

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

The *Adult Guardianship and Trusteeship Act* (AGTA) legislation replaced the 30 year old *Dependent Adults Act* (DAA).

The AGTA is mainly about providing decision-making options when an adult needs assistance or requires a substitute for personal and financial decisions.

The AGTA received Royal Assent in December 2008 and was proclaimed on October 30, 2009.

Why is the Act needed?

The *Dependent Adults Act* (DAA) was passed in 1978. Since then, the needs of Albertans have changed and legislation in this area needed to be developed to reflect these changes.

How does the AGTA respond to the concerns of Albertans?

A legislative review of the *Dependent Adults Act* and the *Personal Directives Act* began in 2005. The review involved extensive public consultations including a public survey, community meetings, focus groups with key stakeholders and dependent adults, and consultation with other jurisdictions.

Over 4,300 Albertans, from regular citizens to experts in the field, provided their personal stories, feedback, and recommendations about guardianship and trusteeship, and personal directive legislation in Alberta. The AGTA reflects what Albertans said they wanted and needed in this area to help themselves and each other when the ability to make decisions is lost. The [Final Report and Recommendations](#) from the review was released in January 2007.

Does the AGTA replace personal directive and enduring power of attorney documents?

No. The *Personal Directives Act* governs matters related to personal directives and the *Powers of Attorney Act* governs matters related to enduring powers of attorney.

All adult Albertans are encouraged to plan ahead for a time when they may be unable to make decisions. A personal directive allows Albertans to write instructions and name a trusted decision maker for personal matters such as health care treatments and where to live. An enduring power of attorney allows Albertans to name a decision maker for financial and property decisions if the ability to make these decisions is ever lost. Both are legal documents and must be prepared while the adult is capable. The documents only come into effect if the ability to make decisions is lost due to an illness or accident. Albertans often name trusted family members or friends as their decision makers within the documents.

The AGTA applies in situations where an adult has lost capacity and does not have a personal directive or enduring power of attorney. In these circumstances, a relative or friend would have to apply to court to become the adult's co-decision maker/guardian (for personal decisions) or trustee (for financial/property decisions). When an adult has no family member or friend who can take on these roles, the Public Guardian or Public Trustee may act as the adult's decision maker(s).

What is the AGTA based on?

The AGTA is built on four guiding principles:

- The adult is presumed to have capacity to make decisions until the contrary is determined;
- The ability to communicate verbally is not a relevant determination of capacity, the adult is entitled to communicate by any means that enables them to be understood;
- Focus on autonomy with a less intrusive and less restrictive approach; and
- Decision making that focuses on the best interests of the adult and how the adult would have made the decision if capable.

What are the key elements of the AGTA?

The AGTA clarifies and standardizes issues surrounding capacity assessment and allows for a range of supportive and substitute decision-making options. These options address the reality that adults have different levels of decision-making ability and that an adult's capacity may change over time.

The AGTA continuum avoids an “all or nothing” approach to mental capacity and substitute decision-making in relation to personal matters. The continuum allows adults to receive assistance according to their needs and to maintain as much autonomy as possible.

The continuum includes the following options (from least to most intrusive):

- **Supported decision-making authorizations:** These authorizations are a [regulated form](#) and allow an adult with capacity to designate a “supporter” to help them make decisions in personal matters. The authorization allows the supporter to access personal and health information to assist the adult in making the decision. The adult can terminate the authorization at any time.
- **Co-decision-making orders for personal matters:** Co-decision making orders can be used if an adult is assessed as having a significant impairment, but can still make decisions with assistance. A co-decision making order is a Court order and the adult must agree to it. Before granting the order, the Court must consider whether less intrusive options could meet the adult's needs. This provision is useful for families where there is a trusting relationship; for example, a wife assisting her husband who is in the early stages of dementia.
- **Specific decision-making provisions:** This provision is for when an adult has no personal directive or guardian. It covers situations where an adult suddenly loses capacity and a health professional believes the adult cannot provide informed consent on a health care or temporary placement/discharge decision. In these time sensitive circumstances a health professional can select a relative of the adult to make the decision or, as a last resort, the Public Guardian can make the decision. The specific decision maker's authority is limited to the health care or temporary placement/discharge decision at hand.
- **Urgent/temporary guardianship and trusteeship orders:** These provisions apply to situations when an adult is believed to lack capacity and is in imminent danger of death, serious harm or financial loss if someone does not make a decision to prevent the death, harm or financial loss. In these rare and urgent situations, the Court may waive or modify some application requirements (e.g., notification) and grant a

