



Alberta
Justice

Alberta
Seniors and
Community Supports

**Legislative Review
of the *Dependent Adults Act*
and the *Personal Directives Act***

Final Report and Recommendations

January 2007

If you were unable to make decisions for yourself, what kind of support would you want? What rights would you have? Who would you want to help make financial and personal decisions?

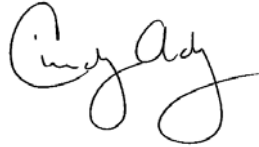
When the Government of Alberta launched a review of two important pieces of legislation—the *Dependent Adults Act* and the *Personal Directives Act*—we took a long, hard look at these questions and many others.

We put ourselves in the shoes of the many adults in Alberta who are not capable of making decisions of their own, and we asked the experts for their input—the people who live and work with the legislation every day. They included dependent adults, guardians and trustees, physicians, lawyers, long-term care providers, advocacy groups, ethics organizations, financial institutions, police officers and many others. At least 4,330 people formally provided input through surveys, focus groups, written submissions and meetings. They had something important to say, and we listened.

These recommendations reflect the themes we heard from the thousands who participated in the consultation process and the extensive research we conducted both internationally and in Canada. I was pleased to present these recommendations to Yvonne Fritz, former Minister of Seniors and Community Supports, and the Honourable Ron Stevens, Minister of Justice and Attorney General, and they will be carried forward by the Honourable Greg Melchin, Minister of Seniors and Community Supports, and Minister Stevens.

We have developed models that give Albertans a wider range of choices regarding decision-making support—ones which respect their right to autonomy. The focus is on retaining as much decision-making power as possible and, where possible, having a voice in the process. These models recognize the important role family plays in most care situations and create provisions for government to step in where necessary. We are also proposing changes to the court system, to make the guardianship and trusteeship appointment and review processes easier to navigate for people who are not familiar with the legal system.

As Alberta's population ages, issues around diminished decision-making capacity increase in importance. We have a responsibility to create a user-friendly system where people receive the right level of support at the right time. With the help of more than 4,330 experts, we have created recommendations that will help us achieve that goal.

A handwritten signature in black ink that reads "Cindy Ady". The signature is written in a cursive style with a large initial 'C' and a long, sweeping tail on the 'y'.

Cindy Ady

Review Chair and MLA for Calgary Shaw

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I. INTRODUCTION

This report presents a series of recommendations related to the *Dependent Adults Act (DAA)* and the *Personal Directives Act (PDA)*—two pieces of legislation that affect the lives of thousands of Albertans.

These Acts deal with decision-making for adults who are unable to make decisions of their own because they lack mental capacity. They include adults with developmental disabilities or dementia, people who have sustained a serious brain injury and many others. The legislation also impacts average Albertans, many of whom outline plans for their future care in a personal directive. This legislation lays out how decision-making ability is assessed, who speaks on a dependent adult's behalf, what the boundaries of authority are and other important issues. Changes to the *DAA* and the *PDA* also impact health care professionals, the legal community and the many people who provide daily assistance to adults who lack mental capacity.

The *DAA* was enacted in 1978. Although it was state-of-the-art at that time, it is time to realign it with the current needs of Albertans. When the Government of Alberta announced a review of the legislation in June of 2005, they included the *PDA* because it also deals with issues related to diminished decision-making capacity. The *PDA* was enacted in 1997, and the review presented an opportunity to fine-tune the legislation.

The cornerstone of this legislative review is an extensive consultation process; more than 4,300 Albertans gave their time to attend meetings and focus groups, complete surveys and make written submissions, many traveling long distances to be part of the process. Physicians, lawyers, police, dependent adults, advocacy groups, guardians and trustees, concerned friends and family members, financial institutions, long-term care providers, mental health agencies, nurses and social workers, ethics organizations, judges and others shared their insight into both the issues and the solutions.

The legislative review process also included careful examination of service delivery models in other Canadian jurisdictions and internationally. Government representatives from Alberta, British Columbia, Saskatchewan, Manitoba, Ontario and the Northwest Territories met

for two days to discuss delivery models and issues. Cindy Ady, the MLA who chaired the review, also traveled to Australia to see the country's innovative and successful tribunal process for guardianship and trusteeship appointments.

The result of this extensive legislative review process is a series of recommendations that reflect what Albertans need today—legislation that respects the rights of the adult while providing the support and protection needed to live as full a life as possible.

II. LEGISLATIVE REVIEW PROCESS

Phase One: Public Survey

- In the spring of 2005, Albertans were invited to complete a survey about how the two Acts should be changed; 1,905 surveys were completed for the *Dependent Adults Act* and 1,596 surveys were completed for the *Personal Directives Act*. Eight written submissions were also received.
 - Report: *Legislative Review of the Dependent Adults Act and Personal Directives Act: Survey Results*.

