

Understanding Personal Directives

Advance planning options

Every Albertan who is at least 18 years old should have:

- a personal directive for non-financial matters
- an enduring power of attorney for financial matters
- a will to plan for the disposition of financial and personal assets after death

You should have these important documents because if you don't, someone may have to apply to the court to become your decision maker if you lose capacity.

	Decision-makers chosen by you if you plan in advance...	Decision-makers decided by the court if you don't plan in advance...
...while you are alive		
Personal decisions	Personal directive: Agent Supported decision authorization: Supporter	Co-decision-making: Co-decision maker Guardianship: Guardian
Financial decisions	Enduring power of attorney: Attorney	Trusteeship: Trustee
...after death		
Financial assets	Will: Executor	Wills and Succession Act: Administrator

When you state your wishes in a legally recognized format you gain some control over your future if these documents are needed.

What is a personal directive?

A personal directive is a legal document allowing a person to name another person(s) they trust to make personal, non-financial decisions on their behalf if they lose mental capacity. Capacity is the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

Personal directives are governed under the *Personal Directives Act*.

Writing a personal directive is a choice. It is not required by law.

It is illegal to require a person to have a personal directive as a condition of obtaining residence or continuing as a resident.

The maker, the person who makes a personal directive, can include instructions they want followed and outline their wishes about important personal matters reflecting their values and beliefs.

A personal directive is only enacted if the maker has lost mental capacity. Capacity can be reassessed at any time.

You may wish to consult a lawyer for legal advice to ensure your wishes are represented accurately when making a personal directive.

Areas of personal decision-making authority

A personal matter is defined in the *Personal Directives Act* as being anything of a non-financial nature, including:

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

Decisions cannot be made in the following areas unless the personal directive provides clear instructions:

- psychosurgery as defined in the Mental Health Act
- sterilization not medically necessary to protect the person's health
- removal of tissue for implantation in the body of another person or for medical education or research purposes
- participation in research or experimental activities if there is little or no potential benefit to the person

A personal directive instruction is void if the instruction is prohibited by law.

Considerations before writing a personal directive

A personal directive can designate an agent(s) and the agent's areas of authority. An agent is a person designated in a personal directive to make personal decisions on behalf of the maker.

The maker's instructions guide the agent(s) decisions about important issues regarding personal, non-financial matters. Some examples are:

- specific instructions about health care—including any examination, procedure, service or treatment done for a therapeutic, preventative, palliative, diagnostic or other health related purpose
- medical treatments the maker would or would not want
- flexibility allowing for changes in technology or in the maker's circumstances (names of medications, types of treatments or equipment used may change)
- allowing or restricting access to personal information from family or others
- who the maker wants to temporarily care for and educate minor children if the maker is no longer capable of doing so
- how the agent makes decisions
- whether the agent can be paid for carrying out the duties or reimbursed for any related expenses the agent incurs

It is assumed the agent(s) have authority in all personal, non-financial areas unless the maker specifically lists areas of authority for the agent(s).

A health care practitioner can provide medical services without consent in a medical emergency. The health care practitioner must inform the nearest relative or legal representative as soon as possible.

Different jurisdictions

It does not matter if a personal directive was written outside Alberta if it meets the requirements of the *Personal Directives Act*.

A personal directive from outside Alberta may be known by a different name.

Writing a personal directive

Any Albertan 18 years of age or older with mental capacity can make a personal directive.

A personal directive does not need to follow a specific format. However, there is a regulated form available: formsmgmt.gov.ab.ca/Public/OPG5521.xdp

A personal directive must be:

- in writing - by hand, typed or by computer
- dated
- signed by the maker in the presence of a witness
 - if the maker is physically unable to sign the directive, another person must sign on the maker's behalf in the presence of a witness
- signed by a witness in the maker's presence

The following persons must not witness the signing of a personal directive:

- any person the maker has selected to make decisions as an agent
- the spouse or adult interdependent partner of an agent
- the maker's spouse or adult interdependent partner
- the person who signs the directive on the maker's behalf, if the maker is physically unable, or their spouse or adult interdependent partner

A personal directive is always the property of the maker. An original document is not required to be considered valid.