temporary order of no more than 90 days. A temporary order must be reviewed before the Court on or before the 90 day time limit.

- **Guardianship and trusteeship orders:** These options are for adults assessed as incapable, but the application process allows for improved screening and information provision for prospective guardians and trustees. The new process also ensures the adult's views are included in a report to the Court, if possible. The AGTA also provides the Court with additional guidance when granting an order. For example, the Court must consider whether less intrusive options could meet the person's needs.
- **Temporary Protection Orders:** The Public Guardian may apply for a temporary protection order where there is reason to believe a represented adult is at risk of serious harm. In these rare and urgent situations, the Court may waive typical application processes (e.g., notification) if the Court is satisfied the adult is at risk of serious harm (e.g., death or substantial health risks). The Court may grant the Public Guardian temporary decision making authority and authorize the police to assist the Public Guardian in removing the adult to a place of safety. Unless otherwise ordered by the Court, temporary protection orders expire after 30 days.

Some other key provisions of the AGTA are:

- a formalized capacity assessment process, with capacity assessors designated by the Minister after satisfactorily completing the necessary training;
- a formal complaint process to follow if there are concerns about how the co-decision maker, guardian, or trustee are acting in this role;
- improved suitability screening of individuals applying to be co-decision maker, guardian, or trustee;
- granting the Court the ability to make guardianship, trusteeship, and co-decision-making orders for 17 year olds with the orders becoming effective when the minor turns 18.

Can the Public Guardian be a Co-decision Maker?

No. Co-decision making orders are intended to be used by people with a strong personal relationship, such as a wife assisting her husband who has early Alzheimer's disease.

Co-decision making orders are a new, less intrusive option, included in the AGTA that allow adults with a significant capacity limitation to make decisions with a trusted partner. The assisted adult must agree to the co-decision making order and can withdraw his or her consent at anytime. If the assisted adult withdraws his or her consent, the Public Guardian will meet with the adult. The purpose of the meeting is to ensure there has not been a breakdown in the relationship between the assisted adult and co-decision maker that may put the assisted adult at risk. If the assisted adult's situation is safe, the Public Guardian would take no further action.

What does “capacity” mean?

The AGTA defines capacity as the ability to understand information relevant to a decision and to appreciate the reasonably foreseeable consequences of a decision or a failure to make a decision.

People have a right to make unwise decisions or decisions others may disagree with. As long as the person understands information about the decision and what is likely to happen as a result, they have the capacity to make the decision.

What does a capacity assessment involve under the AGTA?

The AGTA guiding principles state an adult is presumed to be capable of making decisions unless the contrary has been demonstrated. This means there must be some event or reason that triggers a capacity assessment. For example, a significant stroke or brain injury that results in a very noticeable impairment in a person’s ability to make decisions.

Before any assessment the capacity assessor must consult with a physician who evaluated the adult to rule out all temporary or reversible medical conditions (e.g. infections, depression) that may impact the adult’s ability to make decisions. The assessor must then meet with the adult and explain the nature and purpose of the assessment, the significance of a finding of incapacity, and the adult’s right to refuse to be assessed.

The assessment will be both cognitive (ability to think and solve problems) and functional (practical skills such as paying bills). The assessment will focus on only those areas where there is a valid reason to believe the adult has lost capacity and decisions need to be made. The assessor will evaluate whether the adult is able to understand and retain information about a decision, understand options related to the decision, appreciate the consequences of making or not making a decision, and communicate (in any way) the decision.

What happens if the adult refuses to be assessed?

