

1996 BILL 35

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THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 35

PERSONAL DIRECTIVES ACT

MS HALEY

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

*Bill 35
Ms Haley*

BILL 35

1996

PERSONAL DIRECTIVES ACT

(Assented to , 1996)

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

PART 1

DEFINITIONS AND APPLICATION

- Definitions **1** In this Act,
- (a) “agent” means a person designated in a personal directive to make personal decisions on behalf of the maker;
 - (b) “capacity” means the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision;
 - (c) “Court” means the Court of Queen’s Bench;
 - (d) “dependent adult” means a person who is the subject of a guardianship order made under the *Dependent Adults Act*;

- (e) “guardian” means a guardian under the *Dependent Adults Act*;
- (f) “health care” means any examination, procedure, service or treatment that is done for a therapeutic, preventive, palliative, diagnostic or other health related purpose;
- (g) “legal representative” means an attorney under the *Powers of Attorney Act* or a guardian or trustee under the *Dependent Adults Act*;
- (h) “maker” means a person who makes a personal directive;
- (i) “nearest relative” means, with respect to any person, the relative of that person first listed in the following subclauses, relatives of the whole blood being preferred to relatives of the same description of the half-blood and the elder or eldest of 2 or more relatives described in any subclause being preferred to the other of those relatives regardless of gender:
 - (i) husband or wife;
 - (ii) son or daughter;
 - (iii) father or mother;
 - (iv) brother or sister;
 - (v) grandfather or grandmother;
 - (vi) grandson or granddaughter;
 - (vii) uncle or aunt;
 - (viii) nephew or niece;
- (j) “personal decision” means 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;
- (k) “personal directive” means a directive made in accordance with Part 2;
- (l) “personal matter” means, subject to the regulations, any matter of a non-financial nature that relates to an individual’s person and without limitation includes:
 - (i) health care;

- (ii) accommodation;
 - (iii) with whom the person may live and associate;
 - (iv) participation in social, educational and employment activities;
 - (v) legal matters;
 - (vi) any other matter prescribed by the regulations;
- (m) “personal service” means a service provided with respect to a personal matter;
- (n) “service provider” means 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 the individual before providing the service.

Application **2** This Act applies only to personal directives made after this Act comes into force.

PART 2

PERSONAL DIRECTIVES

Who can make a personal directive **3(1)** Any person who is at least 18 years of age and understands the nature and effect of a personal directive may make a personal directive.

(2) A person who is at least 18 years of age is presumed to understand the nature and effect of a personal directive.

Personal directive by dependent adult **4** Despite section 3, a dependent adult may not make a personal directive with respect to a matter over which the dependent adult’s guardian has authority.

Requirements of personal directive **5(1)** A personal directive must

- (a) be in writing,
- (b) be dated,
- (c) be signed at the end

(i) by the maker in the presence of a witness, or

- (ii) 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
 - (d) be signed by the witness referred to in clause (c) in the presence of the maker.
- (2) The following persons may not sign a personal directive on behalf of the maker:
- (a) a person designated in the directive as an agent;
 - (b) the spouse of a person designated in the directive as an agent.
- (3) The following persons may not witness the signing of a personal directive:
- (a) a person designated in the directive as an agent;
 - (b) the spouse of a person designated in the directive as an agent;
 - (c) the spouse of the maker;
 - (d) a person who signs the directive on behalf of the maker;
 - (e) the spouse of a person who signs the directive on behalf of the maker.

More than one personal directive

6 A person may make more than one personal directive.

Contents of personal directive

7(1) A personal directive may contain information and instructions respecting any personal matter, including, without limitation, the following:

- (a) respecting the designation of agents and their authority;
- (b) designating one or more persons to determine the maker's capacity under section 9;
- (c) naming the persons who are and the persons who are not to be notified of the coming into effect of the personal directive;
- (d) providing instructions with respect to access to confidential information about the maker.

- (2) If a personal directive contains an instruction that is prohibited by law, the instruction is void.
- (3) A personal directive may designate an agent
 - (a) by naming the individual who is to act as the agent, or
 - (b) subject to the regulations, by naming an office or position the occupant of which is to act as the agent.

Revoking a personal directive

8(1) If the maker understands the nature and effect of revoking a personal directive, the maker may revoke the directive in whole or in part in accordance with this section.

