

ADULT CAPACITY AND DECISION-MAKING



If an adult is unable to make important health, personal care or financial decisions on their own, a family member or other caring person can apply to court to become the adult's representative to make some or all of those decisions for them. A representative may make only the decisions the adult is not able to make on their own.

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ADULT CAPACITY AND DECISION-MAKING

Sometimes an adult is not able to make important decisions about their health, personal care or spending. We say that they do not have **capacity** to make important decisions. This can be because of a brain injury, a disability, or mental health problems, or for other reasons.

People who cannot make important decisions on their own might need another adult to make those decisions for them. In those cases a family member or other caring person can apply to court to ask to be the adult's representative decision-maker or **representative**.

A representative may have legal responsibilities and duties related to part or all of the adult's finances or personal or health care. A representative may make only the decisions the adult is not able to make on their own.

The *Adult Capacity and Decision-making Act* gives the court the power to appoint a representative for an adult who cannot make their own important decisions. This law replaces Nova Scotia's *Incompetent Persons Act*, which allowed the court to appoint a guardian for an adult. A guardian made all decisions for the adult whether the adult had the ability to decide a matter or not.

You can get more information about the *Adult Capacity and Decision-making Act*, and about being a representative decision-maker for an adult at novascotia.ca/just/pto/adult-capacity-decision.asp.



What is adult representation?

Representation allows someone to be responsible for the personal and financial interests of an adult who is not able to make their own decisions. If an adult cannot make significant health or personal care or financial decisions on their own, a family member or other caring person can apply to the court to be appointed as the adult's **representative**. Some people may refer to a representative as an adult guardian, delegate, or substitute decision maker, although these terms do not always have the same legal meaning.

The person for whom a representative is appointed is called an **adult in need of representation**. Only a judge can appoint a representative.

The law relating to adults who need a representative to help in decision-making used to be called the *Incompetent Persons Act*. The *Incompetent Persons Act* allowed the court to appoint an adult guardian.

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The *Incompetent Persons Act* has been replaced by the *Adult Capacity and Decision-making Act*, which took effect on December 28, 2017. The new law allows the court to make a representation order appointing a **representative** for an adult.

Guardianship orders made under the *Incompetent Persons Act* continue as representation orders. Guardians become representatives, and have the same duties and responsibilities as new representatives under the *Adult Capacity and Decision-making Act*.

A representative must use the least intrusive and least restrictive steps possible to help an adult in need of representation manage their affairs. This means that the representative must not interfere with the privacy and freedom of the adult in need of representation unless absolutely necessary.

▶ What is a representative and what do they do?

A **representative** is a person who has the legal right to make decisions for another adult. A judge appoints a representative for an adult who does not have capacity to make some or all decisions. The judge also approves a representation order and a representation plan. These tell what decisions the representative can make and what actions they can take for the adult. A representation order may give a representative authority to make only a single decision on behalf of the adult, or the order might cover a number of decisions.

A representative can only make decisions for the adult that the adult cannot make for themselves. A representative may have authority to manage finances or to make health and personal care decisions for the adult in need of representation. One example of a personal care decision is what social activities the adult will take part in. If the adult works, a personal care decision could be where and what type of work the adult will do.

A representative must:

- encourage the adult to make decisions whenever possible
- follow the adult's prior instructions whenever possible
- follow the wishes of the adult whenever possible
- respect the adult's beliefs and values
- only make decisions for the adult that the adult cannot make for themselves
- tell the adult about any decision they need to make or have made on the adult's behalf

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- protect the adult's well-being and financial interests in any decision they make on the adult's behalf
- act in good faith, and
- always make the least restrictive and least intrusive decisions possible.

A representative must not:

- make a decision the adult could make on their own
- make secret profits
- delegate authority to another person
- act for the benefit of anyone other than the adult
- sell or give away real estate belonging to the adult without a court order
- make or change the adult's will
- start a divorce or change parenting arrangements, parenting time, contact time or interactions with a child without a court order
- agree to adoption or guardianship of a child without a court order
- agree to tissue donation from the adult without a court order
- agree to a treatment, procedure or therapy that uses aversive stimulus without a court order
- give away anything that belongs to the adult
- represent themselves as the adult in any communication.

