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PERSONAL DIRECTIVES INFORMATION PACKAGE

TABLE OF CONTENTS

What is the Difference between a Will, Power of Attorney and Personal Directive?.....	1
Why is a Personal Directive Important?	2
What can my Agent make Decisions About?	2
When can my Agent Act?.....	2
Who is Responsible for Determining if I Lack Capacity?	2
What Authority will my Agent Have?	2
What are my Agent's Responsibilities?	3
What is my Agent Unable to Make Decisions About?	3
Who should I Appoint as my Agent?	3
What are the Requirements for a Valid Personal Directive?	4
Will my Agent be Able to Access my Personal Information?	4
Will my Agent be paid?	4
When will my Personal Directive Cease to be in Effect?	4
Is my Personal Directive Effective Outside Alberta?	5
What is the Personal Directives Registry	5

What is the Difference between a Will, Power of Attorney and Personal Directive?

A **Will** (or “Last Will and Testament”) is a document in which you state how you want your Estate to be distributed after you pass away. In your Will you appoint a Personal Representative (used to be called the executor or executrix) to oversee the administration of your Estate and outline how you want your property distributed. If you have minor children, you can appoint a Guardian and make arrangements for their care.

An **Enduring Power of Attorney** is a document in which you appoint an “Attorney” and give them the power to make decisions relating to your financial matters while you are alive. An Enduring Power of Attorney can come into effect immediately or when you lose the capacity to make your own decisions (e.g., accident, Alzheimer’s, etc). Your Attorney can be any person you choose and does not have to be a lawyer.

A **Personal Directive** is a document that states, in plain language, your views and wishes about the personal care you would like to receive when you are unable to speak for yourself. In this document you give your “Agent” the legal authority to make decisions on your behalf about such matters as health care, where you live, who can visit you, designating who will take over the care and education of your minor children and other personal care issues. A Personal Directive can also include a Living Will.

Why is a Personal Directive Important?

It is a common misconception that your spouse or family automatically have the authority to make medical decisions on your behalf if you become incapacitated. In reality, if you do not have a Personal Directive, any relative may consent to emergency health care or a temporary residential placement. For non-emergency care, health care providers select a family member from your next of kin to make decisions. If your ability to make decisions is permanently affected or if your family does not agree on what is best for you, your family may have to make an Application to the Court to become your legal guardian.

If you have a Personal Directive, your Agent has the authority to make medical and personal decisions on your behalf. Further, you state, in plain language, your values and wishes with respect to the medical care you would like to receive in the Personal Directive to assist your Agent when making decisions.

A Personal Directive allows you to minimize the possible discord and difficulty that may occur if a personal decision needs to be made while you are receiving medical treatment and unable to make the decision yourself.

What can my Agent make Decisions About?

An Agent can make decisions about any matter of a non-financial nature, including:

1. The care and education of your minor children;
2. Your health care;
3. Your accommodation;
4. Your with whom the person may live and associate;
5. Your participation in social, educational and employment activities; and
6. Your non-financial legal matters (such as providing consent for the release of medical records).

You can either give your Agent specific instructions or provide a general set of guidelines that the Agent can use to make decisions on your personal matters.

When can my Agent Act?

You must be incapacitated before your Agent can start making decisions on your behalf. The Personal Directive is brought into effect by the completion of a Declaration of Incapacity form.

Who is Responsible for Determining if I Lack Capacity?

You establish who has the authority to bring your Personal Directive into effect in your Personal Directive. Some people allow their Agent to determine that they lack capacity after consulting with a physician or psychologist. Other people require that their Agent and their treating physician agree that they lack capacity.

What Authority will my Agent Have?

When your Personal Directive is in effect, a decision by your Agent will have the same effect as if you personally made the decision. For example, if your Agent consents to a medical procedure, it will be as if you consented to the medical procedure.

What are my Agent's Responsibilities?

Your Agent has several responsibilities. Your Agent must:

1. Determine that you are incapacitated and sign the Declaration of Incapacity form to bring your Personal Directive into effect
2. Follow any clear instructions provided in your Personal Directive
3. If there are no clear instructions in your Personal Directive that are relevant to your situation, the Agent must make the decision your Agent believes you would make in the circumstances based on
 - a. the Agent's knowledge of the your wishes, beliefs and values and
 - b. the medical information available
4. If your Agent does not know your wishes, beliefs or values, your Agent must make the decision your Agent believes is in your best interests, given the circumstances

When making decisions your Agent must, to the extent possible, consult with you.

