

Guide to Capacity Assessment under the Personal Directives Act

Office of the Public Guardian

Alberta

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Capacity Assessment and the *Personal Directives Act*

Who should read this guide?

This guide provides general information about capacity assessments under the *Personal Directives Act* (the Act). The guide is intended for the public, people who write a personal directive (makers), people who are named as decision makers in a personal directive (agents), and those who may have a role in conducting capacity assessments (someone named to assess capacity in a personal directive, physicians and psychologists, and service providers). The Office of the Public Guardian (OPG) can provide further information about capacity assessment.

What is a personal directive?

A personal directive is a legal document that allows Albertans to write instructions and/or name a person(s) they trust to make personal decisions on their behalf if they become incapable due to an accident or illness. Personal decisions include things like health care, where to live, and social activities. A personal directive does not include financial or property decisions. A different document called an Enduring Power of Attorney can be completed for decision making about finances and property.

Under the Act, the person who writes a personal directive is called a "maker". The person named in the personal directive to make decisions is called an "agent".

What is capacity?

In the Act, capacity is defined as the ability to understand information relevant to making a decision about a personal matter and the ability to appreciate the reasonably foreseeable consequences of the decision. In other words, a person understands facts about a decision and what could happen if they choose one thing over another.

It is important to know that disagreeing with a decision does not make someone incapable. For example, a maker could decide not to take medication recommended by their doctor. If the maker understands why the medication is important and what will happen if they do not take it, they are probably capable of making this decision. As well, it is possible to have capacity in one area and not another. For example, someone might struggle to understand complex health care decisions, but still be capable of making decisions about their social activities.

What is a capacity assessment?

Generally, adults are assumed to have the capacity to make their own decisions. A capacity assessment is only initiated if there is reason to believe an adult is unable to conduct his/her personal affairs.

Under the *Personal Directives Act*, a capacity assessment is used to evaluate whether a maker is capable of making personal decisions. The Act outlines who is authorized to complete capacity assessments and how capacity assessments must be done.

Who is authorized to complete capacity assessments?

If a maker named a specific person in his/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. If the maker does not name a specific person to assess his/her capacity, the Act states that two service providers, one of whom must be a physician or psychologist, can complete a capacity assessment.

Information for makers

What can makers expect if their capacity is assessed?

No matter who does the capacity assessment, the steps outlined below must be followed.

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. If the maker refuses, a Court Order can be obtained to have the assessment completed if it is believed to be in the maker's best interest.

Before completing the assessment, the assessor has to identify why they believe an assessment should be done and for what types of decisions. For example, the assessor might think the maker has problems understanding information about health care decisions, but believes the maker is capable of all other personal decisions. In this situation, the maker would only be assessed for his/her ability to make health care 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 (e.g., information about a medical condition);
- retain information relevant to making a decision;
- identify and appreciate the consequences of making or not making a decision (e.g., the risks and benefits of having surgery or not having surgery); and
- communicate his/her decision. This doesn't mean the maker has to be able to speak, but he/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 (e.g., give reasons they believe the maker didn't understand information, etc.).

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 advise the maker he/she can apply to the Court for a review of the determination that he/she lacks capacity.

What happens if a maker gets better and regains capacity?

If a maker's personal directive is in effect (the maker was declared incapable) and a significant change in the maker's ability to make personal decisions has been observed, an assessment of regained capacity can be done. The Act defines a significant change as "an observable and sustained improvement that does not appear to be temporary."

An agent or a service provider who provides health services can initiate a determination of regained capacity. Agents and service providers have a duty to initiate this process if they believe the maker has regained capacity.

If the agent and service provider agree the maker has regained capacity to make decisions, a Determination of Regained Capacity can be made. If the agent and service provider disagree the maker has regained capacity, a physician or psychologist will be asked to complete an independent assessment. The roles of the agent, service provider and physician/psychologist in determining regained capacity are outlined in the charts at the back of this booklet.

What can a maker do if others don't notice they have regained capacity?

