to assist you with preplanning and with the death and dying process" 7th ed.

Calgary Legal Guidance

Legal clinic in Calgary. Call for hours and eligibility.

Phone: 403.234.9266

<http://clg.ab.ca>

Edmonton Community Legal Centre

Legal clinic in Edmonton. Call for hours and eligibility.

Phone: 780.702.1725

www.eclc.ca

Law Society of Alberta Lawyer Referral Service

Provides names of three lawyers. Each lawyer to provide half-hour consultation free of charge.

Toll-free: 1.800.661.1095

<https://www.lawsociety.ab.ca/public/lawyer-referral/>

Legal Aid Alberta (Legal Services Centre)

Toll-free: 1.866.845.3425

www.legalaid.ab.ca

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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 www.cplea.ca/store

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

- Making a Will
- Making a Personal Directive
- Making an Enduring Power of Attorney
- Being a Personal Representative
- Being an Attorney Under an Enduring Power of Attorney
- General Powers of Attorney
- *Adult Guardianship and Trusteeship Act*

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You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2019