



Let's Talk: **ELDER ABUSE**

Resource Manual

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Module 1:

ELDER ABUSE, CAPACITY, AND THE LAW

This module covers

1.1 Elder Abuse

- › Discussing who's at risk and how abuse presents itself

1.2 Capacity

- › How capacity is defined; who decides capacity; and how incapacity is recognized

1.3 The Law

- › How the laws come to us; the variety and types of laws that govern our behaviour; the court system; the laws that help to avoid or stop abuse; and how law enforcement can assist to keep seniors safe



Eileen's Story

Eileen's grandson, Jason, has been helping her to buy her groceries. To make it easier for Jason to pay for the groceries, Eileen added Jason's name to her chequing account so that he could write cheques. At first Eileen thought that this was working well. But Eileen has started to notice that there are an ever-increasing number of cheques and withdrawals that she does not know anything about. They have not been for very large amounts, but she is uncertain what they are for. Then again, she has been having memory issues lately. Sometimes, Jason asks Eileen for money for things other than groceries. Now Jason says that he needs to borrow \$1,500 to repay a debt. At first, Eileen refused to give the money to him. Eileen was shocked when she received her monthly bank statement. There was a withdrawal of \$1,500 for which she had no record. Eileen knows that Jason has taken the money and she is worried about getting the money back.

Bill's Story

Bill and his niece Betty live together. Betty has been very helpful to Bill in the past, but lately she has been getting more and more impatient with him when he is moving around the apartment. She often takes his arm to help him move fast, but sometimes, to Bill, it feels like more of a push and sometimes it has caused him to stumble and fall. Betty often tells Bill that he is old, clumsy, and useless. Recently, in a hurry, Betty poured boiling water on Bill's hand as she was making him a cup of tea. Bill screamed as the water hit his hand and badly burned it. Bill's neighbour heard the screams and immediately called the police, as it was not the first time that she had heard Bill screaming. Bill does not remember those other times.

Tom's Story

Tom has moved in with his daughter and her family. It seemed like the ideal situation. He has his own room and can share the common spaces. At first, Tom felt that things were going well. More recently, though, things have not gone as smoothly. Tom is now often asked to stay in his room for extended periods of time while his teenage grandchildren use the common spaces. Behind his back, but loud enough to be heard, his son-in-law calls Tom stupid and lazy and threatens to get rid of him unless he shuts up. Tom is no longer sure what happened to his possessions after he moved in. Tom does not feel safe around his son-in-law.

George's Story

George and Chris have been together over 40 years. After many years of health and happiness, George becomes ill. It is a debilitating illness, complete with a vast array of medications, constant falling, failing memory, and increasing frustration. The couple wants to stay together as long as possible, but it becomes increasingly difficult to do so. Dealing with all of this tries Chris's patience, strength, and emotional health. Chris, trying to ensure George's physical safety, starts to confine and restrain George some of the time (so that errands can be completed more quickly). Noticing that some of the medications make George sleepy and more docile, Chris also gives him extra medication on more volatile days. Sometimes, though, George behaves so badly that Chris has on occasion threatened to put George in a home if the behaviour does not improve.

Any deliberate action or lack of action that causes harm to an older adult is elder abuse.

Legal Responses...

to Eileen's Story: Although Eileen would never want to name this behaviour as such, Jason's actions amount to theft—a criminal offence. Eileen could lay criminal charges, but a better approach would be to go to her bank and rescind the joint bank account status. She might consider a Power of Attorney. A lawyer could advise her about the best type of Power of Attorney for her situation.

to Bill's Story: Bill is experiencing mental and physical abuse. A helpful legal response might be a Personal Directive. The scalding episode could actually be called an assault, which is a criminal offence.

to Tom's Story: Tom is experiencing mental abuse, and the episodes he is experiencing in the house are approaching physical abuse. He may need to find another place to live. The police could help with an Intervention Team response. He might also need a Personal Directive or to arrange for a supported decision-making arrangement with someone he trusts.

to George's Story: George's partner Chris seems to be slowly falling into a pattern of abusive behaviour, both physical and mental. He may not realize the seriousness of his actions. George could ask a trusted person for some sort of intervention or meeting. He might also need a Personal Directive or a supported decision-making agreement, but such an agreement should not name Chris, given the present situation.

1.1 Elder Abuse

Those Most At Risk

Every case is unique, with different facts. Risk factors are many and various, possibly including:

- > a history of abuse between family members, for example, spousal abuse becomes elder abuse, or abused children become abusive caregivers to elderly parents
- > dependency, for example, the elderly person becomes dependent on family members, or someone is dependent upon the elderly person for money or housing
- > stress, which might be caused by a number of factors such as mental or physical illness, financial pressures, lack of support systems, lack of choice for accommodation for an elderly person, or fear of one's own aging
- > alcohol or drug use
- > greed
- > lack of knowledge about the degree of care and needs of an elderly person
- > lack of respect given to elderly people in a society that values youth, self-reliance, and energy
- > lack of professional awareness about the problem of elder abuse, so that it might continue undetected.

What Is Abuse?

- > Physical
- > Financial and/or material
- > Psychological
- > Neglect and/or self-neglect
- > Medication abuse

Physical Abuse

Examples	Indicators
<ul style="list-style-type: none"> > pushing, shoving, hitting, slapping, poking, burning > pulling hair, biting, pinching, tickling > threatening to apply force, e.g., shaking a fist, displaying a weapon > confining someone to one place, room, bed, or chair > failing to provide proper food, clean clothing, health care, personal hygiene, or denying social contact (neglect) > forcing someone to take too much medication or withholding required medication > forced sexual activity or inappropriate touching (sexual abuse) 	<ul style="list-style-type: none"> > unexplained injuries in various stages of healing > medical attention sought from a variety of doctors or clinics > history of accidents or injuries > injuries have not received proper medical attention > depression, fear > signs of anxiety in presence of possible abuser > repeated falls > injury to scalp, evidence of hair pulling > rope or belt marks > delay in seeking medical treatment

NOTE: Some of these indicators may be present and the older adult is not being abused; these are merely possible examples and indicators of abuse.

Financial and/or Material Abuse

Examples	Indicators
<ul style="list-style-type: none">> stealing money, belongings, or pension cheques> forcing someone to change a Will> misusing another's bank cards or credit cards> forging a signature on personal cheques or legal documents> withholding money that is needed> forcing or tricking someone to sell a home or possessions, or to pay for unnecessary services> pressuring someone to provide services for free, for example, babysitting or sharing a house> refusing to return borrowed money or property as agreed upon, or when requested by an older adult or his/her agent> abusing power of attorney, guardianship, or trusteeship responsibilities	<ul style="list-style-type: none">> may be confused about finances> may have signed a document without being told of consequences> lack of financial choices and/or decisions> family members moving in without agreement and not sharing costs> unusual bank or ATM activity on behalf of older person> discrepancy between income and standard of living> possessions disappearing> sudden or unexplained difficulty in paying bills> refusal to spend money without agreement of caregiver

NOTE: Some of these indicators may be present and the older adult is not being abused; these are merely **possible** examples and indicators of abuse. ALSO NOTE: These actions may or may not be accompanied by other abusive behaviour (physical or psychological abuse). The abuser could be perfectly pleasant and claiming to act in the older adult's best interest while taking advantage of him/her financially. It may take some time before anyone realizes what is happening, and the older adult may be the only one who sees it.

Psychological Abuse

Examples	Indicators
<ul style="list-style-type: none">> making threats to do something to the older adult or to something or someone that he/she cares about> humiliating, belittling comments and/or put-downs that erode self-esteem> yelling or scolding> begging, pleading, or manipulating someone into doing something he/she doesn't want to do> forced socialization or isolation> treating someone like a child> refusing access to grandchildren, friends, other family members> not allowing someone to make decisions	<ul style="list-style-type: none">> becoming passive, withdrawn, agitated, anxious> depression> unusual weight gain or loss> unexplained paranoia> reluctance to talk openly> making inconsistent statements> appearing nervous around certain caregiver, family member, friend, or neighbour> waiting for caregiver to respond to questions> noticeable behavioural changes including avoiding eye contact> low self-esteem> difficulty sleeping or needing excessive sleep> making excuses for social isolation

NOTE: Some of these indicators may be present and the older adult is not being abused; these are merely *possible* examples and indicators of abuse.

Medication Abuse

Examples	Indicators
<ul style="list-style-type: none">> the misuse of medications, prescriptions, or mood-altering substances on purpose or by accident> over-medication> not providing adequate or appropriate medication when needed or when prescribed	<ul style="list-style-type: none">> reduced mental or physical activity> unusual behaviour, e.g., sleepiness, agitation, tremors> failure to fill prescriptions> reduced beneficial response from medications> depression> making inconsistent statements> appearing confused

NOTE: Some of these indicators may be present and the older adult is not being abused; these are merely *possible* examples and indicators of abuse.

ADDITIONAL RESOURCES ON ELDER ABUSE

- > The Centre for Public Legal Education Alberta has several resources on elder abuse. See their FAQs on “Abuse of Older Adults” at www.cplea.ca/publications/ and the Oak-Net website at www.oaknet.ca/abuse.
-

1.2 Capacity Matters

When we use the law as a tool against abuse, the **capacity** of the person being abused is a critical factor in determining the options that are available.

Mental capacity is the ability to understand and appreciate the nature and consequences of one's decisions.

All legal adults (age 18+ in Alberta) are **presumed** to have mental capacity unless and until established otherwise, as required by law (usually by medical opinion and/or a judge's decision).

From Black and White to a Continuum

A loss of capacity may be evident and sudden. For example, if you are in an accident and wind up in a coma, you cannot make financial decisions and someone will have to be appointed to be your decision-maker. But often, a loss of capacity will be less clear and more gradual, for example, in the case of dementia.

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. A person can flip back and forth between having capacity and not having capacity, especially with older adults, due to factors such as:

- > a medical condition
- > stress and/or anxiety from difficult circumstances (e.g., abuse) or events (e.g., death of a family member)

- > the effect of medication and/or forgetting to take medication
- > exhaustion and time of day
- > diabetes and fluctuating blood sugar levels
- > alcohol and recreation drug use mixed with illness or medication

Capacity is, therefore, more of a continuum. That is, between the clear capacity to make a decision at one end and the clear incapacity to make a decision at the other end, there is a range of more or less capacity.