What is my Agent Unable to Make Decisions About?

Your Agent will not be able to make decisions that are illegal, such as euthanasia or assisted suicide. Further, your Agent may not consent to the following procedures unless there are specific instructions in the Personal Directive:

1. Psychosurgery
2. Sterilization that is not medically necessary to protect your health
3. Removal of tissue or organs for implantation in the body of another person, for medical education or for research
4. Participation in research or experimental activities if there is little or no potential benefit to you

Who should I Appoint as my Agent?

Any adult can be appointed as an Agent. Most people turn to a spouse, a child, a relative, a family friend, or a professional. You can also appoint more than one Agent and require that they agree on some or all of any Personal Decisions. However, if you appoint multiple Agents you should outline a dispute resolution method. The Agent is not required to be a resident of Alberta, but it is strongly recommended.

An Agent should have certain qualities, including:

1. Willing to do the job and able to put sufficient time and effort into it
2. Intelligent enough to do the job
3. Free from conflict of interest (as much as possible)
4. Able to resist any undue influence
5. Aware of your goals and desires
6. Capable of recording all decisions carried out as your Agent
7. Most importantly, trustworthy

You should also make sure that the person you appoint as your Agent is aware of

- their appointment;
- your medical care wishes; and
- where you keep your Personal Directive (i.e., give them a copy)

You should also make sure that your agent agrees to act as your Agent being appointed.

What are the Requirements for a Valid Personal Directive?

In Alberta, a Personal Directive must be:

1. In writing and dated
2. Signed by the maker in the presence of a witness
3. Signed by the witness in the presence of the maker

The following persons may not witness a Personal Directive

1. A person designated in the directive as an Agent
2. The spouse or adult interdependent partner of a person designated in the directive as an Agent
3. The spouse or adult interdependent partner of the maker
4. A person who signs the directive on behalf of the maker
5. The spouse or adult interdependent partner of a person who signs the directive on behalf of the maker

Will my Agent be Able to Access my Personal Information?

Unless you state otherwise, your Agent has the right to be provided with the information and records that are relevant to any personal decision they have to make.

Will my Agent be paid?

An agent can be reimbursed for out-of-pocket expenses incurred while acting as agent, but only if you provide for compensation in your personal directive.

When will my Personal Directive Cease to be in Effect?

Your Personal Directive will cease to be in effect:

1. if you recover the capacity to make your own personal decisions
2. if you revoke your Personal Directive
3. if a court determines that your Personal Directive is no longer in effect
4. when your Personal Directive expires, if you specify an expiration date in it
5. if you destroy your Personal Directive with the intent of revoking it

Is my Personal Directive Effective Outside Alberta?

Whether an Alberta Personal Directive is recognized outside Alberta depends on the law of the other jurisdiction. While there is a certain amount of consistency in the signing formalities and internal requirements for Personal Directives across Canada and the United States, the requirements of each separate jurisdiction need to be assessed on a case by case basis to determine if an Alberta Personal Directive would be valid.

What is the Personal Directives Registry

The Alberta Public Guardian has a Personal Directives Registry where you can record contact information for yourself and your Agent(s) at no cost. The information in the registry is then available to "approved professionals" upon request. You can register for the Personal Directives Registry online at <http://www.seniors.gov.ab.ca/opq/registry> or by calling toll-free at 1-877-427-4525.

Turning Point Law is a father – son Wills, Estates and Trusts law firm. Paul McLaughlin (father) and Andrew McLaughlin (son) are committed to helping our clients find peace of mind through plain language drafting of Wills, Enduring Powers of Attorney, Personal Directives and Trusts. We also assist our clients with Applications for Grants of Probate and Grants of Administration, and with the Administration of Estates.

Our office is located in Sherwood Park, Alberta, and we serve clients in Strathcona County, Fort Saskatchewan, Edmonton, St Albert, Leduc, Camrose, Tofield and Spruce Grove. We also serve clients in Red Deer and Calgary.

Please do not hesitate to contact our office with any questions you may have.