

Be an Agent



**Personal
Directive**

About CPLEA

The Centre for Public Legal Education Alberta, also known as CPLEA, is a not-for-profit, non-government organization committed to making the law understandable for Albertans. We offer **free** legal information and learning resources in plain language.

Our resources increase awareness and understanding of the law and empower Albertans to take action and, ultimately, gain better access to justice.

Visit www.cplea.ca to learn more about the laws that impact your life.

CPLEA is the operating name for the Legal Resource Centre of Alberta Ltd.

Funders and partners

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Canada

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Be an Agent

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Introduction

This booklet summarizes key information you should know before and while acting as an agent under someone's Personal Directive. The law can be complicated but understanding your responsibilities doesn't have to be.

This booklet replaces CPLEA's previous "Being an Agent" booklet.

Don't miss these related CPLEA resources!

- Estate Planning 101
- Capacity
- Be an Attorney
- Be a Personal Representative
- Adult Guardianship and Trusteeship Act (AGTA)
- Getting a Grant of Probate or Administration

Find the above resources as well as more information about planning ahead in different formats, including info sheets, FAQs, videos and blog posts.



Get started at cplea.ca/planning-for-future-care/
and cplea.ca/willsandestates/

What is an Agent?

An agent is the person named in a **Personal Directive** to make **personal decisions** for its maker if they lose capacity.

A **maker** is a person who makes a Personal Directive.

Personal decisions are any non-financial decisions. They include decisions about the maker's:

- healthcare
- living situation
- social activities
- education and training
- work
- legal proceedings not about financial issues

To act as an agent, you must be 18 years or older and have **capacity**.

The Personal Directive may name you to be an agent, co-agent or alternate agent.

- If you're named as the sole agent, you alone make decisions for the maker.
- If you're named as a **co-agent**, you share agent responsibilities with other named co-agents. The Personal Directive should say whether you must act **jointly** (together) or **severally and jointly** (both alone or together). If the Personal Directive does not say anything, you must act jointly, meaning you and the other co-agents must make all decisions together.
- If you're named as the **alternate agent**, the Personal Directive should say in what order you act. For example, if you're the first alternate agent, then you only act if the first-named agent can no longer act.

An agent **cannot** make financial decisions. Only an **attorney** named in an **Enduring Power of Attorney** or a trustee named in a trusteeship order can make financial decisions for the donor.

Someone may name you to be both their agent in their Personal Directive and their attorney in their Enduring Power of Attorney. While this gives you the power to make both personal and financial decisions for the person, you must separate your responsibilities. You have different legal obligations as an agent than you do as an attorney.

Alberta's *Personal Directives Act* sets out the rules for Personal Directives and agents.



Learn more about Personal Directives and Enduring Powers of Attorney in CPLEA's **Estate Planning 101** booklet: www.cplea.ca/estate-planning-101.pdf

How a Personal Directive Works

A Personal Directive is a legal document used while its maker is still alive but does not have **capacity**, meaning they can no longer make decisions for themselves.

To be valid, a Personal Directive must be in writing, dated, and signed by the maker and at least one witness.

A Personal Directive is only in effect while the maker does not have capacity to make personal decisions for themselves. If the maker regains capacity, you must stop acting for the maker. If the maker loses capacity again, the Personal Directive can come back into effect.

A Personal Directive may:

- name an agent and alternate agents
- describe your authority to make all or some personal decisions for the maker
- say who decides whether the maker has lost capacity
- say who you should and should not notify when the Personal Directive comes into effect
- if the maker has children under 18 years, name someone to care for their children

In their Personal Directive, the maker may describe their wishes for or against certain medical procedures, but they don't have to. A Personal Directive can be very vague, which empowers you to make personal decisions for them based on what you know or think they would have wanted.

Agent Powers and Responsibilities

As an agent, you have legal powers and responsibilities that are set out in both the Personal Directive and the law.

When your role starts and stops

Your powers and responsibilities **start** when the maker loses capacity.

Your powers and responsibilities **end** when one of the following happens:

- the maker regains capacity
- the maker dies
- a court decides the Personal Directive is no longer in effect
- you decide you no longer want to be an agent
- you lose capacity
- you die

While the maker has capacity, they can revoke (cancel) their Personal Directive or change it to name a different agent.

Your powers and responsibilities

The Personal Directive will say what **powers** you have, either full or limited, to make personal decisions for its maker. If the Personal Directive limits your powers, it must be clear what powers you have. If the Personal Directive gives you full powers, this means you can make all personal decisions for the maker except for those the law says you cannot.