Even when one does “technically” have capacity, there is a range of abilities. On some days, a person may just need a bit of help. For example, even though Fred had not lost capacity immediately after his diagnosis of early-stage dementia, he had occasional comprehension issues. As he moved closer and closer to incapacity, he needed ever-increasing help from his wife, Linda.

This means that there is a range of abilities from having “good” capacity to having no capacity and a person can move up or down in level of capacity for various reasons. When a person needs a bit of help, he/she may still be able to make some—but not all—decisions. Whether a person has the capacity to make a particular decision depends 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 disorder.

The question of capacity is one of understanding and comprehension. It is not about vulnerability, which is being at risk and/or perhaps in need of care. Nor is capacity about labels, such as “old,” “disabled,” or “mentally ill”.



Mary is 75 years old and lives in a rural community. She has multiple sclerosis, but no cognitive impairments. She has a history of being domestically abused, having been regularly assaulted by her long-time husband. Mary has low-esteem and no friends or close family to support her. When her husband died, Mary's son moved back in with her. He begins to physically and emotionally abuse her and to deliberately make her think she is going crazy. Mary's son takes advantage of her mental distress and forces her to sign a Power of Attorney, giving him control of all her finances.



Indira is 80 years old and lives in an excellent nursing home in an urban setting. Indira suffers from the late stages of Alzheimer's but has no physical impairments. Despite her high level of dementia, Indira's family and friends maintain very close ties with her, visiting her often and trying to include her in their daily lives. Her caregivers respect Indira's values, wishes, beliefs, and her care and lifestyle choices, as much as she is able to express them. When she cannot express her choices, her caregivers use pre-existing, pre-expressed values, wishes, and beliefs that Indira had set out prior to the onset of her disease. Indira's assets are held in trust and cannot be accessed improperly by others.

Who Decides?

The law provides several options for capacity assessment—depending on the circumstances.

Lawyers

When an older adult goes to a lawyer's office to sign planning documents such as Wills, Personal Directives, and Powers of Attorney, the lawyer may ask questions to determine mental capacity to ensure that the person understands what he/she is signing. If another person accompanies the older adult, the lawyer will usually insist on speaking to the older adult in private so that he/she can ensure that the older adult is willingly and knowingly signing the document(s) in question. That is all that a lawyer can do; he/she cannot speak to capacity except at that very moment.

A lawyer does not sign any kind of documentation indicating that the person has or has lost capacity, and the refusal of a lawyer to let the person sign a document should not be taken as a definitive statement that that person no longer has capacity in general.

Doctors

In most jurisdictions, the law gives medical professionals the task of determining whether a person has mental capacity. For example, in Alberta, the law about Personal Directives prescribes the exact form that must be used. It is called a "Declaration of Incapacity." To officially deem a person "incapable," this form must be filled out and signed (by either one or two medical professionals, depending on the contents of the specific Personal Directive).

Many jurisdictions have similar forms. If the law requires no specific form, doctors may create their own. Often, these forms do not require any specific kinds of testing—medical professionals are trusted to do as they feel is best. However, each jurisdiction is entitled to make its own rules in this regard.

Capacity Assessors

In Alberta, the *Adult Guardianship and Trusteeship Act* (AGTA) provides an additional method of determining whether or not a person has lost capacity. This Capacity Assessment Process (CAP) provides a rigorous and domain-specific method of determining an adult's cognitive and functional capacity. Although the CAP is intended to be used in the various legal options under the AGTA, other people could consider it for guidance any time a decision about capacity is required.

The expert who conducts the tests is called the Capacity Assessor (CA). The CAP uses standardized assessment tools. It requires the assessor to test for and specify the areas in which the adult has lost the capacity to make personal or financial decisions. To do this, the CA must access personal information. This usually includes information about the adult's health care or living situation.

Certain health professions can become Capacity Assessors, including medical practitioners (e.g., doctors), psychologists, registered nurses of various specialties, occupational therapists, and social workers. Capacity Assessors must meet an established standard of conduct and must undergo training and continuing education.

While the law presents the “line” of capacity as one that is clear and stable, that is not always true to life.

Incapacity Matters

The *Alberta Personal Directives Act* includes a prescribed Declaration of Incapacity Form to be used to activate a Personal Directive. This is quite helpful, as the form exists and is sanctioned by law.

But this form is **only** for the purposes of assessing capacity for personal decisions, not financial decisions. Financial decisions are covered by Powers of Attorney (and the *Powers of Attorney Act*).

This has created a problem. Doctors do not have a standardized form on which they can rely. And, because it is a legal issue, doctors are often not comfortable simply creating their own form. Therefore, when the time comes, you may find that you have difficulty obtaining a Declaration of Incapacity for the purposes of bringing a Power of Attorney into effect.

At the moment, the options for dealing with this gap include:

- > asking the doctor to create a Declaration of Incapacity form
- > asking a social worker (who sometimes have templates)
- > asking a lawyer to create a Declaration of Incapacity form
- > using a designated Capacity Assessor

ADDITIONAL RESOURCES ON CAPACITY

- > For more information on guardianship go to www.oaknet.ca
 - > Trusteeships and Guardianships: www.humanservices.alberta.ca/guardianship-trusteeship/opg-adult-guardianship-trusteeship.html
 - > Personal Directives: www.humanservices.alberta.ca/guardianship-trusteeship/opg-personal-directives.html
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1.3 Where Is the Law?

When a person wants to use the law to help prevent abuse, one must, of course, understand the laws that can help. First, then, let's find those laws and know where to look to learn about them. Understanding whether a law is in the federal or the provincial jurisdiction will get you much more quickly to the information you need. At the same time, in order to use the law to stop abuse, it is important to understand how to go about doing that and what the process will be. This is especially true for the older adult who might end up having to talk to the police and go to court.

Broadly speaking, the term “legal system” can be taken to include principles of democracy, certain parts of our federal and provincial levels of government, their law-making powers, law enforcement, and court structure and functions. We are restricting our discussion of the legal system, however, to the basic structure, function, and operation of law-making and to its application in our court system.

Laws are rules that citizens, through their elected representatives, have created in order to help individuals, as well as our society in general, function in an orderly manner.

Courts contribute to the creation of law in two ways:

- > through the creation of “common law” (see more, following) and
- > by interpreting the laws made by elected representatives (which can include expanding those laws or disallowing laws because they are unconstitutional).

Courts are also structures that settle disputes. They operate by applying fixed rules to a problem. The steps in a court procedure are also fixed, and the rules vary depending upon what court you are in.

Sources of Law

When Canada was first founded in 1867, law-making power was divided between the federal government and the provincial or territorial governments. This division of power is set out in sections 91 and 92 of the *Constitution Act 1867* (which you may have learned as the *British North America—or BNA—Act 1867*).

Federal government has control over broad areas in laws that apply to all individuals across Canada

Federal jurisdiction: banking, criminal law, employment insurance, marriage and divorce, and more	For example: <i>Criminal Code</i> <i>Divorce Act</i>
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Provincial or territorial governments

Provincial jurisdiction: civil rights and property, education, highways and roads in the province, hospitals, the administration of justice in the province, and more	For example: laws related to legal aid, victims of domestic violence, driving on roads in the province, powers of attorney, child protection
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Cities, towns, and other municipalities have powers delegated to them by provincial or territorial governments

Municipal jurisdiction: Laws made at this level are called bylaws	For example: garbage disposal, playgrounds, libraries, building codes, parking
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Which Law Is Which? Statutes and Regulations; Public and Private

A **statute** (also known as an “act” or “legislation”) is a written law created by a legislative body (such as Parliament or a provincial or territorial legislature).

In order to come into being or to be changed, statutes must go through a rigorous process and be debated in the parliament or legislature.

Common law is a kind of law that is not written in a statute or regulation, but instead is a record of past decisions of the courts. The practice began in England before there was a parliament. Judges applied a common standard of rules to all cases heard in the country. As rules were applied, “new” laws were made. This concept of common law is still part of our legal system.

Regulations set out in detail how the goals of the statute will be reached. Many statutes, whether provincial or federal, will have one or more sets of regulations. Just like statutes, regulations have the force of law. Whereas a statute takes a long route through parliament or legislatures, regulations can be changed much more quickly.

Precedent represents a second aspect of common law. Under common law, a judge deciding a case is bound by an earlier judge’s decision in a similar case or in a higher court. This law applies not only where there is no statute to cover a particular situation, but also where a statute (or regulation) needs interpretation.

Types of Law

Broadly speaking, our laws can be divided into “public law” and “private law.” Public law is all law that deals with relations between an individual and the state or between individuals and organizations of government, i.e., criminal, constitutional, administrative, and international law. Private law means the law relating to persons and personal relationships, such as family law and personal injury law.

Public	Private
Criminal Law	Family Law
Constitutional Law	Wills and Estate Law
Administrative Law	Property Law

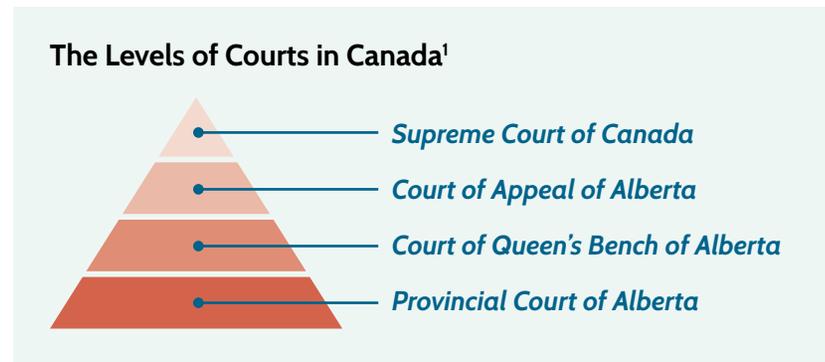
Criminal law is an important branch of public law. Setting a standard of behaviour for all Canadians, its main purpose is to protect society and keep the community peaceful and safe.

