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PERSONAL DIRECTIVE

FREQUENCY ASKED QUESTIONS

- **Key Terms**
 - “**Agent**” means the person(s) appointed in the Personal Directive to make personal (non-personal) decisions for the Maker
 - “**Maker**” means the person who is the creator and subject matter of the document

- **Who needs a Personal Directive?**
 - All Adults, regardless of age or marital status
 - Must be over the age of eighteen (18) years and understand the nature and effect of creating a Personal Directive
 - A Represented Adult, who is subject to a Guardianship Order, is prohibited from making a Personal Directive

- **What does a Personal Directive do?**
 - Is the legal authority for the Agent, who is a third party (i.e. spouse, child, parent, trusted friend, etc.) to make personal (non-personal) decisions in the event of the Maker’s incapacity

- **Why do I need a Personal Directive?**
 - There is no default in the legislation that automatically allows your spouse / children / parents / etc. to make personal decisions for you in the event of incapacity
 - You control who you trust to make personal decisions on your behalf if you are unable to do so for yourself
 - The alternative is that someone (presumably a family member) will have to apply to the Court to be appointed as your Guardian in order to make personal decisions without a Personal Directive
 - This process can be lengthy (unless you can establish urgent circumstances, it is a min. 1 month notice period if they proceed by hearing; much longer delays if they proceed by desk application)
 - The Court may not appoint the person that you trust most to make objective decisions in your best interests
 - Court now has oversight over the Guardian’s decisions and actions while the Order is in effect, and your personal situation becomes part of a public record

- **When does a Personal Directive come into effect, and how is it activated?**
 - Comes into effect only upon the mental incapacity of the Maker
 - So long as the Maker retains capacity to make reasonable decisions about their person, this document cannot be activated; however, other options may exist
 - A Personal Directive can be activated by:
 - the Agent after conferring with the Maker's physician or psychologist, or
 - if the Agent is unwilling to do so, then two service providers, one of whom must be a physician or psychologist, must sign the form
 - The Province of Alberta has created a prescribed form for activating a Personal Directive. This form CANNOT be used for a Power of Attorney – it clearly indicates it is for personal decisions only
 - If the Maker regains capacity, then the Personal Directive ceases to be in force
 - If the Maker dies, the authority granted in the Personal Directive to the Agent is automatically terminated

- **What are the responsibilities of an Agent appointed in a Personal Directive?**
 - To make all personal (non-financial) decisions for the Maker, including but not limited to:
 - Health care;
 - Accommodations;
 - Whom the Maker can live and associate with;
 - Participation in social, educational and/or employment activities, if appropriate; and
 - Any other legal matters not relating to the Maker's estate or primarily financial in nature
 - Access to all personal records, including but not limited to medical, dental, and pharmacological records, if stated in Personal Directive
 - Involve the Maker in any personal decisions to the greatest extent possible
 - At all times, the Agent must act in accordance with the Maker's wishes, values and beliefs, to the extent known and/or expressed. If the Maker's wishes aren't known to the Agent, they must act in the Maker's best interests, and cannot contradict any clear instructions left by the Maker in relation to personal decisions
 - An Agent may be required to work closely with an Attorney appointed in a Power of Attorney (for example, accommodation decisions). In the event that the Agent and the Attorney are separate persons, they need to work cooperatively in the Maker's best interests
 - Keep careful records of all personal decisions made by the Agent on behalf of the Maker for the period of incapacity and two (2) years following the cessation of duties (either due to the Maker regaining capacity, being removed, or the Maker dies)

- **Are there any restrictions or limitations on the decisions an Agent can make?**
 - YES! An Agent cannot consent on behalf of a Maker, unless the Personal Directive specifically contemplates it, to any of the following types of medical decisions:
 - Psychosurgery per the *Mental Health Act*;
 - Sterilization that is not medically necessary to protect the Maker's health;
 - Removal of tissue from Maker's living body for implant in another living person (which is why, if Maker wants to be an organ donor, should be specified in the Personal Directive to ensure the Agent has authority to consent if appropriate), or for research purposes (if the Maker wishes to donate their body to an Anatomical Gifts program, they need to register in advance and this should also be contemplated in Personal Directive);
 - Participation by the Maker in research or experimental activities if there is little or no benefit to the Maker; and
 - Medical Assistance in Dying (MAiD), unless the Maker has already qualified and arranged for advanced consent

- **What if the Maker still has capacity but wants/needs some assistance to gather, understand and process information, or communicate decisions? If the Personal Directive cannot be activated yet, are there other options?**
 - Yes. Depending on the circumstances, there are two options:
 - Supported Decision-Making Authorization
 - If the Maker has reached a stage where they require some assistance to understand personal decisions to be made on their behalf, but they still have capacity, they can sign this authorization
 - This document can appoint up to three (3) supporters to assist the Maker as required. The types of authority are referenced on the document
 - This is a prescribed form, which needs to be completed by the Maker in the presence of a witness, and the Supporters must sign as well
 - The authority granted in this document terminates when the Maker loses capacity
 - Co-Decision Maker
 - This involves a Court Order, appointed someone to be a co-decision maker alongside the Maker
 - Typically both the Maker and Co-Decision Maker must make and communicate all decisions together
 - However, in the event of a dispute between the Maker and Co-Decision Maker, the Maker has the final decision
 - These applications are not very common