- (2) A personal directive is revoked, in whole or in part,
 - (a) on the occurrence of a date or event that is stated in the personal directive to be the date or event that determines when the personal directive, or part of it, is revoked,
 - (b) by the making of a subsequent personal directive that contradicts an earlier directive, to the extent of the contradiction, or
 - (c) by the making of any document, including a subsequent personal directive, that expresses an intention to revoke an earlier personal directive or a part of it.
- (3) A document that revokes a personal directive must meet the requirements of section 5.
- (4) Despite subsection (3), a maker may revoke a personal directive by destroying the originals of the directive with the intention of revoking the directive.

Bringing personal directive into effect

9(1) A personal directive, or part of a personal directive, has effect with respect to a personal matter only when the maker lacks capacity with respect to that matter.

- (2) For the purpose of subsection (1), a maker lacks capacity
 - (a) when the person or persons designated in the personal directive to determine the maker's capacity make, in consultation with a physician or psychologist, a written declaration that the maker lacks capacity, or
 - (b) if

- (i) the personal directive does not designate a person to determine the maker's capacity, or
- (ii) the person designated in the personal directive to determine the maker's capacity is unable or unwilling to do so or cannot be contacted after every reasonable effort has been made,

when 2 service providers, at least one of whom is a physician or a psychologist, make a written declaration that the maker lacks capacity.

(3) A physician or psychologist who has been consulted in the making of, or who makes, a determination of a maker's lack of capacity in accordance with subsection (2) must keep a written record of the determination of lack of capacity and the name of any other person involved in making the determination.

(4) When a determination of lack of capacity has been made under subsection (2), the person making the determination must provide a copy of the declaration to the maker, the maker's agent, if any, and any other person designated in the maker's personal directive and must advise them

- (a) that a determination has been made that the maker lacks capacity, and
- (b) that the maker may make an application to the Court for a review of the determination.

(5) Within a reasonable time after a personal directive takes effect with respect to a personal matter, if an agent is designated in the directive with respect to that matter, the agent must, subject to the personal directive, make every reasonable effort to notify the nearest relative and legal representative of the maker that the directive is in effect.

Personal
directive
ceases to
have effect

10 A personal directive ceases to have effect in the following circumstances:

- (a) in respect of a personal matter, during any period in which the maker regains and has capacity;
- (b) on the maker's death;
- (c) on revocation of the personal directive in accordance with section 8, to the extent of the revocation;
- (d) on a determination by the Court pursuant to section 26 that the personal directive ceases to have effect.

PART 3
AGENTS

- | | |
|----------------------------------|--|
| Effect of agent's decisions | <p>11 A personal decision made by an agent in accordance with this Act has the same effect as if the maker had made the personal decision while the maker had capacity.</p> |
| Limitations on agent's authority | <p>12 If, at any time while a personal directive is in effect, an agent designated in the directive</p> <ul style="list-style-type: none">(a) is under 18 years of age, or(b) lacks the capacity to make personal decisions on behalf of the maker, <p>the agent has no authority to act under the personal directive.</p> |
| Duty to consult | <p>13 Before making a personal decision pursuant to a personal directive, an agent must consult with the maker regarding the decision.</p> |
| Agent's authority | <p>14(1) Unless a personal directive provides otherwise, an agent has authority to make personal decisions on all personal matters of the maker.</p> <p>(2) An agent must follow any clear instructions provided in the personal directive that are relevant to the personal decision to be made.</p> <p>(3) If the personal directive does not contain clear instructions that are relevant to the decision to be made, the agent must</p> <ul style="list-style-type: none">(a) make the decision that the agent believes the maker would have made in the circumstances, based on the agent's knowledge of the wishes, beliefs and values of the maker, or(b) if the agent does not know what the maker's wishes, beliefs and values are, make the decision that the agent believes in the circumstances is in the best interests of the maker. |

Limitation on authority

15 Despite section 14, an agent has no authority to make personal decisions relating to the following matters unless the maker's personal directive contains clear instructions that enable the agent to do so:

- (a) psychosurgery as defined in the *Mental Health Act*;
- (b) sterilization that is not medically necessary to protect the maker's health;
- (c) removal of tissue from the maker's living body
 - (i) for implantation in the body of another living person pursuant to Part 1 of the *Human Tissue Gift Act*, or
 - (ii) for medical education or research purposes;
- (d) participation by the maker in research or experimental activities, if the participation offers little or no potential benefit to the maker;
- (e) any other matter prescribed in the regulations.

More than one agent

16(1) If more than one agent is authorized to act with respect to the same personal matter and the agents are unable to agree on who will communicate decisions, the agent designated first in the personal directive is authorized to communicate decisions.