When a person’s behaviour does not meet the standards set out in statutes such as the *Criminal Code of Canada*, that person could face criminal charges. If the charges are proven, sanctions or penalties will result. People other than an accused person may also come into contact with the criminal law, as this branch of law affects victims, witnesses, and jurors.

Constitutional law sets out the division of powers between the federal and provincial levels of government. One of the most important parts of our constitutional law is the *Canadian Charter of Rights and Freedoms* (the “Charter”).

The Charter applies to actions between individuals and governments. The Charter is the supreme law of our country; knowledge and awareness of the Charter can ensure that people are informed about their rights and freedoms, as well as their responsibilities.

Our Court System



In every province and territory there are several levels of court. Each level is responsible for different things and has a different role to fulfill. The names of these courts vary from province to province, but in general they are as follows.

Provincial (sometimes called Lower) Courts. These courts are trial courts, sometimes with a few divisions (such as civil, criminal, family, traffic). The exact rules differ in each province and territory.

Higher Courts (often called Superior, Supreme, or Queen's Bench). This court can hear both civil and criminal trials, including jury trials. The more serious criminal and civil law cases generally come to this court. The exact rules differ in each province and territory.

¹Source: CPLEA's Families and the Law: Representing Yourself in Family Court, p5

Provincial or Territorial Court of Appeal. Unlike other courts in the province, courts of appeal do not conduct trials. Instead, their main role is to hear appeals, both civil and criminal, from the lower courts. To appeal means to ask a higher court to reconsider a decision made in a lower court. The exact rules about appeals differ in each province and territory.

Supreme Court of Canada. This is the highest court in Canada. The decisions are final and conclusive. The Supreme Court hears appeals of criminal and civil cases from courts across Canada. The Supreme Court will consider things such as the public interest in an issue and the nature or significance of the issue.

ADDITIONAL RESOURCES ON THE ALBERTA COURT SYSTEM

> Visit justice.alberta.ca/programs_services/courts/Pages/chart_courts_alberta.aspx

Laws that Help to Avoid or Stop Abuse

Although abuse is always wrong, many actions that are mean and hurtful are not technically "crimes" or "offences". Sometimes, however, an abusive action can be a crime or offence and the legal system can help. Although there is no crime or offence called "elder abuse," some forms of abuse are criminal offences as described in the *Criminal Code of Canada* (which applies in all provinces and territories). Some forms of abuse are also offences described under some provincial and territorial statutes. These vary across jurisdictions.

In Alberta

In Alberta, elder abuse cases may be affected by the following acts:

- > *Adult Guardianship and Trusteeship Act* (replaced *Dependent Adults Act*)
 - > *Dower Act*
 - > *Family Law Act*
 - > *Matrimonial Property Act*
 - > *Mental Health Act*
 - > *Personal Directives Act*
 - > *Powers of Attorney Act*
 - > *Protection Against Family Violence Act* (PAFVA)
 - > *Protection of Persons in Care Act* (PPCA)
 - > *Victims of Crime Act*
 - > *Victims Restitution and Compensation Payment Act*
 - > *Wills and Succession Act*
- and
- > *Criminal Code of Canada*

The ***Mental Health Act***, while not dealing specifically with elder abuse, is occasionally used to remove a senior from an abusive environment if a police officer observes a person acting in a disorderly or dangerous manner and appears to have a mental disorder. This legislation is used in extreme situations and only used in cases when the abuser is not mentally competent.

The ***Protection Against Family Violence Act*** protects all family members who are victims of family violence. Three kinds of protective tools are available under the PAFVA: Emergency Protection Orders, Queen's Bench Protection Orders, and Warrant Permitting Entry. Restraining Orders and Peace Bonds lie outside

this Act, but can stop an abusive person from contacting an older adult. Learn more about these orders and how to apply for them at www.oaknet.ca/orders.

Although this workshop does not deal with elder abuse in institutions, note that ***Alberta's Protection of Persons in Care Act*** promotes the safety of adults in publicly funded care. Under this law, among other specifications, service providers in facilities that are funded by the government must take reasonable steps to protect clients from abuse, while providing care or support services. More information can be found in the Alberta government pamphlet at www.health.alberta.ca/documents/PPC-Understand-PPCA.pdf.

The ***Adult Guardianship and Trusteeship Act*** standardizes issues around capacity assessment and allows for a range of supportive and substitute decision-making options. These options address the reality that adults have different levels of decision-making ability and that an adult's capacity may change over time. Options range from supported decision-making authorizations to guardianship and trusteeship orders (as discussed in Module 2). Learn more at www.oaknet.ca/agta.

The ***Family Law Act*** provides a way to apply for a Support Order in cases of neglect. For more information, go to www.oaknet.ca/neglect#SupportOrders.

The ***Personal Directives Act*** allows people to create a legal document setting out their wishes relating to personal care at a time when they are no longer able to make those decisions for themselves. The ***Powers of Attorney Act*** allows people to create a legal document appointing someone to manage their financial assets. Depending on the type of Power of Attorney, this may or may not extend past incapacity. Both Personal Directives and Powers of Attorney are discussed in more detail in Module 2 of this workshop.

Although elder abuse is not a specific crime under the *Criminal Code of Canada*, there are some criminal offences that apply to different types of elder abuse, as in the following.

Physical:

- › Assault (common assault, assault with a weapon or causing bodily harm, and aggravated assault)
- › Sexual assault
- › Forcible confinement
- › Murder/manslaughter
- › Administering a noxious substance
- › Counselling suicide

Financial:

- › Theft, including theft by a person holding Power of Attorney, and theft with a credit card
- › Fraud and fraud with a credit card
- › Robbery
- › Breaking and entering
- › Forgery and using forged documents
- › Extortion
- › Stopping mail with intent
- › Criminal breach of trust and conversion by a trustee

Psychological:

- › Intimidation
- › Uttering threats
- › Harassing telephone calls
- › Criminal harassment (i.e., stalking)

Neglect:

- › Criminal negligence causing bodily harm
- › Breach of duties to provide necessities of life

Law Enforcement: Getting the Police Involved

Calling the police is an important way for the abused person to be protected and to prevent future occurrences. The first step to have criminal proceedings taken against an alleged abuser is to make a report to the police. Anyone can report an incident of abuse of older adults to the police wherever it occurs. The following notes refer to both a report by an abused older adult or a family member or friend reporting abuse on someone else's behalf.

You may, however, be worried about making a report to the police, especially if the person doing the harming is also someone you care about. Remember that abusive behaviour is not healthy for anyone—whether for yourself or someone else, it is best to reach out for help.

The police have several avenues open to them:

- › The police will investigate the complaint.
- › The police will interview the abused person and may interview family members, caregivers, and neighbours who may have evidence about the incident.
- › The police may also interview the accused.
- › The police will gather other evidence that is relevant to the complaint; this can include securing for a time the area where the abuse happened (also known as “preserving the scene”).
- › The police may then lay charges against the abuser.
- › The older adult will be assured that no charges will be laid without his/her consent.

The police can provide information about the criminal process and what is involved for the victim or witness. They can explain the workings of the criminal justice system and what options and possible outcomes to expect. Even if the abuse is not a criminal matter involving the law, the police can be very helpful in connecting seniors to various supports in the community and making referrals to other agencies. Some police departments have officers who specialize in seniors' issues. Seniors and the general public are encouraged to call to talk about their concerns and these officers can provide them with valuable information about different options and resources.

Making a Criminal Complaint

When you as a concerned party report on behalf of someone or when an older adult reports his/her own abuse to the police, the officer who talks to the person in question will do it in person and ask many questions. Although the questions may be difficult to answer, it is best to give as much information as possible. Charges will not be laid if the abused older adult does not agree to charge the abuser.

What the police are told in this conversation will be recorded in a statement. After the statement is complete, the person being questioned will be asked to sign it. A copy of the statement should be given to the interviewee; it should note the police officer's name and phone number and the reference or file number of the report. If the person reporting the abuse later remembers something that should have been included, he/she can contact the officer and provide this additional information.

Threats or any sense of danger should be reported immediately to the police officer. Anyone at risk should have a plan to keep safe. The police can help do that and/or connect him/her to other people who can help (such as victims' services workers).

Some victims of crimes cannot tell the police what happened because of illness, injury, or disability. In that case, the police can still look for other evidence, including, for example, weapons, property that has been obtained illegally, or statements by witnesses.

What else?

Any documents that can show evidence of the abuse—no matter the type—should be gathered together. Photographs should be taken of any injuries caused by the abuser; a physical examination at a hospital may be recommended. The abused person may have to testify in court if charges are laid.

Either the abused older adult or someone working on his/her behalf should stay informed about what is happening with the complaint. If nothing has been heard from the police after a week or so, the report can be followed up on by contacting the officer who took the complaint. Victims' service workers may also be able to help find out what is happening. If the abused senior wants someone else to follow up, he/she will need to give consent for that person to communicate with Victims' Services.

Victims' Services, Particularly for the Abused

Victims' Services workers offer victims of crime the information, practical assistance, and emotional support they need when they get involved in the justice system. They can also help the victim communicate his or her needs and concerns to the police or Crown counsel.

Some Victims' Services programs are community-based, which means they are provided through community agencies across the province or territory. Some specialize in helping victims of certain kinds of crimes and others specialize in serving people from specific cultural backgrounds.

Other Victims' Services programs are police-based. These are usually located in police detachments, and they usually work with victims of any crime, and are generally involved from the time the crime is reported to police. The City of Edmonton, for example, has an Elder Abuse Intervention Team.

What Is "Laying Charges"?

The phrase "laying charges" comes from a legal process: in order for a criminal matter to begin, an "information" has to be "laid" by the police.

It happens like this:

- › After the statement (of complaint, as above) has been completed, the police will investigate the complaint.
- › If the officer thinks that the accused committed a crime, he/she will prepare a "Report to Crown Counsel" (RTCC). It is also sometimes referred to as "particulars of charge."
- › The Crown counsel will review the report and decide whether the person should be charged with a crime.
- › If there is enough evidence that a crime has been committed, an information will be laid and the police will arrest the suspected offender.

