

Being an Agent

in Alberta

This booklet is for people who have been asked to be an Agent under someone's Personal Directive. It explains what is involved in being an Agent. It is divided into two sections:

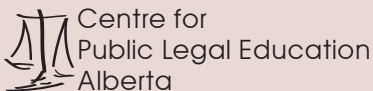
- *a question and answer section that covers issues to consider before you accept the job as well as common questions and examples; and*
- *a checklist section that helps guide you when the Personal Directive comes into effect.*

This booklet gives general information only, not legal advice. It is not a do-it-yourself guide. For that, you need a more detailed self-help publication or legal advice. See the last few pages of this booklet for information on where to get this help.

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You should **not** rely on this booklet for legal advice. It provides general information on **Alberta law only.**



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1. Should I agree to the job?

Top 10 questions about what's involved in being an Agent

1.1

What is an Agent?

An Agent is the person named in a Personal Directive who will make personal decisions on behalf of the maker, when the maker no longer has the mental capacity to make those decisions for him- or herself.

Personal decisions include the giving of consent, the refusal to give consent, or the withdrawal of consent regarding any personal matter.

A personal matter, as defined in the *Personal Directives Act*, is anything of a non-financial nature that relates to an individual, including:

- health care;
- accommodation;
- with whom the person may live and associate;
- participation in social, educational and employment activities;
- non-financial legal matters such as providing consent for the release of medical records; and
- any other personal and legal decisions (for example, the continued care and education of a minor for whom the maker is the guardian).

An Agent does **not** make decisions about financial issues; for that, one needs a separate document called a Power of Attorney.

1.2

Who can be an Agent?

Any adult can be an Agent. However, being an Agent can be a complex, difficult job. An Agent is responsible for all the maker's personal affairs. A lot of work is involved and the law expects Agents to meet very high standards.

Accordingly, an Agent should:

- be responsible and trustworthy;
- know the maker well enough to understand and interpret his or her instructions; and
- have the time and willingness to do the job.

Another factor to consider is proximity. It is most convenient if the Agent lives in the same city, or at least

the same province, as the maker. This factor, however, should not overshadow the other criteria. A person who is trustworthy, capable, and willing is more suitable than someone who is not, even if s/he lives on the other side of the country.

1.3

How difficult is it to be an Agent?

It depends. Being named as an Agent can be a big undertaking requiring a considerable amount of time and energy, for example, if the mental incapacity is prolonged or irreversible. In other instances, however, it can be quite brief and straightforward, for example, when a person has been temporarily injured but is expected to make a full and speedy recovery.

In any event, being an Agent often requires a considerable amount of diplomacy. As an Agent you are making very personal decisions about another individual. It may happen that the person's family members, friends, and loved ones have differing opinions on what is best. As Agent, you will hear, and deal with, all these opinions. However, as Agent, you will make the final decisions.

1.4

I have just been asked to be an Agent. Do I have to agree?

If someone asks you to be an Agent and you don't want to do the job, you can simply say no. No one can force you to take this job.

Since no one knows what the future will bring (how long will the maker's incapacity last; how many decisions will I have to make; will there be familial strife?), it is best to agree to act as Agent *only* if you feel you can do the job well and give it adequate time and attention. Be sure also to consider family dynamics.

If you agree to be an Agent, you will be entrusted to handle the personal affairs of the maker and you owe it to him or her to make sure you know what is required of you.

1.5

What are the duties of an Agent?

While the responsibilities of an Agent may vary as needed, the basic duties include:

- confirming that the Personal Directive is in effect;
- consulting with the maker before making decisions to ensure that the maker contributes to the extent that s/he is able;
- making the personal decisions of the maker (for more details – see question 2.7) for as long as the maker remains incapacitated;
- monitoring for change in capacity so that, if the maker regains capacity, the appropriate paperwork can be completed (for more details, see question 2.7);
- keeping a record of personal decisions you made, which must be retained for the entire duration of the maker's incapacity and for two years thereafter;
- on request, providing a copy of the Personal Directive and the record of decisions to the maker, and, in the case of a particular matter to the maker's lawyer, or other representative (including any other Agent) that has authority with respect to that particular matter.

For all decisions, Agents are also encouraged to consult with people who are knowledgeable in the area of concern, as well as those who may be affected by the decision, such as the maker's family and friends.

When you, as an Agent, act with reasonable effort and in good faith, there is no liability. If, however, you willfully destroy, conceal, or alter a Personal Directive, or a document revoking the Personal Directive, you can be fined. The terms "reasonable effort" and "good faith" depend on the individual circumstances of the situation. It is not possible to define these terms without first considering the particular case.

1.6

I have just agreed to be someone's Agent. What information should I get right now?