A maker can ask his/her agent or a service provider who provides health care services to assess his/her capacity, but neither party is required to do so if they do not believe there has been a significant change in the maker's capacity. A maker can also apply to the Court to request a determination of his/her capacity or ask another person to do this on his/her behalf. A maker could also call the Office of the Public Guardian for help. Telephone numbers for the OPG are listed at the back of this booklet.

Information for persons named in a personal directive to assess capacity

People who are aware they have been named in a personal directive to assess capacity should become familiar with the definition of capacity used in the Act and their role in activating a personal directive.

People named in a directive to assess capacity must consult with a physician or psychologist prior to completing their assessment. The Act also states a physician or psychologist must complete a separate independent assessment. A regulated Declaration of Incapacity form (Schedule 2) is used in this circumstance. The form has two parts. The person named to assess capacity completes Part 1; the physician/psychologist completes Part 2.

Consultation with a physician or psychologist is important as this will assist the person named to assess capacity in considering his or her reasons for the assessment (e.g., why the maker's ability to make personal decisions has been called into question). The physician/psychologist can also identify and address health issues contributing to incapacity.

For example, someone with severe depression may be incapable of making personal decisions but, with proper treatment, could regain capacity to do so. Similarly, the physician or psychologist can advise on issues surrounding the timing of an assessment. For example, a frail elderly person may become disoriented

when admitted to hospital leaving them temporarily unable to make personal decisions. Determining capacity at this time is not a good idea because the senior may regain the ability to make his/her own decisions within a few days.

Before conducting their assessment, the Act requires both the person named to assess capacity and the physician or psychologist to meet with the maker to explain the purpose of the assessment, the maker's right to refuse to be assessed, and the significance of a finding that the maker lacks capacity. If the maker refuses to be assessed, a Court may order the assessment if it is believed to be in the maker's best interests. In situations where an assessor believes the maker lacks, or might lack, the capacity to consent to the assessment, the assessment can proceed if the maker does not refuse and the assessor believes the assessment is in the maker's best interests.

The next stage of the assessment process involves the person named to assess capacity and the physician or psychologist completing separate interviews with the maker. As noted, there is a regulated form (Schedule 2: Declaration of Incapacity) for this purpose. The form has two parts. The person named to assess capacity completes Part 1; physicians and psychologists complete Part 2.

The assessment process requires an opinion by the assessor about the type of personal decisions (e.g., health care, social activities, etc.) where the maker lacks the capacity. The form also requires an indication of the maker's level of consciousness at the time of assessment and asks if temporary medical conditions that may impact capacity have been ruled out.

The form provides an area for an opinion (and rationale for the opinion) about the maker's ability to:

- understand the information needed to make a decision and the options presented;
- retain the information that is relevant to making a decision;
- identify and appreciate the consequences of making or not making a decision; and
- communicate the decision.

Finally, the form provides an area to recommend a review of the maker's capacity (if warranted). For example, if the maker has suffered a stroke, his/her ability to make decisions may be expected to improve within a certain time frame.

Information for physicians and psychologists

What do physicians and psychologists need to know about capacity assessment under the Act?

Physicians and psychologist should become familiar with the definition of capacity used in the Act and their role in activating a personal directive and determining if a maker has regained capacity.

Activating a personal directive

A personal directive may be activated (e.g. the maker declared to be incapable of making decisions) in two ways under the Act. Physicians and psychologists play a central role in both scenarios. There are regulated Declaration of Incapacity forms for each scenario (Schedule 2 and Schedule 3). Declaration of Incapacity forms provide some definitions and outline steps to assist in completing capacity assessments. The required forms are available online at www.seniors.gov.ab.ca/opg or in the Personal Directives Regulation.

Scenario one: maker names specific person to assess capacity

Role of Physician or Psychologist

A maker can name someone in his/her personal directive to assess capacity (e.g., a trusted friend, sister). In this scenario, physicians and psychologists consult with the person named to do the assessment and complete their own independent capacity assessment. Schedule 2 is used in this circumstance.