The person who made the complaint will be informed whether the accused has been charged. If the accused is charged, the Crown counsel will prosecute the accused; that is, the person who made the complaint does not hire his/her own lawyer.

The Accused

The police may arrest a person suspected of committing a crime in order to stop him/her from continuing the crime or to make sure that the victim and other people are safe.

When an accused is arrested, the police will either:

- › keep that person in custody if they believe that he/she is a risk to others or may not attend court as required. The Crown counsel will conduct a "show cause hearing" to give reasons for not releasing the accused until a preliminary inquiry or trial is held.
- or
- › let the person go with conditions attached to the release (that is, bail).

The Criminal Process

There are three types of criminal offences:

- › those that can only be tried **summarily** (known as summary offences)
- › those that can only be tried on **indictment** (known as indictable offences)
- › those that can be tried **either summarily or on indictment**

Generally speaking, less serious offences proceed summarily; more serious offences proceed by indictment. If the offence could proceed either summarily or by indictment, the Crown Counsel decides which option to take.

The type of criminal offence with which a person is charged will determine the process that his/her case will follow.

ADDITIONAL RESOURCES ON ALBERTA LAW

- › More information about abuse of older adults, including links to related websites, can be found on Oak-Net at www.oaknet.ca/abuse
-

Module 2:

PLANNING AHEAD

Education about the law can help prevent abuse. The law provides many tools to help people deal with decision-making. These tools can be used to help protect older adults from would-be abusers. In the wrong hands, however, the same tools can be used as a licence to abuse. The legal instruments can give the abuser complete access to the older adult and the ability to shut other people out.

Older adults, therefore, should understand the legal tools, how they work (and how they can be misused), when they are available, and when they can be used. Your role may be to help older adults see all the options available to them.

This module covers:

2.1 Planning While There's Still Capacity

- › Legal tools that can be set up by the older adult *before* his/her incapacity and which are used *before* incapacity
- › Joint property, supported decision-making, co-decision-making, informal trusteeships.

2.2 Planning for Incapacity

- › Legal tools that are set up by the older adult *before* his/her incapacity, but which are to be used only after incapacity
- › Powers of Attorney, Enduring Powers of Attorney, Personal Directives
- › Wills, which are set up by the older adult *before* incapacity, only to be used after that adult's death.

2.3 When Incapacity Is Not Planned For

- › Legal tools set up by other people (i.e., not the older adult) *after* the older adult's incapacity, to be used during the remainder of incapacity
- › Trusteeship, Guardianship

2.4 Opportunities for Abuse Both Pre- and Post-Incapacity

- › Access to grandchildren, pets, and housing

2.1 Planning While There's Still Capacity

Are Joint Bank Accounts a Good Idea?

Eileen and her grandson Jason have a joint bank account. With such an arrangement, either one can make payments, deposit or withdraw money, and so on. This is very handy. If Eileen is having difficulty getting out, her grandson can step in to help without any additional paperwork or other steps required.

Jason, however, begins to “borrow” money from Eileen’s bank account. Ever-increasing numbers of cheques and withdrawals are happening that Eileen can’t explain. They’re not for very large amounts, but she is uncertain what they’re for. Then again, she has been having memory issues lately.

Then Jason asked to borrow \$1,500 to repay a debt. Eileen refused to give the money to him. Shortly after, Eileen was shocked when she received her monthly bank statement. There was a withdrawal of \$1,500 for which she had no record.

Fred and Linda have four children. Two of those children live further away; two of them live close by. Fred and Linda bank jointly with one bank. Their accounts at that one bank have just about all of their money in it. For the sake of convenience, they place their accounts in joint names with their youngest daughter. They also hope that this will avoid probate.

The daughter promises to share all the money with her siblings after Fred and Linda die, according to the Will.

Although a joint bank account provides convenience, it can easily lead to problems. A joint bank account means that both people own the money equally.

Is Joint Real Property a Good Idea?

Joint tenancy of real property (e.g., house, condo, bare land, farm) works the same way as joint bank accounts—both parties own the property equally.

Bill and Betty. Bill and his niece Betty live together. Betty has been very helpful over the past few years as Bill has slowed down due to deteriorating health. Bill has been thinking of putting his home in joint names with his niece. He’s heard that this would avoid probate after his death.

Options: Supported Decision-Making

Supported decision-making authorization is only available for **personal** decision-making not involving **financial** decision-making (see “Informal Trusteeships”).

A supported decision-making arrangement could be very helpful for:

- › individuals whose capacity is not impaired but who face complex **personal** decision-making
- › people who have difficulty communicating in English
- › people with mild disabilities such as hearing loss or mobility issues
- › people who have other communication difficulties
- › people who—due to a temporary condition—may only need a bit of help for a little while

To complete such an arrangement, the older adult and the person who will be his/her supporter must:

- › agree on the need for the arrangement and
- › sign a supported decision-making authorization form that outlines the purpose and the kinds of decisions the older adult wishes to include.

There is no need to obtain a court order.

For Linda and Fred, a supported decision-making authorization might be good in the early days following Fred’s diagnosis of early-stage dementia. Both are able to agree to the arrangement and there is no need to involve anyone else. Further, due to hearing trouble, Fred can’t always understand others; Linda can communicate much better with Fred than anyone else can. At this time, Fred has good capacity most days. It is just that sometimes memory fades a bit; Linda has shared memories and knowledge of their life circumstances, so can remind Fred as necessary.

Are there drawbacks? Like joint bank accounts or joint real property, supported decision-making could be used to abuse.

For Fred and Linda, hopefully none of these will come up. However, you can see that, if Linda were to become abusive toward Fred as his capacity fades, Fred’s increased reliance on Linda might lead to a greater risk of abuse.

FOR MORE INFORMATION ON SUPPORTED DECISION-MAKING IN ALBERTA:

- › contact the Alberta Office of the Public Guardian
 - › read CPLEA’s booklet about the *Alberta Adult Guardianship and Trusteeship Act*.
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Options: Co-Decision-Making

A Co-Decision-Making Order is a formal arrangement through a court order in which the “assisted adult” and his/her “co-decision-maker” are required to make decisions together. Co-Decision-Making Orders are only available for **personal** decision-making not involving **financial** decision-making (see “Informal Trusteeships”).

A Co-Decision-Making Order is helpful for adults who:

- > have some capacity impairment but who can still make decisions with assistance
- > cannot make personal decisions on their own but could make personal decisions with the guidance and support of another person.
- > have a close relationship with someone willing to provide decision-making support
- > do not have a guardian or a Personal Directive.

Are there drawbacks? As with some of the other legal instruments, a Co-Decision-Making Order, although meant to be helpful, could be used to abuse.



In the case of Linda and Fred, Fred is now starting to have a lot of bad days and is having a lot more trouble with complicated matters. Linda is getting worried because, more and more, Fred does not remember the decisions they have made and they are arguing about it later. The family (including all

of the children) has now been informed of Fred’s decline in health. Some family members disagree with the decisions that Fred and Linda have made together, and these family members are trying to pressure Fred to make different decisions.

Fred and Linda could apply to the court for a Co-Decision-Making Order. While the court process is proceeding, the supported decision-making authorization continues (simply replaced by the Co-Decision-Making Order, when it is issued). Because this arrangement is in the form of a court order, it provides Linda with more formal authority. This might help in stopping the annoyed family members from trying to get involved in the decision-making process.

However, if Linda is abusive toward Fred, this court-mandated role of helper might result in placing Fred at greater risk. If the family is worried, they could get involved before the order is granted or make a complaint after the order is granted. Such a complaint could lead to an investigation and resolution of the problem.

Even if Linda has not in the past been abusive toward Fred, the role of being a caregiver and helper could be causing stress and burnout for Linda. The family could watch for signs of this and, if they think abusive behaviour is beginning, they could file a complaint.

FOR MORE INFORMATION ON CO-DECISION-MAKING IN ALBERTA:

- › contact the Alberta Office of the Public Guardian
 - › read CPLEA's booklet about the *Alberta Adult Guardianship and Trusteeship Act*.
-

Options: Informal Trusteeships

As important as making personal decisions, adults who still have capacity would sometimes benefit from the help of someone they trust when making financial decisions. However, unlike with pre-incapacity **personal** decisions, in Alberta there are no formal, provincially legislated options for “a bit of help” prior to incapacity: there is no supported decision-making authorization or Co-Decision-Making Order for **financial** decision-making.

Informal trusteeships are a means of putting an individual in charge of handling financial decisions for a person who has diminished capacity. It does not function exactly like a Power of Attorney or a trusteeship. Instead of being a global approach, a person would need to fill out separate paperwork for a trusteeship at each agency or government department that allows for such an arrangement.

Federal government programs that allow for informal trusteeships are the Canada Pension Plan (CPP), Old Age Security (OAS), and Veterans' Affairs. In Alberta, informal trusteeships can be arranged through Assured Income for the Severely Handicapped (AISH), Alberta Seniors' Benefit, and the ministry responsible for employment and immigration. Some care facilities may also allow informal trusteeships.



Fred and Linda both get CPP and OAS. At the provincial level, they both obtain a seniors' benefit. Fred is also a veteran and used to be part of a union. From previous employment, Fred has a retirement pension. Fred also had a few personal bank accounts and investments and some credit cards.

Since the time of the dementia diagnosis, Fred and Linda have contacted all those agencies to try to set up informal trusteeships. They had to contact each one directly and complete whatever requirements that agency had. The agreements are now all set up, and Linda is keeping good records of the decisions made with each agency. This record keeping has become increasingly important as Fred's condition has worsened, as Fred does not always remember the decisions or the reasons behind them and is helped by being able to review the notes.

Fred and Linda are considering adding one or more of the children as informal trustee(s) as well. This may especially become necessary if Linda later needs help with the work (or if Linda were to become abusive toward Fred).

How to Prevent Misuse and Abuse

In each case—joint bank accounts, joint real property, supported decision-making, co-decision-making, and informal trusteeships, older adults should consider various angles on the choices they make, while they still have the capacity to do so. Here are some questions and considerations an older adult might ask him/herself.

