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THE PERSONAL DIRECTIVE A GUIDE

The purpose of this Guide is to outline the nature and effect of a Personal Directive and to assist clients of Walsh LLP in their decisions whether or not to grant a Personal Directive, and if a decision is made to grant the Personal Directive, then the provisions that should be contained in the Personal Directive. For the purposes of this Guide, the person who grants the Personal Directive will be called the "Maker", the person named in the Personal Directive to act on behalf of the Maker will be called the "Agent", and the Personal Directive will be called the "PD".

A Personal Directive is a written document whereby the Maker provides instructions to be followed in relation to health care and other personal matters in the event of his or her incapacity, and in that document, the Maker may also appoint an Agent to act on behalf of the Maker in making decisions in relation to health care and other personal matters of the Maker in the event the Maker is incapable of understanding information that is relevant to the making of a personal decision and is incapable of appreciating the consequences of such decision. The PD is more comprehensive than an Advance Health Care Directive or a Living Will, dealing with all personal matters that are non-financial, including, but not restricted to, health care, accommodation, with whom the person may live or associate, participation in social, educational, and employment activities, and legal matters.

Until PD's were recognized in law in Alberta, the primary legal means whereby a person could act on behalf of another person who was unable to manage his or her health care and other personal affairs was for that person to be appointed Guardian under the *Adult Guardianship and Trusteeship Act* of Alberta. The procedure under the *Adult Guardianship and Trusteeship Act* is not only costly but can also present inconvenience to a Represented Adult's family and can be regarded as an intrusion upon their lives. The PD allows us to plan for our incapacity (similar to the planning that is afforded to us in planning for the management of our financial affairs in the event of incapacity under an Enduring Power of Attorney and in the administration of our Estate upon our death under a Will) and affords a relatively inexpensive alternative to the procedure under the *Adult Guardianship and Trusteeship Act*. By specifying what health care or other personal care choices the Maker would want the Agent to make in particular situations and what values and beliefs should guide all such other personal decisions, the Maker can hopefully avoid conflict and relieve his or her loved ones from the burden and guilt feelings often accompanying the making of those difficult decisions, including life-and-death decisions.

The decision to grant a PD should not be taken lightly and should be taken only after consultation with all concerned. Depending upon your health situation, it may be appropriate to review your PD with your physician, who can assist you in ensuring that you understand the choices available and that same are suitable to your medical circumstances. It should be remembered that the PD relates only to the health care and other personal matters of the Maker.

To assist you in your planning, you will find attached to this Guide our Notes to Makers as well as a Confidential Questionnaire.

If you choose to proceed with the preparation of a PD, please review the Notes to Makers and complete and return the Confidential Questionnaire to these offices. We will then be in a position to advise you and assist you in the completion of a PD.

Warmest personal regards,

WALSH LLP

NOTES TO MAKERS

RE: PERSONAL DIRECTIVES

1. FIDUCIARY DUTY OF AGENT

As a general principle, restrictions on an Agent's authority arise out of the fiduciary duty owed by an agent (Agent) to his principal (Maker). These restrictions are imposed at law to prevent the Agent from abusing the duties owed to the Maker.

The fiduciary duty owed by an agent (Agent) to his principal (Maker) is one of utmost good faith which requires that the Maker's instructions as contained in the Personal Directive be followed. This duty extends to prohibiting any action where it would conflict with the best interests of the Maker.

2. IMPLEMENTING A PERSONAL DIRECTIVE

The essential nature of a Personal Directive is that all or part of a Personal Directive will come into and remain in force and effect only during such period or periods of time that the Maker lacks capacity to make a personal decision after having granted the Personal Directive. Temporary medical conditions that may affect the Maker's capacity must first be ruled out. The Maker is said to lack capacity to make a personal decision when he or she:

- (a) Can no longer understand the information relevant to a personal decision;
- (b) Can no longer retain the information that is relevant to the making of a personal decision;
- (c) Does not have the ability to identify and appreciate the consequences of his or her decision;
- (d) Can no longer communicate his or her decision; and
- (e) A written declaration of incapacity is obtained.