Here are some kinds of information you should consider requesting:

- a notarized copy of the Personal Directive, so that you have it when the time comes;
- the location of the original Personal Directive;
- whether or not the Personal Directive has been registered in the Alberta Personal Directive Registry (www.seniors.alberta.ca/opg/registry);
- a detailed discussion with the maker about the instructions in the Personal Directive, in order to understand the maker's values and beliefs. This will help you in making decisions later, because it can be difficult to anticipate all circumstances that could occur;
- details about how the maker's loss of mental capacity will be diagnosed;
- details regarding whether anyone will be reviewing your decisions as Agent (and whom you therefore need to keep explicitly informed);
- clarification regarding whether you will be paid a fee for your services as Agent;
- the names and contact details of any other people who have a copy of the Personal Directive;
- the names and contact details of any people that you are to notify when the Personal Directive comes into effect; and
- the name and contact details of who has been named as an Attorney under any Power of Attorney made by the maker.

If you agree to be an Agent, you will be entrusted to handle the personal affairs of the maker and you owe it to him or her to make sure you know what is required of you.

1.7

I have just agreed to be someone's Agent. Is there anything I should ask the maker to do now in order to make my job easier when the time comes?

You should consider asking the maker to:

- keep you up-to-date on changes in the maker's wishes;
- talk to family members, the beneficiaries, or anyone who may be affected by your appointment as Agent. Explain what his or her plans are, as this may prevent problems for you later;
- keep you apprised of any updates or changes to the Personal Directives (including providing you with updated notarized copies);
- if it has not yet been done, register the Personal Directive in the Alberta Personal Directive Registry;
- keep a card in his or her wallet indicating that you are the Agent (this could help in an emergency); and
- if the maker regularly spends time outside of Alberta, complete a similar document that will definitively be valid in that jurisdiction (in case the Alberta Personal Directive is not valid there).

1.8

Can I be the Agent if I am also the Attorney under this person's Power of Attorney?

Yes. In addition, you can also be the Executor under the person's Will.

An Agent can only take a fee if the maker has provided for this in his or her Personal Directive.

If the Personal Directive does not state that the Agent is to be paid for his or her service, the Agent may not take a fee.

1.9

Can I get paid for being an Agent?

Often an Agent does not accept a fee. This is common if the Agent is a spouse, adult interdependent partner, family member, or close friend.

Any expenses the Agent incurs while performing his or her duties can always be recovered by the Agent. Examples of expenses are photocopying, postage, and long-distance telephone calls.

An Agent can only take a fee if the maker has provided for this in his or her Personal Directive. If the Personal Directive does **not** state that the Agent is to be paid for his or her service, the Agent may **not** take a fee.

1.10

I agreed to be an Agent, but now I have changed my mind. Can I get out of the duties?

If the Personal Directive is not yet in effect, you can change your mind at any time. Let the maker know as soon as possible so that s/he can make a new Personal Directive, if required.

You can also resign later, after the person has lost mental capacity. If there is a co-Agent, s/he can take over. If there is no co-Agent, and if the Personal Directive identifies an alternate Agent, then that person may take your place. If all of the possible Agents named in the Personal Directive are unable or unwilling to act, the Personal Directive will cease to have effect and someone will have to apply to the courts to become the guardian of the maker under the *Adult Guardianship and Trusteeship Act* (this is known as a Guardianship Application).

2. What happens when ...?

Top 15 general questions about being an Agent

2.1

How does a Personal Directive come into effect? What is this Declaration of Incapacity?

A Personal Directive only comes into effect once the maker has been determined to be incapable of making his or her own personal decisions. The Directive may continue to be used only during the time that the maker is mentally incapable of making his or her own personal care decisions.

A Personal Directive often includes a provision about *who* will determine mental incapacity for making personal care decisions. If this is included, the decision will be made by that person, after that person has consulted with a physician or psychologist. If this is *not* included, the law requires that the determination be made by two service providers, at least one of whom is a physician or psychologist.

Regardless of who makes this determination, the parties must make a written statement that the person lacks capacity (this is known as the “Declaration of Incapacity”). This form is available at: www.seniors.alberta.ca/opg/personaldirectives/OPG5522.pdf. This written record must be kept by the physician or psychologist. A copy of the Declaration of Incapacity must be given to the maker, the Agent, and any other persons named in the Personal Directive.

The Agent must then inform the maker’s nearest relative (unless the Personal Directive says not to) as well as the maker’s legal representative that the Personal Directive is in effect.

A Personal Directive often includes a provision about who will determine mental incapacity for making personal care decisions...[r]egardless of who makes this determination, the parties must make a “Declaration of Incapacity”.

2.2

How do I confirm that I was named as the Agent?

Currently in Alberta, a maker does not *have* to give a copy of his or her Personal Directive to anyone. This can result in much confusion in emergency situations. For this reason, if you know that you have been named as Agent, you should consider:

- keeping a notarized copy of the Personal Directive where it can be accessed quickly and easily;
- asking the maker to keep a card in his or her wallet, indicating your status as Agent as well as your contact details;
- asking the maker to register the Personal Directive in the Alberta Personal Directive Registry; and
- when the time comes, obtaining the original version of the Personal Directive.
 - If it is not at the maker’s home, check in his or her safety deposit box (for this, you will need to contact the Attorney named under the maker’s Power of Attorney) or at the office of the lawyer who drafted the Personal Directive.
 - To look in the safety deposit box:
 - make an appointment at the bank; and
 - take the safety deposit box key and your own identification.