The AGTA does include provisions to address high risk situations where an adult has refused to be assessed, but is in significant danger (e.g., person suffering from paranoia who is in extreme health distress). These provisions allow for an application to Court for the Court to order an assessment or make a determination about the adult’s capacity based on evidence given by those who know the adult well and/or provide care (e.g., a psychiatric nurse and doctor may provide a report to the Court outlining the adult’s diagnosis and deteriorating mental and physical condition)

Who can apply to be a guardian and trustee? What’s the process?

Any interested person can apply to be a guardian or trustee. Typically, this is the adult’s family member or friend with a close trusting relationship with the adult. When an adult has no family or friend willing, able, or suitable to take on the role, the Public Guardian and Public Trustee are available as a last resort. Anyone applying for guardianship or trusteeship must identify their relationship to the adult as part of the application process.

A current (within six months) capacity assessment must be included as part of an application. There are several other forms required that outline the adult's decision making needs, the guardian/trustee's plan to meet the adult's decision making needs, as well as identifying immediate family members and professionals that must be notified of the application. All required forms are available on Alberta Seniors and Community Supports website or by calling the Office of the Public Guardian.

When there is no hearing about an application, all documents must be submitted to the OPG. A Review Officer with the OPG then completes a suitability review on the applicant(s). This involves completing a personal reference and criminal record check, and in the case of a trusteeship application, a credit check. The Review Officer also completes required notification (e.g., all immediate family members are notified) and personally meets the adult to inform them of the application and gain their views about the application and proposed guardian/trustee. The Review Officer completes a report for the Court on the guardian/trustee's suitability, the outcome of notification (e.g., if anyone requested a hearing), and the adult's views of the application. The Review Officer files this report and files all other application documents with the Court.

Before granting a guardianship or trusteeship order, the Court must be satisfied that:

- the adult lacks capacity to make decisions about personal and/or property matters;
- the order would be in the best interest of the adult; and
- no less intrusive or less restrictive alternative(s) would be more appropriate for the adult and the situation.

Once the Court has examined the evidence and makes a decision the adult, applicant(s), and any other person notified of the application will be informed of the decision.

What if the adult disagrees with the application?

A primary purpose of the Review Officer's meeting with the adult is to gain their views and wishes about the application and this information is provided in a report to the Court. When meeting with the adult, the Review Officer also informs the adult of their right to request a hearing on the application and obtain legal representation.

The AGTA does not include funding provisions to ensure payment of legal counsel. Alberta Legal Aid is available to Albertans who do not have the funds to pay a lawyer themselves.

How does the AGTA address abuse of the elderly and persons with disabilities?

Abuse of vulnerable people is a significant concern of this government and the AGTA makes considerable improvements in the area of protection in two ways:

- When someone applies to be a co-decision maker, guardian or trustee, they are screened as part of the application process. This includes a personal reference check, a police record check, and, in the case of trusteeship applications, a credit check. A proposed guardian or trustee must submit a guardianship or trusteeship plan for the Court's approval. As well, the AGTA application process requires a Review Officer to meet with the proposed assisted or represented adult to explain the nature and purpose of the

application and gain the adult's views about the application and potential decision maker. If the adult or any other person disagrees with application a Court hearing can be requested.

- When a co-decision making, guardianship, or trusteeship order is in place, the AGTA allows the Minister of Seniors and Community Supports to designate one or more individuals to receive and investigate complaints that a guardian, trustee, or co-decision-maker is failing to comply with the order or their duties and this failure is likely to cause harm or financial loss to the assisted/represented adult.

Where a complaint concerns the Public Guardian or Public Trustee, the Minister may appoint an independent investigator to conduct the investigation.

The AGTA also allows urgent applications and temporary protection orders where there is reason to believe a vulnerable or represented adult is at risk of serious harm and/or is in a life threatening situation. Additionally, the Act also allows a guardian to apply to Court for an order to enforce a decision in circumstances where the represented adult or another person is preventing a decision and there is serious risk to the adult's health or safety. An enforcement order allows a guardian to gain the Court's assistance in removing a represented adult from life threatening situations if the adult will not or can not leave the situation on their own.