- › Carefully consider the options and do not enter such an arrangement lightly.
- › Choose assistance carefully. How much do you trust the person you are considering in this role? Does this person treat you well and has he/she treated you well in the past? Consider choosing more than one supporter, co-decision-maker, or informal trustee (so there is another person watching).
- › If a joint situation is a must, can you limit it to only some of your assets (instead of all)?
- › Are these the best options for you at this time: the joint account, the joint property? Avoid situations where there are no other options.
- › Can the bank and/or your lawyer suggest other convenient options that are less risky (and that could ensure that funds and real property go through your Will)?
- › Well before the onset of issues regarding capacity, research which agencies and government departments offer informal trusteeship and look into their procedures (including potential for abuse).
- › Where can you learn more about probate? (Will you even be able to avoid it? Is it really a major issue for your estate?)
- › Consider including all—or more—reporting requirements. Can the bank ensure that you will always receive bank statements; can your lawyer ensure that you will always receive all land-related documentation? Investigate whether the agencies or government departments you deal with will allow a reporting provision. Might the supporter or co-decision-maker and you report to someone else at regular intervals? Choose that person wisely as well, as choosing someone who has issues with the supporter or co-decision-maker can lead to additional problems. You can even require that the co-decision-maker report back to the court.
- › Finally, if you think you are being abused, trust your instincts and seek help.

2.2 Planning for Incapacity

Several legal tools can be set up by the older adult **before** his/her incapacity for use only **after** incapacity, in particular, Powers of Attorney and Personal Directives. Wills are set up by the older adult **before** incapacity, but are only used after that adult's death.

The law has a back-up plan that will kick in when there is nothing else in place, but it is not what most people think it is.

The result of nothing having been put in place: the family must make a court application to get someone appointed. This is much more expensive than having planned in advance, and, unfortunately, it can lead to family stress and strife. The following examines what is involved in planning for the possibility of future incapacity, as well as some of the ways that this planning can be used against an older adult and how to help prevent that.

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

Financial

Financial decisions are those related to dealing with something you can own (including money)—whether obtaining it, getting rid of it, handling it, or keeping it safe.

Personal

Personal decisions are those related to any issue except a financial matter, relating to the adult, including:

- > health care
- > where, with whom, and under what conditions to live (either permanently or temporarily)

- > with whom to associate
- > social activities
- > participation in educational, vocational, or other training
- > employment
- > legal proceedings not relating primarily to money

When planning for possible future incapacity, a person must address both of these categories of decision-making. Each one has its own separate and distinct legal instrument that needs to be created. They cannot be combined.

The names of each of these documents vary in each province or territory, as this area of law is under provincial and territorial jurisdiction. In Alberta, the document dealing with financial decisions is called a Power of Attorney and the document dealing with personal decisions is called a Personal Directive.

Financial: Powers of Attorney

In Alberta (and in many other jurisdictions), substitute financial decision-making is set up through a Power of Attorney. When signing such a document, the older adult is the “donor” who is giving authority (“power”) to another person (“attorney”) to deal with his/her financial affairs, while that adult is still alive.

Kinds of Powers of Attorney

There are different kinds of PoAs, with different names, and each functions a little differently.

Immediate

- › takes effect as soon as it is signed (or on a specified date)
- › stops on a specific date or when the donor becomes mentally incapacitated.
- › temporary, e.g., someone to look after financial transactions while one is away from home for an extended period of time

The most important thing to know about this type of Power of Attorney is that it ceases to have effect as soon as the maker becomes incapacitated.

Enduring Power of Attorney

- › endures past the point of becoming mentally incapacitated
- › two kinds:
 - takes effect immediately upon signing and continues past incapacity
 - takes effect only when a future event (e.g., incapacity) occurs. This is known as a “springing” Power of Attorney.

Springing Power of Attorney

- › A springing Power of Attorney takes effect only when the maker has been determined to be incapable of taking care of his/her financial affairs.
- › This determination can be made, in writing, by one or more persons named in the Enduring Power of Attorney and can include the person named as the attorney. If no one is named to make this decision, then two medical practitioners can make the declaration in writing.

When and How

An Immediate Power of Attorney that is not intended as Enduring should have an end date or a specific task to which the power relates (or both, depending on need).

An Enduring or Springing Power of Attorney must indicate the future event (for example, mental incapacity) at which the power will come into effect. One or more persons can specify in writing that the contingency has occurred.

Choosing Between an Immediate Power of Attorney and Informal Trusteeships



Let's look at **Fred and Linda** again. Instead of setting up all of those informal trusteeships with each of the individual agencies and organizations, Fred and Linda could simply sign an Immediate and Enduring Power of Attorney. With this document, Linda can start making financial decisions for Fred and all of the agencies and organizations have to follow it (as opposed to each having their own requirements and paperwork).

The problem is that PoAs are intended to create a substitute decision-maker. So, does this mean that Fred can no longer make financial decisions? Perhaps Fred does not want to be cut out of those decisions yet. What if Fred and Linda disagree about a financial decision before incapacity sets in: who has the power to make the decision? And what does this mean for Linda's liability?

Remember, as an attorney, Linda has to keep track of decisions and balance the books (under this law, this is a serious legal obligation): can Linda do that while Fred is still making decisions, too? Will Fred let Linda know about every such decision? Does this mean that Linda has legal liability for a bad decision made by Fred? This might be especially problematic for Linda if the child from Fred's first marriage is questioning the decisions and feels that he has somehow lost part of his inheritance due to decisions made under the Immediate Power of Attorney.

Appointing an Attorney

Choosing an attorney needs careful consideration. The attorney will be making profoundly important decisions about another person's money. The following matters should be considered when choosing an attorney:

- > Is the person willing to take on this job? There is a lot of work involved, and the law expects the attorney to meet very high standards. As a result, ensure the person is willing to take the job before being appointed.
- > Is the person trustworthy, responsible, and good at handling finances? Will he/she make sure the older adult has all the things that he/she needs? Will the older adult's privacy be respected?
- > Does the person treat the older adult respectfully? And has he/she generally always done so? Can the person(s) be trusted not to misuse the money? Can the person be trusted not to abuse in any way?

Personal: Personal Directives

A Personal Directive (PD) is a written, signed, dated, and witnessed document that appoints someone else to look after the personal (that is, non-financial) matters of an adult. It allows older adults to determine in advance who will make personal (non-financial) decisions on their behalf if, due to illness or injury, they ever lose the mental ability to make these decisions for themselves. It only applies while the older adult is alive and ceases to be effective upon his/her death. A very helpful template for a Personal Directive can be found at www.humanservices.alberta.ca/guardianship-trusteeship/opg-personal-directives.html

When such a document is signed, the older adult is called the "maker" and the person named to make personal decisions is known as the "agent."

The agent can make almost any decision of a personal nature. It is important, therefore, that the maker inform the agent of his/her wishes, beliefs, and values. Instructions can be about any or all personal matters that are non-financial, such as:

- > medical treatments you would or would not want (e.g., chiropractors, naturopaths, massage therapists, immunizations, chemotherapy)
- > where you would like to live
- > with whom you would like to live
- > choices about other personal activities (recreation, employment, or education)
- > any other personal decisions (e.g., food, hygiene, clothing, safety)

A few powers cannot be given to an agent unless the Personal Directive explicitly provides for these powers.

Generally, they include:

- > removal of tissue from the maker's living body for implantation in the body of another living person pursuant to Part 1 of the *Human Tissue Gift Act* or for medical education or research purposes (i.e., organ donation)
- > participation by the maker in research or experimental activities, if the participation offers little or no potential benefit to the maker
- > requests for illegal actions

Since the law in Alberta does not allow for one person to automatically make decisions for someone else—not even a spouse, adult interdependent partner, or a close relative, making a Personal Directive is extremely important.

Appointing an Agent

When choosing the person to be appointed as an agent, the maker should consider:

- > Is the person willing to take on this job? A lot of work is involved and the law expects the agent to meet very high standards.
- > Is the person trustworthy and responsible? Does he/she know the maker well enough to understand and interpret instructions? Will he/she make sure the maker has everything that's needed? Will the maker's privacy be respected?
- > Does the potential agent treat the maker respectfully? And has he/she generally always done so? Can this person be trusted to follow the maker's instructions and make decisions in his/her best interest? Can the person be trusted not to abuse?

If the older adult does not have anyone to act as agent, a service provider could be appointed. A specific person must be named—not by role, but by name. The Public Guardian could be named as an agent, but only if:

- > the Public Guardian is the only agent designated in the Personal Directive
- > the maker satisfies the Public Guardian that no other person is able and willing to act as agent
- > the Public Guardian consents to being designated as agent and
- > the maker registers the Personal Directive with the Public Guardian.

How to Prevent Misuse and Abuse

- > Make sure powers are properly understood.
- > Choose attorneys and agents well.
- > Ensure someone is watching.
- > Choose wisely exactly how the Power of Attorney and/or the Personal Directive will come into effect.
- > Encourage everyone—particularly loved ones—to be familiar with the law.

Doing Without

In the case of Fred and Linda, Linda might assume that, once Fred loses capacity, a switch in decision-making power to her would be automatic. Surely the doctors and bankers will turn to Fred's spouse of 30 years. Is that not the intent of marriage; does the spouse not know the person best?

Although this approach would seem like common sense to most of us, it is too problematic for the law to implement. The seemingly obvious go-to person is not always as self-evident as one might think. What about the child from Fred's first marriage? What if that child and Linda were to disagree about something—if there is no Personal Directive in place, who should make the decision?

If there is **no Enduring Power of Attorney** and/or **no Personal Directive** in the case of mental incapacity, family members or other interested parties will have to apply under the *Adult Guardianship and Trusteeship Act* to become trustees of the property (a “trusteeship” application) or guardians of that person. This court process can be lengthy, costly, and potentially controversial.

In general, the government does not step in to help—it acts only in situations where no other suitable person is available, able, and willing.

Common Problems

Powers of Attorney: Issues with Banks

Some banks have their own Power of Attorney forms and may ask that their forms be signed instead of signing a general PoA (not specific to the bank). Understand that a bank's Power of Attorney form allows the person named to manage assets deposited with that bank, but only that bank.