The physician or psychologist will consult with the person named to assess capacity to assist the person in considering his/her reason(s) for assessing the maker's capacity (e.g., why has the maker's ability to make personal decisions been called into question). This consultation is important so health issues contributing to incapacity can be addressed. For example, someone with severe depression may be incapable of making personal decisions but with proper treatment, may regain the capacity to do so.

Similarly, a physician or psychologist can advise on issues surrounding the timing of an assessment. For example, a frail elderly person may become disoriented when admitted to hospital leaving them temporarily unable to make personal decisions. Determining capacity at this time is not a good idea because the senior may regain the ability to make his/her own decisions within a few days.

Before conducting their assessment, the Act requires both the person named to assess capacity and the physician or psychologist to meet with the maker to explain the purpose of the assessment, the maker's right to refuse to be assessed, and the significance of a finding that the maker lacks capacity. If the maker refuses to be assessed, a Court may order the assessment if it is believed to be in the maker's best interests. In situations where an assessor believes the maker lacks, or might lack, the capacity to consent to the assessment, the assessment can proceed if the maker does not refuse and the assessor believes the assessment is in the maker's best interests.

The next stage of the assessment process involves the person named to assess capacity and the physician or psychologist completing separate interviews with the maker. As noted, Schedule 2 is used for this purpose. The form has two parts. The person named to assess capacity completes Part 1; physicians and psychologists complete Part 2.

The form requires an opinion from the physician or psychologist about the type of personal decisions (e.g., health care, social activities, etc.) where the maker lacks capacity. The form also requires an indication of the maker's level of consciousness at the time of assessment and asks if temporary medical conditions that may impact capacity have been ruled out.

The form also provides an area for opinion (and rationale for the opinion) about the maker's ability to:

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

Finally, the form provides an area to recommend a review of the maker's capacity, if warranted. For example, if the maker has suffered a stroke, his/her ability to make decisions may be expected to improve within a certain time frame.

Scenario two: two service providers assess capacity

Role of the physician or psychologist

If the maker does not name a specific person to assess capacity, two service providers, one of whom must be a physician or psychologist, can perform the assessment.

An example of this scenario is a nurse and a family doctor completing an assessment. Schedule 3 is used in this circumstance. Physicians and psychologists complete Part 1 of the form and the service provider completes Part 2.

The role of physicians and psychologists is similar to scenario one, but there is no requirement to consult with the service provider. Physicians and psychologists are still expected to inform the maker about the assessment prior to conducting the assessment and to complete a separate interview to form their opinion about the maker's capacity, etc.

Information for service providers

Service providers should become familiar with the definition of capacity used in the Act and their role in activating a personal directive. Service providers should also be aware they have a role in determining if a maker has regained the capacity to make decisions. Information about regained capacity is outlined under *Information about Regaining Capacity* below.

Service providers should be aware a personal directive can be activated (the maker declared incapable) in two ways under the Act.

The first method applies to situations where a maker has named a specific person in their personal directive to assess capacity (e.g., sister, friend). The person named must consult with a physician or psychologist prior to conducting their assessment and the physician/psychologist must complete their own independent assessment.

The second method applies to situations where no specific person has been named in the personal directive to assess capacity. In these circumstances, two service providers, one of whom must be a physician or psychologist, complete their own independent assessments.

Regulated Declaration of Incapacity forms are available for both situations. The required forms are available at www.seniors.gov.ab.ca/opg or in the Personal Directives Regulation.

An example of the “two service provider method” of assessing capacity would be a family doctor and a nurse completing the assessment. Schedule 3 is used in this circumstance. The form has two parts. The physician or psychologist completes Part 1; the service provider completes Part 2.

