

Understanding Guardianship

ADULT GUARDIANSHIP AND TRUSTEESHIP ACT





The *Adult Guardianship and Trusteeship Act (AGTA)* was created to provide decision-making options for people who need assistance in making decisions or who cannot make their own decisions in their best interest. This legislation provides more decision-making options to Albertans.

Decision-making options for individuals who need assistance are on a continuum, ranging from supported decision-making authorizations to full guardianship.

A guardian is a Court appointed substitute decision-maker for a represented adult. The guardian may make decisions for the represented adult in some or all areas of personal decision-making except for financial matters.

For information on other decision-making options, please visit our website at: www.seniors.alberta.ca/opg

The *Adult Guardianship and Trusteeship Act*

The *Adult Guardianship and Trusteeship Act* sets out the necessary legal process for granting powers of substitute decision-making to a guardian.

The *Adult Guardianship and Trusteeship Act* is built on four guiding principles:

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

What is Guardianship?

Guardianship is a legal court order which gives an individual the legal authority and responsibility to make or assist in making decisions about (non-financial) personal matters on behalf of a represented adult. A represented adult is someone who is the subject of a guardianship or trusteeship order. The decision to apply for guardianship is not an easy choice and should be made carefully and thoughtfully.

You and your family may wish to consider the following when you are trying to decide who will be the most appropriate person to apply for guardianship:

- Who is able and willing to maintain regular contact with the adult?
- Who lives closest to the adult?
- Whom does the adult trust?
- Who has a close relationship with the adult?
- Who is able to make informed decisions based on the adult's values, beliefs and best interests?

A proposed legal guardian needs to make an application to be appointed someone's guardian.

Who can apply to be a Guardian?

When determining whether it would be in an adult's best interests to appoint a guardian, the Court will consider whether the adult's lack of capacity to make decisions about personal matters is likely to expose that adult to harm and whether the benefits of appointing a guardian would outweigh any adverse consequences to the adult.

The Court may appoint you as the adult's guardian if you:

- are 18 years of age or over;
- consent to act as a guardian;
- will act in the adult's best interest;
- will encourage the adult to become, as much as possible, capable of caring for themselves and of making decisions in respect to their person;
- will not allow your interests to conflict with the adult's interests;
- are suitable and able to act as a guardian and will respect the views and wishes of the adult; and
- have the ability to effectively exercise authority about personal matters referred to in the order.

There is no requirement under the *Adult Guardianship and Trusteeship Act* for the guardian to live in Alberta or Canada.

The guardian should be someone who is familiar with the adult's wishes, values, and beliefs. The individual should have knowledge and understanding of the adult's religious and cultural heritage, as well as preferences and opinions for lifestyle and health care. The guardian must also have a personal concern for the adult's well-being.

Before you apply for guardianship, you will need to know whether the proposed represented adult has a personal directive and what it says. For many adults, a guardianship application will be unnecessary if there is a valid personal directive in place.

Who is a Represented Adult?

A represented adult is someone who has a guardianship or trusteeship order. They are an Albertan, 18 years of age or older who does not have the capacity to make decisions about personal matters and whose needs would not be met by other, less intrusive decision-making alternatives. This inability to make decisions can be a result of a mental disability, for example, a developmental disability or chronic mental illness, acquired brain injury, or dementia.

Application for guardianship for a proposed represented adult may be submitted up to 12 months prior to the adult's 18th birthday. If approved by the Court, the guardianship order would go into effect on his or her 18th birthday.

Factors when Considering Guardianship

The first consideration when thinking about making an application to be someone's guardian is to ask the question: Would a less intrusive or less restrictive decision-making alternative be more suitable or is a guardian necessary?

The decision to apply for guardianship can be a difficult choice for a family. It may be helpful for you and your family to consider the following points when you discuss a family member's need for a guardian.