If the Personal Directive is there and names you as Agent, the bank should let you take it.

2.3

What if I can’t find the original Personal Directive?

If you can’t find the original Personal Directive, check with the maker’s relatives and close friends. They may know where it is.

Although you can proceed with your notarized copy, someone may ask to see the original and it is best to have it. In addition, if there is any dispute between family members as to the authenticity of the Personal Directive, it is best to have the original.

2.4

I found a Personal Directive that is handwritten, signed, and dated, but no one else witnessed it. Is it valid?

No. Although a Personal Directive can be valid if it is entirely handwritten by the maker, it must meet all other requirements of the *Personal Directives Act*.

According to the Act, the Personal Directive must be:

- dated;
- signed;
 - by the maker in the presence of a witness, or
 - if the maker is physically unable to sign the directive, by another person on behalf of the maker, at the maker's direction and in the presence of both the maker and a witness; and
- signed by that same witness in the presence of the maker.

2.5

What happens if there is more than one Personal Directive?

Usually, there is only one valid, binding Personal Directive. Generally, the binding Personal Directive is the one that is both the most recent and which meets all legal requirements.

Example

- A maker wrote a Personal Directive in 2002, which met all of the legal requirements.
- The maker wrote a new Personal Directive in 2007; it attempted to revoke the 2002 document, but not all of the legal requirements were met.
- The 2002 Personal Directive remains the valid one.

As Agent, you must make appropriate effort to ensure that you are working with the correct document. Your job is to do your best to ensure that the wishes of the maker are carried out.

Sometimes, however, there may be a dispute regarding which Personal Directive is valid (for example, there may be a claim that the most recent Personal Directive was written when the maker did not have capacity). A court may have to decide.

If there is more than one Personal Directive and they can be read together (that is, they do not conflict) a court may take into account the provisions of both, but this is extremely rare.

2.6

As an Agent, what exactly is it that I have power over?

As Agent you are responsible for making the personal (including legal) but non-financial decisions of the maker, for as long as the maker remains incapacitated.

Personal decisions include the giving of consent, the refusal to give consent, or the withdrawal of consent regarding any personal matter.

A personal matter, as defined in the *Personal Directives Act*, is anything of a non-financial nature that relates to an individual, and without limitation includes:

- health care;
- accommodation;
- with whom the person may live and associate;
- participation in social, educational and employment activities;
- non-financial legal matters such as providing consent for the release of medical records; and
- any other personal and legal decisions (for example: the continued care and education of a minor for whom the maker is the guardian).

2.7

As Agent, what are my responsibilities?

While the responsibilities of an Agent may vary, the basic duties include:

- confirm that the Personal Directive is in effect;
- consult with the maker before making decisions to ensure that the maker contributes to the extent that s/he is able;
- follow any clear instructions provided by the maker in the Personal Directive;
- if there are no clear instructions relevant to a particular situation, make the decision that you feel the maker

would have made in the same circumstances, based on your knowledge of the maker's wishes, beliefs, and values;

- if you do not know the wishes, beliefs or values of the maker, make a decision based on the maker's best interests;
- keep a record of personal decisions you have made, which must be retained for the entire duration of the maker's incapacity and for two years thereafter;
- on request, provide a copy of the Personal Directive and the record of your decisions to the maker, and, in the case of a particular matter, to the maker's lawyer, or other representative (including any other Agent) that has authority with respect to that particular matter.

Agents are also encouraged to consult with people who are knowledgeable in the area of concern, as well as those who may be affected by the decision, such as the maker's family and friends.

Agents should only make those personal care decisions that the maker cannot make himself or herself. (Service providers must also make reasonable efforts to determine whether the maker continues to lack capacity). The maker might, for example, be incapable of making a serious health care decision, but still be able to make his or her own choices about routine day-to-day matters.

In addition, if it appears to an Agent that there has been an improvement (known as a "significant change") in the maker's capacity, that Agent must consult with a service provider who provides health care services to assess the maker's capacity. In the *Personal Directives Act*, the term "significant change" is defined as "an observable and sustained improvement that does not appear to be temporary".

- If the Agent and service provider agree that the maker has regained capacity to make decisions with respect to personal matters, make a determination in the prescribed form (this is known as the "Determination of Regained Capacity Form").
- If the Agent and the service provider do not agree, the Agent must then have two service providers, at least one of whom is a physician or psychologist, assess the maker's capacity.

As the Agent, when you act with reasonable effort and in good faith, there is no liability. If, however, you willfully destroy, conceal, or alter a Personal Directive, or a document revoking the Personal Directive, you can be fined. The terms "reasonable effort" and "good faith" depend on the individual circumstances of the situation. These terms cannot be described in detail without first considering the particular case.

2.8

Are there things that an Agent *cannot* do?

An Agent may not sign a second Personal Directive on behalf of the maker for whom he or she is an Agent.