Before conducting an assessment, the Act requires a service provider to meet with the maker to explain the purpose of the assessment, the maker’s right to refuse to be assessed, and the significance of a finding that the maker lacks capacity. If the maker refuses to be assessed, a Court may order the assessment if it is believed to be in the maker’s best interests. In situations where the service provider believes the maker lacks, or might lack, the capacity to consent to the assessment, the assessment can proceed if the maker does not refuse and the service provider believes the assessment is in the maker’s best interests.

Service providers will consider reason(s) for assessing the maker’s capacity (e.g., why the maker’s ability to make personal decisions has been called into question) and must rule out any temporary health conditions that may contribute to the maker’s incapacity. For example, someone with severe depression may be incapable of making personal decisions but with proper treatment could regain capacity to do so.

Similarly, a frail elderly person may become disoriented when admitted to hospital leaving him/her temporarily unable to make personal decisions. Determining capacity at this time is not a good idea because the senior may regain the ability to make his/her own decisions within a few days.

The next stage of the assessment process involves completing an independent interview with the maker. Schedule 3 offers some guidance to complete the assessment. The form provides an area for the service provider's opinion about the type of personal decisions (e.g., health care, social activities, etc.) where the maker lacks the capacity. The form also requires an indication of the maker's level of consciousness at the time of assessment and asks if temporary medical conditions that may impact capacity have been ruled out.

The form provides an area for opinion (and rationale for the opinion) about the maker's ability to:

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

Finally, the form provides an area to recommend a review of the maker's capacity on a specific date if warranted. For example, if the maker has suffered a stroke, his/her ability to make decisions may be expected to improve within a certain time frame.

Information about regaining capacity

What is the role of physicians/ psychologists, service providers, and agent(s) if a maker regains capacity?

If a maker, who has an activated personal directive, demonstrates a significant improvement in his/her capacity, the Act outlines a relatively simple process so the maker can return to legally making his/her own decisions. Agents and service providers who provide health services have a duty to initiate this process if they believe the maker has regained capacity. Both parties must agree the maker has regained capacity and complete the appropriate regulated Determination of Regained Capacity forms. Schedule 4 is used when an agent initiates a determination of regained capacity and Schedule 5 is used when a service provider initiates the process. The forms have two parts with separate sections for agents and service providers. The forms are available at www.seniors.gov.ab.ca/opg and offer guidance for both parties. See charts on pages 16 and 17.

The agent and the service provider completing the form must speak with the maker, a service provider who recently provided a health service to the maker, and consider the time period over which a change in the maker's capacity has been observed. A key element in making the determination is direct observation of a significant change

in the maker's capacity.

The agent and service provider may also consider recent health care records, discussions with the maker's physician, statements/recommendations of other health care practitioners, and speak with other agents named in the personal directive (if applicable). Neither party is expected to do a full and formal cognitive assessment but must document the changes they, or a service provider who is providing health care services to the maker, have observed and give reasons for their opinions.

What if the agent and service provider disagree?

If the agent and service provider disagree that the maker has regained capacity, then a physician or psychologist, along with another service provider, must complete an independent assessment. See page 17. Schedule 6 is used in this circumstance. Schedule 6 provides guidance regarding the factors that must be considered when determining regained capacity. Physicians and psychologists complete Part 1; a second independent service provider completes Part 2.

Physicians/psychologists and the second service provider must conduct separate assessments of regained capacity. The process used when determining regained capacity is similar to the assessment completed when the maker was first declared incapable.

First, both parties must identify and rule out any temporary medical conditions that may affect the maker's capacity to make personal decisions. Next, the physician/psychologist and the service provider are required to identify personal matters where an assessment of regained decision making ability is warranted. As well, prior to conducting the assessment, both parties must meet with the maker to explain the purpose of the assessment and the maker's right to refuse to be assessed. [Note: if the maker's agent refuses to consent to the assessment on behalf of the maker, the assessment can still proceed if the physician/psychologist and service provider agree it is in the maker's best interests and the maker does not refuse to be assessed.]

