

# The Adult Guardianship and Trusteeship Act

Alberta

This booklet is for people who either:

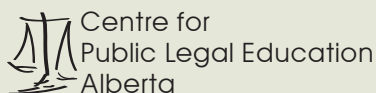
- find themselves, or a loved one, in a state of diminished mental capacity and are interested in exploring joint decision-making options; or
- have a loved one who has lost capacity and must set up Guardianship and Trusteeship for that person.

This booklet gives general information only, not legal advice. It is not a do-it-yourself guide. For that, you need a more detailed self-help publication or legal advice. See the last few pages of this booklet for information on where to get this help.

## Contents

1. What is the new <i>AGTA</i> and what does it do? Top 10 General Information Questions.....	2
2. What if only a little bit of help is required? Top 10 Questions about Supported Decision-Making .....	5
3. What if more consistent help is required? Top 20 Questions about Co-Decision-Making.....	8
4. What if we need help fast? Top 10 Questions about Specific Decision-Making .....	13
5. What if a person has lost capacity to make personal decisions? Top 20 Questions about Guardianship .....	15
6. What if a person has lost capacity to make financial decisions? Top 20 Questions about Trusteeship.....	19
7. What happens when something goes wrong? Top 10 Questions about Protective Measures and Investigations .....	23
8. How is capacity determined? Top 10 Questions about Capacity Assessments .....	25
9. What do the words mean? Glossary .....	28
10. Where can I get more help? List of Resources .....	30

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



#800 10050 – 112 Street  
Edmonton, AB T5K 2J1  
Phone: 780-451-8764  
Fax: 780-451-2341  
info@cplea.ca  
www.cplea.ca

# 1. What is the new AGTA and what does it do?

## Top 10 General Information Questions.

### 1.1

#### **What is the Alberta Adult Guardianship and Trusteeship Act (AGTA)?**

The AGTA is a new law that came into force on October 30, 2009. It replaced the 30-year-old *Dependent Adults Act (DAA)*. When an adult needs assistance making decisions, the AGTA provides a variety of options that range from having a person provide some help in making decisions to having a person take over the decision-making completely. The exact options depend on the kinds of decisions being made.

### 1.2

#### **How is the AGTA different from the old *Dependent Adults Act (DAA)*?**

Under the DAA, decision-making ability (or “mental capacity”) was an all-or-nothing concept: a person was considered either capable or not capable of making decisions. The AGTA, on the other hand, is based on the idea that capacity for personal decision-making capacity is a continuum – a person may only need a bit of help or may still be able to make some decisions, but not all. Similarly, a person’s capacity may change over time. As a result, the AGTA enables a variety of support and substitute decision-making options, depending on individuals’ decision-making needs. The goal is to keep the person as independent as possible and intrude on them as little as possible, given their needs and circumstances. However, under the AGTA capacity for financial decision-making is still an all-or-nothing concept.

*... the AGTA provides a variety of options that range from having a person provide some help in making decisions to having a person take over the decisions completely.*

### 1.3

#### **What kinds of “decisions” are covered by the AGTA?**

There are two kinds of decisions covered by the AGTA: “personal” matters and “financial” matters.

A personal matter is defined as any issue, except a financial matter, relating to the person of an 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 any educational, vocational or other training;
- employment; and
- any legal proceedings that do not relate primarily to the financial matters.

A financial matter is defined as any matter relating to the acquisition, disposition, management or protection of property. You could say it relates to dealing with something you can own (including money), whether obtaining it, getting rid of it, handling it or keeping it safe.

### 1.4

#### **For “personal matters”, what are the various options under the AGTA?**

The options for personal matters are (from least to most intrusive):

##### **Supported Decision-Making Authorizations**

This allows an adult with capacity to name a “Supporter” to help make decisions in personal matters. For this option, there is no need to involve a court. Instead, this option is in the form of an “Authorization” (a pre-set document). This option is not available for financial matters.

## Co-Decision-Making Orders

Co-Decision-Making Orders are for adults whose capacity is impaired, but who can still make decisions with assistance. This takes the form of a court order. However, the Assisted Adult must agree to it. This option is not available for financial matters. (For more information, see page 8.)

*It is important to note that if an adult becomes the subject of a Trusteeship Order, that adult will **no longer** be able to enter into, or continue with, either a Supported Decision-Making Authorization or a Co-Decision-Making Order. Therefore, if you want one of these arrangements for personal decisions, you may wish first to consider *informal trusteeships* for financial decisions. (See link at the back of this booklet.)*

## Specific Decision-Making Provisions

This option is for situations where:

- an adult has no Personal Directive or Guardian; and
- a health-care provider believes the adult cannot provide consent to health care, to the temporary admission into a facility, or to the discharge from a facility.

In these circumstances the health-care provider can select a relative of the adult to make the decision or, as a last resort, the Public Guardian can make the decision. (For more information, see page 13.)

## Temporary Guardianship Orders

This is for situations in which an adult is believed to lack capacity and is in imminent danger of death or serious harm if someone does not make a decision to prevent that death or harm. A temporary court order is required. This order can generally only last 90 days, but under certain circumstances it can be extended to up to six months.

## Guardianship Orders

This option is for adults assessed as incapable and who have not completed a Personal Directive. This kind of court order gives another adult the ability to make personal decisions on behalf of incapable adult. (For more information on Guardianship, see page 15.)

## 1.5

### For “financial matters”, what are the various options under the AGTA?

The options for financial decisions are (from least to most intrusive):

#### Temporary Trusteeship Orders

This is for situations in which an adult is believed to lack capacity and is in imminent danger of financial loss if someone does not make a decision to prevent that financial loss. A temporary court order is required. This order can generally only last 90 days, but under certain circumstances it can be extended to up to six months.

#### Trusteeship Orders

This option is for adults assessed as incapable and who have not completed an Enduring Power of Attorney. This kind of court order gives another adult the ability to make financial decisions on behalf of incapable adult. (For more information on Trusteeship, see page 19.)

*It is important to note that if an adult becomes the subject of a Trusteeship Order, that adult will **no longer** be able to enter into, or continue with, either a Supported Decision-Making Authorization or a Co-Decision-Making Order. Therefore, if you want one of these arrangements for personal decisions, you may wish first to consider *informal trusteeships* for financial decisions. (See link at the back of this booklet.)*

*The AGTA, on the other hand, is based on the idea that capacity for personal decision-making is a continuum.*

*...However, capacity for financial decision-making is still all-or-nothing.*

## 1.6

### What exactly is “capacity”?

The term “capacity” refers to a person’s mental ability to make decisions. Specifically, in the AGTA, capacity is defined as:

- the ability to understand the information that is relevant to a decision; and
- the ability to appreciate the reasonably foreseeable consequences of
  - making a decision; and
  - not making a decision [i.e.: the failure to make a decision].

Capacity is, therefore, a continuum, meaning 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. A person may only need a bit of help, she or he may still be able to make some – but not all – decisions. Whether a person has a 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 a craft-making lesson. Similarly, a person’s capacity can change over time – especially when a person is suffering from a degenerative disorder.

*Whether a person has a capacity to make a particular decision depends on the kind of decision in question ... similarly, a person’s capacity can change over time.*

## 1.7

### How do the various AGTA options fit with Personal Directives?

A Personal Directive is signed before an adult has lost capacity and comes into effect only once an adult has lost capacity. Therefore:

- even if an adult has completed a Personal Directive, that adult can still obtain either a Supported Decision-Making Authorization or a Co-Decision-Making Order (because, for both of these options, some capacity remains);
- if an adult has completed a Personal Directive, and then loses capacity, a Guardianship Order should not be required. Instead, when capacity is lost, the Personal Directive comes into effect and the named Agent can begin to make personal decisions on behalf of the incapacitated adult; and
- if an adult has *not* completed a Personal Directive and then loses capacity, a Guardianship application will be necessary.

## 1.8

### How do the various AGTA options fit with Enduring Powers of Attorney?

An Enduring Power of Attorney is signed before an adult has lost capacity and comes into effect only once an adult has lost capacity. Therefore:

- if an adult has completed an Enduring Power of Attorney, and then loses capacity, a Trusteeship Order should not be required. Instead, when capacity is lost, the Enduring Power of Attorney comes into effect and the named Attorney can begin to make financial decisions on behalf of the incapacitated adult; and
- if an adult has *not* completed an Enduring Power of Attorney and then loses capacity, a Trusteeship application will be necessary.

## 1.9

### How does the AGTA fit with privacy laws?

For all of the options available under the AGTA, privacy laws have been considered.

For example, in Supported Decision-Making Authorizations, the adult can give his or her Supporter legal permission to access relevant information that might otherwise be protected under privacy laws. Similarly, AGTA court orders will provide permission to third parties to provide otherwise private information to the person appointed in the court order. For example, a Guardian would need to access health information about the Represented Adult in order to make health care decisions.

## 1.10

### What does the AGTA mean for people who have old court orders under the *Dependent Adults Act*?

A guardianship and/or trusteeship order that was made under the *Dependent Adults Act (DAA)*, continues “as if” it had been created under the AGTA (this includes any powers that would otherwise not exist under the AGTA – however those powers [for example, the authority to make decisions about licenses and permits] will not survive review).