- Has the adult already prepared a personal directive which appoints an agent for a number of personal matters and gives instructions about personal decisions to be made for him or her in the future?
- Can the adult make responsible decisions?
- Has the adult demonstrated that he or she has continuously had difficulty understanding the consequences of decisions he or she has made?
- Would one of the less intrusive options, like supported decision-making or co-decision-making, meet the needs of the adult or is guardianship the only alternative?
- Is the adult able to care for themselves?
- If a guardian is not appointed, is the adult at risk of being taken advantage of?
- Has the adult demonstrated an inability to manage his or her personal affairs without a substitute decision-maker?
- Is the adult knowledgeable about his/her legal rights?
- Is there a decision that requires legal authority such as health care consent, housing, or other legal matters?

- Would the guardian be able to achieve something that someone without legal authority cannot?
- Would the benefits of guardianship outweigh any loss of autonomy the adult might experience?

What Role Would a Guardian Play?

A guardian is usually a person who is a relative or close friend of the adult. You do not have to be a lawyer or someone who has expertise in business or health matters to be a guardian. As a guardian, you will be legally authorized to assist in making or to make decisions for the adult, monitor the services received, advocate for services needed and ensure that the adult's rights are protected.

Choosing to be a Guardian

Represented adults can be vulnerable as a result of experiencing difficulty in caring for themselves because their mental capacity is impaired. This may limit the adult's ability to make decisions and understand and appreciate the consequences of their decisions. You or your family may be concerned that you are in some way taking away the rights of the adult.

Being a guardian is a difficult decision and challenging work. You are faced with the responsibility of making decisions that have a significant impact on the adult. At times there may be conflict with the represented adult or other family members. The guardian needs to be aware of the potential for conflict and ensure they are making decisions based on what the adult values and believes.

Guardianship ensures that the represented adult's rights are exercised by a person (the guardian) who is accountable and who can support the adult while at the same time protecting the adult's right to participate in the decision-making.

A guardian's responsibilities are based on the needs of the represented adult. As each adult's needs and capabilities differ, so do the responsibilities of each guardian.

Duties and Responsibilities of a Guardian

When making decisions, the guardian must ask themselves "What would the represented adult decide?" A guardian is responsible for knowing the values, wishes, and beliefs of the represented adult and making decisions for the adult that are reflective of these. Depending on the areas of authority granted to the guardian in the guardianship order, the guardian would make decisions about the adult's participation in certain activities, undergoing health care treatments, or moving into or out of their residence.

It is the responsibility of the guardian to provide informed consents for the represented adult. Informed consent implies that you have been given an explanation that adequately presents the facts and foreseeable outcomes of making a decision about an action or course of action, as well as any reasonable alternatives to the suggested action. Furthermore, you have made a decision based on an understanding of these facts and alternatives. Finally, you understand the implications and reasonably foreseeable consequences of providing consent and refusing to provide consent for an action.

Informed consent must be voluntary – if you feel coerced, you are not giving informed consent. Additionally, informed consent can only be given by an individual over the age of majority who has capacity (the guardian).

Guardians cannot make decisions about organ donation or sterilization for the represented adult. Additionally, guardians cannot make decisions about anything related to financial matters, and this includes signing a lease or waiver. Guardians also cannot consent to the release of information about the adult if the purpose of the release is not clear nor can they sign documents that delegate the authority of guardianship unless the alternate is included in the guardianship order.

Making decisions

A guardian is expected to exercise their authority in a manner which recognizes and respects the adult's dignity and best interests, promotes the development of the adult's ability to act independently and uses the least restrictive alternative when a choice must be made. Guardians must include the adult in the decision-making as much as possible.

Remember that when you are making a decision as a guardian, take the time you need to gather the necessary information to make a good decision and you can ask as many questions as you need to. As well, just like decisions made for yourself, you can change your mind.

The guardian is also responsible for keeping a record of the decisions they have made for the represented adult. Decisions should always be made with serious consideration of the situation and any alternatives available. Decisions should encourage the represented adult's development as much as possible.