The two service providers must only conduct an assessment of those personal matters that have been identified as warranting assessment. Based upon an interview with the maker, they must each form an opinion about whether the maker is able to:

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

If the two service providers decide that the maker has regained the capacity to make personal decisions, they must both sign the required form – a Determination of Regained Capacity form (see online at www.seniors.gov.ab.ca/opg or Schedule 6 of the Personal Directives Regulation).

Agents, service providers, and physicians/psychologists conducting assessments of regained capacity may wish to refer to the three flow charts on pages 15, 16 and 17 of this Guide for a pictorial view of the three different ways a determination of regained capacity can be made.

Who receives a copy of the assessment?

Declaration of Incapacity (Schedule 2 or 3)

Physicians and psychologists must keep a written record of their assessment(s), including the names of others who have been involved in the capacity assessment process. As well, the maker, the maker's agent, and any other person named in the personal directive must receive a copy of the Declaration of Incapacity. The maker must also be advised he/she can apply to the Court for a review of the determination.

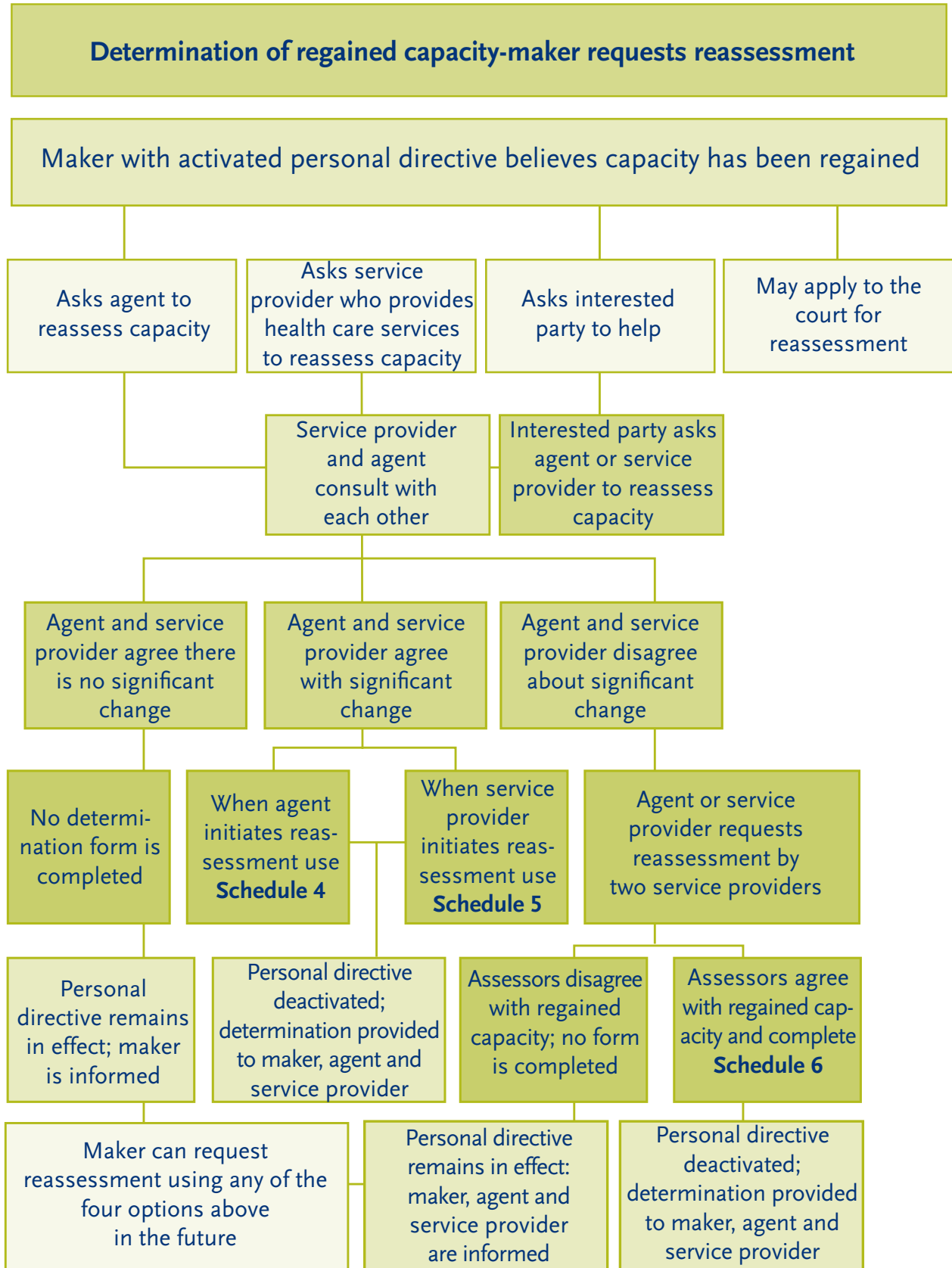
Determination of Regained Capacity (Schedule 4, 5, or 6)