Under the DAA, reviews were mandatory. At the next review date, the DAA order will be replaced with an AGTA order. This means that the AGTA provisions will apply. As a result, there may not be the same review requirements in the future (see questions 5:18 and 6:18, below). At the time of review, an applicant may consider if less intrusive forms of decision-making support, such as a Co-Decision-Making Order, would better meet the adult’s decision-making needs, and, if so, this option can be presented to the Court.

## 2. What if only a little bit of help is required?

### Top 10 Questions about Supported Decision-Making.

## 2.1

### What is Supported Decision-Making?

Sometimes, adults who still have capacity would benefit from the help of a person they trust when making decisions. For example: a person might need help with medical information, or with communication. Similarly, a person might feel better able to make decisions if someone could help them through the decision-making process by explaining the possible impact of different options.

Such adults can now sign a form that authorizes such a relationship. This form is known as a “Supported Decision-Making Authorization”. The adult who prepares this form is known as the “Supported Adult.” The person who will assist the Supported Adult is called the “Supporter.”

## 2.2

### Is Supported Decision-Making available for all kinds of decision-making?

No. Supported Decision-Making is only available for personal matters. Supported Decision-Making is *not* available for financial matters.

*Supported Decision-Making is only available for personal matters...not financial matters.*

## 2.3

### For whom would Supported Decision-Making be a good option?

A Supported Decision-Making arrangement could be very helpful for:

- capable individuals who face complex decisions (especially if they often face such decisions),
- people who have difficulty communicating in English,
- people with mild disabilities,
- people who have other communication difficulties, and
- people who – due to a temporary condition – may only need a bit of help for a little while.

If you are considering a Supported Decision-Making Authorization and you have not yet completed a Personal Directive, you might also think about preparing and registering a Personal Directive which would come into effect if you lost capacity to make personal decisions.

*It is important to note, however, that if an adult becomes the subject of a Trusteeship Order, that adult will no longer be able to enter into, or continue with a Supported Decision-Making Authorization. Therefore, if you want to create or continue a Supported Decision-Making arrangement for personal decisions, you may wish to consider informal trusteeships if you also require help for financial decisions. (See link at the back of this booklet.)*

*Sometimes, adults who still have capacity would benefit from the help of a person they trust when making decisions. ... Such adults can now sign a form that authorizes such a relationship.*

## 2.4

### Who can I appoint to be a Supporter?

A Supporter must:

- be at least 18 years old;
- have the ability to act as a Supporter (i.e.: they themselves have capacity); and
- consent to act as a Supporter.

Before appointing a Supporter, you should give thought to the person(s) you are most comfortable with having access to your information and assisting you to make and/or communicate decisions. The Public Guardian cannot be a supporter.

## 2.5

### How can I enter into a Supported Decision-Making arrangement?

To complete a Supported Decision-Making arrangement, you and the person who will be your Supporter must:

- agree on the need for the arrangement; and
- sign a Supported Decision-Making Authorization form that outlines the purpose of the arrangement and the kinds of decisions you wish to include.

There is no formal court application process to enter into a Supported Decision-Making arrangement.

You can obtain a Supported Decision-Making authorization form at [www.seniors.alberta.ca/opg](http://www.seniors.alberta.ca/opg). You can also pick up a copy of the form at any Office of the Public Guardian (see back panel for contact information).

## 2.6

### Once it is signed, what do I do with Supported Decision-Making Authorization form?

Once the Authorization form is signed, both parties keep a copy of it and present it as required. There is no need to register it anywhere.

*... if an adult becomes the subject of a Trusteeship Order, that adult will no longer be able to enter into, or continue with a Supported Decision-Making Authorization.*

## 2.7

### **How will the presence and help of the Supporter be treated and viewed?**

As long as there is no evidence of undue influence or fraud, a decision made by the Supported Adult with the assistance of the Supporter is the decision of the adult and can be relied upon and acted upon.

## 2.8

### **What are the exact responsibilities of a Supporter?**

A Supporter must keep a record of decisions that s/he assisted the Supported Adult in making and must act in the Supported Adult's "best interests." As long as a Supporter acts "in good faith," s/he cannot be held liable for his/her actions.

*A Supported Decision-Making arrangement is a tool you can use before you lose capacity – and it would cease as soon as you do lose capacity (at which point your Personal Directive would come into effect).*

## 2.9

### **How does the Authorization end?**

There are several ways which a Supported Decision-Making arrangement can come to an end. They include:

- when the Authorization is terminated by the Supported Adult completing a Termination Form (e.g.: this can occur if the Supported Adult wishes to have the help of a different Supporter, or if the Supported Adult no longer needs any help);
- when the adult's capacity to make personal decisions is further impaired and the Court appoints a Co-Decision-Maker;
- when the adult loses his/her capacity to make personal decisions and the Court appoints a Guardian (which could occur if the adult did not have a Personal Directive); or
- when the adult loses his/her capacity and his/her Personal Directive comes into force.

*It is also important to note that if an adult becomes the subject of a Trusteeship Order, that adult will no longer be able to enter into, or continue with, a Supported Decision-Making Authorization.*

## 2.10

### **Can I enter into an Authorization if I have already signed a Personal Directive?**

Yes. The Personal Directive would still be valid – it just would not become effective until you lose capacity. A Supported Decision-Making arrangement, on the other hand, is a tool you can use before you lose capacity – and it would cease as soon as you do lose capacity (at which point your Personal Directive would come into effect).

## 3. What if more consistent significant help is required?

### Top 20 Questions about Co-Decision-Making.

#### 3.1

##### What is Co-Decision-Making?

If an adult's ability to make personal decisions is significantly impaired but s/he can still make decisions with support, a Co-Decision-Making Order may be an option. The adult who is the subject of one of these orders is called the "Assisted Adult". The person who is assisting is known as the "Co-Decision-Maker."

A Co-Decision-Making Order is a formal arrangement wherein the adult and his/her Co-Decision-Maker are required to make decisions together. A Co-Decision-Maker is required to assist the adult in communicating or carrying out decisions, when necessary or appropriate. For example, when making a health care decision, both the Assisted Adult and the Co-Decision-Maker would sign the consent form. All decisions made must be in the best interests of the Assisted Adult.

Co-Decision-Making Orders are voluntary. The Court cannot grant such an order unless both the proposed Assisted Adult and the proposed Co-Decision-Maker agree.

#### 3.2

##### Is Co-Decision-Making available for all kinds of decision-making?

No. Co-Decision-Making Orders are only available for personal matters. There are no Co-Decision-Making Orders for financial matters.

*A Co-Decision-Making Order is a more formal arrangement wherein the adult and his/her Co-Decision-Maker are required to make decisions together.*

#### 3.3

##### For whom would Co-Decision-Making be a good option?

A Co-Decision-Making Order could be very helpful for adults who:

- cannot make personal decisions on their own but could make personal decisions with the guidance and support of another person; and
- have a close relationship with someone willing to provide decision-making support; and
- do not have a Guardian or a Personal Directive.

A Co-Decision-Making Order is also available for an adult who was under a Guardianship Order, but whose capacity has improved (but the Guardianship Order must first be terminated). It is not possible to have a Co-Decision-Making Order for some types of personal decisions (e.g.: health) matters and a Guardianship Order for others (e.g.: where to live).

*It is important to note, however, that if an adult becomes the subject of a Trusteeship Order, that adult will no longer be able to enter into, or continue with a Co-Decision-Making Order. Therefore, if you want to create or continue a Co-Decision-Making arrangement for personal decisions, you may wish to consider *informal trusteeships* if you also require help for financial decisions. (See link at the back of this booklet.)*

#### 3.4

##### Who can the Court appoint to be a Co-Decision-Maker?

A Co-Decision-Maker must be at least 18 years old, must consent to act, and should have a trusting relationship with the Assisted Adult. As a result, a Co-Decision-Making Order is often appropriate for family and close friends. Neither the Public Guardian nor the Public Trustee can act as a Co-Decision-Maker.

### 3.5

#### **Is it possible to have more than one Co-Decision-Maker?**

Yes. However, the Co-Decision-Making Order must specify if these Co-Decision-Makers are to act jointly (meaning that they have to agree on all decisions), separately (meaning the CDMs are responsible for separate types of decisions such as one CDM helping with health care decisions and the other CDM helping with social decisions) or successively (meaning one after another in a ranked order).

### 3.6

#### **I think that my impaired 17-year-old son would benefit from a Co-Decision-Making arrangement. Do I have wait until he is 18 to apply?**

No. An application for a Co-Decision-Making Order can be made for an individual up to twelve months before his/her 18th birthday. This way, the order can come into effect immediately upon his/her birthday.

### 3.7

#### **How can I enter into a Co-Decision-Making arrangement?**

The decision to grant a Co-Decision-Making Order is made by the Court. As a result, the process is more involved than the process for a Supported Decision-Making Authorization. However, this does not mean that a court appearance will always be required. Often, you can do it with a “desk” application (see question 3.10).