The law says you **cannot** give consent on behalf of the maker:

- for psychosurgery
- for sterilization that is not medically necessary
- to participate in research or experimental activities that offer them little or no potential benefit
- to be a living donor
- to receive medical assistance in dying (MAID)

You also have legal **responsibilities** towards the maker. You must:

- if possible, talk with the maker about their wishes before you make a decision for them
- follow all lawful instructions in the Personal Directive, even if you don't agree with them
- keep their personal information private
- record all decisions you make on behalf of the maker
- act in the best interests of the maker, not yourself or anyone else

As long as you act in good faith while making decisions for the maker, you are not liable to others for your actions or inactions.



Learn more in CPLEA's **Medical Assistance in Dying** info sheet:
www.cplea.ca/MedicalAssistanceInDying.pdf

Before You Agree to Act

Below are some things you should think about before agreeing to act as an agent.

Do you want to act?

The maker of a Personal Directive should talk to you before they name you as their agent. You can decide at that point whether you are willing to act if the maker one day loses capacity.

While you can decline to act when the maker actually loses capacity, you may leave the maker without an agent if they haven't named an alternate.

What is your relationship with the maker?

You may be a family member or friend of the maker. It's important to know the maker well enough to feel comfortable making important personal decisions for them.

Do you have the time to be an agent?

Being an agent can take a lot of time and effort. The maker may live for many years with no capacity, during which time you'll have to make decisions for them.

Are you well-suited to make personal decisions for the maker?

Making personal decisions for the maker can be stressful and emotional. You may have to consider various treatment options and choose the one you think the maker would want. You may also have to make emergency or life-changing medical decisions, such as whether to remove the maker from life support.

Do you want to be paid?

The maker (or their trustee under a trusteeship order or attorney under an Enduring Power of Attorney) must pay you for any expenses you incur while acting for them, such as for photocopying and parking. You can receive payment for your time *if* the maker says so in the Personal Directive. Talk to the maker about whether you want them to pay you. If the maker doesn't have extra money to pay you, you'll be volunteering your time.

Are you organized?

You must record all the decisions you make and keep those records for two years after the maker either regains capacity or passes away.

What are the maker's family dynamics?

The maker can instruct you whether to share information with family members. Dealing with others can be challenging depending on their relationship with the maker.

If You Agree to Act

If you agree to act as the maker's agent, there are several steps you can take while the maker still has capacity to help you perform your role.

Ask the maker for either a copy or original of the Personal Directive

If you don't have the original Personal Directive, make sure you know where to find it quickly. You'll need the original to start acting for them if they lose capacity.

Suggest the maker register their Personal Directive with the Alberta Personal Directive Registry

The registry records your name and contact information. A medical provider can access this information and contact you if they need you to make a decision.

Ask the maker if they also have an Enduring Power of Attorney (EPA) and a Will

If they don't, suggest they make both documents.

If they do, ask who are their attorney (under their EPA) and **personal representative** (under their **Will**). You may be filling one or both of these roles too. If you're not the attorney and personal representative, you'll likely have to work with them. The attorney will provide money you need for certain decisions, such as moving the maker, and reimburse you for your expenses. Once the maker passes away, you may have to hand over information to the personal representative to allow them to wrap up the maker's estate.

Talk with the maker about their wishes, beliefs and values

- Where do they want to live as they age?
- What kinds of medical care do they want or not want?
- Who do they want or not want you to share information with?

While these conversations are not always easy, they are important to help you make decisions for the maker if need be.



Learn more from the Government of Alberta about **how to register with the Personal Directive Registry**: www.alberta.ca/personal-directive

If the Maker Loses Capacity

If you think the maker is losing capacity, you must first activate the Personal Directive before you start making decisions for the maker. Follow the steps below.

1. Activate the Personal Directive

If the maker is showing signs they are losing capacity, you must take steps to activate (start or bring into effect) the Personal Directive. Read the Personal Directive to see how it comes into effect.

The Personal Directive can name a person (such as you, the agent) who must talk with a doctor or psychologist to decide whether the maker has lost capacity. If the person and doctor/psychologist decide the maker has lost capacity, they must both fill out the following form:

Declaration of Incapacity to Make Decisions about a Personal Matter (Section 9(2)(a)) - Schedule 2

If the Personal Directive doesn't name someone or that person doesn't want to decide whether the maker has lost capacity, then two service providers can declare in writing that the maker has lost capacity. One of the service providers must be a doctor or psychologist. Both service providers must fill out the following form:

Declaration of Incapacity to Make Decisions about a Personal Matter (Section 9(2)(b)) - Schedule 3

Once you have a completed Declaration of Incapacity, the Personal Directive is in effect, and you can start making personal decisions for the maker. Keep both the Declaration of Incapacity and the Personal Directive with you while you are carrying out your agent duties. Others may ask to see it as proof you have authority to act for the maker.