In the case of Fred and Linda, they have most of their funds at one bank, but some at two other banks. They used the banks' PoA forms to handle the funds at each of these institutions plus a general PoA for all other matters. That resulted in four PoAs all in existence at the same time.

Currently, Alberta law does **not** require you to use a lawyer's services when completing a Power of Attorney, although it used to (the PoA used to have to be accompanied by a Certificate of Legal Advice).

Since some banks may still ask for a Certificate of Legal Advice, there are two possibilities:

- › Have the PoA completed by a lawyer and ask that a Certificate of Legal Advice be included. Explain to the lawyer why it's needed.
- › Let the bank know as soon as a PoA has been completed and make sure, before incapacitation, that the bank will accept the Power of Attorney.

Personal Directives: Misunderstandings with Medical Practitioners

Personal Directives can be drafted quite simply, or they can contain many detailed instructions. Either way, there is always a possibility of misunderstanding, and this can include misunderstandings on the part of medical personnel. One common problem area stems from a **lack of specific instructions** in the PD.

Strategies for older adults to leave enough instruction include the following.

- › Describe things in some detail, especially life-saving and end-of-life issues.
- › Discuss this matter with your doctor, as your doctor will be able to tell you about some of the more common medical interventions and the pros and cons associated with each.
- › Discuss these issues with your agent and other family members.
- › During these discussions, use resources intended to guide these conversations. For example, in Alberta, the government has developed a document called “Goals of Care.” This document outlines some of the various care stages you can expect.
- › Have a copy of the PD (and any supporting documentation) handy for reference. Take the time to show it to medical personnel, if necessary.



Fred and Linda have both told their children that they want no heroic measures for themselves. They have had conversations with some of the children about CPR and intubation. Fred sometimes gets confused by the conversations and insists that he would want resuscitation, but wouldn't want to live on life support for very long. Linda knows that CPR can be hard on the body and says there's no need for it at her age. When there was talk of heart surgery, however, she thought she'd want that if it gave her her old energy back.

Another problem area arises if **medical personnel are reluctant to implement the decisions** of the agent. Again, this occurs more often in situations of life-saving or end-of-life decision making—all the more reason to have clear instructions in writing, but also a clear understanding on behalf of the agent.

Powers of Attorney and Personal Directives: Misconceptions about Relationship Responsibilities

Deciding who to appoint as attorney or agent will have serious and lasting implications for the older adult's quality of life should he/she become incapacitated. Choosing the wrong person could lead to abuse. That's why the matter deserves careful consideration. One thing to understand is whether or not there are any legal responsibilities regarding this choice. This is a topic about which there are many misconceptions.

> **MYTH:** People sometimes believe that they are required to choose their spouse or child as agent or attorney.

False: This is not the case. You do not have to choose your spouse or child.

Similarly, there is never an obligation to anyone else to appoint him/her as agent or attorney.

The decision about who to choose as agent or attorney is not—and should never be—based on any perceived legal obligations; nor should it be based on any perceived feelings of entitlement, bloodlines, or worries about hurting anyone else’s feelings.

Wills and Planning for Death

Sadly, abuse can happen in relation to death as well. An abuser can abuse past death by influencing a person to write or change a Will.

Just as with other kinds of abuse, there are many reasons that a person may use the writing or distribution of a Will to abuse an elder.

Eileen’s grandson Jason took \$1,500 from his and Eileen’s joint bank account to repay a debt. He has promised to pay her back, but suggests that she should change her Will to cover this amount, pointing out how helpful he’s been in buying her groceries, not to mention caring for her yard by mowing the grass in summer and shovelling in the winter.

Bill has decided not to put his niece Betty’s name as joint owner of his home. Betty is encouraging him to include the house in his Will as part of her inheritance, considering how she has been living in and caring for the house (and him) all these years.

Understanding the law around Wills can help older adults to take steps to prevent such abuse from happening. For more information, see CPLEA’s publications on Wills at www.oaknet.ca

How to Prevent Misuse and Abuse

“Undue influence”—meaning inappropriate, improper, or unjust pressure—is the most common force put on an older person to affect the content of a Will. Undue influence in these cases is quite likely due to guilt, threats, or capacity issues.

Guilt

Sometimes family members may feel that they have been hard done by during their lives, and, if they do, they may try to convince (to “guilt”) a testator to make up for that.

Meet Jane. Jane has two children, Susan and John. John feels that Susan was always the “favourite” child and got more than he did. As a result, John tries to convince his mother that she should change her Will to leave him more than she leaves Susan. He

may even try to convince his mother that she should spend as little as possible during the remainder of her life so that there actually is more money to leave him. In doing this, John recalls every time he felt that his mother did him wrong and touches on things for which Jane feels guilt. (After all, what parent does not make mistakes?) John is using guilt to manipulate his mother into leaving an amount of money that Jane otherwise would not leave to him.

Threats

Sometimes loved ones resort to outright threats to get what they want. Usually, this is done secretly and the testator is the only person who knows that such threats have been issued.

William has several children, but his daughter Lori is the only one who lives near him. As a result, his care, which is increasing as he ages, has fallen to her. Lori feels that this entitles her to a share of his estate that is greater than that of her siblings. Lori threatens that she will not take care of William unless he changes his Will to increase her inheritance.

Capacity

A very common area in which abuse is seen relates to capacity. More specifically, an abuser taking advantage of an elder's diminished or lack of capacity to convince him/her to leave the abuser a bequest in the Will and/or appoint the abuser as executor.

Meet Margaret. Margaret wrote a Will a few years ago, but does not remember where it is. In recent years, Margaret has had to first downsize and then move into an assisted-care facility. Margaret fears that her Will has been lost in one of her recent moves. Her grandson, Robert, who has been helping her lately, finds the Will and thinks that his grandmother did not leave him enough of a bequest. He tells his grandmother that he has found the Will but tries to convince her—since he has been helping her—to write a new Will, give him more, and make him the executor.

Although there is no way to guarantee that an older adult will not be forced to write or change a Will after they have lost capacity, there are a few things that can be done to help avoid such an eventuality. As with so many legal instruments, the older adult can save a Will by considering the following.

- › Choose wisely who to trust and who will help.
- › Write a Personal Directive that has detailed instructions about how incapacity will be determined.

- › Have a family doctor while health is good and involve the doctor in mental health care. Should it ever be required, this can help provide proof of capacity or incapacity at a given time.
- › When approaching incapacity, use the legal tools available to help ensure that trustworthy people are at hand before any problems arise.
- › Write a Will while still having capacity.
- › Meet with a lawyer to discuss the Will. This will provide proof that the Will was made by free choice. At some point when completing the Will, be alone with the lawyer. Speak freely without being afraid of hurting anyone's feelings. Seeing a lawyer ensures that wishes are set out in the Will and no pressure is exerted by outside parties.
- › Never make any changes to a Will without first talking to a lawyer or a very trusted advisor.
- › Become familiar with how the law can help once abuse starts, and ensure that trusted family members and caregivers also are familiar with the law.

2.3 When Incapacity Is *Not* Planned For

Many people do not plan for the possibility of incapacity before death. They do not sign a Power of Attorney; they do not sign a Personal Directive. A common reason for this lack of planning is a misunderstanding of what occurs when capacity is lost and no appropriate documents are in place. Many people assume that the next of kin—a spouse or child—automatically is the person who will make all the necessary decisions. While many believe that this is the law's “back-up plan” for a lack of official documents, unfortunately, this is not so. Without an official legally recognized substitute decision-maker, the family must make a court application to get someone appointed. This is more expensive than having completed a PoA and PD in advance and can lead to family stress and strife.

While this requirement may not make sense to some, the “common sense” approach is too problematic for the law to implement. The “go-to person” is not always as self-evident as one might assume.

**For example, imagine the following scenarios.
From whom should a service provider take direction?**

- › The adult child of 58 or the new spouse who has only known the older adult for two years?
- › The spouse who has been out of the picture for 20 years or the common-law partner of eight years?
- › The eldest child who has lived far away for years or another child who lives nearby?
- › The spouse who is not doing so well or the adult child?

While the answers are not always simple, a complicating factor is that these decisions usually need to be made very quickly. Hence the legal back-up plan, which will require the family to apply to the courts to figure it out.

The law that governs this topic is in the provincial jurisdiction. As a result, the laws will vary from province to province and territory to territory. In most jurisdictions, the concepts are called Trusteeship (for financial substitute-decision-making) and Guardianship (for personal substitute-decision-making).

Financial Issues: Trusteeship

When an adult no longer has capacity to make decisions on financial matters, and has not prepared for that possibility by completing a Power of Attorney, someone must apply for trusteeship. The adult who is the subject of a Trusteeship Order is called a “represented adult”. The person authorized to make financial decisions for the represented adult is called the “trustee.”

What Is Already in Place?

The first question to ask is whether there is already an Enduring Power of Attorney. A trustee and an attorney cannot both have responsibilities for making decisions in the same area, and there may be no need for a Trusteeship Order if there is an Enduring Power of Attorney.

Is there either a supported decision-making authorization or a Co-Decision-Making Order? If one of these arrangements is wanted for personal decisions, an informal trusteeship for financial decisions may be preferable to a formal trusteeship.

The Role of the Trustee

Like the roles of attorney, agent, and executor, the trustee

- > must be at least 18 years of age
- > must also consent to act as trustee in this situation
- > must satisfy the Court that he/she is suitable and will act in the best interests of the adult.

Usually the trustee is a family member or friend; the Office of the Public Trustee can be appointed, but only as a last resort.

Once appointed, a trustee can do *almost* everything in relation to financial matters that the represented adult would do if he/she had capacity, with access to and control over all money and financial information of the represented adult. In addition, the trustee must keep careful records of all transactions, always acting in the best interests of the represented adult while acting in accordance with the Trusteeship Order and the Trusteeship Plan, as approved by the Court.



In the case of Fred and Linda, appointment of a trustee would be required when Fred lost capacity... but only if Fred had not signed an Enduring Power of Attorney. If Fred had signed an Enduring Power of Attorney before losing capacity, the provisions of that document would kick in instead.