The Co-Decision-Making Order application package includes a number of forms, including a Capacity Assessment Form (see question 3.9). The application package is available through the Office of the Public Guardian (see contact information on the back of this booklet).

### 3.8

#### **What kinds of decisions can be covered by Co-Decision-Making?**

Co-Decision-Making Orders must specifically list the personal matters to which Co-Decision-Making applies.

The options include:

- the adult’s health care;
- where, with whom, and under what conditions the adult is to live, either permanently or temporarily;
- the persons with whom the adult may associate;
- the adult’s participation in social activities;
- the adult’s participation in any education, vocational or other training;
- the adult’s employment; and
- the carrying on of any legal proceedings that does not relate primarily to the financial matters of the adult.

### 3.9

#### **What is a “Capacity Assessment Report” and what is involved in completing one?**

In order to obtain a Co-Decision-Making Order, the proposed Assisted Adult must take part in a Capacity Assessment and be found to be “*significantly impaired*.”

There are set standards for the assessment process. It includes a cognitive (ability to think and reason) and functional (ability to do things and relate to others) assessment. It focuses on the kinds of decisions that the adult needs to make and evaluates the level of assistance required. In addition, the assessor will only assess “domains” or the types of decisions where assessment is warranted. For example, there may be no concerns about how the adult chooses his/her social activities, but there is concern about the adult’s ability to make health-care decisions. In this situation, the assessor would only assess the adult’s ability to make health-care decisions.

The capacity assessment process must be completed by a doctor, psychologist or other health care professional specifically trained to be a Capacity Assessor (see question 8.2, below). The Office of the Public Guardian can provide a list of qualified and trained Capacity Assessors.

### 3.10

#### What is a “desk application”?

A “desk application” is a streamlined process for obtaining a court order, without having to appear in Court. For Co-Decision-Making, Guardianship, and Trusteeship, if the case is straightforward with nothing to be argued, the application can be made by submitting the appropriate paperwork to a Review Officer at the Office of the Public Guardian. The Review Officer then completes a separate report on the application and files the application with the Court. If the Court is satisfied with the information presented, the Court can grant the Order. If, however, the Court or other interested party requests a hearing, such a hearing can still occur (at which point the application is no longer a “desk” process).

### 3.11

#### What exactly is the role of the Review Officer?

At a general level, Review Officers (ROs) provide information to the general public.

In addition, ROs assist applicants with both desk and court applications.

Under the desk application route, an applicant does not file the documents directly with the court but instead submits them to an RO, who then:

- meets with the adult to explain both the application itself as well as the adult’s right to request a hearing and have a lawyer, and to gather the adult’s views on the application;
- sends notice of the application to the appropriate persons (see next question);
- receives any requests for a hearing; and
- prepares a written report of the adult’s views and the suitability of the proposed decision-making order (Co-Decision-Making, Guardianship or Trusteeship)

There is a time limit for someone to submit a request for a hearing. When this time has passed, the RO files the application documents and the RO’s report with the Court.

### 3.12

#### Who does the Review Officer notify of an application?

The RO must notify specific family members (known as the “members of the prescribed family class”) who live in Canada. This includes:

- the spouse or the adult interdependent partner of the adult;
- the parents of the adult;
- all children of the adult who are 18 years of age or older; and
- all the brothers and sisters of the adult who are 18 years of age or older.

However, the applicant can apply to dispense with notice to a specific person if there is an acceptable reason.

For example: if a person would not understand the application (such as a sibling who has dementia), or there has been no contact between the adult and that person for many years. The Court decides whether the notice must be sent or not.

### 3.13

#### Do these people get a copy of everything in the application?

No. The notice includes a summary document (called a “Notice of Application”) and a Request for Hearing Form. A copy of the Capacity Assessment is *not* provided.

### 3.14

#### I have received notice of an application for my sibling, but there is no copy of the Capacity Assessment Report (CAR). I would like more information. Where can I get a copy of the CAR?

If you require more information, you could contact the RO. S/he may be able to answer your questions. But the RO *cannot* give out a copy of the CAR. For that, you can try contacting the applicant or the applicant’s lawyer. If they will not give you a copy of the CAR and you still wish to see it, you will need to file the Request for Hearing Form.

### 3.15

#### What does the Court consider when deciding whether to grant the Co-Decision-Making Order?

For the Court to grant a Co-Decision-Making Order, the Court must find:

- that the adult’s capacity is “significantly impaired”, but that the adult could make a decision with “guidance and support”;
- that less intrusive means are not adequate; and
- that it is in the best interests of the adult to have a Co-Decision-Maker.

In deciding whether it is in the adult’s best interests to have a Co-Decision-Making Order, the Court must consider:

- the Capacity Assessment Report;
- the Review Officer’s report;
- the views of the adult;
- the assisted adult’s Personal Directive (if there is one);
- the assisted adult’s Supported Decision-Making Authorization (if there is one);
- whether the personal matters about which the adult is significantly impaired are likely to expose the assisted adult to harm; and
- whether the benefits of a Co-Decision-Making Order outweigh the risks, if any, to the adult of having a Co-Decision-Maker.

Because there is no required review period in the *AGTA*, the Court must also consider whether any reviews of the Order will be required. If yes, the Court must specifically include the review provisions in the Order itself. This consideration is especially important if the Capacity Assessment Report indicated that the adult’s capacity is likely to improve.

### 3.16

#### What are the responsibilities of a Co-Decision-Maker?

A Co-Decision-Maker *cannot* decide for, or on behalf of, the Assisted Adult. A Co-Decision-Maker can only assist in making decisions in any or all of the personal matters listed in the Co-Decision-Making Order. These can include: health care, where and with whom the adult can live, who the adult may associate with, social activities, education or vocational training, employment, legal matters or any other personal matters the Court determines necessary.

Co-Decision-Makers *cannot* assist with decisions on any personal matter *not* listed in the Co-Decision-Making Order or on any financial matters.

A Co-Decision-Maker must exercise his/her authority diligently, in good faith, and in the best interests of the Assisted Adult. As long as the Co-Decision-Maker does so, s/he cannot be held liable for his/her actions.

A Co-Decision-Maker or the Assisted Adult can seek the advice and direction of the Court on any question respecting the Assisted Adult.

### 3.17

#### Can a Co-Decision-Maker be paid for his/her work?

A Co-Decision-Maker can be reimbursed for expenses incurred in exercising his/her authority or carrying out duties, but a Co-Decision-Maker *cannot* be paid for being a Co-Decision-Maker.

*A Co-Decision-Maker cannot decide for, or on behalf of, the Assisted Adult. A Co-Decision-Maker can only assist in making decisions .*

### 3.18

#### **What if the adult and the Co-Decision-Maker do not agree on a particular decision?**

The intent of Co-Decision-Making is that the Assisted Adult and the Co-Decision-Maker work through decisions together. As a result, a Co-Decision-Maker cannot decide for, or on behalf of, the Assisted Adult. This can be challenging.

If the Assisted Adult and the Co-Decision-Maker cannot reach an agreement on a decision, the adult's decision applies. Similarly, a Co-Decision-Maker cannot refuse to sign a document within the Co-Decision-Maker's authority if a reasonable person would sign the document and the decision is not likely to cause harm to the Assisted Adult.

At any time, the Assisted Adult or the Co-Decision-Maker may end the Co-Decision-Making agreement by filing a "Withdrawal of Consent to Co-Decision-Making" form with the Court. If this occurs, the Office of the Public Guardian will follow up to determine the next steps — whether there is someone else who could act as Co-Decision-Maker or whether another type of decision-making support is more appropriate for the Assisted Adult.

### 3.19

#### **Can a Co-Decision-Making Order be reviewed?**

Yes.

Although there is no generally required review period (as there was in the *DAA*) a review of a Co-Decision-Making Order is mandatory if:

- the Order itself specifies a review date;
- there has been a significant change in the Assisted Adult's capacity for which a variation or termination of the Order would be in the best interests of the Assisted Adult; or
- there is a change of circumstance in the Co-Decision-Maker that warrants a review of the Order.

Applications for reviews of Co-Decision-Making Orders also go through the Review Officer.

### 3.20

#### **How can a Co-Decision-Making Order end?**

A Co-Decision-Making Order remains operative until:

- it is terminated,
- a Guardianship Order is granted, or
- a Personal Directive is activated.

An Assisted Adult can withdraw consent to the co-decision-making arrangement by filing a "Withdrawal of Consent to Co-Decision-Making" form with the Court.

*It is also important to note that if an adult becomes the subject of a Trusteeship Order, that adult will no longer be able to enter into, or continue with, a Co-Decision-Making Order.*

## 4. What if we need help fast?

### Top 10 Questions about Specific Decision-Making.

#### 4.1

##### **What is Specific Decision-Making?**

When an adult does not have the capacity to make a decision and they do not have a Guardian or Personal Directive, a health-care provider (a physician, nurse practitioner, or dentist for dental care only), may choose a relative to act as a Specific Decision-Maker to make a necessary decision on behalf of the adult.

#### 4.2

##### **When does Specific Decision-Making apply?**

Specific Decision-Making is used for time-sensitive decisions, in situations where there is no decision-making arrangement or Personal Directive in effect.

