

# Making a Personal Directive



**This booklet is for Albertans who are thinking about writing or changing a Personal Directive.** A Personal Directive allows you to plan for the future by appointing someone else to manage your personal, non-financial matters while you are still alive but no longer have the ability to do so. This booklet gives general information only, not legal advice. If you need more detailed help or advice, see the end of this booklet for more resources.



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

## DISCLAIMER

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

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 Be aware that there may have been subsequent changes which make the information outdated at the time you are reading it.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

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# What is a Personal Directive?

In Alberta, the *Personal Directives Act* creates Personal Directives.

A Personal Directive is a written, signed, dated and witnessed legal document. It gives someone else the right to make decisions for you about personal, non-financial matters while you are still alive. This can include decisions related to health care, housing, and medical treatment.

**Sometimes this document is called a “Living Will” but, in Alberta, the correct legal term is “Personal Directive”.**

A Personal Directive does **not** give someone authority to make decisions about your finances if you no longer have mental capacity – for that you need a separate document called an **Enduring Power of Attorney**.

When you make a Personal Directive, you are the “**Maker**” and you name another person (your “**Agent**”) to make your personal decisions.

Your Personal Directive comes into effect when you no longer have mental capacity to make personal decisions. It only applies while you are still alive and comes to an end when you die.

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

You should have a Personal Directive because, if you suffer a serious injury or illness, you may become incapable of making personal decisions for yourself. This is mental incapacity or infirmity. The law in Alberta does not allow for another person to automatically make personal decisions for you. By preparing a Personal Directive now, while you have mental capacity, you have more control and can ensure that your personal decisions will be made by someone who knows you and what you want.

Without a Personal Directive, your family or another interested party will have to apply to the court under Alberta's *Adult Guardianship and Trusteeship Act* to become your **guardian**. This court process can take months, is complex, and can be very expensive. It may also result in someone making decisions for you that you would not have chosen.

In a medical emergency, a health care practitioner can still provide emergency medical services to you if you do not have mental capacity and even if you do not have a Personal Directive. However, in non-emergency situations, doctors and other health care providers cannot continue to make decisions for you without consent from either you (if you have mental capacity) or your Agent.

The government (through the **Office of the Public Guardian and Trustee**, or also known simply as the **Public Guardian**) will not be your Agent unless there is no other person who is willing, able and suitable to act as your Agent.

### Office of the Public Guardian and Trustee

Services and support for vulnerable Albertans and their families.

Toll-free: 310.0000 then 780.422.1868

<http://bit.ly/2IF6Fw1>

A Personal Directive may not be effective outside Alberta.

An **Enduring Power of Attorney** is a type of Power of Attorney that continues on even if you lose mental capacity.

For more information on Enduring Powers of Attorney, see CPLEA's booklet called **Making an Enduring Power of Attorney**.

The **guardian** of an adult is a person named as a guardian in a guardianship order made under section 26 of Alberta's *Adult Guardianship and Trusteeship Act*. The guardian of an adult has the authority to make personal, non-financial decisions for that adult.

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

An **Alternate Agent** is a person named in a Personal Directive to act if another Agent cannot act.

A **spouse** is a person to whom one is legally married.

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

A Personal Directive lasts until:

- you die;
- you revoke (cancel) it;
- a court determines that the Personal Directive no longer has effect; or
- your Agent dies or quits and there is no **Alternate Agent** to take over.

Remember that an Agent can only make decisions under your Personal Directive while you lack mental capacity. You may regain mental capacity and be able to make some or all of your own personal decisions again. If you completely regain mental capacity, then your Agent no longer has any authority to act for you. At that point, you do not need to make a new Personal Directive unless the existing Personal Directive no longer meets your needs. If you lose mental capacity again, your same Personal Directive can still be used.

More than one Personal Directive can be valid for you at the same time. For example, you might have different documents for different purposes. It can become confusing though if more than one Personal Directive provides the same powers to different people. As well, if your Personal Directives contradict each other on certain things, then the direction in the newest Personal Directive is valid and the direction in the older Personal Directive is not.

The Government of Alberta's form of a Personal Directive is found here:

<http://bit.ly/2WlmeN4>

# Making a Personal Directive

In Alberta, a Personal Directive must be in writing, and must be dated and signed by both you (the Maker) and a witness, in the presence of each other. You must be 18 years of age or older, and you must, at the time of signing, understand the nature and effect of the document.