A declaration of incapacity does not mean that the Maker has a mental disorder. It merely means that he or she is unable to understand the nature or effect of his or her decisions relative to a particular personal matter after receiving an adequate explanation of the options. If this situation exists, the Maker is no longer able to give a valid consent relative to the personal matter in question. For example, the Maker may be able to make decisions about recreation, but not about a complex health care treatment. For this reason, there is a continuing need for a service provider to make reasonable efforts to determine whether or not the Maker has capacity or continues to lack capacity to make the required decision (in which case the Personal Directive must be consulted and any appointed Agent's consent must be obtained) before providing the service in question.

The assessment of capacity and a determination of incapacity can be done by either a person named in the Personal Directive, after consulting with a physician or psychologist, or if no one is designated, or if the designated person is unwilling or unable to carry out this task, then two service providers, at least one of whom is a physician or psychologist, who must make a written

declaration in the prescribed form if the Maker lacks capacity. The 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 to whom the Maker directs be given a copy in the Personal Directive. The Agent must inform the Maker's nearest relative and Legal Representative (e.g. an Attorney under the *Powers of Attorney Act*, or a Guardian or Trustee under the *Adult Guardianship and Trusteeship Act*) that the Personal Directive is in effect.

3. REVOCATION OR TERMINATION OF A PERSONAL DIRECTIVE

Just as the Maker has the power to grant a Personal Directive while mentally competent, the Maker has the ability to change or to revoke the Personal Directive at any time while mentally competent to do so.

If the Maker becomes mentally incompetent and by reason thereof is unable to revoke the Personal Directive, the instructions contained in the Personal Directive will continue and if an Agent is appointed, then the Agent's authority to act will continue until or unless terminated in any of the following circumstances:

- (a) If the Maker has specified a date or event in the Personal Directive that triggers the revocation of the Personal Directive (e.g. automatically revoked Five (5) years after the date it was made or a substitute person is named to replace the Agent upon that person attaining the age of majority);
- (b) When a determination in the form prescribed by law is made that the Maker has regained capacity to make his or her own personal decisions;
- (c) If, upon the application to the Court of an interested person, the Court were to remove the Agent;
- (d) Upon the Court appointing a Guardian to act as Guardian of the Person of the Maker under the *Adult Guardianship and Trusteeship Act* of Alberta;
- (e) Upon the Court determining that the Personal Directive ceases to have effect;
- (f) Upon the Agent lacking capacity to make personal decisions on behalf of the Maker, including upon a Guardian being appointed to act as Guardian of the Person of the Agent under the *Adult Guardianship and Trusteeship Act*;
- (g) Upon the Agent refusing to act because the Agent is unwilling or unable to make a decision;
- (h) Upon the death of the Agent or the death of the last remaining Agent; or
- (i) Upon the death of the Maker (in which case the Legal Personal Representatives of the Maker have the authority to deal with the Maker's funeral arrangements).

An Agent who refuses to act cannot delegate the responsibility to another person unless the Personal Directive names more than one Agent. In that case, the Agent's refusal to accept the role will mean that the other Agent or Agents will act.

If all the Agents are unwilling or unable to make a particular decision, and no other Agent is named, then a service provider, such as a physician, lawyer, or other health care professional, can follow any clear instructions in the Personal Directive that are relevant to the circumstances, or, if no instructions are available, then the service provider must make a reasonable effort to inform the Maker's nearest relative about the circumstances. In the event of a medical emergency, a health care practitioner can provide medical services without consent. In that event, the health care practitioner as soon as practicable must make a reasonable effort to inform the Maker's Agent or Guardian or, if none, then the Maker's nearest relative of the circumstances, or the Maker's Legal Representative, and if none of them can be reached, they must contact the Office of the Public Guardian.

The *Personal Directives Act* has provided a list of "nearest relatives" to be contacted in the order listed, namely:

- (i) Spouse or adult interdependent partner;
- (ii) Son or daughter;
- (iii) Father or mother;
- (iv) Brother or sister;
- (v) Grandfather or grandmother;
- (vi) Grandson or granddaughter;
- (vii) Uncle or aunt; or
- (viii) Nephew or niece.