Specific Decision-Making is restricted to:

- health care; and
- temporary admission to or discharge from a residential facility.

In other words, health care providers (physicians, nurse practitioners or dentists for dental care only) may use Specific Decision-Making to allow a relative to make a one-time decision on behalf of an adult who lacks capacity.

Before doing this, the health-care provider must first assess whether or not the adult is able to make the decision in question. The Specific Decision-Making option is only used after the adult has been assessed as being *incapable* of providing informed consent for making a specific decision and the health-care provider has identified that a treatment or placement decision is needed. This is its own kind of narrow capacity assessment, and is slightly different (and less involved) than the Capacity Assessment required for other decision-making options.

#### 4.3

##### **Are there limits to the types of decisions that can be made?**

Yes. Specific Decision-Making does not apply to decisions about treatment of mental health disorders, psychosurgery, sterilization, transplantation of tissue, certain kinds of experimental activities, or decisions where withdrawal or withholding of health care would lead to imminent death.

#### 4.4

##### **Does this mean that in an emergency a health-care provider will not make a decision until a relative can be found?**

No. A health-care provider can always provide emergency care if the health care is required to preserve the adult's life, or to prevent serious physical or mental harm, or to alleviate severe pain.

*Specific Decision-Making is used for time sensitive decisions, in situations where there is no decision-making arrangement or Personal Directive in effect.*

## 4.5

### How does the health-care provider choose the relative who will make the decision?

The health-care provider chooses the “nearest relative” from a ranked list:

- spouse or adult interdependent partner;
- adult son or daughter;
- father or mother;
- adult brother or sister;
- grandfather or grandmother;
- adult grandson or granddaughter;
- adult uncle or aunt;
- adult nephew or niece; or
- the Public Guardian (as a last resort).

However, the relative must:

- be over 18 years of age;
- be available and willing to make the decision;
- be aware of the adult’s wishes, beliefs and values;
- be on good terms with the adult; and
- have been in contact with the adult within the past 12 months.

## 4.6

### What if there is a dispute about whom to choose?

If there is disagreement about who should be selected, the Public Guardian can either act as the Specific Decision-Maker or authorize a family member who is not part of the initial disagreement.

## 4.7

### What kinds of things must the Specific Decision-Maker consider when making the decision?

When making a decision, a Specific Decision-Maker must consider:

- whether the adult’s condition or quality of life will likely be improved by the proposed action,
- whether the potential benefit of the action is greater than the potential risk of harm; and
- whether something less restrictive or less intrusive would be equally beneficial.

## 4.8

### Can the adult still have a say in the decision?

Yes. Even though the adult has been assessed as unable to make a decision, the relative should consult with him/her to the greatest extent possible.

## 4.9

### Are there forms required to make the decision?

Yes. Health-care providers and health-care organizations have the necessary forms. The health-care provider must keep a record of the completed form, and of the decision that was made.

## 4.10

### What if a conflict arises after the decision has been made?

In general, health-care providers are entitled to rely in the decision of the Specific Decision-Maker.

However, a health-care provider may **not** immediately act upon a decision of the Specific Decision-Maker if that health-care provider has been informed that the adult (or any relative, close friend or legal representative of the adult) has requested a capacity re-assessment or a review of the decision.

When this occurs, these parties must take action on their intent (e.g.: arrange for capacity assessment, make a court application) within **one** week. If they do not do so, the health-care professional can *then* act on the decision. In addition, even after a decision was acted upon, any relative, close friend or legal representative of the adult can challenge the decision in court.

It is also important to note that, regardless of the instructions of the Specific Decision-Maker, health-care providers are not required to provide health care if, in the opinion of the health-care provider, the provision of health care would be futile.

*Guardianship applies when an adult has no capacity to make decisions on personal matters.*

## 5. What if a person has lost capacity to make personal decisions?

### Top 20 Questions about Guardianship.

#### 5.1

##### What is Guardianship?

Guardianship applies when an adult has no capacity to make decisions on personal matters. A person 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.” A Guardian, appointed by the Court, has the legal responsibility to make personal decisions for the Represented Adult.

#### 5.2

##### What kinds of things do I need to know before applying for Guardianship?

Before you apply for guardianship, you need to know whether the proposed Represented Adult has a Personal Directive and what it says, because a Guardian and an Agent cannot have responsibilities for making decisions in the same areas. You also need to know who is familiar with the proposed Represented Adult’s values, preferences, opinions, religious and cultural heritage, as a Guardian must make decisions based on these factors.

#### 5.3

##### What is Temporary Guardianship?

If the Court is satisfied that there is evidence that an adult lacks capacity to make a decision on a personal matter and the adult is in immediate danger of death or serious physical or mental harm, the Court can grant a Guardianship Order on an urgent basis for up to 90 days. To do so, the Court can change any requirements in the Act or Regulations with regard to filing documents, service of those documents, and evidence of urgency so warrants. Such a temporary order can, upon review, be extended for up to six months.

#### 5.4

##### Who can be a Guardian?

A Guardian must be over the age of 18. It is not necessary that the Guardian live in Alberta, but they should be in regular contact with the proposed Represented Adult and have a good understanding of the adult’s values and beliefs. Guardians must also consent to the role.

Usually a family member or friend applies for Guardianship. If there is no other individual willing, able and suitable to act, the Public Guardian may be appointed. Before that can occur, however, the Public Guardian must be given both notice and a reasonable opportunity to make representations to the court.

#### 5.5

##### Is it possible to have more than one Guardian?

Yes.

If more than one Guardian is appointed, you will need to address the question of division of powers between the Guardians. For example:

- will one have authority over certain decisions, and the other authority over other decisions;
- will they have to both/all agree on every decision before it can be made; or
- will they each be able to act separately on all kinds of decisions.

#### 5.6

##### My incapable 17-year old daughter will require a Guardian when she turns 18. Must I wait until after the 18<sup>th</sup> birthday to apply for Guardianship?

No. An application for Guardianship can be made for an individual up to twelve months before his/her 18th birthday. This way, the order can come into effect immediately upon his/her birthday.

## 5.7

### **Is it possible to apply for Guardianship if there is a Personal Directive?**

Technically, yes. However, a Guardian and an Agent cannot have responsibilities for making decisions in the same areas. Therefore, if a Personal Directive (PD) is in effect, a Guardianship Order would only be required for areas of personal decision-making not already included in the PD. Most PDs give sufficient decision-making authority to an Agent, so Guardianship is not necessary.

## 5.8

### **How can I obtain Guardianship for my loved one?**

The decision to grant Guardianship is made by the Court. However, this does not mean that a court appearance will necessarily be required. Often, the process can be complete by what is known as a desk application (see questions 3.9–13, above).

The Guardianship application package is available through the Office of the Public Guardian (see back panel for contact information). It includes a number of forms including a Guardianship Plan and a Capacity Assessment Report. The proposed Represented Adult's capacity is assessed by a physician, psychologist or other health care professional designated as a Capacity Assessor. The Office of the Public Guardian can provide a list of Capacity Assessors. Once completed, the applicant must submit the package to the Office of the Public Guardian.

*... if a Personal Directive (PD) is in effect, a Guardianship Order would only be required for areas of personal decision-making not already included in the PD.*

## 5.9

### **What kinds of decisions can be covered by Guardianship?**

Depending upon 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 areas:

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

## 5.10

### **What is a "Capacity Assessment Report" and what is involved in completing one?**

In order to obtain a Guardianship Order, the proposed Represented Adult must take part in a Capacity Assessment and be found to be incapacitated.

There are standards set for the assessment process. It includes a cognitive (ability to think and reason) and functional (ability to do things and relate to others) assessment. It focuses on the kinds of decisions that the adult needs to make and evaluates the level of assistance required.

The Capacity Assessment process must be completed by a doctor, psychologist or other health care professional specifically trained to be a Capacity Assessor (see question 8.2, below). The Office of the Public Guardian has a list of qualified and trained Capacity Assessors.

## 5.11

### What is the “Guardianship Plan”?

A Guardianship Plan (GP) outlines future decisions a Guardian might make. Essentially, it gives the Court detail about the areas in which decisions will be required and when those decisions are expected to be required. This helps the Court to decide about the various parts of the Order. Because the proposed Guardian will have to stick to the plan, the GP should be balanced between:

- enough detail to satisfy the Court about what is required; and
- not so much detail that the Guardian will be overly restricted in the future.

The Court can approve the plan as is; approve the plan with some changes; or require that the applicant resubmit an amended GP for the Court’s approval within a certain time frame.

## 5.12

### When granting Guardianship, what does the Court consider?

For the Court to grant a Guardianship Order, the Court must find that the adult is incapacitated. In addition, the Court must be satisfied that less intrusive and less restrictive measures have been considered (or implemented) but either would not (or did not) meet the needs of the adult. The Court must also be satisfied that appointing a Guardian would be in the best interests of the adult.