If you are physically unable to sign, your Personal Directive can be signed by another person on your behalf – but that person cannot be the Agent being named or the **spouse** or **adult interdependent partner** of your Agent.

You can make your own Personal Directive or you can get a lawyer to help you. The Government of Alberta has a form that you can fill out or use as a guide to create your own Personal Directive.

## Mental Capacity

Having the mental capacity required for making a Personal Directive means that you understand:

- the kinds of personal decisions your Agent can make for you;
- the authority that you are giving your Agent;
- whether the person you name as your Agent is truly concerned with your well-being;
- that you may need the person you name as your Agent to make decisions for you;
- that, as long as you are mentally capable, you can revoke (cancel) your Personal Directive; and
- that there is always a chance that your Agent could misuse their authority.

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

It is a “relationship of interdependence” between two people who:

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

A “relationship of interdependence” exists where two people:

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

The **guardian** of a child is the person who has legal responsibility to care for and financially support the child, and the authority to make all of the decisions with respect to that child. Unless a court orders otherwise, the child's parents are their guardians.

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

If you are worried that someone might challenge your mental capacity, you should have a lawyer prepare your Personal Directive. You could also ask your doctor for a letter stating that you are mentally capable.

Even if you take these steps, it is always possible for someone to ask a judge to terminate your Personal Directive, and a judge may do so if they consider it to be in your best interests.

## Appointing an Agent

The term "**Agent**" refers to the person or persons you choose to act for you with regard to your personal, non-financial matters. Your Agent must be at least 18 years of age and be mentally capable.

Your Agent should also:

- be willing to act as your Agent;
- be honest, trustworthy and responsible;
- know you well enough to know what your wishes are or to understand and interpret your instructions.

It is convenient, but not mandatory, for your Agent to live in the same province as you do.

You can name one or more Agents to act at the same time (**Co-Agents**). You can require that your Co-Agents act together ("jointly") or you can have them act separately as well as together ("severally and jointly"). If they can act severally and jointly, then either of your Agents will be able to act alone on your behalf. If one is away or sick, for example, the other would still be able to give instructions on your behalf. If you do not indicate that they can act severally, they will have to do everything together. Be aware that naming Co-Agents may make things more complicated if difficult decisions need to be made quickly.

If you name Co-Agents, you should include some way for them to resolve disputes if they arise. If not, the *Personal Directives Act* states that the decision of the majority of Agents must be followed.

You should also name at least one **Alternate Agent** who can act if your Agent dies, becomes mentally incapacitated or otherwise cannot act for you. If you name several alternatives, you should be clear in what order they should act.

If none of the Agents, Co-Agents or Alternate Agents named in your Personal Directive can act, then your Personal Directive will not be valid, and you should make a new one.

If no one is able or willing to be your Agent, you can name the **Office of the Public Guardian and Trustee**. However, the Public Guardian must agree to be your Agent before you can name them.

## Witnesses to Personal Directive

Anyone who is 18 years of age or older and is mentally capable may witness your Personal Directive. You and your witness must be present together and see each other sign the document in order for it to be valid. A witness must act in good faith and should refuse to witness the Personal Directive if they have reason to question your mental capacity.

Some people cannot act as witnesses:

- anyone under the age of 18;
- anyone who is mentally incapacitated;
- the person being named as an Agent (including Co-Agent or Alternate Agent);
- the spouse or adult interdependent partner of a person named as an Agent;
- the spouse or adult interdependent partner of the Maker;
- a person who signed the Personal Directive on behalf of the Maker; and
- the spouse or adult interdependent partner of the person who signed the Personal Directive on behalf of the Maker.

## Guardian for Minor Children

If you are a **guardian** for a minor child, you can name someone to care for your child if you are mentally incapacitated. This person can be your Agent or a different person.

Remember that a Personal Directive only applies while you are alive. To name who you wish to be guardians for your children in case of your death, you will need to include this in a **Will**. In either case, the court can change the guardian if it decides the person you name is not appropriate.

## Agent Powers

Your Agent will be able to make almost any personal decision that you can, unless you specifically limit their powers.