A representative may give gifts to the adult's loved ones out of the adult's property only if the court agrees.

A representative must keep good records of all financial decisions. If the representation ends for any reason, the representative must give the court records about financial decisions. The judge can order the representative to give those records or report to the court at any time.

Representatives must always protect the adult's privacy and personal information, and must make decisions in the least restrictive and least intrusive way.

A representative who thinks the adult's ability to make decisions has changed must have the adult's capacity reassessed and must apply to court to have the representation order reviewed if the adult's ability to make decisions changes.

The Nova Scotia government has a Guide to Applying for a Review of a Guardianship Order or a Representation Order. It is on the NS Public Trustee website at novascotia.ca/just/pto/adult-capacity-decision.asp.

Who needs a representative?

An adult may need a **representative** if they do not have the capacity to make their own decisions. This might happen when a person:

- is in a coma after an accident
- has an illness like Alzheimer's disease
- has a mental disability that stops them from managing their lives
- has a mental disability as the result of accident or injury.

See the Nova Scotia government's Guide to Adult Representation, under Is representation the best option, for information about some things to consider in deciding whether a representation order is needed. The guide is on the NS Public Trustee website at novascotia.ca/just/pto/adult-capacity-decision.asp

The court cannot appoint a representative for any area already covered by a current, valid personal directive or enduring power of attorney. See the sections on Health Care Treatment and Consent and Powers of Attorney for more information.

What is capacity?

Capacity is the ability to do or understand something. In decision-making, capacity means you can understand:

- the information needed to make a decision, and
- what could happen because of a decision.

For example, you have capacity to agree to medical treatment only if you understand how the treatment could be good for you or bad for you.

All adults are presumed to have capacity unless there is clear evidence to prove this is not the case. Adults have a right to make their own decisions. This includes the right to make decisions that friends or family might think are risky or unwise. Just because someone made a bad decision, or decisions others might not have made, does not mean they do not have capacity to make their own decisions.

A person can have different capacity at different times.

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For example, you might be able to understand and make decisions about your health care, but not decisions about your money or property.

The way an adult communicates does not tell people whether you have capacity. You may need help from a translator, interpreter, family member, friend, or technology to tell people about your wishes. This does not mean that you cannot understand information or make decisions.



How is a representative appointed?

A representative for an adult is appointed by a judge of the Supreme Court of Nova Scotia. The judge will hold a hearing to decide if the adult has the capacity to make important decisions for themselves.

When deciding if a representative should be appointed, the court will consider:

- the wishes of the adult
- a **capacity assessment report**
- any other evidence about the adult's capacity
- a **representation plan**
- any power of attorney made by the adult
- any personal directive made by the adult
- the areas where the adult may need help
- the value and type of property the adult owns
- any other evidence the court thinks is important



Who can be a representative?

Any adult can apply to be the representative decision-maker for an adult who does not have capacity to make important decisions on their own. A court will appoint a representative only when a judge is sure that the adult needs one and that the proposed representative:

- agrees to be appointed
- will fulfill their duties under the *Adult Capacity and Decision-making Act*, and
- is suitable to act as the adult's representative.

The judge will also think about:

- the adult's views and wishes
- the relationship between the adult and the proposed representative where relevant to a representative's duties

- things that might make it harder for a judge to oversee a **representation order**, such as if a proposed representative lives outside Nova Scotia
- anything else the judge feels is relevant.

The court can appoint a trust company or the Nova Scotia Public Trustee as a representative. A trust company can only deal with a person's finances. For more information, contact the Office of the Public Trustee at novascotia.ca/just/pto/.

▶ Can the court appoint more than one representative?

A court can appoint more than one representative to act together (jointly) or separately. If two or more representatives are appointed to act together, the representation order must include a way to end any disputes that might come up between the representatives when carrying out their duties.

▶ How do I apply to be a representative?