In deciding whether it is in the Represented Adult’s best interests to have a Guardianship Order, the Court must consider:

- the Capacity Assessment Report;
- the Review Officer’s report;
- the views of the adult;
- the adult’s Personal Directive (if there is one);
- the adult Supported Decision-Making Authorization (if there is one);

- the adult’s Co-Decision-Making Order (if there is one);
- whether the personal matters about which the adult lacks capacity are likely to expose the adult to harm; and
- whether the benefits of a Guardianship Order outweigh the risks, if any, to the adult of having a Guardian.

Because there is no required review period in the AGTA, the Court must also consider whether any reviews of the Order will be required. If yes, the Court must specifically include the review provisions in the Order itself. This consideration is especially important if the Capacity Assessment Report indicated that the adult’s capacity is likely to improve.

The Court cannot order a Guardianship order for a personal matter for which a Personal Directive is in effect.

## 5.13

### What are the responsibilities of a Guardian?

The Guardian has been granted legal authority to make decisions on behalf of the Represented Adult. Guardians are expected to make decisions in the Represented Adult’s best interests and according to the beliefs, values and wishes that the Represented Adult held while s/he was still capable. However, the Represented Adult should be included, to whatever extent possible, by the Guardian in the decision-making process.

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 made by the Guardian and must keep a record of decisions.

*Guardians are expected to make decisions in the Represented Adult’s best interests and according to the beliefs, values and wishes that the Represented Adult held while s/he was still capable.*

## 5.14

### **What if a Guardian is unsure of a decision, can s/he ask for help?**

Yes. A Guardian can apply to the Court for advice and direction. The Office of the Public Guardian (OPG) also assists private Guardians. A Guardian may wish to discuss the situation with staff from the OPG.

## 5.15

### **Can a Guardian be held liable for his/her decisions?**

No liability attaches to a Guardian acting in good faith.

## 5.16

### **What if a health-care provider or other person does not follow a decision by the Guardian?**

The decisions of the Guardian are in effect the decisions of the Represented Adult and, therefore, must be followed. If they are not followed, the Guardian can apply to the Court for an Order to “give effect to a decision” of a Guardian. This is essentially an enforcement provision that enables the Guardian to apply to the Court to authorize steps needed to carry out the Order. This can include police involvement, if necessary. This provision also can be applied if the Represented Adult is refusing or failing to act in accordance the Guardian’s decision.

## 5.17

### **Can a Guardian be paid for his/her work?**

No. Although a Guardian can be reimbursed for expenses incurred in carrying out his/her authority and responsibilities, a Guardian cannot be paid for performing the role of Guardian.

*No liability attaches to a guardian acting in good faith.*

## 5.18

### **Can a Guardianship Order be reviewed?**

Yes.

Although there is no generally required review period (as there was in the DAA) a review of a Guardianship Order must be held if:

- the Order itself specifies a review date;
- there has been a significant change in the Represented Adult’s capacity for which a variation or termination of the Order would be in the best interests of the Represented Adult; or
- there is a change of circumstance in the Guardian that warrants a review of the Order.

An interested person may apply for a review at any time. If the Represented Adult’s capacity is in issue, the person applying must include a recent Capacity Assessment Report.

Desk Applications for reviews of Guardianship Orders also go through the Review Officer while reviews proceeding by hearing are filed directly with the Court.

## 5.19

### **How can a Guardianship Order end?**

A Guardianship Order remains operative until it is terminated by the Court. The death of the Represented Adult will also end the Guardianship Order.

## 5.20

### **Can a Guardianship Order ever be replaced by a Co-Decision-Making Order?**

Yes. However, this decision must be made by the Court. This might occur in situations in which the Represented Adult regains a portion of capacity. However, if the Represented Adult is also the subject of a Trusteeship Order, s/he cannot enter into a Co-Decision-Making Order.

## 6. What if a person has lost capacity to make financial decisions?

### Top 20 Questions about Trusteeship.

#### 6.1

##### What is Trusteeship?

Trusteeship applies when an adult has no capacity to make decisions on financial matters. A person 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.” A Trustee, appointed by the Court, has the legal responsibility to make financial decisions for the Represented Adult.

#### 6.2

##### Who can be the subject of a Trusteeship Order?

The Court may make a Trusteeship Order for any adult, or for a person who will attain the age of majority within 12 months, who is ordinarily resident in Alberta. In addition, if a person is not resident in Alberta but owns real property in Alberta, the Court can make a Trusteeship Order which relates only to that property.

#### 6.3

##### What kinds of things do I need to know before applying for Trusteeship?

Before you apply for Trusteeship, you need to know whether the proposed Represented Adult has an Enduring Power of Attorney and what it says, because a Trustee and an Attorney cannot have responsibilities for making decisions in the same areas. If there is an Enduring Power of Attorney, there may be no need to obtain a Trusteeship Order.

You should also keep in mind that, once an adult becomes the subject of a Trusteeship Order, that adult will **no longer** be able to enter into, or continue with, either a Supported Decision-Making Authorization or a Co-Decision-Making Order. Therefore, if you want one of these arrangements for personal decisions, you may wish first to consider informal trusteeships for financial decisions. For information about informal trusteeships, please see the list of resources at the back of this booklet.

#### 6.4

##### What is Temporary Trusteeship?

If the Court is satisfied that there is evidence that an adult lacks capacity to make a decision on a financial matter and the adult is in immediate danger of suffering serious financial loss, the Court can grant a Trusteeship Order on an urgent basis for up to 90 days. To do so, the Court can change any requirements in the AGTA or its Regulations with regard to filing documents, service of documents and evidence if urgency so warrants. Such a temporary order can, upon review, be extended for up to six months.

#### 6.5

##### Is it possible to apply for Trusteeship if there is an Enduring Power of Attorney in effect?

Technically, yes. However, the granting of a Trusteeship Order would normally terminate the Enduring Power of Attorney unless the Trusteeship Order specifically directed that the Enduring Power of Attorney remain in effect. A Trustee and an Attorney cannot have responsibilities for making decisions in the same areas. Therefore, if an Enduring Power of Attorney is in effect, a Trusteeship Order would only be required for areas of financial decision-making not already included in the Enduring Power of Attorney.

#### 6.6

##### Who can be a Trustee?

A Trustee must be at least 18 years of age. S/he must also consent to act as Trustee for the proposed Represented Adult, and s/he must satisfy the Court that s/he is suitable and will act in the best interests of the adult. Usually the Trustee is a family member or friend, but the Office of the Public Trustee can be appointed as a last resort. Before accepting this role, however, the Public Trustee has a duty to enquire into the allegation that an adult is in need of Trusteeship (this allegation must be made in writing) and it must be satisfied that no one else is likely to apply to become a Trustee.

## 6.7

### Does a Trustee need to be a resident of Alberta?

No. However, a non-resident must provide a bond or other security, unless the Court removes this requirement.

## 6.8

### How can I obtain Trusteeship for my loved one?

The decision to grant Trusteeship is made by the Court. However, this does not mean that a court appearance will necessarily be required. Often, the process can be completed by what is known as a desk application (see questions 3.9–13, above).

The Trusteeship application package is available through the Office of the Public Guardian (see back panel for contact information). It includes a number of forms including a Trusteeship Plan and a Capacity Assessment Report. The proposed Represented Adult's capacity is assessed by a physician, psychologist or other health care professional designated as a Capacity Assessor. The Office of the Public Guardian can provide a list of Capacity Assessors. Once completed, the applicant must submit the package to the Office of the Public Guardian.

## 6.9

### When considering an application for Trusteeship, what does the Court consider?

For the Court to grant a Trusteeship Order, the Court must find that the adult does not have the capacity to make decisions respecting any or all financial matters. In addition, the Court must be satisfied that less intrusive and less restrictive measures (such as in informal trusteeship under the AISH legislation) have been considered, or implemented, but either would not, or did not, meet the needs of the adult. The Court must also be satisfied that appointing a Trustee would be in the best interests of the adult.

In deciding about the proposed Represented Adult's best interests, the Court must consider:

- the Capacity Assessment Report;
- the Review Officer's report;
- the views of the adult;

- the adult's Enduring Power of Attorney (if there is one);
- whether the financial matters about which the adult lacks capacity are likely to expose the assisted adult to harm;
- whether it would be in the adult's best interests to impose any limits on the power of the Trustee; and
- whether the benefits of a Trusteeship Order outweigh the risks, if any, to the adult of having a Trustee.

Because there is no required review period in the *AGTA* the Court must also consider whether any reviews of the Order will be required. If yes, the Court must specifically include the review provisions in the Order itself. This consideration is especially important if the Capacity Assessment Report indicated that the adult's capacity is likely to improve.

The Court may appoint multiple trustees, who act jointly (meaning they must agree about all decisions) unless the Order provides otherwise.

## 6.10

### What is a Trusteeship Plan?

A Trusteeship Plan (TP) outlines how the proposed Trustee will manage, and make future decisions about, the property of the proposed Represented Adult. Essentially, it gives the Court detail about the areas in which decisions will be required, when those decisions are expected to be required, and insight into how those decision might be made. This helps the Court to decide if Trusteeship should be granted to the proposed Trustee. Because the proposed Trustee will have to comply with the TP that is submitted to the Court, the TP should be balanced between:

- enough detail to satisfy the Court about what is required; and
- not so much detail that the Trustee will be overly restricted in the future.