When a Determination of Regained Capacity has been made, the person making the determination must provide a copy of the form to the maker, the maker's physician and agent (if applicable), and to the operator of a residential facility that provides accommodation to the maker (if applicable).

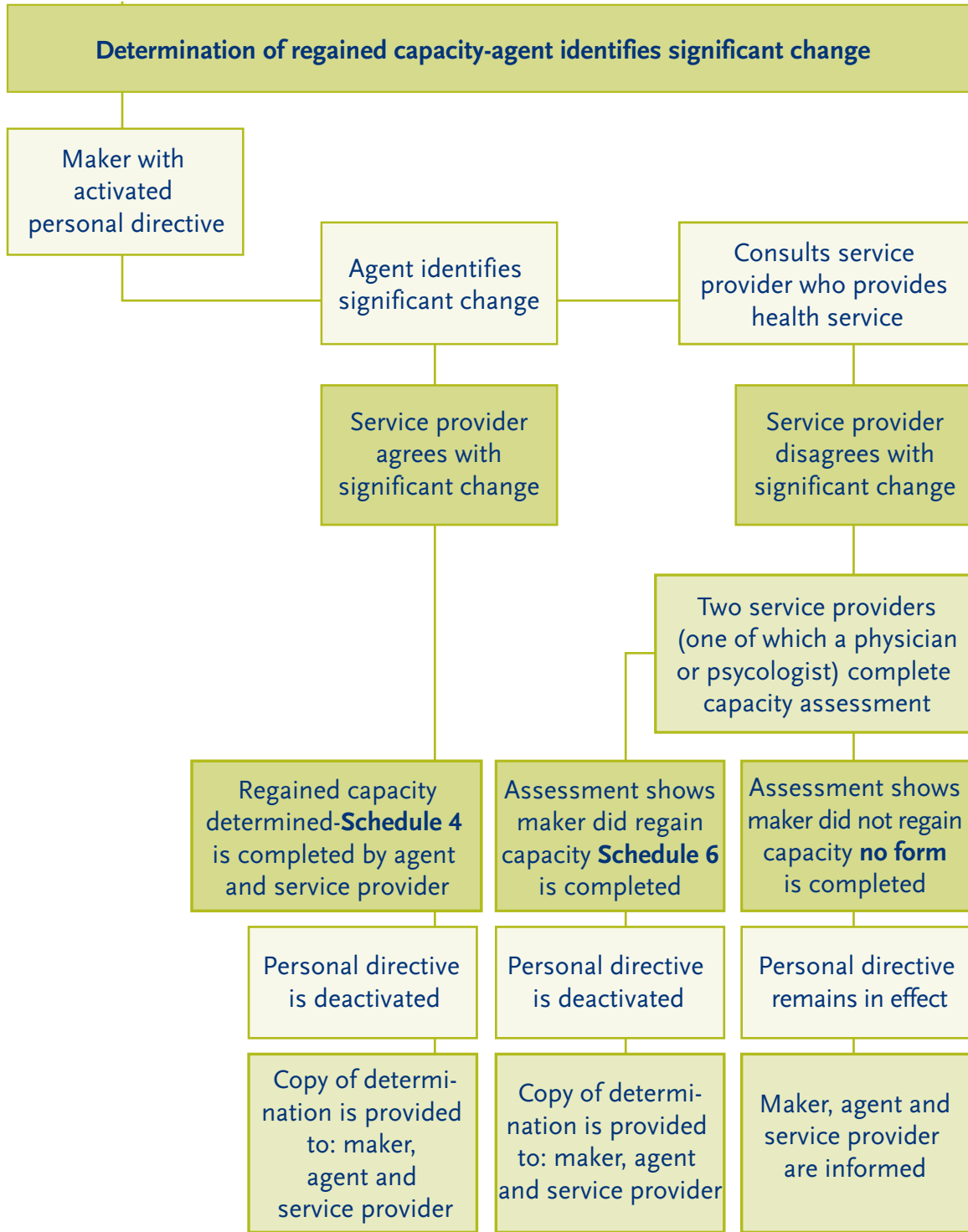
Are people liable if they make the wrong decision about capacity?

