

Interactions in Legislation

The *Adult Guardianship and Trusteeship Act* (AGTA) was created to be compatible with the *Personal Directives Act* (PDA). Both Acts also interact with and are compatible with the *Mental Health Act*.

The AGTA provides decision-making options and safeguards to protect vulnerable adults who are no longer able to make all of their own decisions and who do not have a personal directive.

The PDA allows adults to write a personal directive to name a decision-maker and/or provide written instructions regarding personal (non-financial) decisions to be followed when they are no longer able to make all of their own decisions.

What is capacity?

Under the new *Adult Guardianship and Trusteeship Act*, capacity is defined as the ability to understand information relevant to a decision and to appreciate the reasonably foreseeable consequences of (i) making a decision or (ii) the failure to make a decision. Disagreeing with a decision does not make someone incapable. For example, someone could decide not to take medication recommended by their doctor. If they understand why the medication is important and what will happen if they do not take it, they are probably capable of making the decision. It is also possible to have capacity in one area and not another. Under AGTA capacity is determined by the Court and is not a medical diagnosis. Capacity assessments provided by capacity assessors are a clinical opinion provided to the Court. In guardianship, trusteeship and co-decision-making applications, capacity is a legal determination made by the Court, based on evidence from the capacity assessment report as well as any other evidence presented as part of the application.

Under the **PDA** capacity is defined as: the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision. Again, disagreeing with a decision does not make someone incapable. These two legal definitions of capacity are very similar and reflect the most current understanding of capacity in the legal system addressed across the country.

Why is capacity assessed?

Under the AGTA, capacity is assessed to provide the Court with information to help determine whether or not a co-decision maker, guardian, or trustee should be appointed for an adult. The Court also considers that if the adult does not have the capacity to make decisions about the personal matters that are referred to in the order, that less intrusive and less restrictive alternative measures have been considered or have been implemented and would not likely be or have not been effective to meet the needs of the adult, and that it is in the adult's best interests to make the order.

Under the PDA, a capacity assessment is used to evaluate whether a maker is capable of making personal decisions. A capacity assessment is only initiated if there is reason to believe an adult is unable to conduct his or her personal affairs. If the adult is assessed as incapable and has a personal directive, the capacity assessment would activate the personal directive—giving legal authority to the agent and/or instructions stated in the personal directive.

Who is authorized to conduct capacity assessments?

Under AGTA, health professionals may be designated as capacity assessors. Physicians and psychologists are automatically designated by legislation as capacity assessors and other health professionals (i.e. registered nurses, registered occupational therapists, registered social workers, and registered psychiatric nurses) may become capacity assessors if they complete a training course and fulfill all the requirements to be designated by the Minister of Seniors and Community Supports.

Under the PDA, if a maker named a specific person in his or her personal directive to determine capacity, this person can complete a capacity assessment. For example, the maker might name a trusted friend to determine capacity. The Act requires the person named (in this example the maker's friend) to consult with a physician or psychologist when completing the assessment. A physician or psychologist must also complete their own separate assessment. If the maker does not name a specific person to assess his or her capacity, the Act states that two service providers, one of whom must be a physician or psychologist, can complete a capacity assessment.



How do I find a capacity assessor?

A physician, psychologist or a designated capacity assessor can complete the process. The Office of the Public Guardian maintains a list of individual health professionals who are designated capacity assessors. The roster will also include physicians and psychologists who have requested their names to appear as capacity assessors. Go online at www.seniors.alberta.ca/opg/guardianship/capacityassessors/ to find out more.

With the PDA, if a maker named a specific person in his or her personal directive to determine capacity, this person can complete a capacity assessment in conjunction with physician or psychologist.

What is the assessment process under the AGTA?

Under the AGTA, there must be legitimate reasons for a capacity assessment. The capacity assessor will ask about the adult's situation, why there are concerns about their ability to make decisions, and the specific types of decisions in question. The assessor will also want to confirm that a physician has examined the person to ensure a reversible or temporary medical condition is not affecting their ability to make decisions. If an assessment is needed, the assessor will meet with the adult to explain the assessment process including what will happen if they are found to lack capacity. The adult can have someone present (e.g., family member) as an observer to help them feel comfortable and he or she can have a translator or assisted communication device to help them communicate during the assessment.

The assessor will focus on the types of decisions that need to be assessed. The assessor will discuss with the adult their understanding of specific decisions (e.g., medical condition) and the consequences of making or not making a decision (e.g., risks and benefits of having surgery or not having surgery).

At the conclusion of the assessment, the assessor documents the findings on a regulated form regarding the adult's capacity in the specific areas that needed to be assessed. The assessor also identifies whether or not the adult is likely to regain capacity. If they believe the adult may regain capacity, they will recommend a date when capacity should be re-assessed.

What is the assessment process under the PDA?

Under the PDA, the person assessing capacity must meet with the maker and tell them about the assessment. The maker must be told what will happen if they are found to lack capacity and that they can refuse to be assessed. Before completing the assessment, the assessor has to identify why they believe an assessment should be done and for what types of decisions. The assessor needs to note the maker's level of consciousness at the time of the assessment (e.g., maker

appears alert, non-responsive, etc.) and consider any temporary medical conditions that might impact the maker's ability to make decisions (e.g., severe depression).

The assessor will ask questions to see if the maker can:

- understand information needed to make a decision and the options presented
- retain information relevant to making a decision;
- identify and appreciate the consequences of making or not making a decision, and
- communicate his or her decision. This doesn't mean the maker has to be able to speak, but he or she can let others know what they want to do (e.g., write the decision or point to a picture of what they decide).

Assessors must complete a form called a Declaration of Incapacity when the capacity assessment is finished. The assessor has to write reasons why, in their opinion, the maker lacks capacity.

An assessor may recommend that the maker's capacity be reviewed on a certain date if they believe the maker's decision-making ability could improve. For example, the maker could be expected to recover from a stroke.

The assessor who completes the Declaration of Incapacity must give the maker, the maker's agent, and any other person designated in the personal directive, a copy of the form and advises the maker that they can apply to the Court for a review of the determination that he/she lacks capacity.

When can an adult ask for a re-assessment of their capacity?

Under AGTA, the capacity assessment must provide an opinion on when it should be re-assessed.

Court may use the date on the form to state when the court order should be reviewed. A represented adult or interested party can ask for a review of the Court order any time or ask for a re-assessment of capacity.

Under PDA, there are processes to make it easier for makers to establish they have regained capacity:

1. maker can ask agent/service provider to re-assess;
2. agent or service provider can initiate if they feel there is significant change;
3. dispute process - a full assessment by an independent capacity assessment; or
4. the matter can be taken to Court.

For more information

We welcome the opportunity to speak with you! 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 call 1-877-427-4525.

Please visit our website: www.seniors.alberta.ca/opg

OPG Vision: Albertans have access to a continuum of decision-making choices to maintain personal autonomy and dignity throughout their lives.