In addition, the *Personal Directives Act* specifies that there are certain things that an Agent cannot approve **unless** the maker's Personal Directive contains clear instructions enabling the Agent to do so. These include:

- psychosurgery as defined in the *Alberta Mental Health Act*;
- sterilization that is not medically necessary to protect the maker's health;
- removal of tissue from the maker's living body;
 - for implantation in the body of another living person pursuant to Part 1 of the *Human Tissue Gift Act*, or
 - for medical education or research purposes;
- participation by the maker in research or experimental activities, if the participation offers little or no potential benefit to the maker.

2.9

If the Personal Directive was made in another province, is it still valid here?

As long as it meets the requirements of the *Alberta Personal Directives Act*, the Personal Directive is valid in Alberta.

If it does not meet all of the requirements of the *Personal Directives Act*, a service provider can refuse to accept the Personal Directive. Although, a service provider may still choose to honour the document, this can lead to difficulties.

2.10

The maker now lives outside the province. Is the Personal Directive still valid?

Not necessarily. Another province or another country may choose not to accept the Alberta Personal Directive. If that occurs, you may wish to consult a lawyer.

2.11

Can I ask some professionals for help with my duties as an Agent?

Agents are encouraged to consult with people who are knowledgeable in the area of concern, such as doctors. In addition, Agents may wish to consult those who may be affected by the decisions in question, such as family and friends.

The Office of the Public Guardian may be a helpful resource (offices are listed at the end of this pamphlet).

2.12

What are the responsibilities of service providers?

If a service provider intends to provide personal services to a maker who lacks capacity and a Personal Directive is in effect, the service provider must:

- if the Personal Directive designates an Agent, follow any clear instructions of the Agent that are relevant; or
- if the Personal Directive does not designate an Agent, or if the Agent is unable or unwilling to make a personal decision (or cannot be contacted after every reasonable effort has been made), follow any clear instructions in the Personal Directive that are relevant to the decision to be made.

In addition, if it appears to a service provider that there has been a significant change (namely, an “observable and sustained improvement that does not appear to be temporary”) in the capacity of the maker, that service provider must:

- consult with the Agent and assess the maker’s capacity; and

- if the Agent and service provider agree that the maker has regained capacity to make decisions with respect to that or other personal matters, complete the appropriate form (known as the “Determination of Regained Capacity Form”).

If the Agent and service provider do not agree, two service providers, at least one of whom is a physician or psychologist, must assess the maker’s capacity. The service provider must arrange this assessment if the Agent has not already done so.

2.13

What happens in an emergency?

The *Personal Directives Act* gives health care practitioners permission to provide emergency medical services to a person who appears to lack mental capacity in a situation where:

- the Personal Directive cannot be found;
- an Agent cannot or is not willing to make a decision;
- the Agent cannot be found after reasonable effort and the Personal Directive does not contain clear instructions;
- or
- the Personal Directive does not appoint an Agent and does not contain clear instructions.

After providing the emergency medical service, the health care practitioner must try to contact, in the following order:

1. an Agent or Guardian;
2. the nearest relative;
3. any other legal representative of the maker (such as his or her Attorney under a Power of Attorney); and
4. the Public Guardian.

The Personal Directives Act gives health care practitioners permission to provide emergency medical services to a person who appears to lack mental capacity in a situation where the Personal Directive cannot be found.

2.14

Can someone review and/or challenge the decisions that I make as Agent?

The *Personal Directives Act* provides no formal means to review the actions of an Agent, but it allows the maker to include such a provision. As Agent, you will need to check the Personal Directive and provide documentation as directed. In addition, at any time, the maker can request a review.

The question of challenges depends on the particular issue.

Any interested person may apply to the Court of Queen's Bench to question the capacity of the maker at the time the Personal Directive was made or question the validity of a Personal Directive or part of it. Only a court has the final say about such issues.

Until July 2008, any complaints about the actions or inactions of one or more Agents also had to come through a court application. Although an interested party can still proceed this way, the Alberta Office of the Public Guardian now has the authority to investigate such complaints. The only complaints that will be investigated this way are those involving an Agent failing to comply with the Personal Directive or the duties of an Agent, thus causing physical or mental harm to the maker. All other complaints can still be resolved through a court application.

Complaints must be made, in writing, to the Office of the Public Guardian. Any interested party can send a written complaint about the Agent to the Office of the Public Guardian. The form is available from www.seniors.alberta.ca/opg or by calling 1-877-427-4525 toll-free. All complaints will be reviewed.

If there is an indication that an Agent is not following instructions or complying with his or her duties, and there is harm to the maker as a result, an investigation will be conducted. Investigations can include interviews and accessing relevant records. If a complaint warrants an investigation, the Office of the Public Guardian will formally notify the Agent and provide the Agent with the opportunity to present his or her side.

If the investigation shows the complaint has merit, the Office of the Public Guardian may try to resolve the matter (for example, by further educating or training the Agent), make a referral to an alternative dispute resolution process, or apply to the Court for one or more orders including the revoking of an Agent's authority.

2.15

When do my responsibilities as Agent end?