Relatives of whole blood are preferred to half-blood relatives, and the eldest of two or more relatives of the same description is preferred, regardless of gender.

A Personal Directive is always the property of the person who makes it. The Maker or the Agent, however, may request that a copy of all or part of the Personal Directive be included in a service provider's file or be provided to an interested person.

A photocopy of the Personal Directive is just as valid as the original. If the original is revoked or changed, copies of the old Personal Directive should be destroyed to avoid confusion.

4. DUTY AND AUTHORITY OF AGENT TO ACT

At such time as all or any part of a Personal Directive becomes operative, then once the Agent has commenced to act or has otherwise indicated acceptance of the appointment as Agent, certain duties and responsibilities will arise.

An Agent has the right to the Maker's personal information, but only that which is relevant and necessary to the decision in question, unless otherwise specified in the Personal Directive.

Once an Agent decides to accept his or her role, the Agent should discuss the instructions contained in the Personal Directive with the Maker in order to better understand his or her values and beliefs. This will help the Agent in making decisions later, because it can be difficult to anticipate all circumstances that could occur.

The Agent must continue to consult with the Maker regarding all decisions to be made to ensure that the Maker contributes to the extent that he or she is able.

If it appears to an Agent that there has been a significant change (i.e. an observable and sustained improvement that does not appear to be temporary) in the Maker's capacity, the Agent must take steps to consult with a service provider who provides health care services and to have the Maker assessed, and if the Agent and service provider agree that the Maker has regained capacity to make decisions relative to that personal matter, then they must provide a written determination in the form prescribed by law and provide a copy of same to the Maker, his or her physician, the other Agents, and the operator of any extended care or residential facility where the Maker resides.

The Agent must act in good faith while carrying out his or her authority under the Personal Directive. After a personal decision has been made relative to a personal matter in accordance with instructions in the Personal Directive, in the event the Maker later regains capacity and changes his or her instructions relative to that personal matter, the Agent or a service provider will not be held liable for following those initial instructions made while the Maker lacked capacity. If the service provided is reversible and it is possible for the Maker's revised wishes to be met, every reasonable effort should be made to follow those revised wishes.

The Personal Directive should be carefully considered with respect to the areas of authority granted to the Agent by the Personal Directive and the manner in which decisions relating to those areas of authority are to be made, and particularly with respect to any specific instructions provided or restrictions imposed by the Maker on the decision-making powers of the Agent. An Agent can only make decisions in areas where the Personal Directive has granted that authority. The instructions and decisions of the Agent are legally binding, as if the Maker of the Personal Directive had made the decision himself or herself.

If a Personal Directive specifies one or more areas of authority, then the Agent's authority is restricted to those areas. However, if the Personal Directive does not specify any area or provide instructions, then the Agent has authority in all areas, except those limited by law. An Agent has no authority over financial matters and will not be responsible for the Maker's bills. In making decisions for the Maker's care that will necessarily attract costs ancillary to such care, the Agent should consult with the Maker's Legal Representative for the purposes of negotiating and arranging for the payment of such costs from the Maker's Estate. Agents cannot override clear instructions in a Personal Directive. Their role is to validate and interpret instructions in the Personal Directive and to communicate the decisions made in accordance with the terms of the Personal Directive. There are three guidelines for Agents when they are making personal decisions on behalf of the Maker, namely:

- (a) Follow any clear instructions provided in the Personal Directive;
- (b) If there are no clear instructions for a particular decision, or the instructions are not relevant to the situation, the Agent must make the decision he or she believes the Maker would make in the same circumstances, based on the Agent's knowledge of the Maker's wishes, beliefs, and values; and
- (c) If the Agent does not know the Maker's wishes, beliefs, and values, then the Agent should decide based on what the Agent believes to be in the Maker's best interests.

Personal decisions include the giving of consent, the refusal to give consent, or the withdrawal of consent regarding any personal matter, which means anything of a non-financial nature that relates to a person, and includes, but is not restricted to, health care (including any examination, procedure, service, or treatment that is done for a therapeutic, preventative, palliative or comfort care, diagnostic, or other health related purpose), accommodation, with whom the person may live and associate, participation in social, educational, and employment activities, and legal matters. The Agent is 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 family and friends. The Office of the Public Guardian is also available to guide Agents.

