



FIELD ATKINSON PERRATON
BARRISTERS & SOLICITORS

THE ADVISOR

Legal Issues of General Interest to Individuals

DUTIES OF PERSONAL REPRESENTATIVES, ATTORNEYS AND AGENTS

A parent, sibling or close friend has asked you if you would act as the “Personal Representative” (Executor or Administrator) of their Will, as an “Attorney” under an Enduring Power of Attorney or as an “Agent” under a personal directive. Or maybe you are planning your future and want to ask someone to act for you in one or more of these capacities.

As flattering as it is to be asked, before agreeing to act or asking anyone to act for you in any of these roles, it is important to know what is involved. This Advisor is intended to help you make an informed decision by providing a brief explanation of the duties of a Personal Representative, Attorney and Agent.

Duties of a Personal Representative Appointed Under a Will

A Personal Representative is an individual appointed by a person making a will (a “Testator”) to handle the administration and

management of the Estate. The duties of an a Personal Representative are detailed in the *Surrogate Rules of Alberta*. They include:

- Making arrangements for the disposition of the body and for funeral, memorial or other similar arrangements;
- Determining who is entitled to the estate property, notifying them of their interests and arranging for distribution;
- Determining the nature and value of property and debts of the deceased at the date of death and arranging for payment of debts and expenses;
- Examining insurance policies, advising insurance companies of the death and applying for any insurance benefits, pensions, annuities, or other benefits;
- Protecting the estate property;
- Arranging for proper management of the estate property, including continuing business operations, taking control of property and selling property;
- Hiring a lawyer to advise on the administration of the estate, to apply for a grant from the court, if necessary, or to bring any matter before the court;

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- Determining the tax liability of the deceased and the estate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property;
 - Administering any trusts if there is not another person named as trustee;

A Personal Representative is entitled to receive fair and reasonable compensation for administering the estate. Even if it is not mentioned in the Will, the Personal Representative is still entitled to compensation and reimbursement for any expenses properly incurred in the administration of the estate.

Duties of an Attorney Appointed under the Powers of Attorney Act

An individual (a “Donor”) can appoint someone (the “Attorney”) to handle either all or part of their financial affairs. The appointment can be effective immediately or postponed until the Donor becomes incapable of managing his or her affairs. The timing and extent of authority depends on the wording of the Power of Attorney.

A general Power of Attorney grants broad authority. The Attorney has the authority to do anything on behalf of the Donor that the Donor can lawfully do through an Attorney. An Attorney cannot draft a will for the

Donor or make decisions relating to matters other than the financial matters of the Donor. An Attorney can make decisions with respect to the maintenance, education, benefit and advancement of the Donor’s spouse and dependent children, even if the Attorney is the spouse.

The Attorney can apply to the Court for direction and advice and if the Attorney follows that direction or advice and is not guilty of fraud, wilful concealment or misrepresentation, then the Attorney will be found to have reasonably discharged his or her duty.

The Attorney may be required to account to the Court for any transactions entered into under the Enduring Power of Attorney. It is best to keep a detailed, written record of all expenditures and dispositions of the Donor’s property under your control.

Duties of an Agent Appointed under a Personal Directive

A person (the “Maker”) has the option under current Alberta law to appoint someone (the “Agent”) to make decisions about personal matters if they become incapacitated. The document, called a Personal Directive, takes effect upon the Donor’s incapacity. Personal matters are defined as “any matter of a non-financial nature that relates to an individual’s person” and include but are not limited to:

health care; accommodation; with whom the person may live and associate; participation in social, educational and employment activities and legal matters.

As an Agent, you make personal decisions for the Maker both on a day to day and long term basis as long as the Maker is unable to make such decisions for herself or himself. Before making a decision under a Personal Directive, the Agent must consult the Maker, but the Agent is the ultimate decision-maker.

There may be express instructions in the Personal Directive. If so, the Agent must follow those instructions. If there are no express, clear instructions relevant to the decision to be made, the Agent must make the decision the Agent believes the Maker would have made, based on the Agent's knowledge of the wishes, beliefs and values of the Maker. If the Agent is not aware of the Maker's wishes, beliefs and values, then the Agent must make the decision that the Agent believes is in the best interests of the Maker. Therefore, when appointing an Agent or being appointed as an Agent, it is best that the Agent and Maker discuss express instructions and the Maker's wishes, beliefs and values.

There may be limits on your duties as an Agent. A guardian may have been appointed by the Court. If so, you have no authority over any matter that has been assigned to the guardian. The Maker of the

Personal Directive may have placed limits on your authority. The Personal Directive should be examined closely for any express instructions or limits. The legislation has also placed limits on an Agent's authority. Unless there are clear instructions in the Personal Directive, an Agent has no authority to make personal decisions relating to psychosurgery, 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 person or for medical education or research, and participation in research or experimental activities if the participation offers little or no potential benefit to the Maker. Other regulatory restrictions may arise in the future, so changes to the law should be reviewed before making any decisions.

Finally, there is a recording duty. An Agent must keep a record of all personal decisions made by the Agent and keep that record during the period the Maker lacks capacity and for at least 2 years after the Agent's authority ends. Certain people are entitled to review the record. We recommend you obtain legal advice before disclosing the record.

As an Agent, subject to any limitation in the Personal Directive, you are entitled to be provided with information and records regarding the Maker. You have a duty to use

that information only to carry out your duties as an Agent.

OUR RECOMMENDATIONS:

If you are ever asked to act as a Personal Representative, Attorney or Agent, our recommendations are as follows:

- Read the document appointing you to be sure you understand what you are being asked to do and to determine any limits on your authority;
- If you have any questions about the document appointing you or your duties and obligations under the document, obtain professional advice;
- Before accepting an appointment, discuss the wishes of the person appointing you; and
- If you accept an appointment:
 - i) keep clear, detailed records of your decisions and actions; and
 - ii) contact a lawyer if you are uncertain about how to carry out your duties.

This article is prepared by lawyers in the Personal Services Group of Field Atkinson Perraton. It is intended to provide general information on areas of law that affect individuals. This publication is based on the law at the date of publication and is not intended to provide legal advice on any specific fact situation. Please consult a lawyer before acting on the information provided.

Our experienced professionals are happy to meet with you at your convenience to discuss your individual circumstances. For further information on this topic please contact **Roy Boettger** (403-260-8507), **Nan Stevenson** (403-260-8518) or **Barbara Kimmitt** (403-260-8532) in Calgary or **Doug Murray** (780-423-3003) in Edmonton.

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