Your responsibilities as an Agent cease:

- during any period in which the maker regains and has capacity to make his or her own decisions;
- if the maker has indicated a date or circumstance in which his or her Personal Directive will be revoked or changed. For example, a Personal Directive can name one Agent for a set period of time, with another Agent to take over at a set future date, ("my sister, until my child turns 18; then my son, once he turns 18");
- if the maker dies;
- if a court determines that the Personal Directive ceases to have effect;
- any time you no longer wish to be an Agent; or
- when you die.

[I]f it appears to an Agent that there has been an improvement ... in the maker's capacity, that Agent must consult with a service provider who provides health care services to assess the maker's capacity.

3. How can it go wrong?

Top 5 questions about the most common problems

3.1

What if I have disagreements with another Agent?

If the Personal Directive does not provide instructions about how to resolve disagreements, the *Personal Directives Act* states that the decision of the majority of Agents must be followed. If no majority can be reached, the Agents may seek help to reach a consensus by consulting with others, such as family members or a professional. Agents may also apply to the courts to give direction.

When Agents are named jointly and they are unable to agree on who will communicate decisions (for example: to doctors, caregivers, family, or friends) the *Personal Directives Act* states that the Agent listed first is authorized to communicate decisions, unless the Personal Directive states otherwise.

3.2

What if family members, friends, or service providers do not agree with the decisions that I am making?

How you proceed within the terms of the Personal Directive is up to you, but keeping the peace may help avoid even more problems. Setting a plan and then sharing that strategy with all the affected loved ones at the same time may build trust and provide a setting where they hear each other ask questions and get answers. Keeping all the affected loved ones informed also helps develop confidence in your actions. Ultimately, however, disputes may have to be settled in court.

If you are the Agent and the maker's loved ones or service providers do not agree on how to proceed, you may also consider obtaining the advice of a lawyer.

3.3

What if I do not follow the exact directions in the Personal Directive?

An Agent *must* follow the wishes of the maker as expressed in the Personal Directive. Sometimes loved ones are not happy with the decisions the Agent is making, but the Agent has the obligation to proceed in accordance with the instructions in the Personal Directive, regardless of others.

That said, the wise Agent keeps the loved ones up-to-date and, where possible, asks them for input. If the Personal Directive is a little unclear on a particular matter, you may choose not to proceed without either the written agreement of the immediate family or a court order. (Remember – you can always ask a court for advice and direction.)

As the Agent, if you fail to act reasonably or if you act in a way that is not at all consistent with the Personal Directive, interested parties can take legal action to find a solution. When you act with reasonable effort and in good faith, there is no liability. If, however, you willfully destroy, conceal, or alter a Personal Directive, or a document revoking the Personal Directive, you can be fined up to \$10,000.

If the Personal Directive is a little unclear on a particular matter, you may choose not to proceed without either the written agreement of the immediate family or a court order.

3.4

I feel that the maker would want a certain decision, but I am not comfortable making that decision. Can I refuse to make the decision and resign as Agent?

Refusal by an Agent to make a decision after a Personal Directive has been brought into effect means that an alternate Agent would have to act.

If no other Agent is named, then, in a medical emergency, a health care practitioner would provide medical services without consent. The health care practitioner, however, would have to inform either the nearest relative or legal representative. If these people could not be reached, the Office of the Public Guardian would have to be contacted.

If disagreement occurs during an emergency, remember that you have the final authority. A doctor or caregiver is not entitled to make his or her own decision instead of yours.

Personal decisions include the giving of consent, the refusal to give consent, or the withdrawal of consent regarding any personal matter.

3.5

What if someone disagrees with a decision I have made and challenges that decision?

Any complaints about the actions or inactions of one or more Agents can either be taken to court or to the Alberta Office of the Public Guardian. This office will investigate only those complaints that involve an Agent failing to comply with the Personal Directive or the duties of an Agent and causing physical or mental harm to the maker. All other complaints must be resolved through a court application. See question 2.4 for more detail.

If a complaint warrants an investigation, the Office of the Public Guardian will formally notify the Agent and provide the Agent with the opportunity to present his or her side.

If disagreement occurs during an emergency, remember that you have the final authority. A doctor or caregiver is not entitled to make his or her own decision instead of yours. You are the Agent.

4. The time has come: where do I begin?

Checklist: 10 steps upon the incapacity of the maker

While being an Agent does not have to be difficult, there are many details and you need to be organized. Here are the ten most common steps that an Agent should take when the maker loses capacity.

The sequence is not written in stone – it will depend on the situation. No two situations are exactly the same. Many of the steps will occur at the same time. It may seem like a lot to do in a short time, but you will find that one step leads to another. You may also wish to consider talking to someone you know who has been an Agent.

You may wish to start a filing system, such as a binder, to keep track of all the matters that arise and the decisions that you make.

4.1

Locate the Personal Directive and read it as soon as possible.

Many people keep their original Personal Directive in a safety deposit box. To look in the safety deposit box, make an appointment with the bank. Take the safety deposit box key, your copy of the Personal Directive, and your own identification. Tell the manager of the financial institution that you are the Agent and are looking for the original Personal Directive. If the Personal Directive is there and names you as Agent, the bank should let you take the document.

If you cannot find the deposit box key, the box can be drilled open for a charge.