The Act assumes agents and service providers will act in a maker's best interests and in good faith. The Act states agents and service providers are not liable for what they do, or don't do, as long as they are acting in good faith and in accordance with the Act.

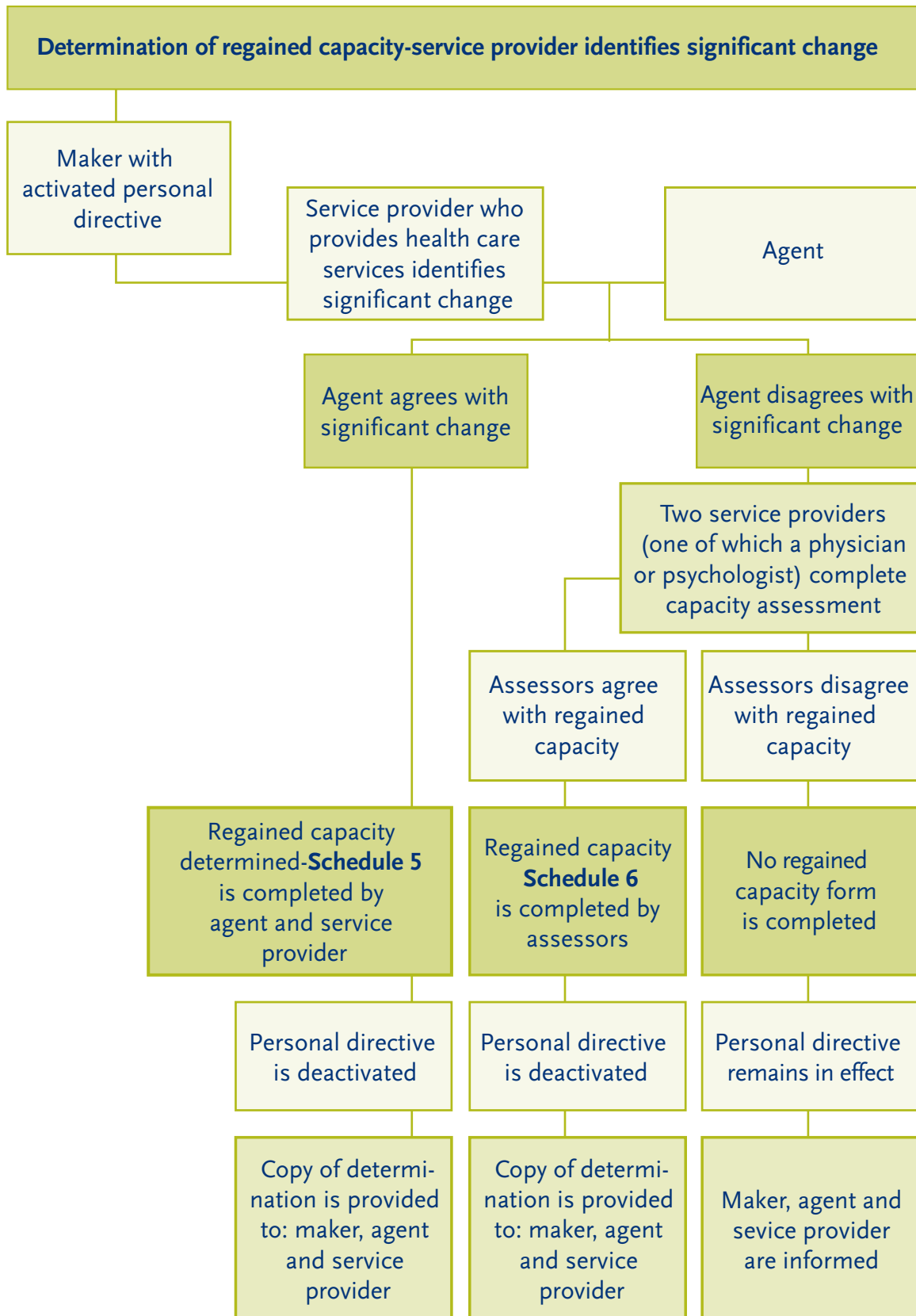
MAKER'S CHOICES



AGENT PROCESS



SERVICE PROVIDERS



Definitions

The Act: the *Personal Directives Act*, came into effect in 1997 and was amended in 2007.

Agent: a person named in a personal directive to whom the maker has chosen to give decision-making authority.

Capacity: the ability to understand information relevant to making a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

Fluctuating capacity: capacity that is not sustained, that comes and goes over time. For example, some people with dementia can be lucid or clear at one point in the day but not later.

Health care: any examination, procedure, service or treatment that is done for a therapeutic, preventative, palliative, diagnostic or other health related purpose.

Legal representative: an attorney under the *Powers of Attorney Act* or a guardian or trustee under the *Dependent Adults Act*.

Maker: a person who writes a personal directive.

Personal directive: a legal document made in accordance with the *Personal Directives Act*.

Personal matter: anything of a non-financial nature that includes:

- a. health care;
- b. accommodation;

- c. with whom the person may live and associate;
- d. participation in social, educational and employment activities;
- e. non-financial legal matters; and
- f. any other matters prescribed by the regulations under the *Personal Directives Act*.

Physician: a registered practitioner under the *Medical Professions Act*.