Find the **declaration forms** on the Office of the Public Guardian and Trustee (OPGT) website: www.alberta.ca/office-public-guardian-trustee-forms

2. Inform everyone who needs to know

The Personal Directive may list, or the maker may have told you, who you need to inform that the Personal Directive is in effect. The Personal Directive or maker may also say who **not** to inform.

You must inform the maker's **nearest relative**, unless the Personal Directive says not to. The maker's nearest relative is the first person who exists in the following list:

- spouse or adult interdependent partner
- child
- parent
- sibling
- grandparent
- grandchild
- uncle or aunt
- nephew or niece

For example, if the maker doesn't have a spouse or adult interdependent partner but they have a child, that child is their nearest relative.

Within a category in the above list, a whole blood relative is preferred to a half-blood relative, and the elder relative is preferred to the younger relative. For example, if the maker has no spouse or adult interdependent partner but has three children, the oldest child is the nearest relative.

3. Make decisions for the maker

Once the Personal Directive is in effect, you make personal decisions for the maker as if the maker was making the decisions themselves.

How do you make decisions?

First, read the Personal Directive. If it gives **instructions** on how to make certain decisions, you must follow those instructions.

If the Personal Directive does not leave clear instructions, then you must make the decision you believe the maker would have made in the situation based on what you know about their **wishes, beliefs and values**. This is why it's a good idea to talk to the maker about their wishes before they lose capacity. You also have a duty to talk with the maker before you make a decision for them.

If you don't know the maker's wishes, beliefs and values, then you must make the decision that you believe is in the maker's **best interests**.

4. In an emergency

Even if there's a Personal Directive, a doctor can provide emergency medical help to the maker in the following situations:

- the Personal Directive is not yet activated
- the healthcare provider cannot find the Personal Directive
- you cannot or will not make a decision
- the healthcare provider cannot find you and the Personal Directive doesn't have clear instructions
- the Personal Directive doesn't appoint an agent and doesn't have clear instructions

After providing emergency medical help, the healthcare provider must contact you.

5. Keep records of your decisions

You must record all personal decisions you make for the maker. Keeping complete and detailed records includes:

- safekeeping the original Personal Directive
- a list of all decisions you make, including dates and relevant information
- all documents, including declarations of incapacity and determinations of regained capacity
- all decisions of the Office of the Public Guardian and Trustee (OPGT) and courts
- any other documents relating to your authority

It's important to keep these records organized. You must keep these records for at least two years after the maker regains capacity or passes away.

If the Maker Regains Capacity

The maker may regain capacity. Maybe they have recovered from medical treatment and are able to make their own decisions again.

You or a healthcare provider can decide whether the maker has capacity to make their own personal decisions again. Who decides determines which form you need to declare the maker has regained capacity.

If you think the maker is regaining capacity, you must talk with a healthcare provider to assess the maker's capacity. If you and the healthcare provider agree the maker has regained capacity, you and the healthcare provider must fill out the following form:

Determination of Regained Capacity (Section 10.1(1)) - Schedule 4

If the healthcare provider thinks the maker is regaining capacity, they must talk with you to assess the maker's capacity. If the healthcare provider believes the maker has regained capacity, they must fill out the following form: **Determination of Regained Capacity (Section 10.1(2)) - Schedule 5**

If you and the healthcare provider do not agree on whether the maker has regained capacity, you must ask two service providers (one must be a doctor or psychologist) to assess the maker's capacity. If they believe the maker has regained capacity, they both must fill out the following form:

Determination of Regained Capacity (Section 10.1(5)) - Schedule 6



Find the **determination forms** on the Office of the Public Guardian and Trustee (OPGT) website: www.alberta.ca/office-public-guardian-trustee-forms

When Problems Arise

Issues may come up. You may not be able to find the original Personal Directive. Someone may challenge the Personal Directive or your authority as agent. You and your co-agent may disagree on how to make a decision. Or you may not agree with a family member or service provider.

If you cannot find the original Personal Directive

If you cannot find the original Personal Directive, you may be able to act if you have a copy of it. However, it's a good idea to get legal advice before you start acting as the agent.

If you can't find the original or any copies, you cannot act. The person with priority in law will have to apply to the court for a guardianship order to make personal decisions for the maker.



Learn more about guardianship orders in CPLEA's **Adult Guardianship and Trusteeship Act** booklet: www.cplea.ca/AdultGuardianshipAndTrusteeAct.pdf

If someone challenges the Personal Directive or your authority

Unless the Personal Directive says not to:

- if they ask, you must give a copy of your decision records to the maker, the maker's lawyer or legal representative, or other agents who also have authority to make those decisions
- you may share a copy of your decision records with anyone you think it is in the maker's best interests to do so with

The maker's friends, family or healthcare providers can make a complaint about you to the **Office of the Public Guardian and Trustee (OPGT)**. The OPGT can investigate further. If the OPGT cannot resolve the issue, they can ask the court to do so.