Some people leave the Personal Directive with their lawyer. Problems can arise if they have not kept in touch with the lawyer or notary, who may have died, or moved, or sold the business. If this has occurred, you can contact the Law Society of Alberta to see if another lawyer has taken over the file.

Once you have the original, you may wish to have numerous notarized copies made, as most service providers will want to see (and often keep) a notarized or certified copy for their own records.

4.2

Ensure that there is a proper Declaration of Incapacity.

In order for a Personal Directive to come into effect, the maker's incapacitation must be proven. This is done with a document known as a Declaration of Incapacity.

A Declaration of Incapacity is a written document that confirms that the maker no longer has the mental capacity to make personal decisions on his or her own behalf. This form is available from hospitals, care facilities, and doctors. It is also available online at: www.seniors.alberta.ca/opg/personaldirectives/OPG5522.pdf.

The provisions of the Personal Directive may determine who is to sign the Declaration of Incapacity. If the Personal Directive names one or more people who are to determine capacity, the named person(s) must sign the document, after consulting with a physician or psychologist (who must also sign the document). If the Personal Directive does not indicate who is to make the Declaration, then the form must be completed by two medical practitioners, at least one of whom is a physician or psychologist.

Ensure that all portions of this document are completed and clearly filled out and that it is dated and signed appropriately. Also be sure that the document is consistent with the provisions of the Personal Directive.

A Declaration of Incapacity is a written document that confirms that the maker no longer has the mental capacity to make personal decisions on his or her own behalf.

4.3

Immediately inform everyone who needs to know.

When a Declaration of Incapacity is issued, make sure that you inform **all** relevant parties. The Personal Directive may provide a list of people to notify or the maker may have told you verbally. Keeping everyone informed helps develop confidence in your actions and may help avoid later complications.

If not included in the list above, within a reasonable amount of time, the Agent must notify the maker's nearest relative. The ordered list of nearest relatives is:

1. spouse or adult interdependent partner;
2. son or daughter;
3. father or mother;
4. brother or sister;
5. grandfather or grandmother;
6. grandson or granddaughter;
7. uncle or aunt; and
8. nephew or niece.

Within this list: (i) a whole blood relative is preferred to half blood relative of the same description, (ii) in any category, the elder is preferred to a younger relative, and (iii) gender is irrelevant.

If the maker has indicated in the Personal Directive that the person who, in accordance with this list, would qualify as the nearest relative is not to be notified, do not notify that person. Move to the next person in the list and notify her or him instead.

Every notice should be dated and in writing and should indicate both that the Personal Directive is in effect (a Declaration of Incapacity has been issued) and that the maker can challenge this Declaration of Incapacity by application to a court.

When a Declaration of Incapacity is issued, make sure that you inform all relevant parties.. Keeping everyone informed helps develop confidence in your actions and may help avoid later complications.

4.4

Find out details about any Power of Attorney the maker may have made.

There are several reasons for doing this.

- If you are also the Attorney appointed under a Power of Attorney, you will want to know this as soon as possible, as you may have some immediate financial decisions to make.
- Assuming you are not the Attorney, depending on the circumstances, you may have to start working very closely with this person on issues affecting the maker. For example, if the maker needs to be placed in a care facility, the financial aspects of that decision will fall to the Attorney and, although you are responsible for personal aspects only, you will require input.
- Even if immediate collaboration is not required, collaboration will likely be required at some point. Start building a working relationship now.

4.5

Find out details about the maker's Will.

There are two main reasons for doing this.

- If you are also the Executor appointed under the Will, you will want to address immediately any potential conflict issues regarding your roles and actions.
- If you are not the Executor appointed under the Will, the Will (and/or associated documentation) may contain information that can help you in your decision-making while the maker is still alive.

4.6

Determine the decisions that need to be made immediately.

The job of Agent can be brief or it can go on for many years. Often, it is impossible to tell at the beginning which it will be. Either way, keeping organized and on top of your responsibilities will be key to your success.

Go through the maker's important documents. Make a list of the decisions that need to be made and the timelines in which to make them. Determine which, if any, decisions should include input from the maker and or the maker's family.

4.7

Make the necessary decisions.

There is no universal order to decisions. In the beginning, you will likely find that many decisions need to be made in quick succession and that these decisions all affect each other. Try to stay organized. You may wish to record your reasons for your decisions so that you can refer to them later, if need be.

Remember that, in terms of making decisions, your responsibilities are to:

- consult with the maker before making decisions to ensure that the maker contributes to the extent that s/he is able;
- follow any clear instructions provided by the maker in the Personal Directive;
- if there are no clear instructions relevant to a particular situation, make the decision that you feel the maker would have made in the same circumstances, based on your knowledge of the maker's wishes, beliefs and values; and
- if you do not know the wishes, beliefs, or values of the maker in a particular circumstance, make a decision based on the maker's best interests.

Also remember that you can consult the maker's family and loved ones and, if required, you can seek advice and direction from either the Office of the Public Guardian or a court.

4.8

Stay aware of changes in the capacity of the maker.