The Nova Scotia government has a Guide to Adult Representation that provides information on applying to become a representative. It is on the Nova Scotia Public Trustee website at novascotia.ca/just/pto/ under Adult Capacity and Decision-making, or contact the Nova Scotia Public Trustee at 902-424-7760 to request a copy.

It is important to know whether the adult has an enduring power of attorney and/or personal directive in place. See the sections on Power of Attorney and Health Care Treatment and Consent for information about those documents. If those documents are in place, a representation order may not be needed.

If you have chosen to become a representative decision-maker for an adult, you will need to apply to the Supreme Court of Nova Scotia. The process takes time and is technical. It is a good idea to talk with a lawyer, even for a short time.

You must fill out several forms to apply to be a representative. You must file the forms with the Supreme Court of Nova Scotia. The forms you need are listed below. You can get them from the Supreme Court of Nova Scotia, or online at courts.ns.ca under Documents for Court, then Nova Scotia Civil Procedure Rules. You will find court contact information at courts.ns.ca, or under courts in the telephone book.

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You must file:

1. A Notice of Application in Chambers – Form 5.03, under Civil Procedure Rule 5.03 (“Chambers” is where judges have shorter hearings)
2. A Supporting Affidavit (a sworn or affirmed statement explaining why you believe the adult needs a representative) – Form 39.08, under Civil Procedure Rule 39.08. See the Guide to Adult Representation on the Nova Scotia Public Trustee website at novascotia.ca/just/pto/ for information about what to include in the affidavit.
3. A draft order for the judge to sign if they agree to appoint you as representative – Form 78.05, under Civil Procedure Rule 78.05

You must also give the court these documents:

1. A brief (a letter to the court explaining why you believe the adult is in need of representation)
2. A **capacity assessment report** from a health professional (medical doctor, psychologist, other trained capacity assessor)
3. A **representation plan**
4. A vulnerable sector check (a background check completed by police)

You can find the forms for a capacity assessment report and representation plan on the Public Trustee’s website novascotia.ca/just/pto/forms.asp under Adult Capacity and Decision-making.

When you have filled out all of these documents, take them to the court to be issued. This means that the court stamps them to show that they have been added to court records. The court will give you an issued copy of the application documents. The documents must then be personally **served** (delivered in person) to the adult and anyone else who is a respondent (named in) on the Notice of Application. Once the application documents have been served, you, or the person who served the documents, must fill out an Affidavit of Service – Form 31.05 under Civil Procedure Rule 31.05, and file it with the court as proof of service.

You also need to make sure a copy of the Notice of Application is sent to other interested persons, including:

- the adult’s spouse, parents, children 19 or over, and siblings 19 or over

- a guardian for the adult appointed under the old Incompetent Persons Act
- an attorney for the adult appointed by a **power of attorney**
- a **delegate** for the adult appointed by a **personal directive**
- the director of a care facility, such as a nursing home, if the adult lives in one.

You must deliver the application documents to these people at least 25 business days before the date of the hearing. Remember to allow for the day when the documents are delivered or sent, the day of the hearing, weekends and holidays.

If you are concerned that someone on the above list should not be given notice of the application ahead of time, you may ask the court for permission not to notify them. You should ask the court about it when you file the application.

The adult or any other person who might be affected by the application may not agree with your application. If they do not agree they may file a Notice of Contest (Chambers Application) with the court (Form 5.04 for Contesting an Application on Notice in Chambers, under Rule 5.04).

What does a representation application cost?

Going to court nearly always involves costs. These are listed below.

Legal fees.

A lawyer will charge a fee to prepare a representation application and appear in court. This work will likely cost \$5,000 to \$6,000. Some lawyers may charge more or less. You can also contact Nova Scotia Legal Aid to see if you qualify for free legal help. Legal Aid is listed in the telephone book under Legal Aid, or go to nslegalaid.ca. You can apply to court without a lawyer if you choose to or cannot pay a lawyer.

Court filing fee.

It will cost \$246.80 (December 2018) to file an application with the Supreme Court of Nova Scotia. This includes tax and the cost of having the document issued (stamped) by the court.