The Court can either approve the TP as is; approve the plan with some changes; or require that the applicant resubmit an amended plan for the Court's approval within a certain timeframe.

## 6.11

### Can there be more than one Trustee?

Yes.

If more than one Trustee is appointed, you will need to address the question of division of powers between the Trustees. For example:

- will one have authority over certain decisions, and the other authority over other decisions;
- will they have to both/all agree on every decision before it can be made; or
- will they each be able to act separately on all kinds of decisions?

## 6.12

### What are the responsibilities of a Trustee?

A Trustee can do *almost* everything in relation to financial matters that the Represented Adult would be able to do if he/she had capacity.

The more specific duties of a Trustee include:

- keeping the Represented Adult's property separate from his/her own;
- maintaining accounts (which includes an inventory as of the date of the Trustee's appointment and a complete record of all transactions affecting the property administered);
- investing the Represented Adult's property with a view to earning a reasonable return without taking undue risk (but always subject to the Trusteeship Plan);
- generally exercising the care, skill and diligence that a reasonably prudent person would exercise in managing their own financial affairs; and
- 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.

However, there are a few things a Trustee cannot do. For example, a Trustee *cannot*:

- sell, transfer or encumber real property already owned by the Represented Adult or purchase real property on behalf of the Represented Adult except as specifically allowed in the Trusteeship Order;

- consent to disposition of the adult's homestead pursuant to the *Dower Act* unless the Trusteeship Order specifically allows;
- grant a Power of Attorney on behalf of the Represented Adult; and
- write a new Will or other testamentary disposition (such as a beneficiary form for life insurance), or change an existing document that has testamentary effect, on behalf of the Represented Adult.

## 6.13

### Can a Trustee spend funds on the dependents of the Represented Adult?

Maybe. That ability is always subject to the needs of the Represented Adult as well as the terms of the Trusteeship Order and Trusteeship Plan.

## 6.14

### Can a Trustee make gifts on behalf of the Represented Adult?

Maybe. A Trustee has only limited authority to make gifts without specific court authority. For example, the gift must be made out of property that is not required to meet the needs of the Represented Adult or the adult's dependent(s).

In addition:

- the Trustee must have reasonable grounds to believe the Represented Adult would make the gift if the s/he had capacity;
- the total value of gifts in a year shall not exceed a certain percentage of the Represented Adult's taxable income for the previous year; and
- a Trustee cannot make a gift to himself/herself unless the proposed gift is first disclosed in the Trusteeship Plan and approved by the Court.

## 6.15

### Can a Trustee be held liable for his/her decisions?

Yes. Trustees can be held liable for breaches of their duties. However, a Court may relieve the Trustee for a breach of duty if the Trustee acted reasonably and honestly.

## 6.16

### What if someone does not follow a decision of the Trustee?

The decisions of the Trustee are, in effect, the decisions of the Represented Adult and, therefore, must be followed. If they are not followed, any interested person may apply to the Court for a review.

## 6.17

### Can a Trustee be paid for his/her work?

Yes. There are a few ways in which this can occur.

The *AGTA* allows trustees to choose to be compensated according to a fee schedule rather than always requiring the Court to determine compensation on a case-by-case basis. This fee schedule can be found in the *Alberta Trusteeship and Guardianship Regulation* (the Regulation). If there is more than one Trustee, they must share the fee.

A Trustee who chooses to be compensated in accordance with the Regulation must still obtain court approval to actually take the compensation. If the Trustee chooses not to be compensated in accordance with the Regulation, the Court may set compensation based on the Trustee's effort, care and responsibility and the time spent on behalf of the Represented Adult.

In addition, a Trustee is always entitled to be reimbursed for the direct expenses incurred and disbursement made on behalf of the Represented Adult.

*A Trustee who chooses to be compensated in accordance with the Regulation must still obtain court approval to actually take the compensation.*

## 6.18

### Can a Trusteeship Order be reviewed?

Yes.

Although there is no generally required review period (as there was in the *Dependent Adults Act*) a review of a Trusteeship Order is must be held if:

- the Order itself specifies a review date;
- there has been a significant change in the Represented Adult for which a variation or termination of the Order would be in the best interests of the Represented Adult; or
- there is a change of circumstance in the Trustee that warrants a review of the Order.

An interested person may apply for a review at any time. If the Represented Adult's capacity is in issue, the person applying must include a recent Capacity Assessment Report.

Applications for reviews of Trusteeship Orders also go through the Review Officer.

## 6.19

### What if a Trustee dies or is incapacitated?

If an Alternate Trustee was named, the Alternate Trustee can take over. If there was no Alternate Trustee named, the Public Trustee must be notified and the Public Trustee will determine if it is appropriate to become involved in the financial affairs of the Represented Adult.

When this occurs, the personal representative of a deceased or incapacitated Trustee must account to the person taking over the role (the Alternate Trustee, the new Trustee appointed by the Court, or the Public Trustee, as the case may be).

## 6.20

### How can a Trusteeship Order end?

A Trusteeship Order remains operative until it is terminated by the Court. The death of the Represented Adult will also end the Trusteeship Order.

## 7. What happens when something goes wrong?

### Top 10 Questions about Protective Measures and Investigations.

#### 7.1

##### **What if a Co-Decision-Maker, Guardian, or Trustee is not doing his/her job properly?**

If this occurs, you can register a written complaint with a complaints officer appointed under the *AGTA*. There is a form to assist you in making a complaint on the OPG website.

#### 7.2

##### **How serious does the situation need to be before I can register a complaint?**

The complaints and investigations process is intended for serious complaints. You can make a complaint if you have reason to believe:

- a Guardian, Co-Decision-Maker or Trustee has failed (or is failing) to follow the Court order;
- a Guardian, Co-Decision-Maker or Trustee has failed (or is failing) to comply with his/her duties;

AND

- this failure is likely to cause physical, mental or financial harm to the adult in question.

#### 7.3

##### **Are there any other options to registering a complaint?**

Yes, there are always alternatives. If at all possible, you may wish to start by talking to the person with whom you are having the dispute. Often, a speedy and non-adversarial resolution is in everyone's best interest. However, there are also more formal options available for alternative dispute resolution or mediation (see back of this booklet). The *AGTA* also allows any interested person, including the adult, to apply for a Court review of the Guardianship, Trusteeship, or Co-Decision-Making order at any time.

#### 7.4

##### **How do I make a complaint?**

Complaints must be made in writing, signed and submitted to the Complaints Officer appointed under the *AGTA*. Anonymous complaints will not be accepted. A complaint form is available online at [www.seniors.alberta.ca/opg](http://www.seniors.alberta.ca/opg) or by contacting the Office of the Public Guardian (see back of booklet for contact information).

#### 7.5

##### **What happens after I file the complaint?**

The Complaints Officer (CO) will call you to let you know your complaint was received and will discuss your concerns with you. Then, based on the information you provide, the CO will decide whether or not to refer the matter for investigation.

If the complaint is referred for investigation, the Co-Decision-Maker, Guardian, or Trustee will be told that they are under investigation. The Assisted Adult/Represented Adult and any other decision-makers are also informed. If the CO decides not to investigate, s/he will send you a letter explaining this decision. At this time, the CO may also suggest other remedies such as alternative dispute resolution or mediation.

If the Complaints Officer thinks the complaint is either: an offence under the *Criminal Code of Canada*, abuse under the *Protection of Persons in Care Act*; or an offence under any other Alberta law, the CO may call the police or notify the appropriate Minister.

*Complaints must be made in writing, signed and submitted to the Complaints Officer ...  
Anonymous complaints will not be accepted.*

## 7.6

### **What if my complaint is about the Public Guardian or the Public Trustee?**

Complaints about the Public Guardian or the Public Trustee can also be submitted to the Complaints Officer. An independent investigator will be appointed.

## 7.7

### **My matter has been referred for investigation. What happens next?**

The investigator will review relevant records and interview people who know about the situation. If need be, the investigator can also apply for court orders requiring others to provide documentation or allow access into where documents or the adult are located. Based on the information collected, the investigator will determine if the complaint is founded or unfounded.

You will be informed of the outcome of the investigation. So will the Co-Decision-Maker, Guardian, Trustee, the Represented Adult, and any other decision-makers.

*Once the investigation is complete, the investigator can make recommendations to resolve the situation ... If, on the other hand, an investigator determines a complaint is unfounded, written reasons will be provided to the complainant.*

## 7.8

### **What are the possible results of a complaint?**

Once the investigation is complete, the investigator can make recommendations to resolve the situation. This can include resolving the issue through education or referring the matter to an alternative dispute resolution process. The investigator may also recommend that the Public Guardian or Public Trustee apply to the Court for a Guardianship or Trusteeship Order, or any other appropriate order. If, on the other hand, an investigator determines a complaint is unfounded, written reasons will be provided to the complainant.