The *Personal Directives Act* will not allow people to decide how and when they will die. The Act will only allow a person to extend his or her existing right to consent to or to refuse proposed care and services into possible future periods of incapacity.

Illegal actions, such as assisted suicide or euthanasia, are prohibited, and if a Personal Directive contains an instruction that is prohibited by law, then that instruction is void in law and must not be followed. The Act also provides for some other limitations. Unless the Personal Directive contains clear instructions that allow the Agent to do so, the Agent has no authority to give consent for psychosurgery (such as a lobotomy) as defined in the *Mental Health Act*, sterilization that is not medically necessary for the Maker's health, removal of tissue from the Maker's living body either for implantation in another living person or for medical or research purposes, and participation in research or experimental activities that offer little or no benefit to the Maker. The Personal Directive may provide for organ donation on death.

If the Maker is the parent or Guardian of a minor child, the Maker may appoint an Agent to make decisions about the care and education of that minor child until another Guardian takes over, or until the Court appoints a legal Guardian, or until a determination is made that the Maker has regained capacity.

The Public Guardian may be named as the sole Agent, but only if the Maker has first obtained the consent of the Office of the Public Guardian and satisfied the Office of the Public Guardian that there is no other person able and willing to act.

The Personal Directive may provide for the appointment of an Alternate Agent if the Primary Agent dies before the Personal Directive becomes operative, refuses to act or to continue to act, resigns, or is unable to act or to continue to act as Agent.

Where two or more Agents are appointed, their respective areas of authority may be specified in the Personal Directive and there may also be areas of overlap.

When two or more Agents are appointed, it is presumed to be given to them jointly, unless a contrary intention is shown in the Personal Directive.

When the Personal Directive appoints two or more Agents severally, or jointly and severally, any one of them may act without the concurrence of the others.

If more than one Agent is authorized in the Personal Directive to act on the same matter, and the Personal Directive does not provide instructions about how to resolve disagreements, the *Personal Directives Act* states that the decision of the majority of the Agents must be followed. If no majority can be reached, the Agents may consider seeking assistance to reach a consensus by consulting with available resources, such as ethics committees, pastoral care

workers, social workers, or any others that the Agents trust. The Agents may also appeal to the Courts to make a ruling. In the event of a dispute, the Agent listed first in a Personal Directive is authorized to communicate the decisions, unless the Personal Directive states otherwise.

If a service provider does not agree with an instruction in a Personal Directive or an Agent's decision on the basis that same is contrary to his or her moral or professional ethics, then the service provider is not obligated to provide the service, but that person should provide the name of another service provider who may be willing to offer the requested treatment or other service.

At any time, a Maker, an Agent, or a service provider may request a reassessment be done when the Maker's mental capacity appears to have been regained.

The Public Guardian is authorized to investigate complaints by any interested person about an Agent who fails to act in accordance with the terms of the Personal Directive and the law if that failure is likely to cause physical or mental harm to the Maker.

The Court of Queen's Bench of Alberta may become involved in resolving the following disputes upon the application of the Maker, the Agent, the service provider, the Public Guardian, or any other interested person, namely:

- (i) The capacity of the Maker or the Agent could be questioned;
- (ii) To determine the validity of a Personal Directive, or part of it;
- (iii) To change, confirm, or cancel a personal decision made by an Agent;
- (iv) To determine the authority of an Agent;
- (v) To revoke all or part of the authority of an Agent if the Agent is failing to comply with the Personal Directive or the duties of an Agent and the Court considers the failure is likely to cause serious harm to the physical or mental health of the Maker;
- (vi) To provide advice and directions;
- (vii) To make a decision if the Agents cannot agree;
- (viii) To delay the decision of an Agent; or
- (ix) To make any other Order that the Court considers appropriate in keeping with the intent of an instruction contained in a Personal Directive.