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Bond.

If you are appointed as a representative, you must pay a **bond** (collateral) to the Supreme Court, to be held in trust. This is done so that the adult in need of representation is protected financially if you manage the adult's money or property badly. The bond will be equal to 1.25 times the value of any property you have control over as representative.

If you cannot afford to pay the bond, you can get a guarantor or co-signer to help you pay the bond. This could be another friend or family member, or a surety company. You might not have to pay the bond if you are not granted authority over the adult's financial matters, if there are other safety measures in place to protect the adult, or if the value of the adult's property is worth less than \$3,000.

Vulnerable sector check.

It costs \$50 to apply for a criminal record check/vulnerable sector check from the Halifax Regional Police. Contact your local police or RCMP detachment for information about the process and cost.

Capacity assessment.

Most health professionals will charge a fee to do a capacity assessment report.

You may apply to the Public Trustee's office for help paying some or all of the costs of a capacity assessment. You will have to show that it would be a financial hardship for the adult or for you to pay for it. The government may pay up to \$500 for an assessment for personal care or financial matters, or \$700 for an assessment of both personal care and financial matters.



Who can do a capacity assessment report?

A capacity assessment report can be prepared by a medical doctor or registered psychologist. They can also be prepared by nurse practitioners or registered nurses, occupational therapists, and social workers, after completing specific training developed by the Nova Scotia Public Trustee's office.



What rights does an adult have?

In Nova Scotia all adults have the capacity to make their own decisions, unless there is clear proof that they cannot.

Adults have the right to:

- make their own decisions
- make decisions others might see as risky or unwise
- communicate in whatever way that makes them understood.

An adult has the right to the least restrictive and least intrusive options. For example, an adult should be offered support so they can make their own decisions whenever possible. An adult has the right to use whatever support they need to communicate or make decisions. This might include using an interpreter or having help from a friend, family member, or other support person.

An adult who is the subject of a representation application has the right to have a lawyer. If they cannot afford to hire a lawyer, they can apply to Nova Scotia Legal Aid at nslegalaid.ca, or call Legal Aid at 1-877-420-6578.

In court, the adult has the right to be at the court hearing, to speak to the judge, and to give information to the court. If the adult does not agree with the judge's decision, they can appeal at the Nova Scotia Court of Appeal.

An adult who needs a representative has the right to apply to the court to review the representation order if their ability to make decisions changes. For example, if an adult can again make their own decisions, they can apply to the court to have the representation order reviewed, and to remove their representative decision-maker.

 Do I have to cooperate with an assessment?

You do not have to take part in a capacity assessment.

If you refuse to be assessed or decide to end an assessment in progress, the health professional must stop the assessment and notify the person applying for representation that you have decided not to be assessed. Only a court can order a person to participate in an assessment if they refuse to cooperate. Family members and friends cannot make you cooperate with an assessment.

A trained health professional can assess your ability to make decisions even if you do not want to cooperate. The assessor will look at information from other sources, like family and friends. The assessor can also ask for your personal health information.

The assessor might need your financial information to write the assessment report. If so, the person who is applying to be a representative must ask the court for permission to get that information.

When a capacity assessment is done, the assessor must tell you the results and give you a copy of the report.



How does representation end?

Representation ends when something important changes for the adult who has a representative, or for the representative.

The adult may regain capacity. This means that they can make important decisions again. This could happen, for example, as they get better after a stroke.

If an adult regains the ability to make decisions, they can apply to the court to have the representative removed. If an adult regains capacity, the representative has the responsibility to apply to court to ask the court to review the representation order and to tell the court of the change in the adult's capacity. If the review is successful, the representative must give financial records to the court and return all possessions to the adult who has regained capacity.

Representation can also end if the representative:

- stops acting as a good representative
- has a mental or physical disability
- moves out of the province permanently
- resigns as representative; or
- dies.

If a representative dies, can no longer act, or refuses to act, a judge will appoint a new representative if the adult still needs one. If there is no back-up representative who can act for the adult, the Public Trustee may act as representative until another can be appointed.