## 7.9

### **What if the adult is in serious danger?**

For such situations there are provisions to act quickly to ensure the adult's protection. For example, the Public Guardian can apply to the Court for a Temporary Protection Order. This will allow the Represented Adult to be moved immediately to a safe place. The Public Guardian or Public Trustee can also apply to the Court to have a Co-Decision-Maker, Guardian or Trustee removed.

## 7.10

### **I think my grandmother's Trustee has misused her money. Can this process get her money back?**

Yes, that is possible. The Court may inquire into a claim of misconduct, neglect or default on the part of the Trustee and order that the Trustee reimburse the adult to the extent of the loss suffered by the adult as a result of that misconduct, neglect or default.

## 8. How is capacity determined?

### Top 10 questions about Capacity Assessments.

#### 8.1

##### What is this new Capacity Assessment process?

The Capacity Assessment Process (CAP) under the *AGTA* is a process for determining an adult's cognitive and functional capacity. This process is used for the purposes of creating and reviewing Co-Decision-Making, Guardianship and Trustee Orders; it is *not* part of the process for Supported or Specific-Decision-Making. This new process is rigorous, domain-specific, and ensures the adult is informed of his/her rights. The expert who conducts the tests is called the "Capacity Assessor" (CA).

The CAP uses standardized assessment tools. It requires the CA 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.

#### 8.2

##### Who can be a Capacity Assessor?

Some health professions are already designated as Capacity Assessors. They are:

- medical practitioners under the *Medical Professions Act* (which includes doctors);
- psychologists, registered nurses; registered nurse practitioners, registered psychiatric nurses and mental deficiency nurses, occupational therapists, and social workers who are registered under the *Health Professions Act*; and
- registered medical practitioners and psychologists who are regulated members of the College of Alberta Psychologists.

The Minister for Seniors and Community Support can also designate other health professionals as Capacity Assessors. Similarly, the Minister can revoke the designation; this can occur if a person is no longer conducting Capacity Assessments, or is not conducting Capacity Assessments in accordance with the law.

Capacity Assessors must meet an established standard of conduct and must undergo training and continuing education. However, everyone who was able to conduct capacity assessment under the *DAA* will be able to continue conducting assessments and will not have to undergo the initial training process.

A list of qualified Capacity Assessors is available at: [www.seniors.alberta.ca/opg/guardianship/capacityassessors](http://www.seniors.alberta.ca/opg/guardianship/capacityassessors)

#### 8.3

##### What exactly is involved in the Capacity Assessment process?

The Capacity Assessment Process is divided into three parts: the medical evaluation, the pre-assessment phase, and the cognitive and functional inquiry.

The medical evaluation is conducted by a medical practitioner. As part of the evaluation, the medical practitioner must rule out any temporary, reversible medical conditions affecting capacity.

In the pre-assessment phase, the CA explains the purpose and significance of the assessment and the adult's rights. As part of this process, the CA must:

- ensure that s/he has been advised of the reasons for the assessment and been provided with a description of what has led to the request for the assessment (for example, the adult is displaying symptoms of dementia);
- make reasonable efforts to meet with the adult and, unless the adult is non-responsive, explain to the adult the purpose and nature of the assessment, including the adult's right to refuse to consent;
- explain to the adult about the adult's rights to assistance (such as a person or device) during the assessment process;
- if the adult does not refuse to participate, determine whether the adult understands everything s/he has been told;
- if the adult appears capable of consenting, ensure

that the adult does consent;

- if the adult does not appear capable of consenting, determine whether it is in the adult's best interests to continue with the assessment;
- if the adult refuses, note this on the Capacity Assessment Report and stop the assessment;
- confirm that a medical examination was conducted within three months prior to the assessment and that the results did not indicate that the adult was suffering from a temporary, reversible condition;
- determine which decision-making areas warrant an assessment and only assess those areas; and
- ask the adult about any recent, significant changes in his/her values and beliefs related to the identified decision-making areas.

The cognitive and functional inquiry is a standardized process conducted by the CA during a formal interview with the adult. During this portion, the CA forms an opinion about capacity and, for each decision-making area where assessment is warranted, s/he must give an opinion as to whether the adult is significantly impaired or incapacitated. In addition, the CA must address whether the adult would be seriously harmed if s/he was served with an application for Trusteeship/Guardianship. If there is significant impairment or incapacity, the CA must also form an opinion as to whether there is likely to be improvement and, if so, must recommend that there be a further assessment and indicate when that should occur.

At the end of the process, the CA must complete the required Capacity Assessment Report. There are specific reports that must be filled out, each one slightly different for the different kinds of applications.

*The Capacity Assessment Process (CAP) ... is intended to be more rigorous and domain-specific, and ensures the adult is informed of his/her rights.*

## 8.4

### **Can someone else be with the adult during the Capacity Assessment?**

Yes, an adult has the right to have a person present to assist the adult in feeling comfortable and relaxed. However, that person must comply with any directions of the CA and s/he may be asked to leave if s/he does not do so (as that person is not to interfere with the CAP - for example, by answering the questions for the adult).

## 8.5

### **My grandmother's English is not very good. Can she have an interpreter?**

Yes. An adult has the right to have the assistance of an interpreter or the use of a device to assist the adult to communicate in order for the adult to be able to fully demonstrate capacity.

## 8.6

### **My uncle does far better in the mornings; afternoons are more challenging for him. Can he have a say in the time of day when the assessment will take place?**

Yes. An adult is to be given the opportunity to undergo the Capacity Assessment at a time when, and under circumstances in which, the adult will likely to be able to demonstrate his/her full capacity.

## 8.7

### **When should a Capacity Assessment Report be completed?**

In general, a CAR cannot be dated more than six months before the date that the application is submitted to the Review Officer. (but you can request in your application that the Court consider an earlier one).

## 8.8

### **Can the Court order a Capacity Assessment?**

Yes. If an adult's capacity to make decisions is an issue in a proceeding, the Court may order a Capacity Assessment. This can even include a direction to permit a Capacity Assessor to enter the adult's place of residence, requiring the adult to attend at another place, for the purposes of conducting the assessment.

## 8.9

### **What if the adult refuses to undergo the Capacity Assessment?**

If an adult refuses to undergo (or is prevented from undergoing) a Capacity Assessment, the Court may consider any evidence that the Court considers relevant to the adult's capacity, and, if the Court considers that evidence to be sufficient, may make a determination with respect to the adult's capacity.

*In general, a CAR cannot be dated more than six months before the date that the application is submitted to the Review Officer.*

*If this is a financial hardship for the applicant and the adult, you can apply to the Minister to have the Crown pay for it.*

## 8.10

### **How much do Capacity Assessments cost?**

A Capacity Assessor may charge up to a maximum of \$500 if the adult requires an assessment regarding either personal or financial matters and up to \$700 for an assessment addressing both. The Court may allow an application for a higher fee based on complexity.

If this is a financial hardship for the applicant and the adult, you can apply to the Minister to have the Crown pay for it. However, the Crown will only pay for one assessment per adult per year. For more information see the resources at the back of this booklet.

## 9. What Do the Words Mean?

### Glossary.

<b>Agent</b>	a person designated in a Personal Directive to make personal decisions on behalf of the maker.
<b>AGTA</b>	the acronym for the <i>Alberta Adult Guardianship and Trusteeship Act</i> .
<b>Adult Interdependent Partner</b>	a person with whom you are in an adult interdependent relationship (see next).
<b>Adult Interdependent Relationship</b>	<p>a “relationship of interdependence” is a relationship outside of marriage where two people: share one another’s lives; are emotionally committed to one another; and function as an economic and domestic unit. To meet these criteria, the relationship need not necessarily be conjugal (sexual). It can be platonic. There are two possible ways for such a relationship to exist.</p> <ul style="list-style-type: none"> <li>• If you have made a formal and valid adult interdependent partner agreement with the other person (two people that are related by either blood or adoption <i>must</i> enter into such an agreement in order to be considered adult interdependent partners); or</li> <li>• If you are not related by either blood or adoption and if you have: <ul style="list-style-type: none"> <li>– lived with the other person in a “relationship of interdependence” for at least 3 continuous years; or</li> <li>– lived with the other person in a “relationship of interdependence” of some permanence where there is a child of the relationship (either by birth or adoption).</li> </ul> </li> </ul>
<b>Assets</b>	what you own. Assets can include things such as money, land, investments, and personal possessions such as jewellery and furniture.
<b>Assisted Adult</b>	an adult who is the subject of a Co-Decision-Making Order.
<b>Attorney</b>	a person who is empowered to act on behalf of the donor under a power of attorney. This person does not have to be a lawyer.
<b>Capacity Assessment Process (CAP)</b>	a formal, standardized process to determine the kinds of decisions an adult needs to make and the level of assistance required. The results of the test are recorded in a <b>Capacity Assessment Report</b> (“CAR”).
<b>Capacity Assessor (CA)</b>	a person trained and certified to carry out Capacity Assessments.
<b>Co-Decision-Making</b>	a process that allows an adult whose capacity is significantly impaired, to make decisions with the help of a person, as named in a court order. The formal document that creates this process is called a <b>Co-Decision-Making Order</b> .
<b>Co-Decision-Maker (CDM)</b>	the person who, as permitted by a Co-Decision-Making Order, helps an adult to make decisions.
<b>Complaints Officer (CO)</b>	an employee of the Government of Alberta who accepts and, if applicable, refers written complaints about Guardians, Co-Decision-Makers and Trustees for investigation. The Complaints Officer also accepts complaints about the Public Guardian and Public Trustee.
<b>Court</b>	means the Alberta Court of Queen’s Bench.
<b>DAA</b>	the acronym for the <i>Alberta Dependent Adults Act</i> , which has been replaced by the <i>Adult Guardianship and Trusteeship Act</i>
<b>Debts</b>	what you owe. These can also be called “liabilities” and may include credit card balances, loans, and mortgages.
<b>Declaration of Incapacity</b>	a written document that confirms that the maker of a Personal Directive and/or the donor of a Power of Attorney no longer has the mental capacity to make decisions on his/her own behalf.
<b>Desk Application</b>	a streamlined process for obtaining a court order, without having to appear in court.
<b>Donor</b>	a person who gives an Enduring Power of Attorney.
<b>Enduring Power of Attorney</b>	<p>covers your financial affairs and allows the person you name to act for you even if you become mentally incapable. It can either:</p> <ul style="list-style-type: none"> <li>• take effect immediately upon signing and continues if you become incapable of managing your financial affairs; or</li> <li>• take effect only upon your becoming incapable of managing your financial affairs, or some other specified event (this is also known as a “Springing” Power of Attorney).</li> </ul>
<b>Financial decisions</b>	decisions related to something you can own (such as money or land), whether obtaining it, getting rid of it, handling it or keeping it safe.