5. RECORDS

Agents are required to keep a record of all personal decisions made on behalf of the Maker during the time of his or her decision-making authority and for two years after his or her authority ceases. If requested, an Agent must provide this record to the Maker, the Maker's lawyer, the Maker's Legal Representative, the Public Guardian (if a complaint is lodged with them), or another Agent, if the information is consistent with his or her respective area of authority.

6. AGENT'S REMUNERATION

As a general principle, unless the Personal Directive provides to the contrary, an Agent is not entitled to receive any remuneration for exercising any authority under the Personal Directive on behalf of the Maker.

The Personal Directive may specifically provide that the Agent be reimbursed for his or her out-of-pocket expenses and that remuneration be paid to the Agent, and, in that case the Agent is only entitled to receive the amount of remuneration stated in the Personal Directive at the times stated.

The Personal Directive may state that remuneration is to be determined in accordance with the provisions of the *Trustee Act* of Alberta, and, in that event, if the Maker is mentally incapacitated, the Agent must seek approval for his or her proposed fee from the Court in accordance with the provisions of the *Trustee Act* of Alberta. In that case, the Attorney is not permitted to pre-take compensation, but must wait for the direction of the Court in that regard.

The Agent has the right to refuse to receive any remuneration for so acting at any given time.

Any remuneration received by an Agent is considered to be taxable income from an office or employment and must be reported by that Agent in his or her Income Tax Return for the year in which such remuneration is actually paid to him or her.

7. JURISDICTION

If a Maker made a Personal Directive in another jurisdiction outside Alberta, it will be valid in Alberta as long as it complies with the legal requirements contained in the *Personal Directives Act* of Alberta. An Agent does not have to be a resident of Alberta to be able to act under a Personal Directive.

Depending upon that jurisdiction's laws, we wish to note that jurisdictions outside Alberta may or may not accept the Personal Directive executed in Alberta. If the Personal Directive is intended to be used outside Alberta, you should consult with a lawyer in that other jurisdiction to determine whether they will recognize the foreign Personal Directive. If a similar Personal Directive is to be executed in another jurisdiction, care should be taken not to revoke the Alberta Personal Directive unless the Maker specifically requests it be revoked or unless the Maker ceases to maintain his or her residence or any property or assets in Alberta.

Separate Personal Directives may be executed to deal with the different areas of authority relating to personal matters.

8. PERSONAL DIRECTIVES REGISTRY

Effective June 30th, 2008, a Maker may voluntarily (free-of-charge) register his or her Personal Directive in the Personal Directives Registry maintained by the Office of the Public Guardian. This will allow approved professionals (such as health care providers) to search to find out if a Personal Directive has been granted and how to contact the Agents if the circumstances warrant it. The Personal Directives Registry does not keep a copy of the Personal Directive, but it keeps information relating to the date of the Personal Directive and the contact information for the Maker and Agents. Registration may be done on-line at:

<http://www.seniors.gov.ab.ca/opg/registry/>

or by contacting the Office of the Public Guardian toll-free at 1-877-427-4525 to obtain and complete any necessary registration form. Once the information is provided to the Registry, the Registry will contact the Maker and the Agents to confirm the information and to receive their consent to having the information on the Registry. The Maker and the Agent are responsible for updating any information on file with that Registry, including notifying the Registry of the death of the Maker or Agents.

IF YOU CHOOSE TO MAKE A PERSONAL DIRECTIVE, MAKE SURE CLOSE FRIENDS OR RELATIVES KNOW YOU HAVE A PERSONAL DIRECTIVE AND WHERE IT IS. WE RECOMMEND THAT YOU GIVE A COPY TO YOUR DOCTOR, YOUR LAWYER, AND, IF YOU HAVE CHOSEN TO NAME ONE, TO YOUR AGENT(S).

WARNING TO READER

THE FOREGOING NOTES ARE ONLY INTENDED TO BE A GENERAL STATEMENT OF BROAD PRINCIPLES OF LAW RELATING TO PERSONAL DIRECTIVES AND ARE NOT INTENDED TO HAVE SPECIFIC APPLICATION IN ALL INSTANCES.