How does the Office of the Public Guardian and Office of the Public Trustee handle investigations?

A complaints officer with Alberta Seniors and Community Supports receives written complaints and evaluates whether, in the written complaint, a guardian, trustee, or co-decision-maker is failing to comply with the order or their duties **and** this failure is likely to cause harm or financial loss to the assisted/represented adult.

If the complaint meets these criteria, the complaints officer will refer the matter to an investigator. If a complaint is not referred for investigation, written reasons will be provided to the complainant and options will be provided for them to consider, such as providing more information, or contacting the Office of the Public Guardian.

The investigators have the authority to:

- Interview the adult and other parties about the investigation;
- Require production of relevant records from guardians, trustees, co-decision-makers, and service providers; and
- Apply for court orders permitting entry to premises where the adult resides and access to relevant records if the guardian refuses to allow access.

The investigators will notify the complainant and other parties specified in the regulations when the investigation is concluded and their determination of whether the complaint was founded or unfounded.

If a complaint is founded, the investigators may attempt to resolve the complaint or refer the complainant, the co-decision-maker, guardian or trustee to an alternative dispute resolution process. The investigators may also recommend that the Public Guardian or Public Trustee apply to Court for a guardianship or trusteeship order, or any other appropriate order. If the

investigators determine a complaint is unfounded, written reasons will be provided to the complainant.

Complaints involving private trustees and financial matters are referred to the Public Trustee for investigation.

Does anyone monitor guardians and trustees after an order is in place?

The AGTA outlines the duties and responsibilities of guardians and trustees. The duties and responsibilities emphasize that a least intrusive approach be taken and that the represented adult be involved in decision making. As well, guardians and trustees are bound to act in a represented adult's best interests and for the benefit of the adult.

At the time of application, the Court determines when a guardian or trustee must come back to Court to review their order. Trustees have special duties to submit their accounting to the Court periodically and gain the Court's permission for any substantial decisions such as selling property. At the time of an order review and/or when trustees submit accounts, the adult and all immediate family members are notified of the review. As part of the notification, the adult and family members are provided with specific Court documents which include an overview of the trustee's accounts.

If concerns arise before the review date stipulated by the Court, the AGTA allows any interested person, including the represented adult, to apply for a review of an order or a trustee's accounting at any time. Again, the adult and immediate family would be notified of the review and provided with pertinent documentation. The complaint and investigation process under the AGTA may also address concerns about a guardian or trustee causing harm or financial loss to the represented adult while an order is in place.

How does the AGTA affect me if I was a Guardian or Trustee under the old legislation?

The court order that granted you authority is still in effect under the AGTA. You must review this order on or before the date specified. You may consider discussing the new decision making options within the AGTA with a staff from the Office of the Public Guardian prior to initiating your review. As well, it may be helpful to review and discuss the new capacity assessment process and court application process with OPG staff before you start working on your review.

Are there changes to trusteeship in the AGTA?

Changes to trusteeship include:

- Allowing individuals who live outside Alberta to be trustees with appropriate safeguards;
- Allowing private trustees, subject to specific restrictions, to make any financial decision the adult could have made if capable;
- Directing private trustees to follow the "prudent investor rule" of the *Trustee Act*;
- Giving private trustees limited authority to make gifts without specific court authority; and
- Allowing private 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.

The Court also has discretion whether to require a trustee to submit their accounts for approval periodically.

Where can I get more information on the AGTA?

Several publications and all forms required for court applications are available at Alberta Seniors and Community Supports website at www.seniors.alberta.ca/opg/ or contact the Office of the Public Guardian at **1-877-427-4525**

If you would like to arrange for a presentation about the AGTA or personal directives in your area, please contact the Office of the Public Guardian.

Assistance for Personal Decision Makers

The Office of the Public Guardian funds several community agencies across Alberta to assist in completing the required forms for court applications. Contact the nearest the Office of the Public Guardian for more information.

- [Office of the Public Guardian contact information](#)