<b>Guardian</b>	the person authorized to make personal decisions for a Represented Adult.
<b>Guardianship</b>	a decision-making option for adults assessed as incapable and who have not completed a Personal Directive. It is a court order that gives another adult the ability to make personal decisions on behalf of incapable adult. The document that creates this is known as a Guardianship Order. Guardianship Orders can also be temporary.
<b>Guardianship Plan</b>	a plan (included in the application for Guardianship) which outlines future decisions a Guardian might make.
<b>Maker</b>	a person who makes a Personal Directive.
<b>Mental capacity</b>	the ability to understand information that is relevant to the making of a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.
<b>Personal decisions</b>	decisions related to any matter, except a financial matter, relating to the person of an adult (such as health care, living conditions and social activities).
<b>Personal Directive</b>	a written, signed, dated and witnessed document that appoints someone else to look after your personal, non-financial matters (such as health) on your behalf if, due to illness or injury, you ever lose the mental ability to make these decisions for yourself.
<b>Power of Attorney</b>	a written, signed, dated and witnessed document that gives someone else the right to act on your behalf with respect to your financial affairs. This can include paying bills, depositing and investing money on your behalf, and even selling your house. The Power of Attorney may be for a definite, specific act, or it may be general in nature. It may take effect immediately (Immediate Power of Attorney), can continue upon mental incapacity (Enduring Power of Attorney), or can come into effect only upon incapacity or other event (Springing Power of Attorney).
<b>Represented Adult</b>	a person who is the subject of a Guardianship Order or Trusteeship Order, or both.
<b>Review Officer</b>	an employee of the Office of the Public Guardian who provides information about the AGTA to the public and who assists applicants with court applications (including review applications) under the AGTA.
<b>Specific Decision-Making</b>	a Decision-Making option available for situations where: an adult has no personal directive or guardian; and a health care provider believes the adult cannot provide consent to health care, to the temporary admission to a facility, or discharge from a facility. In these circumstances, the health care provider can select a relative of the adult (or the Public Guardian) to make the decision.
<b>Spouse</b>	a person to whom one is legally married.
<b>Springing Power of Attorney</b>	a Power of Attorney that covers your financial affairs and allows the person you name to act for you only once you become mentally incapable (or some other specified event).
<b>Supported Adult</b>	adult who is the subject of a Supported-Decision-Making Authorization.
<b>Supported Decision-Making</b>	A process that allows an adult with capacity to name a "supporter" to help make decisions in personal matters. The formal document is called a <b>Supported Decision-Making Authorization</b> .
<b>Supporter</b>	the person who, as permitted by a Supported Decision-Making Authorization, helps an adult to make decisions.
<b>Trustee</b>	the person authorized to make financial decisions for a Represented Adult.
<b>Trusteeship</b>	A Decision-Making option for adults assessed as incapable and who have not completed an Enduring Power of Attorney. It is a court order that gives another adult the ability to make financial decisions on behalf of an incapable adult. The document that creates this is known as a Trusteeship Order. Trusteeship Orders can also be temporary.
<b>Trusteeship Plan</b>	a plan (included in application for Trusteeship) which outlines future decisions a Trustee might make.
<b>Will</b>	the legal statement of a person's last wishes as to the disposition of his or her property after death.

## 10. Where can I get more help?

### List of Resources.

For a copy of the *Adult Guardianship and Trusteeship Act* and its regulations contact the Queen's Printer Bookstore.

780-427-4952 in Edmonton

403-297-6251 in Calgary.

Toll-free service in Alberta, dial 310-0000.

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

For more information about all of the options under the *Adult Guardianship and Trusteeship Act*, see [www.seniors.alberta.ca/opg/Guardianship](http://www.seniors.alberta.ca/opg/Guardianship)

For additional information about trusteeship under the *Adult Guardianship and Trusteeship Act*, see: [http://justice.alberta.ca/programs\\_services/public\\_trustee/Pages/default.aspx](http://justice.alberta.ca/programs_services/public_trustee/Pages/default.aspx)

For information about informal trusteeships, see: [http://justice.alberta.ca/programs\\_services/public\\_trustee/represented\\_adults/Pages/informal\\_trusteeship.aspx](http://justice.alberta.ca/programs_services/public_trustee/represented_adults/Pages/informal_trusteeship.aspx)

#### Alberta Office of the Public Guardian

1-877-427-4525, or call 310-0000

Monday to Friday

8:15 a.m. – 4:30 p.m.

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

Northwest Region

Grande Prairie: 780-833-4319

Edmonton Region

Edmonton: 780-427-0017

Central Region

Red Deer: 403-340-5165

Northeast Region

St. Paul: 780-645-6278

Calgary Region

Calgary: 403-297-3364

South Region

Lethbridge: 403-381-5648

Medicine Hat: 403-529-3744

#### Alberta Seniors Information Line

Toll-free in Alberta: 1-800-642-3853

Edmonton Area: 780-427-7876

Deaf or Hearing Impaired with TDD/TTY units:

Toll-free in Alberta: 1-800-232-7215

Edmonton area: 780-427-9999

Fax: 780-422-5954

Hours: Monday to Friday, 8:15 am to 4:30 pm; closed statutory holidays

#### Alberta Seniors and Community Supports, Protection for Persons in Care

Information and Reporting: 1-888-357-9339

Fax: 780-415-8611

Mailing Address: Station M, Box 476

Edmonton, AB T5J 2K1

Hours: Monday to Friday, 8:15 am to 4:30 pm

#### Older Adult Knowledge Network

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

#### Seniors Association of Greater Edmonton (SAGE)

100 – 102A Ave, 15 Sir Winston Churchill Sq NW

Edmonton AB, T5J 2E5

Phone: 780-423-5510, Fax: 780-426-5175

Email: [info@MySage.ca](mailto:info@MySage.ca), Website: [www.MySage.ca](http://www.MySage.ca)

Hours: Monday to Friday, 8:30 a.m. to 4:15 p.m.

#### Law Society of Alberta Lawyer Referral Service

A Lawyer Referral Operator will provide you with the names of three lawyers in your area that you can consult.

Each lawyer will provide a half-hour consultation free of charge.

Toll free: 1-800-661-1095

Calgary Area: 403-228-1722

[http://www.lawsociety.ab.ca/public/lawyer\\_referral.aspx](http://www.lawsociety.ab.ca/public/lawyer_referral.aspx)

---

### **Legal Services Centre**

A program of Legal Aid Alberta, which provides legal information and referrals to Albertans and legal advice to eligible callers. This free service is available across Alberta.

Toll-free in Alberta: 1-866-845-3425

To see the qualifications for free legal advice, visit <http://www.legalaid.ab.ca/help/Pages/Eligibility.aspx>

The Legal Services Centre does not provide legal information or legal advice by e-mail.

### **Student Legal Services**

A non-profit, charitable organization of approximately 300 volunteer law students that provides year-round free legal services to those individuals who are unable to afford a lawyer. Please call in advance as student volunteers are not always available at all hours.

11011-88 Avenue

Edmonton, AB T6G 0Z3

Phone: 780-492-8244

Website: [www.slsedmonton.com](http://www.slsedmonton.com)

### **Dial-A-Law**

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

Toll free: 1-800-332-1091

### **Family Law Information Centre**

Edmonton Law Courts Bldg

1A Sir Winston Churchill Sq

Edmonton, AB T5J 0R2

Phone: 780-415-0404

### **Legal Aid Society of Alberta**

Provides legal services to financially eligible applicants.

Phone: 780-427-7575

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