Psychologist: a person who is a regulated member of the College of Alberta Psychologists under the *Health Professions Act*.

Public Guardian: a representative of the Government of Alberta, employed by the Office of the Public Guardian, who has authority to make decisions on behalf of others, as appointed by the Court.

Service provider: a person who carries on a business or profession that provides or who is employed to provide a personal service to an individual and when providing the service requires a personal decision from the individual before providing the service.

Significant change: an observable and sustainable improvement in a maker's condition that does not appear to be temporary.

Spouse: an adult's married or an adult interdependent partner under Alberta law.

Where can I get more information?

Print and online information

Visit the Alberta Seniors and Community Supports website at www.seniors.gov.ab.ca/opg. There, you can view or download this and other booklets.

For a copy of the *Personal Directives Act* and the Personal Directives Regulations, please contact the Queen's Printer Bookstore. Call **780-427-4952** in Edmonton or **403-297-6251** in Calgary. For toll-free service in Alberta, dial **310-0000**.

Telephone assistance

To speak with a Public Guardian representative, please call **1-877-427-4525** toll-free between the hours of 8:15 a.m. and 4:30 p.m., Monday to Friday or call **780-310-0000** the Office of the Public Guardian nearest you.

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**.

Grande Prairie	780-833-4319
St. Paul	780-645-6278
Edmonton	780-427-0017
Red Deer	403-340-5165
Calgary	403-297-3364
Lethbridge	403-381-5648
Medicine Hat	403-529-3744