(2) If more than one person is designated as an agent and

- (a) each agent has the same authority,
- (b) the agents do not agree on a decision, and
- (c) the personal directive contains no directions for resolving the disagreement,

the decision of the majority of the agents is deemed to be the decision.

Duty to keep records

17(1) An agent must

- (a) keep a record of personal decisions made by the agent under a personal directive, and
- (b) keep the record during the period the maker lacks capacity and for at least 2 years after the agent's authority ceases.

(2) During any period of time that an agent is required to retain a record of personal decisions, the agent must, on request, provide a copy of the record to any of the following:

- (a) the maker;
- (b) the maker's lawyer;
- (c) the maker's legal representatives who have authority with respect to a matter addressed in the record;
- (d) any other agent who has decision-making authority with respect to a matter addressed in the record.

Remuneration **18** An agent is not entitled to receive any remuneration for exercising any authority under the personal directive unless the personal directive so provides.

PART 4

SERVICE PROVIDERS

Providing services **19(1)** If a service provider intends to provide personal services with respect to a personal matter to a maker who lacks capacity and a personal directive is in effect, the service provider must

- (a) if the personal directive designates an agent, follow any clear instructions of the agent that are relevant, or
- (b) if the personal directive does not designate an agent or if the agent designated 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.

(2) If the personal directive does not contain any clear and relevant instructions for the service provider to follow under subsection (1)(b) or the agent cannot be contacted after every reasonable effort has been made by the service provider, the service provider must make every reasonable effort to contact the person's nearest relative or any other individual described in the regulations for the purpose of informing the relative or other individual of the circumstances.

(3) A personal service provided in accordance with this Act by a service provider has the same effect as if the authority to provide the service had been given by the maker while the maker had capacity.

Continuing
duty to
consider
capacity

20(1) Despite that a service provider is aware that a determination has been made that a maker lacks capacity, the service provider must, before providing a personal service, make a reasonable effort to determine if the maker continues to lack capacity.

(2) If a service provider believes that a maker continues to lack capacity, the service provider may, in providing services to that maker, continue to rely on the previous determination of lack of capacity.

Duty to notify
agent

21(1) A service provider who believes that a maker has regained capacity to make a personal decision with respect to a personal matter must, before acting on the maker's personal decisions, notify the agent, if any, that in the opinion of the service provider the maker has regained capacity.

(2) The service provider may act on the maker's personal decisions if the agent does not object.

(3) If the agent objects to the service provider's acting on the maker's personal decisions, the service provider must not so act unless the Court determines that the maker has capacity.

Duty to verify
matters

22 If a person claims to be an agent with authority to provide a service provider with a personal decision, the service provider must satisfy himself

(a) as to the identity of the person who claims to be an agent, and

(b) as to the authority of the agent to make the personal decision.

Providing
emergency
medical
services

23(1) If a person who appears to lack capacity has made a personal directive but

(a) the personal directive has not been located,

(b) the agent designated in the personal directive to make the personal decision with respect to the matter is unable or unwilling to make the decision or cannot be contacted after every reasonable effort has been made and the personal directive does not contain any clear and relevant instructions, or

- (c) the personal directive does not designate an agent and the personal directive does not contain clear and relevant instructions,

a health care practitioner may provide emergency medical services, without consent, to the person.

(2) If a health care practitioner has provided an emergency medical service under subsection (1), the health care practitioner must as soon as practicable make a reasonable effort to contact any one of the following for the purpose of informing that person that an emergency medical service has been provided under this section:

- (a) the agent or guardian, if any, of the person to whom an emergency medical service has been provided;
- (b) the nearest relative if there is no agent or guardian;
- (c) any other individual described in the regulations, if there is no nearest relative.

PART 5

COURT REVIEW

Application

24 A person who makes a personal directive or any other interested person may apply to the Court by way of originating notice for any one or more orders referred to in section 26.

Service of originating notice

25(1) The originating notice must be served on the maker and persons described in the regulations and on any other person the Court determines should be served.

(2) The Court may, if the Court considers it appropriate to do so, with respect to any or all of the persons referred to in subsection (1),

- (a) shorten the time for service,
- (b) direct the manner of service or approve the manner of service that has been effected, or
- (c) dispense with the requirement for service except with respect to the person who is the subject of the application.

(3) Despite subsection (1), an application may be made ex parte if the Court considers it appropriate to do so.