- **What if the Maker changes their mind?**
 - The Personal Directive only has effect during periods of incapacity; if the incapacity is transient or temporary in nature, then Personal Directive will cease to have any effect once Maker regains capacity
 - A Maker can revoke or amend their Personal Directive at any time, as long as they have capacity

- **Can anyone challenge a Personal Directive?**
 - Yes. Any interested party can apply to the Court for review of a personal decision made by an Agent, including an application to have the Agent removed for failing to act in the Maker's best interests and having a Guardian appointed by Court Order instead

- **Is an Agent entitled to compensation for acting in this capacity?**
 - No. The *Personal Directives Act* states that an Agent is not entitled to compensation unless the document specifically contemplates some mechanism for compensating the Agent. There are a number of debates regarding how compensation could be determined, and whether that would create a conflict of interest, so generally, Agents are not compensated for their duties

- **Any special considerations if the Maker is a Guardian for a Represented Adult?**
 - Any time a Guardian is appointed pursuant to a Guardianship Order, they have an obligation to keep records of the personal decisions made for the Adult. Upon the Guardian's incapacity, their Agent will need to apply to the Courts for a Review of Guardianship to have the Guardian discharged, which includes filing a Record of Decisions for the period the Guardian acted in that capacity, so careful notes (includes dates and details of the type of decision made, including any professionals consulted) are critical

Getting Started

Who to Choose? When getting ready to give instructions to prepare a Personal Directive, give careful consideration to who you trust implicitly to make personal decisions for you in your best interests, and in a manner consistent with the decisions you would make for yourself if you were able:

- For most married parties, the logical first choice is your spouse. Do not assume your spouse will be in a first position; you need to specify who you want. In some cases, due to age or health, you may want to appoint someone else, such as a child, instead of a spouse, or alongside a spouse.
- You can appoint more than one person to be your Agent, or your Alternate Agent. If more than one person is appointed, consider whether they will be required to do everything

together (this is called “jointly”), or if they will both/all have access to the personal information but can make decisions independently of each other (this is called “joint and separate” or “joint and several”). There is still an obligation to confer with each other, regardless of the type of appointment, but consider their geographic location, occupation, lifestyle, and other restrictions on their time when deciding how they will be appointed.

- Geography matters more when choosing an Agent than any other role. They may be responsible for taking you to medical/dental appointments, selecting a care facility, communicating regularly with your care facility or caregivers regarding ongoing issues, including diet and nutrition, participation in various social or other activities, dealing with disruptive relatives or friends, etc.
- Always have at least one alternate appointed, just in case. This covers the situation where your primary choice loses capacity or predeceases you, or is unable to continue to act after initially being appointed. It also covers the situation where your primary Agent is not available or willing to act, due to travel, health, lifestyle restrictions, or an unwillingness, without placing yourself in a position where a Guardianship order is necessary.
- This is not a popularity contest. You do not need to select Agents because you are worried about hurting their feelings. You must consider who you have in your life that has the requisite skills, personal acumen, time and ability to fulfill this role properly. Who will best fulfill your wishes – that’s who you want to select!

Specific Instructions. Consider whether any specific instructions or guidelines need to be included in your Personal Directive, such as:

- Whether you are agreeable to receiving pain medications, taking into consideration the range of side effects that may accompany those meds;
- Do you want your life prolonged by artificial means for any period of time once your doctor and other medical consultations have determined that you are in a coma or persistent vegetative state and have no hope of regaining awareness or higher mental functions, no matter what they do?
- Any other medical instructions that you want followed, regardless of the circumstances?
- In addition to your Personal Directive, you should discuss a Goals of Care Designation Order with your doctor to ensure that more specific medical instructions are contained on your medical chart. A Goals of Care Order can be updated as your medical situation changes
- Provision for temporary guardianship of any minor children (including whether their temporary guardians will be consistent with, or different from, those appointed as guardians for minor children in your Will)

Special Instructions for execution. If you have a lawyer prepare your Personal Directive, you can be confident that your documents are prepared and executed in accordance with the *Personal Directives Act* of Alberta. However, if you prepare your own documents, here are some things to keep in mind:

- If the Maker has mental capacity but is unable to sign the documents on their own behalf (due to a medical condition, such as a stroke, paralysis, broken bones, or arthritis), a third party can sign on the Maker's behalf if the Maker has clearly indicated they are consenting to the signing of the document
- There are limitations as to who the witness can be for signing the Personal Directive with the Maker. The following people cannot witness the signing of the Personal Directive:
 - The spouse / adult interdependent (common law) partner of the Maker
 - The Agent (or alternate Agent)
 - The spouse / adult interdependent (common law) partner of the Agent
 - The person who signed on behalf of the Maker
 - The spouse / adult interdependent (common law) partner of the person who signed on behalf of the Maker
 - Anyone under the age of 18 years old
 - Anyone who does not have capacity