Personal Issues: Guardianship

As with the case of financial issues and trusteeships, when an adult no longer has capacity to make personal decisions and has not prepared for that possibility by completing a Personal Directive, someone must apply for guardianship. The adult who is the subject of a Guardianship Order is called a “represented adult.” The person authorized to make personal decisions for the represented adult is called the “guardian.”

The guardian must act diligently, in good faith, and in the represented adult’s best interests. In addition, a guardian must keep the represented adult informed of decisions he/she has made and must keep a record of decisions.

What Is Already in Place?

The first question to ask is whether there is already a Personal Directive. A guardian and an agent cannot both have responsibilities for making decisions in the same area.

In order to obtain a Guardianship Order, the proposed represented adult must be found to be incapacitated through taking part in a formal Capacity Assessment by a doctor, psychologist, or capacity assessor. Cognitive (ability to think and reason) and functional (ability to do things and relate to others) assessments are done focusing on the kinds of decisions that the adult needs to make and evaluating the level of assistance required.

The Role of the Guardian

Most importantly, the guardian needs to be someone familiar with the represented adult’s values, preferences, opinions, and religious and cultural heritage since a guardian must make decisions based on these factors.

Like the roles of attorney, agent, executor, and trustee, the guardian

- > must be at least 18 years of age
- > must consent to act as guardian in this situation
- > must satisfy the Court that he/she is suitable and will act in the best interests of the adult.

Usually the guardian is a family member or friend; the Office of the Public Guardian can be appointed, but must be given both notice and a reasonable opportunity to make representations to the court.

While a guardian doesn’t have to live in Alberta, he/she should have been in regular contact with the proposed represented adult and have a good understanding of the adult’s values and beliefs.

Depending on the adult’s needs and areas where his/her capacity is lacking, areas of decision-making authority can include some or all of the following:

- > health care
- > where and with whom the adult can live
- > with whom the adult may associate
- > social activities, educational, or vocational training
- > employment
- > any legal (non-financial) matters



*In the case of **Fred and Linda**, say there is no Personal Directive in place when Fred loses capacity. Linda and their two youngest children agree to be guardians. Linda will continue to make the decisions of daily living, but the three agree that the three of them together will decide when the time comes to move Fred into a care facility. The youngest child—the daughter—agrees to handle any legal matters that need to be addressed.*

How to Prevent Misuse and Abuse

Plan ahead! For yourself—and for any older adult in your care—well before incapacity.

If a trustee or guardian is necessary for friend, family member, or client, ensure that the order includes a review process and review timing that works best for the represented adult.

If trusteeship or guardianship has been established for a friend, family member, or client, and you think there is abuse, trust your instincts and seek help. This will involve going back to court to have a judge look at the issue. An interested person may apply for a review at any time. If the represented adult's capacity is at issue, the person applying must include a recent Capacity Assessment Report. Applications for reviews of Trusteeship Orders and Guardianship Orders also go through the Review Officer.

FOR MORE INFORMATION ON TRUSTEESHIP AND GUARDIANSHIP IN ALBERTA:

- › contact the Alberta Office of the Public Guardian
 - › read the Centre for Public Legal Education's booklet about the *Alberta Adult Guardianship and Trusteeship Act*.
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2.4 Opportunities for Abuse Both Pre- and Post-Incapacity

Some forms of abuse are easier to see than others. The most difficult to see is psychological or emotional abuse. Some aspects of life that can become contributing factors to the emotional abuse of older adults include access to grandchildren, other family members, and friends; pets; and housing.

Grandchildren

For seniors, grandchildren (and great-grandchildren) can bring a lot of joy. However, abusers commonly use denial of access to those grandchildren as a tactic.

On this topic, the news is not very good. Alberta's *Family Law Act* outlines possible options for grandparents when guardians (typically parents) and grandparents cannot agree on provisions for contact. Sadly, however, nothing in the *Alberta Family Law Act* specifically gives or protects grandparents' rights of access to their grandchildren.

For more information on grandparents' rights in Alberta and how someone can gain access to his/her grandchildren, see the Centre for Public Legal Education's publication, *Grandparents' Rights*.

Pets

The relationship of older adults and their pets makes seniors vulnerable to abusers who would exploit this bond. Abusers may use pets to abuse an older adult for many reasons, including to demonstrate and confirm power and control, to teach submission, to retaliate for acts of independence and self-determination, and/or to prevent the victim from leaving or coerce him/her to return.

The actions of the abuser also vary and range from direct threats to harming an animal if the senior does not do as told, to denying access to pets, or to refusing to pay vet bills.

Housing

Elder abuse tends to take place where the senior lives—most often in the home where the abusers are adult children, other family members such as grandchildren, or spouses or partners of seniors. It can also occur in institutional settings, especially long-term care facilities. In fact, elder neglect, including failure to fulfill a caretaking obligation, constitutes a great many of all reported cases of elder abuse.

Living Alone

It is very difficult to leave a home that one has loved and to which one is accustomed. For that reason, many seniors find themselves living alone, in the home they once shared with other family members. Or perhaps the senior has moved, but insists on still living alone. The isolation associated with living alone can present opportunity for elder abuse.

Living with a Caregiver

In many ways, living with a caregiver, especially when that caregiver is a spouse or adult child, can seem like an ideal solution. At the same time, a senior's mental or physical ailments may make them more trying companions for caregivers. The responsibilities and demands of caregiving, which increase as the senior's condition deteriorates, can be extremely stressful. This stress can lead to caregiver burnout, impatience, and an inability to keep from lashing out against elders in their care.

How to Prevent Misuse and Abuse

What can older adults do?

- › Keep in touch with family and friends and avoid becoming isolated. This is especially true if the person who has the most contact is not treating the senior well.
 - › Older adults should not live with, or be in the sole care of, someone who has not historically treated them kindly (the stress of caregiving will likely only make the treatment worse).
 - › Pay attention to possible social isolation (elder and caregiver are alone together almost all the time). This can very quickly lead to caregiver burnout.
 - › Plan in advance for the time when driving a car is no longer an option (again, in order to avoid isolation).
 - › Make sure that all financial and legal affairs are in order. If they aren't, seek professional help to get them in order, with the assistance of a trusted friend or relative as needed.
 - › Recognize and remember that, as one ages, sight and hearing are not what they used to be, nor is thinking as clear. This can leave openings for unscrupulous people to take advantage, even more so in the case of a degenerative condition.
- › Recognize the potential intensity of any condition that has been diagnosed and plan for care around that intensity (one person may not be able to handle all that is coming).
 - › Make arrangements to ensure that caregivers take care of themselves and get respite care when needed.
 - › Speak up when unhappy with any care being received. Speak up if you see or suspect elder abuse.

ADDITIONAL RESOURCES ON PLANNING AHEAD

- › **Supported Decision-Making**
www.humanservices.alberta.ca/guardianship-trusteeship/agta-supported-decision-making.html
 - › **Co-Decision-Making**
www.humanservices.alberta.ca/guardianship-trusteeship/agta-co-decision-making-order.html
 - › **Personal Directives**
www.humanservices.alberta.ca/guardianship-trusteeship/opg-personal-directives.html
 - › **Powers of Attorney**
www.humanservices.alberta.ca/guardianship-trusteeship/opt-represented-adults-enduring-powers-of-attorney.html
 - › **Trusteeships and Guardianships**
www.humanservices.alberta.ca/guardianship-trusteeship/opg-adult-guardianship-trusteeship.html
 - › **Oak-Net**
www.oaknet.ca/abuse
 - › **Centre for Public Legal Education Alberta**
www.cplea.ca
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Module 3:

LET'S TALK

This module covers the topic of gathering caring people together to talk about plans for an unknown future. An older adult or family or caregivers of an older adult could start this conversation.

With the right information at hand, a most important next step is for an older adult with full capacity to gather together family and supporting friends to talk through this challenging subject. This module gives guidance on how to hold such a meeting.

3.1 Getting Past Resistance

- › Discussing the reasons for not wanting to talk about a time of incapacity and how to overcome them.

3.2 Opening Communication

- › Discussing the reasons why it is important to have open discussion, and setting things in place

3.3 Beginning the Conversation

- › Agenda setting and then beginning a conversation that may unfold over an extended period, depending on the circumstances.

3.1 Getting Past Resistance

- › Planning in advance is the only way to maintain control over end-of-life decisions.
- › Every adult should plan in advance.
- › Planning for the future does not take decision-making power out of our hands in the present.
- › You can change your mind at any time.
- › You can always say, “My lawyer said I should talk to you.”

3.2 Opening Communication

Why is it important to talk about your wishes with the people who may be called on to speak or decide for you?

- › No matter how detailed your paperwork is, others will not fully understand your wishes. The more thoroughly you communicate, the easier it will be for everyone to respect your wishes.
- › It will help you think about what you want. Others will ask you questions or tell you things that will make you think about your wishes in another way.
- › It will help your loved ones make difficult decisions with less pain, doubt, and anxiety.
- › It will save money. Going to court to get someone appointed as a substitute decision-maker is always more costly than planning in advance.
- › It will save much insecurity and grief, especially with regard to medical treatment. Sometimes families continue medical treatments long past the point where they are helpful, simply because they are unsure what their loved one would have wanted. This is emotionally and financially costly.
- › It may even bring your family closer together.

If it makes the older adult more comfortable, he/she can use a letter, tape, or video recording as a starting point.

Before beginning the conversation, the older adult—or someone concerned about an older adult—should line up their ducks:

- > Ask permission to discuss the topic.
 - “I’d like to talk about the best way someone might care for you if you got really sick. Is that okay?”
 - “If you ever got sick, I would be afraid of not knowing the kind of care you would like. Could we talk about this now (or establish a later date)? I’d feel better if we did.”
 - “I want to hear your wishes about how you’d like to be cared for in the event you were sick or injured; can we do that now (or establish a later date)?”
 - Start with a story of someone else’s experience: “Do you remember what happened to so-and-so and what his family went through? We don’t want to go through that with you. That’s why I want to talk about this now, while we can.”
- > Know the legal tools and options (see Modules 1 and 2).
- > Select an appropriate time and setting.
- > Be prepared for difficult moments.
- > Agree on an attendance list.
- > Agree on an agenda.