Decision of
Court

26(1) The Court may, on hearing an application under section 24, do any one or more of the following:

- (a) make a determination of capacity of the maker or agent after considering a report made under subsection (2)(b);
- (b) determine the validity of a personal directive or any part of it;
- (c) based on instructions contained in a personal directive, vary, confirm or rescind a personal decision, in whole or in part, made by an agent;
- (d) determine the authority of an agent;
- (e) provide advice and directions;
- (f) make a decision where a majority cannot agree under section 16(2);
- (g) stay a decision of an agent;
- (h) make any other order that the Court considers appropriate that is not inconsistent with a personal directive.

(2) For the purpose of assisting the Court in making a decision under subsection (1), the Court may

- (a) require an agent to provide to the Court a report of the personal decisions made by the agent, or
- (b) order that a report on the capacity of a maker or an agent be prepared.

(3) In making a decision under subsection (1), the Court may not add to or alter the intent of an instruction contained in a personal directive.

PART 6

LIABILITY AND PROTECTION

Protection
from liability

27(1) No action lies against an agent for anything done or omitted to be done in good faith while carrying out the authority of the agent in accordance with this Act.

(2) No action lies against a service provider for anything done or omitted to be done in good faith while carrying out a personal service or obligation in accordance with this Act.

(3) No action lies against an agent or service provider for anything done or omitted to be done in good faith pursuant to a personal decision made by the agent where the maker of a personal directive has

- (a) changed or revoked the personal directive, or
- (b) revoked the authority of the agent

without the knowledge of the agent or service provider, as the case may be.

No
disentitlement

28 If an agent has acted in good faith, a personal decision made by the agent does not affect the entitlement of the agent or the agent's spouse, or anyone claiming through either of them, to the following:

- (a) a disposition under the will of the maker;
- (b) the proceeds of an insurance policy on the life of the maker;
- (c) a share of the estate of the maker under the *Intestate Succession Act*;
- (d) an order under the *Family Relief Act*.

PART 7

GENERAL

Access to
confidential
information

29(1) Despite any other enactment respecting the disclosure of confidential personal information, but subject to any limitation set out in a personal directive, an agent or a person referred to in section 9(2) has the right to be provided with the information and records respecting the maker that are relevant to the personal decision to be made or the determination of the maker's capacity, as the case may be.

(2) An agent or a person referred to in section 9(2) may use the information and records described in subsection (1) only to carry out the authority of the agent or to determine the maker's capacity, as the case may be.

Offence

30 Any person who, without the consent of the person who makes or revokes a personal directive, wilfully destroys, conceals or alters the personal directive or a document revoking the personal directive

is guilty of an offence and liable to a fine of not more than \$10 000.

Offence **31** Any person who requires, as a condition for a person obtaining residential accommodation or for continued residence in residential accommodation, that the person make a personal directive is guilty of an offence and liable to a fine of not more than \$10 000.

Regulations **32** The Minister may make regulations

- (a) defining words or expressions used in this Act;
- (b) providing, for the purposes of removing doubt, that a matter is or is not a personal matter;
- (c) prescribing matters for the purposes of section 1(1)(l);
- (d) respecting the designation of an agent by naming an office or position;
- (e) prescribing matters for the purposes of section 15(e);
- (f) describing the categories of persons to be contacted under section 19(2);
- (g) describing the categories of persons who must be served under section 25(1);
- (h) respecting forms for the purposes of this Act.

PART 8

CONSEQUENTIAL AMENDMENTS AND COMMENCEMENT

Amends RSA
1980 cA-24 **33** *The Alberta Health Care Insurance Act is amended in section 13(4) by adding the following after clause (e.1):*

(e.2) if the information relates to a personal decision made or to be made under the *Personal Directives Act*, to any person who is authorized by that Act to make the decision and to the Court that is considering the decision in accordance with that Act,

Amends RSA
1980 cD-32 **34** *The Dependent Adults Act is amended*

(a) *in section 1*

(i) by renumbering clause (a) as clause (a.1) and adding the following before clause (a.1):

(a) “agent” means an agent as defined in the *Personal Directives Act*;

(ii) by adding the following after clause (k):

(k.01) “personal directive” means a personal directive as defined in the *Personal Directives Act*;

(b) in section 3(2) by adding the following after clause (e):

(e.1) if the person in respect of whom the application is made has made a personal directive, the agent, if any, designated in the personal directive if the agent is not the applicant or a person otherwise served pursuant to this subsection,

(c) in section 4(1) by renumbering clause (a) as clause (a.1) and adding the following before clause (a.1):

(a) the person in respect of whom the application is made has made a personal directive,

(d) in section 10 by adding the following after subsection (1):

(1.1) Where a person has made a personal directive and the Court grants to a guardian any powers and authority in respect of a matter contained in the personal directive, the guardian, when exercising a power and authority with respect to that matter, must follow all clear and relevant instructions contained in the personal directive, and if an agent has authority with respect to a matter under the personal directive, the authority of the agent must have been terminated.