If a representative wants to resign, they must apply to court to ask to be removed from the representation order.

When should I ask the court to review a representation order or an older guardianship order?

You may have concerns about a guardian, representative, or adult who has a representative decision-maker. If you have, you can apply to the Supreme Court of Nova Scotia to ask a judge to review the representation order.

You can do this if you are an appointed guardian or representative, or an adult who has a representative, or a family member or a friend.

You can ask for a review if you are an adult with a guardian or representative, but you can make important decisions for yourself or believe that the representative is not doing their job right.

Some other reasons to ask the court for a review are:

- If you were appointed as a guardian or representative for an adult and you feel that the adult can make some or all of their own decisions, or something else significant has changed in the adult's life
- If you were appointed as a guardian or representative and you are no longer able to do the job
- If the court ordered you to return for a review after a certain length of time

For more information, see the Guide to Applying for a Review of a Guardianship Order or a Representation Order on the Nova Scotia Public Trustee website at novascotia.ca/just/pto/ under *Adult Capacity and Decision-making Act*, or call the Nova Scotia Public Trustee at 902-424-7760.

Complaints or concerns about a representative

You can complain to the Public Trustee if you think that a representative is not doing their job right. Anyone can also complain to the Public Trustee if they are concerned about the decisions of a guardian under the *Incompetent Persons Act*. The Public Trustee will look into the complaint and may refer the matter to other agencies, such as police or the Department of Community Services.

You can use an online form to make a complaint respecting a representative on the Public Trustee's website at novascotia.ca/just/pto/ under *Adult Capacity and Decision-making Act*, or call the Nova Scotia Public Trustee at 902-424-7760.

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Do representatives get paid?

Anyone who has concerns about a representative may also apply to court to have a representation order reviewed. You can do this if you are an appointed guardian or representative, or an adult who has a representative, or a family member or a friend.

As a representative, you may be paid for out-of-pocket costs related to carrying out your duties. This money comes from the money or property of the adult you represent.

You may also ask the court to approve taking a fee from the adult's money or property. You should know that no pay may come from government benefits or support paid to the adult.

You must ask the court to include this compensation when you apply to become the adult's representative. The court may order up to \$15 per hour for managing health care or personal care matters. If you are managing financial matters, the court may allow you to receive up to 2.5 percent of money the adult gets (for example interest earned) while you are their representative.

Can I manage an adult's finances without becoming a representative?

Sometimes when a person can no longer make their own decisions, someone else will be able to help them. This person is usually a spouse, adult child, or other close family member, or even a close friend.

Informal arrangements work for many people. If informal arrangements work, you do not have to go to court.

If the adult has real estate or financial assets that need to be managed, though, there can be problems. For example, in an informal arrangement, you will not be able to deal with investments unless the person has appointed you as attorney in an enduring power of attorney.

For more information, see the section on Power of Attorney.

Can I make decisions about my finances and personal care before I need a representative?

Yes. While you have capacity to make decisions, you can arrange for someone to manage your financial affairs. This legal document is called an **enduring power of attorney**.

You can also arrange for someone to manage your health and personal care if you lose capacity and are unable to make your own decisions. This legal document is called a **personal directive**.

For more information, see the sections on Power of Attorney and Health Care Treatment and Consent.

Where can I get more information?

- **Nova Scotia Public Trustee:** novascotia.ca/just/pto/ under Adult Capacity and Decision-making Act, or call the Nova Scotia Public Trustee at 902-424-7760.
- **Nova Scotia Legal Aid:** go to nslegalaid.ca, or call Legal Aid at 1-877-420-6578.
- **A lawyer in private practice** who does estates work, including adult representation.
- **Supreme Court of Nova Scotia:** go to courts.ns.ca for court locations and contact information, or look under Courts in the telephone book.

General legal information or a referral to a lawyer in private practice

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902-455-3135
1-800-665-9779
www.legalinfo.org

Email: questions@legalinfo.org

The Legal Information Society of Nova Scotia can also refer you to a lawyer in private practice.