Accountability

A legal guardian is accountable to the Court for decisions made on behalf of the represented adult. Accountability would be exercised by reviewing the guardianship as stated by the Court. Anyone, including the represented adult, may ask the Court to review guardianship at any time.

How to Apply for a Guardianship Order:

A Guardianship Order occurs when application for guardianship is submitted by the Office of the Public Guardian, on your behalf, to the Court. The three main parts of a guardianship application are: a Guardianship Plan, a Capacity Assessment Report—which provides the areas of authority relevant to the application after the capacity assessment—and a Review Officer Report.

There are two ways to apply for guardianship. The applicant may submit an application to the Office of the Public Guardian, referred to as a *desk application*. With a desk application, no hearing is held unless the adult or an interested person requests one. Applicants may also submit their application directly to the Court, called a *notice of hearing application*, and a hearing would be held. These are described in more detail below.

Once the application is submitted to the Office of the Public Guardian, it will be reviewed. The Review Officer will visit the adult to explain what the application is about, gather the adult's views on the application and the proposed guardian, and ensure the adult knows they have the right to request a hearing.

Once the review is completed, the Review Officer will file the application with the Court along with a report that contains any comments the adult made about the application. The Judge will consider all the information presented and make a decision as to whether a guardianship order will be granted. If there is more than one applicant to be guardian, the Judge will decide who the most appropriate person to be appointed guardian is, such as a family member or a friend of the adult.

If you have decided to apply for guardianship, the two ways to make the application are:

1. You can prepare the application yourself by using the Self-Help Kit. This kit has all necessary forms and instructions. These forms are designed for use by people who wish to make an application for guardianship without hiring a lawyer and are available online (www.seniors.alberta.ca/opg) or from the Office of the Public Guardian. You can receive assistance in completing the Self-Help Kit from one of the agencies contracted to assist guardians and trustees. Please contact the Office of the Public Guardian for the agency nearest to you.
2. The alternative is to hire a lawyer to prepare the application on your behalf. If you do not have a lawyer and would like to contact one, the Lawyer Referral Service operated by the Law Society of Alberta can provide you with the names of several lawyers in your community who are interested in this area of practice. You can contact the Lawyer Referral Service by calling 1-800-661-1095.

In very special circumstances, an emergency Guardianship Order can be obtained. A lawyer can also assist you with this process.

Responsibilities of the Applicant When Applying for Guardianship

The Guardianship Plan is a form that outlines the major decisions that the guardian thinks will be required for the represented adult for the next year and for the next five years. The plan also asks the guardian to outline how they will include the represented adult in the decision-making and how the represented adult will be informed of decisions when they are not able to participate.

The Capacity Assessment Report must be completed by a certified capacity assessor and is used to determine the mental capacity of the proposed represented adult has. The Capacity Assessment Report is presented to the Court's to assist in determining whether guardianship is the best option. The Court must have as much information as possible in order to determine if guardianship is in an adult's best interest and will result in substantial benefit to him or her.

Once these two documents are completed and submitted to the Office of the Public Guardian, a Review Officer will review the application to make sure all necessary information is included. They will then meet with the proposed represented adult. Based on the information gathered in the application and through the meeting with the adult, the Review Officer will write a report which will accompany the application to Court.

note

New applications for guardianship will also require that proposed guardians consent to collect a criminal record check. This is to ensure that there are appropriate safeguards in place to protect the proposed represented adult.

The Guardianship Plan and the Capacity Assessment Report help identify what areas of authority (outlined below) are required in the guardianship order and are being requested in the application. The application should only request authority in the areas there is a clearly demonstrated need for decision-making. For example, it is unlikely that an adult in their eighties will need the areas of employment or education and training.

The AGTA allows for the Court to specify any of the following personal matters of the adult as areas in which the guardian has decision-making authority:

- the adult's health care;
- where, with whom, and under what conditions the adult is to live, either permanently or temporarily;
- 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;
- the carrying on of any legal proceeding that does not relate primarily to the financial matters of the adult; and
- any other personal matters the Court considers necessary.