The agent(s) should have a current copy. The maker may also want to give a copy to health care providers.

Requirements to be an agent

An agent must:

- be 18 years of age or older at the time the personal directive takes effect
- have the mental capacity to make decisions on the maker's behalf

There are no restrictions for where the agent(s) lives.

The maker has three options:

1. Name one or more agents and choose the areas the agents will have authority. Different agents can be appointed for different areas of authority.
2. Decide to not have an agent and the personal directive only would provide instructions to service provider(s). A service provider is a person who carries on a business or profession that provides or who is employed to provide a personal service to an individual and when providing the service requires a personal decision from the individual before providing the service.
3. As a last resort, request the public guardian to act as agent if there is no other family or friends able and willing to act as agent(s). The maker must complete a [Request for the Public Guardian to Act as Agent](#) form and submit it to OPGT for the public guardian's consideration. The public guardian must agree to being designated as agent before being named.

Selecting an agent

An agent should be someone the maker trusts to make decisions the maker, themselves, would make. The person(s) chosen should understand the maker's wishes, values and beliefs so they are prepared to act in the maker's best interests.

It is **strongly recommended** the maker ask the proposed agent(s) directly if they wish to be named and are willing, able and available to assume this responsibility. It is important to have this discussion before choosing an agent to appoint so the proposed agent can make an informed decision about agreeing to act on the maker's behalf.

The agent will make highly personal decisions on behalf of the maker. Unless stated otherwise, the agent has the right to access personal information and records relevant to make the decision(s).

Multiple agents

The maker can name one or more agent(s) to act at the same time:

- Agents can be required to act together (“jointly”) or act separately as well as together.
- If they can act separately and jointly, then either agent will be able to act alone on the maker’s behalf.
- If the personal directive does not indicate the agents can act separately, it is assumed the agents must act jointly. This means all agents must agree on all decisions and provide consent.

It should be clearly stated how disagreements between the agents should be resolved if more than one agent is appointed in the same area of authority:

- If the personal directive does not provide instructions about how to resolve disagreements, the *Personal Directives Act* says that the majority rules – the decision favored by the majority of agents must be followed.
- If no majority can be reached because there is an even number of agents, the decision may need to be made by the court.

Registry

Albertans can voluntarily register their personal directive with the Office of the Public Guardian and Trustee.

The registry does not keep a copy of a personal directive. The agent will need to provide a copy of the personal directive to prove their authority.

The registry only includes the fact an adult has a personal directive, and the name and contact information of the agent(s) appointed in the personal directive. The agent(s) must consent to have their contact information included in the registry.

Only approved service providers will be able to request personal directive information. The information provided is confidential, according to the *Freedom of Information and Protection of Privacy Act* and the *Health Information Act*.

Directions about how to register a personal directive are on the personal directive page: www.alberta.ca/personal-directive.aspx

It is the responsibility of the maker and agent(s) to contact the Office of the Public Guardian and Trustee and update personal contact information.

Wallet card

Albertans may wish to carry a wallet card that indicates the existence of a personal directive and lists the names and contact information of the maker’s agent(s). A downloadable wallet card is available: formsmgmt.gov.ab.ca/Public/OPG11241.xdp

Reviewing or changing a personal directive

The maker has a responsibility to review their personal directive regularly to make sure the agent(s) continue to be willing, able and available to act in this role.

The maker can revoke a personal directive and write a new one as long as the personal directive is not in effect:

- A personal directive is valid until it is revoked in writing by the maker or the court, or the maker dies.
- The new personal directive should state that the previous personal directive has been revoked. It is a good idea to destroy the old directive so it is not mistaken for a current document.
- Agent(s) should be given a current copy.

A person, other than the maker, who willfully destroys, conceals or alters a personal directive or a document revoking the personal directive can be prosecuted.

Enacting a personal directive

An agent does not have legal authority to make decisions until the maker has been declared incapable of making decisions and the personal directive has been enacted either for a specific area(s) of authority or for all personal matters.