During the period of incapacity, Agents should only make those personal care decisions that the maker cannot make himself or herself, while service providers must make reasonable efforts to determine whether the maker continues to lack capacity. The maker might, for example, be incapable of making a serious health care decision, but still be able to make his or her own choices about routine day-to-day matters.

In addition, if it appears to an Agent that there has been a **significant change** in the maker's capacity (meaning "an observable and sustained improvement that does not appear to be temporary"), the Agent must:

- consult with a service provider who provides health care services; and
- assess the maker's capacity.

If the Agent and service provider agree that the maker has regained capacity to make decisions with respect to that or other personal matters, make a determination as prescribed by law (this is known as the "Determination of Regained Capacity Form"). If the Agent and the service provider do not agree, the Agent must then have two service providers, at least one of whom is a physician or psychologist, assess the maker's capacity

Also remember that you can consult the maker's family and loved ones and, if required, you can seek advice and direction from either the Office of the Public Guardian or a court.

4.9

Keep proper records.

One of your duties as Agent is to keep complete and detailed records of the decisions you make. There are numerous reasons for this.

- Under the terms of the Personal Directive you may have to provide a report to the maker on a regular basis.
- Under the terms of the Personal Directive, you may have to provide a report to one or more other interested parties on a regular basis.
- If someone else has evidence suggesting mismanagement or believes that you are mentally incapable of being an Agent, they may ask the Office of the Public Guardian or a court to review your records.
- Regardless of the length or complexity of the task, keeping organized will help make your job easier.

Keeping complete and detailed accounts includes:

- documenting the date of your first decision;
- keeping a list of all decisions made during the period of the maker's incapacity;
- keeping all documentation relating to all attempts for a Determination of Regained Capacity;
- keeping a copy of the Personal Directive and of any court orders, or findings by the Office of the Public Guardian, relating to the Agent's authority; and
- keeping these records for the duration of the maker's incapacity and for at least two years after your authority ceases.

The job of Agent can be brief or it can go on for many years. At the beginning of the process, it may be impossible to tell which it will be.

4.10

Keep people informed.

The job of Agent can be brief or it can go on for many years. At the beginning of the process, it may be impossible to tell which it will be. Over the years, you will be dealing with many of the maker's loved ones and caregivers. Everyone will have ideas about the best interests of the maker and what the maker would or would not have wanted. Interpersonal problems are bound to arise.

Although you cannot keep everyone happy all of the time — and it is **not** your responsibility to do so — there are certain things you can do to help minimize the possibility of strife.

- Consider providing the closest loved ones with a copy of the Personal Directive (unless the Personal Directive itself says otherwise).
- Remain aware of any dispute between loved ones, as this may help you put a stop to issues before they arise.
- Show respect and consideration for the opinions and thoughts of others. You are ultimately responsible and you must make the decisions that your duty requires, but a positive attitude towards others can sometimes help with decisions that may be met with some disapproval.
- Keep loved ones informed of big decisions and the reasons. Often when people have warning or at least an explanation of something they might otherwise not agree with, it can help lessen the blow. This in turn may amount to less negative feedback to you. Also, no loved one likes to feel that he or she does not know what is going on.
- Keeping all the affected loved ones informed also helps develop confidence in your actions.

Bear in mind, however, that disputes may ultimately have to be settled by the Office of the Public Guardian or in court.

5. What do the words mean?

Glossary

adult interdependent partner	a person with whom you are in an adult interdependent relationship.
adult interdependent relationship	<p>a term unique to Alberta and governed by the <i>Alberta Adult Interdependent Relationships Act</i>. A “relationship of interdependence” is a relationship outside of marriage where two people:</p> <ul style="list-style-type: none"> • share one another’s lives; • are emotionally committed to one another; and • function as an economic and domestic unit. <p>To meet these criteria, the relationship need not necessarily be conjugal (sexual). It can be platonic. There are two possible ways for such a relationship to exist:</p> <ul style="list-style-type: none"> • If you have made a formal and valid adult interdependent partner agreement with the other person (two people that are related by either blood or adoption <i>must</i> enter into such an agreement in order to be considered adult interdependent partners); or • If you are not related by either blood or adoption and if you have: <ul style="list-style-type: none"> – lived with the other person in a “relationship of interdependence” for at least three continuous years, or – lived with the other person in a “relationship of interdependence” of some permanence where there is a child of the relationship (either by birth or adoption).
Agent	a person designated in a Personal Directive to make personal decisions on behalf of the maker.
Declaration of Incapacity	a written document that confirms that a maker of a Personal Directive and/or the donor of a Power of Attorney no longer has the mental capacity to make decisions on his or her own behalf.
donor	a person who gives a Power of Attorney
guardian	a person who has been appointed, under the <i>Alberta Adult Guardianship and Trusteeship Act</i> , to make non-financial decisions for an adult who no longer has the mental capacity to make those decisions on his or her own behalf.
guardianship application	a court application, brought under the <i>Alberta Adult Guardianship and Trusteeship Act</i> , that asks the court to appoint a particular person as the guardian of an adult who no longer has the mental capacity to make decisions on his or her own behalf.
guardianship order	a court order, granted under the <i>Alberta Adult Guardianship and Trusteeship Act</i> , that appoints a person to make non-financial decisions for an adult who no longer has the mental capacity to make those decisions on his or her own behalf.
health care	any examination, procedure, service, or treatment that is done for a therapeutic, preventive, palliative, diagnostic, or other health related purpose.
living will	an expression sometimes used to refer to a document in which you write down what you want to happen if you become ill and can’t communicate your wishes about treatment. In Alberta, the correct legal term is “Personal Directive.”
maker	a person who makes a Personal Directive.
mental capacity	the ability to understand information that is relevant to the making of a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