Your Agent is responsible for:

- consulting with you before making a personal decision;
- making personal and non-financial decisions for you for what may turn out to be a lengthy period of time;
- making decisions about medical treatments for you (e.g.: medical procedures, chiropractors, naturopaths, massage therapists, immunization issues, chemotherapy, end of life decisions);
- making decisions about where you live and who you will live with;
- making decisions about your personal activities (recreation, social, employment or education);
- following any clear instructions set out in your Personal Directive;
- if there are no clear instructions, making decisions they believe you would have made based on their knowledge of your wishes, beliefs and values;
- if there are no clear instructions and the Agent does not know your wishes, beliefs or values, then making decisions they believe are in your best interests;
- keeping a record of all decisions made on your behalf and saving these records for at least two years after they are no longer your Agent;
- providing you or your lawyer with a list of decisions they made for you, whenever asked.

An Agent cannot authorize:

- **psychosurgery** as defined in the *Mental Health Act*;
- sterilization that is not medically necessary to protect your health;
- your participation in research or experimental activities, if the participation offers little or no potential benefit to you; and
- removal of tissue from your living body for implantation in the body of another living person pursuant to the *Human Tissue and Organ Donation Act* or for medical education or research purposes (i.e. being a living donor).

**Remember that if you limit your Agent's powers, then they will not be able to make decisions on things that are outside their powers. If no one has authority to make these decisions, then someone will have to apply to the court to become your guardian.**

If you want your Agent to be paid for acting for you, you must specifically state this in your Personal Directive.

You may want to include a provision that states your Agent is required to keep your personal information confidential. Your Agent needs to disclose enough information about you to carry out their duties and to obey the law. Otherwise, your Agent must respect your privacy unless you specifically authorize your Agent in your Personal Directive to disclose other confidential information.

For more information about the responsibilities of an Agent, see CPLEA's booklet '**Being an Agent**'.

<https://www.cplea.ca/BeingAnAgent>

## Coming into Effect

Your Personal Directive only comes into effect (can only be used) when you lack mental capacity to make personal decisions. You can have mental capacity to make some personal decisions but lack mental capacity to make other personal decisions. For example, you might be incapable of making a serious health care decision but still be able to make your own choices about routine day-to-day matters.

For more information about **Living Donor Programs**, visit:

Edmonton:  
<http://bit.ly/2IDrgRf>

Calgary:  
<http://bit.ly/2KSXyu6>

For more information on the **Alberta Organ and Tissue Donation Registry**, visit:  
<http://bit.ly/31rOimF>

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

The *Personal Directives Act* defines **significant change** as “an observable and sustained improvement that does not appear to be temporary.”

A Maker can choose one of two ways for the Personal Directive to come into effect:

1. You can designate a specific person in your Personal Directive to determine your mental capacity. This person must consult with a physician or psychologist before making a written declaration that you lack capacity.
2. If you do not designate a person to determine your capacity, or this person is unable or unwilling or cannot be contacted, then two service providers (at least one must be a physician or psychologist) must make a written declaration that you lack capacity.

A written declaration that you lack capacity is called a **Declaration of Incapacity**. The Declaration of Incapacity must be given to you, your Agent, and any other person you name in your Personal Directive as being entitled to receive a copy. The Declaration of Incapacity must state that a determination has been made that you lack capacity and that you may make an application to the court for a review of this determination.

## Regaining Mental Capacity

It is possible for you to regain mental capacity to make some or all of your personal decisions again.

If your Agent or a service provider think there has been a **significant change** in your mental capacity, your Agent and service provider must consult with each other and assess your mental capacity. They must agree that you have regained mental capacity. If they do not, then two other service providers (at least one must be a physician or psychologist) should assess your mental capacity and make a determination.

If you think you have regained capacity, you can request that your Agent or service provider assess your mental capacity. Your Agent or service provider can refuse your request if they do not think there has been a significant change in your mental capacity.

If you have regained mental capacity, then a **Determination of Regained Capacity** must be completed. This document must be provided to you, your physician, your Agent, and, if applicable, the operator of a home you are living in.