Appointing More than One Guardian

Applicants can apply to be joint guardians. The Court can and may appoint more than one guardian to act for a represented adult. If the Court chooses to appoint more than one guardian, the Court may grant each guardian exclusive authority to act and make decisions about specified personal matters of the adult. Additionally, the Court may state that the guardians are to act jointly in one or more personal matters of the adult.

Unless there are explicit instructions from the Court on how the guardians are to carry out their duties, the guardians may act and make decisions separately about the personal matters specified in the order. It would be helpful for guardians in this situation to ask “how will we work together” when developing the guardianship plan. If you are a guardian who is acting jointly, you may request for the Court to provide direction on how you may act.

Appointing an Alternate Guardian

The *Adult Guardianship Trusteeship Act* also provides for the appointment of an alternate guardian to act in your absence (for example, temporarily when you are on vacation, or permanently in the event of your death).

The alternate should be chosen carefully, since both the guardian and the alternate should be familiar with the represented adult’s needs and circumstances. Both people need to be in a good position to make effective decisions. If an alternate is not appointed, the Public Guardian becomes the guardian in the event of your death.

Application Support

The Office of the Public Guardian can provide you with information and resources to assist you in completing your application.

As well, the Office of the Public Guardian funds agencies in several Alberta communities to provide information and assistance about guardianship. The agencies can be sources of valuable advice and support for families seeking guardianship or carrying out their guardianship responsibilities.

Application Costs

The cost of obtaining a guardianship order varies depending on the option you choose. If you prepare the application forms yourself, you may incur direct costs for such items as obtaining a capacity assessment, photocopying and the Court filing fee.

If you choose to retain a lawyer to prepare the application, your costs will increase accordingly. It is important that you discuss costs with your lawyer before you proceed.

The costs associated with guardianship can sometimes pose a hardship for individuals and families. Should this be the case, there are provisions for the Court to assign some of the costs to the Government of Alberta.

Guardianship Reviews

A review application of the Guardianship Order is prepared and provided to the Court. The Court assesses the represented adult’s on-going needs as well as the decisions the guardian has made. A Capacity Assessment Report completed within the last six months needs to be included in the review application.

Reviews Costs

Reviews are subject to the same costs as obtaining a guardianship order, with the exception of the Court filing fee.

The Public Guardian

The Court may appoint the Public Guardian as the guardian for an adult if there is no other individual who is willing, able, and suitable to act as a guardian for the adult. In this case the Public Guardian must be notified about the appointment. The Public Guardian may also make an application to the Court to act as an adult's guardian when necessary. The Public Guardian is subject to the same duties and responsibilities of a private guardian, and is required to act in the adult's best interests, considering the wishes, values, and beliefs of the represented adult.

The Court can also appoint the Public Guardian when appointing more than one guardian in some cases. In these circumstances, the Public Guardian will be granted exclusive authority to act and make decisions in specified personal matters for the adult. The responsibility and authority of the Public Guardian are limited to these personal matters.

The Office of the Public Guardian also provides ongoing support to guardians to assist them in their role.

For More Information

The Office of the Public Guardian has developed other written information to assist guardians in their roles.

Please call the Office of the Public Guardian toll-free between 8:15 a.m. and 4:30 p.m., Monday to Friday:

1-877-427-4525

or visit **www.seniors.alberta.ca/opg**

Offices

The Office of the Public Guardian has offices across the province. They are open Monday to Friday from 8:15 a.m. to 4:30 p.m. To be connected toll-free, call 310-0000. To find an Agency in your area to assist you in completing your Guardianship Self-Help Application, please call your nearest regional office.

Northwest Region

Grande Prairie: 780-833-4319

Northeast Region

St. Paul: 780-645-6278

Edmonton Region

Edmonton: 780-427-0017

Central Region

Red Deer: 403-340-5165

Calgary Region

Calgary: 403-297-3364

South Region

Lethbridge: 403-381-5648

Medicine Hat: 403-528-5245



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