nearest relative	<p>with respect to any person, the relative of that person first listed in the following order:</p> <ol style="list-style-type: none"> 1. spouse or adult interdependent partner; 2. son or daughter; 3. father or mother; 4. brother or sister; 5. grandfather or grandmother; 6. grandson or granddaughter; 7. uncle or aunt; 8. nephew or niece. <p>Note 1: Whole blood relatives are preferred to half blood relatives of the same description. For example, if a person has no spouse, children, or parents living and has a sister and a stepsister, the full sister is the nearest relative.</p> <p>Note 2: The elder of those described in the list above is preferred to the younger. For example, if a person has no spouse or partner, but an older daughter and a younger son, the daughter is the nearest relative.</p> <p>Note 3: Gender is irrelevant.</p>
personal decision	a decision that relates to a personal matter and includes, without limitation, the giving of consent, the refusal to give consent, or the withdrawal of consent to health care.
personal matter	anything non-financial as it relates to an individual, and without limitation including: <ol style="list-style-type: none"> 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 of the <i>Personal Directives Act</i>.
personal service	a service provided with respect to a personal matter.
psychosurgery	any procedure that, by direct or indirect access to the brain, removes, destroys, or interrupts the continuity of normal brain tissue or that inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat intractable physical pain or epilepsy where those conditions are clearly demonstrable.
represented adult	a person who is the subject of a guardianship order or trusteeship order, or both, made under the <i>Alberta Adult Guardianship and Trusteeship Act</i> .
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 that individual. A nursing home is an example of a service provider.
spouse	a person to whom one is legally married.

6. Where can I get more help?

Community resources

Acts

For copies of the *Personal Directives Act* and the *Personal Directives Regulation*, contact the Queen's Printer:

- 780-427-4952 in Edmonton
- 403-297-6251 in Calgary
- Toll-free service in Alberta, dial 310-0000 followed by the 10-digit phone number of the office you wish to contact
- Website: www.qp.alberta.ca

The *Personal Directives Act* is available electronically at <http://www.qp.alberta.ca/570.cfm>

The *Personal Directives Regulation* is available electronically at <http://www.qp.alberta.ca/570.cfm>

The *Adult Guardianship and Trustee Act* (AGTA) can be found at:

<http://www.qp.alberta.ca/documents/Acts/A04P2.pdf>

Regulations relating to the *Adult Guardianship and Trustee Act* (AGTA) can be found at:

http://www.qp.alberta.ca/570.cfm?frm_isbn=9780779737468&search_by=link

The *Adult Guardianship and Trustee Act* (AGTA)

The Office of the Public Guardian is responsible for administering the *Personal Directives Act*.

- The Office of the Public Guardian has offices across the province. To be connected to any of the offices toll-free, call 310-0000. See also a list of offices at www.seniors.alberta.ca/contact_us/opg/index.asp.
- For more information about the Personal Directive template, the Personal Directive Registry, Declarations of Incapacity, Declarations of Regained Capacity, and the Office of the Public Guardian's dispute resolution process, see www.seniors.alberta.ca/opg/personaldirectives.

Alberta Seniors and Community Supports

Personal Directives:

www.seniors.alberta.ca/opg/personaldirectives

Alberta Seniors and Community Supports

Information and Reporting: 1-888-357-9339

www.seniors.gov.ab.ca

Alberta Seniors and Community Supports

Understanding Personal Directives:

<http://www.seniors.alberta.ca/opg/PersonalDirectives/Publications/OPG1646.pdf>

Alberta Seniors Information Line

Toll-free in Alberta: 1-800-642-3853

Edmonton Area: 780-427-7876

Deaf or Hearing Impaired with TDD/TTY units:

Toll-free in Alberta: 1-800-232-7215

Edmonton area: 780-427-9999

Fax: 780-422-5954

Hours: Monday to Friday, 8:15 am to 4:30 pm; closed statutory holidays

Family Law Information Centre

Edmonton Law Courts Building,

1A Sir Winston Churchill Square,

Edmonton, AB T5J 0R2

Phone: 780-415-0404

www.albertacourts.ab.ca/familylaw

Legal Services Centre

A program of Legal Aid Alberta, which provides legal information and referrals to Albertans and legal advice to eligible callers. This free service is available across Alberta.

Toll-free in Alberta: 1.866.845.3425

To see the qualifications for free legal advice, visit

www.legalaid.ab.ca/help/Pages/EdmontonLegalServicesCentre.aspx.

The Legal Services Centre does not provide legal information or legal advice by e-mail.