(e) in section 15(2) by adding the following after clause (e):

(e.1) if the person has made a personal directive, the agent, if any, designated in the personal directive if the agent is not the applicant or a person otherwise served pursuant to this subsection,

(f) in section 20.1 by adding the following after subsection (2):

(3) Subsection (1) does not apply to a person who has made a personal directive relating to a service referred to in subsection (1) unless

- (a) the personal directive does not designate an agent to give the consent, and
- (b) the personal directive does not contain any clear and relevant instructions.

(g) *in section 22(2) by adding the following after clause (e):*

- (e.1) if the person in respect of whom the application is made has made a personal directive, the agent, if any, designated in the personal directive if the agent is not the applicant or a person otherwise served pursuant to this subsection,

(h) *in section 68(2) by adding the following after clause (a.1):*

- (a.2) if the person has made a personal directive, the agent, if any, designated in the personal directive if the agent is not the guardian of the dependent adult or a person otherwise served pursuant to this subsection,

Amends SA
1994 cF-18.5

35 *The Freedom of Information and Protection of Privacy Act is amended in section 79(1) by adding the following after clause (b):*

- (b.1) if an agent has been designated under a personal directive under the *Personal Directives Act*, by the agent under the authority of the directive if the directive so authorizes,

Amends RSA
1980 cH-11

36 *The Hospitals Act is amended in section 40(13)(a) by adding “, the agent designated in a personal directive made by a person in accordance with the *Personal Directives Act*” after “*Dependent Adults Act*”.*

Amends RSA
1980 cH-12

37 *The Human Tissue Gift Act is amended*

(a) *in section 1*

(i) *by renumbering clause (a) as clause (a.1) and adding the following before clause (a.1):*

(a) “agent” means an agent as defined in the *Personal Directives Act*;

(ii) *by adding the following before clause (b):*

(a.2) “personal directive” means a personal directive as defined in the *Personal Directives Act*;

(b) in section 3 by adding the following after subsection (2):

(2.1) An agent may consent to the removal of tissue in accordance with subsection (1) if the personal directive under which the agent is authorized to act states that the consent may be given.

Amends SA
1988 cM-13.1

38 *The Mental Health Act is amended*

(a) in section 1

(i) by adding the following after clause (a):

(a.1) “agent” means an agent as defined in the *Personal Directives Act*;

(ii) by adding the following after clause (i):

(i.1) “personal directive” means a personal directive as defined in the *Personal Directives Act*;

(b) in section 17(1)(c) by adding “, the agent designated in a personal directive made by a person in accordance with the *Personal Directives Act*” after “*Dependent Adults Act*”;

(c) in section 27(3) by adding “his agent, if any,” after “formal patient,”;

(d) in section 28

(i) in subsection (1) by renumbering clause (a) as clause (a.1) and adding the following before clause (a.1):

(a) the formal patient’s agent,

(ii) in subsection (1)(b) by adding “or agent or the agent is not available or not willing or cannot be contacted after every reasonable effort has been made” after “guardian”;

(iii) in subsections (2), (3), (4), (5) and (6) by striking out “(1)(b)” wherever it occurs and substituting “(1)(a) or (b)”;

(e) in section 38(1) by adding “his agent,” before “his guardian”;

(f) in section 40

- (i) in subsection (1)(a) by adding “, his agent, if any,” after “applicant”;*
- (ii) in subsection (2)(a) by adding “, his agent” after “patient” and by striking out “28(1)(b)” and substituting “28(1)(a) or (b)”;*
- (iii) in subsection (3) by adding “, his agent, if any,” after “formal patient”.*

Amends SA
1991 cP-13.5

39 *The Powers of Attorney Act is amended*

(a) in section 2

(i) by repealing subsection (1)(b)(iii) and (iv);

(ii) in subsection (3)

(A) by striking out “and a lawyer”;

(B) by adding “or” at the end of clause (a) and repealing clause (b);

(C) in clause (c) by striking out “or of the lawyer”;

(iii) by repealing subsection (4);

(b) by repealing the Schedule.

Amends SA
1984 cP-27.1

40 *The Public Health Act is amended in section 1(n) by adding “, the agent designated in a personal directive made by a person in accordance with the *Personal Directives Act*” after “*Dependent Adults Act*”.*

Coming into
force

41 *This Act comes into force on Proclamation.*