## Where to Keep your Personal Directive

Once your Personal Directive is completed and signed, you can do one or more of the following with it:

1. You can put your original Personal Directive in a safe place that your Agent knows about and can access quickly if needed.
2. You can make multiple originals of your Personal Directive so that you can keep one original and also give originals to your Agent and Alternate Agents.
3. You can leave the original with a trusted person, such as a lawyer, with specific instructions about when to release it. If you do this, however, remember that it may be years, if ever, before your Personal Directive is needed, and the person you left it with may have moved or died in the meantime.
4. You can let your family doctor, other service providers, family members, or minister (if applicable) know that you have a Personal Directive. You may also leave a copy with them. You should make a list of the people you give a copy to so that you can let them know of any future changes as well.
5. You can register with Alberta's **Personal Directives Registry**. This Registry only lists contact information for you and your Agents. It does not keep a copy of your Personal Directive. If you register with the Registry, health care professionals can see that you have a Personal Directive and get contact information for your Agents. You can register online or by mailing a Registration Form to the Public Guardian.

**In most situations, a photocopy of your Personal Directive will not be enough. Most service providers will require to see either an original or a notarized copy.**

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

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

For more information about the **Personal Directives Registry**, visit:

<http://bit.ly/31w7MXq>

# Reviewing a Personal Directive

Review your Personal Directive:

- at least once a year;
- whenever there are important changes in your relationships with others;
- if any of your family members, or others close to you, get divorced, married or die;
- if your Agent dies or says that they are no longer able or willing to act for you; or
- if there are any significant changes in your health.

After you review your Personal Directive, you can decide if you need to make a new one.

# Revoking a Personal Directive

In Alberta, getting married or entering into an adult interdependent relationship do not affect the validity of a Personal Directive. Neither does separation, divorce or death.

As long as you have mental capacity, you can revoke (cancel) your Personal Directive at any time. This can be done in several ways:

- Your Personal Directive might state that it is revoked on a certain event happening and so your Personal Directive is revoked on the date of that event.
- You can make a new Personal Directive that contradicts an earlier directive. Your old Personal Directive is revoked with respect to the contradiction only and the rest of it is still valid.
- You can make a new Personal Directive that clearly says it revokes all previous Personal Directives.
- You can make a written statement that clearly states you are revoking your Personal Directive.

Once your Personal Directive has been revoked, you should:

- notify your Agent and any other person that you have given a copy or original of your Personal Directive to; and
- destroy all originals and copies of the revoked Personal Directive as soon as possible to avoid confusion; and
- notify the Personal Directives Registry, if you registered your Personal Directive, and provide it with updated information.

**No matter how you revoke your Personal Directive, in each case the document must be in writing and it must be signed, dated and witnessed by one person.**

## Mismanagement Issues

It is against the law to misuse a Personal Directive. If you still have mental capacity, you can choose to revoke your Personal Directive and make a new one.

If your family, friends or service providers believe that your personal decisions are not being made properly by your Agent and that you are likely to be physically or mentally harmed by the Agent's decisions, they can file a complaint with the Public Guardian. The Public Guardian will investigate and may provide a solution. Any interested party (such as family or friends) can also apply to the court for help.

# Challenging a Personal Directive

Any **interested person** may apply to the court to:

- question the capacity of the Maker or Agent;
- determine the validity of a Personal Directive, or part of it;
- change, confirm or cancel a decision made by an Agent;
- determine the authority of an Agent;
- revoke the Agent's authority (fully or partially) if the Agent is not complying with the Personal Directive and the court considers this failure is likely to cause serious harm to the physical or mental health of the Maker;
- provide advice and directions;
- make a decision if the Agents cannot agree;
- delay the decision of an Agent; or
- make any other order that the court considers appropriate.

The *Personal Directives Act* does not define who an “interested person” is. The court has the power to decide.

# Glossary

## **Agent**

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

## **adult interdependent partner**

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

## **adult interdependent relationship**

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

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

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

A "relationship of interdependence" exists where two people:

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

## **Alternate Agent**

A person named in a Personal Directive to act if another Agent cannot act.

## **Attorney**

A person who is named to act on behalf of the Donor in a Power of Attorney or an Enduring Power of Attorney.

## **Co-Agent**

An Agent who has powers at the same time as another Agent. The powers may be over the same personal decisions or over different personal decisions. Co-Agents can have 'joint' powers (they must decide things together) or 'joint and several' powers (either Agent can decide).