3.3 Beginning the Conversation

Even the best-laid plans can go awry, but keeping some communication principles in mind will contribute to a successful conversation.

- > Be prepared to take the lead on the conversation
- > Be a good listener and be patient
- > Keep listening
- > Value each conversation
- > Value your elder

Without being overly officious, conduct the conversation like a business meeting.

- > Agree (again) on the agenda, making sure everyone has a copy in hand.
- > Make sure someone is taking careful notes.

Your agenda might look like this:

1. Identify current advisors
2. Describe current health status
3. Identify current documentation
4. Describe current financial picture and plan
5. Identify difficult or complicated issues
6. Planning ahead: Power of Attorney; Personal Directive; supported-decision-making, co-decision-making, informal trusteeships; Will

7. Determine a shared understanding for post-capacity
8. Next steps: What follow-up is necessary and who is responsible for it?

1. Identify Current Advisors

Find out who the older adult's **current advisors** are and develop a contact list of all advisors. Decide who needs a copy of this list.

Examples of advisors:

- > family doctor
- > other doctors or specialists
- > physiotherapist
- > therapist
- > alternative medical practitioners (chiropractors, herbalists)
- > pharmacist
- > banker
- > loan or mortgage officer
- > financial planner
- > insurance broker
- > pension plan administrators
- > accountant (or bookkeeper)
- > tax preparer
- > lawyers (include all, e.g., estate lawyer, business lawyer, lawyer representing them in a court case)
- > supporter, co-decision-maker, or informal trustee
- > suppliers of in-home services (e.g., home care, Nurse Next Door, Meals on Wheels)

2. Describe Current Health Picture

- > Are there any urgent health concerns affecting the speed at which this work must be done (e.g., is it expected that capacity will be lost very soon)?
- > Are there any longer-term health concerns that should be considered as part of the planning process (e.g., a particular diagnosis that will lead to certain things, like loss of mobility)?

3. Identify Current Documentation

- > Are there any Powers of Attorney in place? This can include general PoAs or bank- or institution-specific PoAs, including any PoAs signed out-of-country or out-of province, and Enduring PoAs. It is best if only one PoA exists at a time.
- > Are there any Personal Directives in place? This can also include documents signed out-of-country or out-of province (in which case, they may not be called Personal Directives). Only one PD should exist at any one time in Alberta.
- > Are there any supported-decision-making authorizations or Co-Decision-Making Orders in place? If there are, the supporter or co-decision-maker will need to be involved in the discussion around the older adult's personal decisions. If this process leads to an undoing of any such arrangements, they must be properly terminated.
- > Are there any informal trusteeships in place? If there are, those informal trustees will want to be involved in decision-making around the topic over which they have authority. If this process leads to an undoing of any such arrangements, those arrangements must be properly terminated.

- > Is there a Will already in place? This can also include a Will signed out-of-country or out-of province. If there are others and this process leads to a new Will being signed, you will need to destroy any previous Will(s).
- > Is there any property for which Designations of Beneficiary have been signed (e.g., life insurance policies, pension plans, RRSP, TFSAs)? Find out who the named beneficiaries are. These should be considered when making plans for a final Will.
- > What other kinds of insurance are in place: long-term care, disability, critical illness, and/or medication?
- > Is there any property held in joint tenancy? This, too, will need to be considered when making decisions regarding PoAs and the distribution of property on death.
- > Whose name is on the title of the older adult's home (if applicable)?
- > If the home is owned, is there still a mortgage and, if so, is it life insured?
- > Is there any other real estate that belongs (in whole or in part) to the older adult? For example, a rental property or a cottage. How are those properties held (e.g., alone or jointly with someone else)? Do any of these properties have a mortgage in the name of the older adult and, if so, are those mortgages life-insured?
- > Is the older adult in question the co-decision-maker, agent, attorney, executor, guardian, or trustee for anyone else? If so, is it clear what will happen should the older adult lose capacity or die? If not, that may have to be dealt with.
- > Where are all current documents kept? Is there a safety deposit box? If so, who has access and does that need to be altered?

4. Identify Current Financial Picture

- > What bank(s) does the older adult use? What are the various accounts?
- > What kinds of investments does the older adult have, and where are they held?
- > Does the older adult have any business assets (perhaps he/she is a sole proprietor or a shareholder in a corporation)? If a shareholder, is there a Shareholder's Agreement? (If so, get a copy.) Is there a business succession plan in place (i.e., how does the older adult plan to dispose of business assets once he/she passes way)?
- > Are there any assets (land, business, personal belongings) in other provinces and/or other countries?
- > Is the older adult currently involved in any lawsuits that might affect any of his/her assets?
- > Does the older adult have large outstanding debts (e.g., mortgages, loans, lines of credit, payments, IOUs, or deferral plans)?
- > When did the older adult last file an income tax return and are there any outstanding unfiled tax returns?
- > What are the older adult's current sources of income? This may include work income, pension income, CPP, OAS, GIS, interest on investments, dividends.
- > If the older adult is receiving income from a pension plan, is there a survivor benefit or a guaranteed period?
- > If the older adult is not already retired, what is the hoped-for retirement date and what are his/her plans for income after retirement?

- › If applicable, how long does the older adult wish to stay in the family home?
- › Can the older adult afford long-term care if needed, or will financial help be needed? For example, help from the children or from forms of government assistance.

5. Determine Difficult or Complicated Issues

- › Does the older adult have any legal dependants?
- › Are there children from previous relationships?
- › Are there any estranged family members that the older adult worries may try to interfere at a later date?
- › Is there property held jointly (and for which the thoughts of the joint tenants should also be heard)?
- › Is there any farm property? (There are many special rules you would need to find out about.)
- › Are any beneficiaries minors?
- › Is the older adult concerned that any of the beneficiaries could not handle the money left to them (perhaps they spend too easily or have issues such as gambling or drinking)?
- › Will the creation of these new documents and plan be a surprise to anyone, or come as shock, especially if duties and powers will be taken away from that person? If so, you may want to discuss and plan for that, in order to avoid problems (such as legal challenges) later.
- › Are there certain people whom the older adult specifically does not want involved in the planning process or in his/her care later? If so, try to document why (especially if there is any concern for previous or potential abuse by that person).

6. Planning Ahead: Possibilities for Official Documentation

Determining whether a Power of Attorney, Enduring Power of Attorney, Personal Directive, supported decision-making, Co-Decision-Making, informal trusteeships, or a Will is necessary is part of this meeting's agenda, while preparing each document may happen later.

Each document requires that a responsible adult be named, such as attorney, agent, supporter, co-decision-maker, guardian, trustee, or executor.

- › Be sure the older adult understands the options and when they can be used.
- › Have the older adult give an opinion on these options, including when, if at all, he/she might want such options to be considered.
- › Have an initial discussion on who the older adult might want to have take on specific roles, should the need arise.
- › If the need has already arisen, you may wish to start the process of completing one or more of the options.
- › Specific topics to discuss:
 - Who to appoint? One individual or more than one (and, if more than one, how the powers should be divided)?
 - What kinds of decisions should be covered?
 - Should there be another person to whom the helpers report on a regular basis and, if so, at what intervals?

7. Determine a Shared Understanding for Post-Capacity

This part of the conversation may be an ongoing one in the days following and will help determine many elements of any official documents that the meeting has agreed need to be prepared.

If or when incapacity occurs:

- > What range of health care and/or intervention would the older adult want?
- > What choices would the older adult prefer regarding his/her finances, especially relating to housing or extended care? What standard of living would he/she expect?
- > What would the older adult want to meet his/her social and emotional needs?

8. Follow-Up

- > Is there a need for another meeting?
- > If so, when and where should it be held?
- > Make a summary of any individual tasks and deadlines that have been assigned.
- > Determine who should get a copy of the meeting notes and how and when they are to be distributed.

Is It or Isn't It?

Meet Linda and Fred

Linda and Fred have been together for the last 30 years. For each of them, however, this was the second marriage. They both had a previous marriage that, although short, produced one child each. They also had two children together.

In the past few years, Fred developed some hearing trouble and was diagnosed with early-stage dementia. At first, neither wanted to tell the children, as they wanted time to deal with it themselves.

As time passed, Fred had more bad days and more trouble with complicated matters. Linda worried because Fred would not remember the decisions they had made and they'd end up arguing. The family (including all of the children) were eventually told of Fred's decline.

Some family members disagreed with the decisions that Fred and Linda had made together, and these family members tried to pressure Fred to make different decisions.

Fred and Linda applied for co-decision-making, while a supported decision-making authorization continued. Because this arrangement is in the form of a court order, it helped in stopping the annoyed family members from trying to get involved in the decision-making process.

As time passes, Fred and Linda consider adding one or more of the children as informal trustee(s) as well. This may become especially necessary when Linda needs help with the work (or if Linda were to become abusive toward Fred).

It seems obvious to everyone that once Fred loses capacity, a switch in decision-making power would automatically go to Linda. Surely the doctors and bankers will turn to Fred's spouse of 30 years. But what about the child from Fred's first marriage? What if that child and Linda were to disagree about something?

What about a Power of Attorney, then? Should Fred and Linda have signed a PoA when Fred was capable of making that decision? The problem with PoAs is that they are intended to create a substitute decision-maker. So, would this mean that Fred could no longer make financial decisions once he had signed? Perhaps Fred doesn't want that—he may wish to continue making financial decisions as long as possible.

From whom should a service provider—like a bank—take directions? The eldest child who has lived far away for years or another child who lives nearby? The spouse who is not doing so well or an adult child? The possibilities are endless. The situation is not as clear as it might first seem.

Fred and Linda are worried about what will happen when Fred loses mental capacity.

- › *If Fred has signed an Immediate Enduring Power of Attorney, then the attorney he has named will be able to make decisions about his financial affairs right away. If he has signed a “Springing Enduring Power of Attorney, then if incapacity is listed as the triggering event, his attorney can begin to act at that point.*
- › *If Fred has not signed either type of Enduring Power of Attorney, then it may be necessary for someone (Linda or another trusted person) to make an application to the court for trusteeship under the Alberta Adult Guardianship and Trusteeship Act.*