There are two ways in which a personal directive can be enacted:

1. The maker can name a person in the personal directive to assess capacity. This person must consult with a physician or psychologist and complete a regulated form. This form is called a [Declaration of Incapacity to Make Decisions about a Personal Matter – Schedule 2](#).
2. If no one is named in the directive to assess capacity or the person named is unwilling or unable to carry out this task, two service providers, at least one of whom is a physician or psychologist, must do a capacity assessment and make a written declaration that the maker lacks capacity on the regulated form. This form is called a [Declaration of Incapacity to Make Decisions about a Personal Matter – Schedule 3](#).

A copy of the Declaration of Incapacity to Make Decisions about a Personal Matter must be given to the maker, the agent and any other persons named in the personal directive. The agent must inform the nearest relative and legal representative (e.g., attorney) the personal directive is in effect.

Duties of an agent once the personal directive is enacted

An agent must:

- only make decisions in the areas the agent has been granted authority by the maker
- consider the maker's capacity on an ongoing basis and arrange for re-assessment of capacity if capacity appears to have been regained
- consult with the maker before making decisions to ensure that the maker contributes to the extent that the maker is able
- make personal decisions on behalf of the maker by following any clear instructions provided in the personal directive
- when the personal directive does not contain clear instructions, make decisions that the agent believes the maker would have made in the circumstances, based on the agent's knowledge of the maker's wishes, beliefs and values
- if the agent does not know what the maker's wishes, beliefs and values are, then a decision can be made that the agent believes to be in the maker's best interest
- keep a record of all personal decisions made on the maker's behalf
- keep personal information of the maker confidential, as required by privacy legislation

An agent is not considered liable for decisions made in good faith on behalf of the maker.

Record of Decisions

Making decisions includes:

- giving consent
- refusing to give consent
- withdrawing consent

The *Personal Directive Act* requires the agent keep a record of all decisions while they are acting as agent and for two years after the agent's authority has ended.

The agent must provide a record of decisions on request to the following:

- the maker
- the maker's lawyer
- the maker's legal representative who has authority with respect to a matter addressed in the record, but only that portion of the record that is relevant to that person's authority
- any other agent who has decision making authority with respect to a matter addressed in the record but only that portion of the record that is relevant to that person's authority

The end of an agent's authority

The responsibility of an agent ends when:

- the maker regains capacity to make decisions, which is recorded on the appropriate form
- the personal directive includes a date or circumstance in which the directive is to be revoked or changed (for example: if the maker divorces, the spouse is no longer the agent)
- the court determines the personal directive is no longer in effect or revokes the authority of the agent
- the agent loses capacity
- the maker dies

If an agent will not act or is unable to act

If the person named as agent refuses to or is unable to assume this role or refuses to make a decision, an alternate agent named in the personal directive may act.

If an alternate agent has not been named:

- service providers, such as physicians, lawyers and other health care professionals, can follow any clear instructions in the personal directive relevant to the decision to be made
- if no instructions are available, the service provider must inform the nearest relative, or any other individual listed in the regulations, a decision needs to be made that is not covered in the personal directive
- family, friends or the public guardian as a last resort, may apply to the court to become the maker's court appointed guardian when there is no agent who is willing and able to act on the maker's behalf

Concerns about an agent

Whether or not instructions are provided about reviewing the decisions of an agent, anyone can make a written complaint about the actions of an agent to the Office of the Public Guardian and Trustee if:

- the personal directive has been enacted
- an agent is failing to comply with the personal directive or the duties of an agent
- the failure is likely to cause harm to the physical or mental health of the maker

Complaints must be written and signed by the complainant. A regulated form may be used to record the details of the complaint and is available on the OPGT website: www.alberta.ca/complaints-about-decision-makers.aspx

Complaints will be screened and an investigation will be conducted if the criteria is met.

Alternatively, someone can apply to the court to have the situation reviewed. This process should be discussed with a lawyer.

Where Can I Get More Information?

Website: www.alberta.ca/personal-directive.aspx

Email: personal.directives@gov.ab.ca

Phone: 1-877-427-4525

Legislation:

Personal Directives Act: open.alberta.ca/publications/p06

Personal Directives Regulation: open.alberta.ca/publications/2008_099

Personal Directives (Ministerial) Regulation: open.alberta.ca/publications/1998_026