## **court**

The Court of Queen's Bench of Alberta or the Provincial Court of Alberta, depending on the situation.

## **Declaration of Incapacity**

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

## **Declaration of Regained Capacity**

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

## **Enduring Power of Attorney**

A type of Power of Attorney that continues on even if you lose mental capacity.

## **guardian**

Of an **adult**, a person named as a guardian in a guardianship order made under section 26 of Alberta's *Adult Guardianship and Trusteeship Act*. The guardian of an adult has the authority to make personal, non-financial decisions for that adult.

## **guardianship order**

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

## **Maker**

A person who makes a Personal Directive.

**mental capacity**

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

**personal decision**

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

**Power of Attorney**

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

**service provider**

A person who carries on a business or profession that provides a personal service to an individual that requires a personal decision from that individual. Examples of services providers are: doctors, dentists, massage therapists, chiropractors, residential caregivers, other health care professionals, lawyers, or accountants.

**spouse**

A person to whom one is legally married.

# Resources

## Legislation

### Alberta Queen's Printer

For free electronic and print copies of Acts or Regulations.

[www.qp.alberta.ca](http://www.qp.alberta.ca)

## Government & Court Resources

### Government of Alberta

[www.alberta.ca](http://www.alberta.ca)

General information about Personal Directives:

<http://bit.ly/2MPhHE4>

Personal Directive form:

<http://bit.ly/2Xujt1H>

Personal Directives publication:

<http://bit.ly/2Xujt1H>

### Alberta Courts

[www.albertacourts.ca](http://www.albertacourts.ca)

### Resolution and Court Administration Services (RCAS)

Resolution and court support services across Alberta.

1.855.738.4747

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

### Alberta Supports

Help accessing more than 30 programs and 120 community services.

Toll-free: 1.877.644.9992

### Office of the Public Guardian and Trustee

Services and support for vulnerable Albertans and their families.

Toll-free: 310.0000 then 780.422.1868

<http://bit.ly/2IF6Fw1>

### Protection for Persons in Care (PPC)

Report abuse of adults receiving care or support from publicly funded service providers.

Toll-free: 1.888.357.9339

<http://bit.ly/2Zw0ZjZ>

## Legal Services

### Law Society of Alberta Lawyer Referral Service

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

Toll-free: 1.800.661.1095

<http://bit.ly/2K2fYcs>

### Legal Aid Alberta

Toll-free: 1.866.845.3425

[www.legalaid.ab.ca](http://www.legalaid.ab.ca)

### Edmonton Community Legal Clinic (ECLC)

Legal clinic in Edmonton. Call for hours and eligibility.

780.702.1725

[www.eclc.ca](http://www.eclc.ca)

### Calgary Legal Guidance (CLG)

Legal clinic in Calgary. Call for hours and eligibility.

403.234.9266

<http://clg.ab.ca>

### Community Legal Clinic – Central Alberta

Legal clinics in Central Alberta. Call for hours and eligibility.

Central Alberta: 403.314.9129

Fort McMurray: 587.674.2282

Lloydminster: 587.789.0727

Medicine Hat: 403.712.1021

[www.communitylegalclinic.net](http://www.communitylegalclinic.net)

### Grande Prairie Legal Guidance

Legal clinic in Grande Prairie. Call for hours and eligibility.

780.882.0036

[www.gplg.ca](http://www.gplg.ca)

### Lethbridge Legal Guidance

Legal clinic in Lethbridge. Call for hours and eligibility.

403.380.6338

<http://www.lethbridgelegalguidance.ca/>

### Dial-A-Law

Pre-recorded legal information available 24 hours a day, 7 days a week.

Toll-free: 1.800.332.1091

<http://clg.ab.ca/programs-services/dial-a-law/>

## Resources for Seniors

### Older Adult Knowledge Network

Legal information on Canadian law for older adults.

[www.oaknet.ca](http://www.oaknet.ca)

### Seniors Association of Greater Edmonton (SAGE)

780.423.5510

[www.MySage.ca](http://www.MySage.ca)

### Kerby Centre (Calgary)

403.265.0661

<https://www.kerbycentre.com/>

### Golden Circle Senior Resource Centre (Calgary)

403.343.6074

[www.goldencircle.ca](http://www.goldencircle.ca)



# Making a Personal Directive

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

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

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

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