The maker's friends, family and healthcare providers can also ask the court to:

- decide whether you or the maker has capacity
- decide whether the Personal Directive is valid
- change, confirm, delay or cancel your decisions
- decide what authority you have
- revoke your authority, fully or partially
- give advice and direction
- make a decision if you and your co-agents cannot agree
- make any other order it sees fit

If you and a co-agent disagree

If you and your co-agents disagree on how to make a decision, review the Personal Directive. If it gives a process for resolving disagreements, follow the process.

If the Personal Directive doesn't say how to resolve disagreements, talk with family members or service providers to help you come to an agreement. If there are an odd number of co-agents, follow the decision of the majority. If you're at an impasse, you can ask the court for direction.

If you and your co-agent(s) disagree on who should communicate decisions to service providers or loved ones, the first named co-agent is responsible for doing so.

If you and family or service providers disagree

Remember, you have a legal duty to act for the maker. You must follow the maker's instructions in the Personal Directive. Loved ones or service providers may have opinions about what decision you should make, but you alone should make the decision after reviewing the Personal Directive and (if possible) talking to the maker.

Glossary

An **adult interdependent partner**, or **AIP**, is a person in an adult interdependent relationship.

An **adult interdependent relationship**, or **AIR**, is unique to Alberta and describes an unmarried couple who live together, with or without children. It exists in three situations:

1. Two people have signed an Adult Interdependent Partner Agreement.
2. Two people have lived together in a relationship of interdependence for three or more years.
3. Two people live together in a relationship of interdependence and have a child together, by birth or adoption.

A relationship of interdependence exists where two people share one another's lives, are emotionally committed to one another and share their home and finances.

An **agent** is a person named in a Personal Directive to make personal decisions for the maker.

An **attorney** is a person named in an Enduring Power of Attorney to make financial decisions for the donor.

Capacity means a person can understand and appreciate the nature of their decisions.

A **donor** is a person who makes an Enduring Power of Attorney.

An **Enduring Power of Attorney** (EPA) is a legal document that names an attorney to make financial decisions for the donor while they are still alive but do not have capacity.

A **maker** is the person who makes a Personal Directive.

A **Personal Directive** is a legal document that names an agent to make personal decisions for the maker while they are still alive but do not have capacity.

A **personal representative**, also known as an executor, is a person named in a Will to deal with the testator's estate when they die.

A **testator** is a person who makes a Will.

A **Will** is a legal document that sets out the testator's wishes for their property after they pass away. It names a personal representative to deal with the testator's estate. It can also name guardians for the testator's minor children and what the testator wants to happen with their body.

More Resources

Legal Support

Free legal clinics in Alberta

List of legal clinics across Canada that provide free legal support to those who qualify: www.cplea.ca/legalhelp/

Alberta Legal Coaches and Limited Services

Lawyers who provide coaching and limited services, for a fee: albertalegal.org

Law Society of Alberta Lawyer Directory

Find a lawyer in Alberta by name, location, practice areas, language(s) spoken, gender and whether they offer limited scope retainers: www.lawsociety.ab.ca/public/findalawyer/

Government & Court Services

Alberta Law Libraries

Free legal information and resources available at courthouse libraries across Alberta. Some services are also available online: lawlibrary.ab.ca

Government of Alberta

Services and information about advance care planning: www.alberta.ca/decision-making-advance-planning

Office of the Public Guardian and Trustee

An Alberta government office providing services and support for vulnerable Albertans and their families, including help with guardianship and trusteeship orders: www.alberta.ca/opgt-supports

Alberta King's Printer

For free online and print copies of Alberta laws: kings-printer.alberta.ca/Laws_Online.cfm

Notes

This image shows a single sheet of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Still have questions? CPLEA has you covered!

More on this topic

Check out more booklets, checklists, blog posts and videos from the Centre for Public Legal Education Alberta (CPLEA) about estate planning, including about:

- Capacity
- Make a Personal Directive checklist
- Make an Enduring Power of Attorney checklist
- Make a Will checklist
- Be an Agent
- Be an Attorney
- Be a Personal Representative
- Getting a Grant of Probate or Administration
- Beneficiaries: Dying without a Will
- Adult Guardianship and Trusteeship Act

Visit www.cplea.ca/planning-for-future-care and www.cplea.ca/willsandestates to learn more!

Other legal topics

CPLEA also offers free legal information about other legal topics, including:

- Abuse and protection
- Consumer, money and debt
- Family and relationships
- Housing
- Recreation
- Resolving disputes
- Work

Visit www.cplea.ca to get started!