Phase Two: Community Consultations

- Eleven open public meetings were held in eight locations across the province in the fall of 2005. Approximately 300 people attended.
 - Report: *Legislative Review of the Dependent Adults Act and Personal Directives Act: Community Consultations Report*.

Phase Three: Stakeholder Consultations

- **Stakeholder Questionnaires:** In December 2005 and January 2006, 128 Albertans involved in or interested in the legislation were invited to complete questionnaires to comment on proposed changes and issues that had been raised in earlier consultations. Eleven written submission were also received.
 - Report: *Legislative Review of the Dependent Adults Act and Personal Directives Act: Stakeholder Consultations Summary*.
 - Report: *Feedback from the Detailed Questionnaire for Stakeholders*.

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- **Stakeholder Focus Groups:** In January 2006, 43 focus groups were held with 318 lawyers, service providers in the disability and mental health fields, health care and long-term care professionals, trustees, guardians, Aboriginal groups and others to explore the issues from their unique perspective.
 - Report: *Legislative Review of the Dependent Adults Act and Personal Directives Act: Stakeholder Consultations Summary*.

Phase 4: Consultations with Dependent Adults and Self-Advocates

- Ten focus groups took place in February 2006 to gather input from 42 dependent adults who have guardians and/or trustees and from self-advocates.
 - Report: *Dependent Adults and Self-Advocates Consultations Summary*.

Western Provinces and Territories Roundtable Discussion

- A total of 29 government representatives from British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and the Northwest Territories attended a two-day meeting in Edmonton in March 2006. Each was responsible within their own jurisdiction for legislation that parallels Alberta's *Dependent Adults Act* and *Personal Directives Act*. They discussed how the Alberta legislation could be improved based on experience with their own legislation.

Study Tour to Australia

- Cindy Ady, Legislative Review Chair and MLA for Calgary Shaw, visited Sydney and Melbourne, Australia in February 2006. She met with government officials and a lead Australian researcher about special purpose tribunals for appointing private guardians and trustees. Australians have used the legal mechanism of special purpose tribunals for appointing guardians and trustees for the past 17 years. Mrs. Ady observed two different tribunal hearing models while in Melbourne and Sydney. Transcripts of her interviews with tribunal officials and the researcher were provided to the steering committees.

Next Steps

- It is anticipated that an Act to replace the *Dependent Adults Act* and a revised *Personal Directives Act* will be introduced in the Alberta Legislature.

Note: Consultation reports are available online at www.seniors.gov.ab.ca or at www.justice.gov.ab.ca.

III. EXECUTIVE SUMMARY

In June 2005, the Government of Alberta announced a review of the *Dependent Adults Act (DAA)* and the *Personal Directives Act (PDA)*. Both Acts deal with adults who are unable to make reasonable personal or financial decisions of their own because they have diminished decision-making capacity. To ensure this legislation meets the needs of Albertans now and in the future, the government asked for input.

The recommendations in this report are the result of an extensive consultation and research process that welcomed the input of more than 4,330 Albertans. It included surveys, open public meetings across the province, focus groups with stakeholders and dependent adults and written submissions. It also included a roundtable discussion with government representatives from other provinces and territories, extensive online research, consultation with legislative experts and professional bodies, and a first-hand look at Australia's tribunal process.

Participants	Legislative Review Activity
1,905	DAA surveys
1,596	PDA surveys
300	11 open public meetings
318	43 stakeholder focus groups
42	10 dependent adult focus groups
40	Detailed online questionnaire
88	General online questionnaire
19	Written submissions
29	Roundtable discussion
4,337	Total

The 4,330 people who offered their insights and opinions come from diverse backgrounds and include judges, parents, service providers, physicians, bank representatives, dependent adults, advocates and many others. Although their perspectives are different, their concerns and ideas for change were often very similar and provided the legislative review committee with a blueprint from which to build recommendations for a new *Dependent Adults Act* and a revised *Personal Directives Act*.

A. Recommendations: *Dependent Adults Act*

The *Dependent Adults Act* and Regulation, which was passed 28 years ago, requires significant change in policy and tone. It should be repealed and replaced by a new Act and Regulation which will incorporate the recommendations detailed in this report. Highlights include:

Create new provisions for implementing innovative proposals

- Provide a framework within the new Act to implement innovative proposals on a geographically limited trial basis. Depending on the results of the evaluation, a proposal could be made permanent and extended to the whole province or terminated.

Provide substitute decision-making for one-time health care and health care placement decisions

- Enable family members on a ranked list to act as one-time substitute decision-makers to give consent on a one-time basis for (i) major or minor health care treatment, including surgery and (ii) admission to a care facility.

Establish new methods for supporting adults other than guardianship or trusteeship

- Provide for the appointment of a property or personal co-decision-maker for an adult who requires assistance making decisions regarding personal or financial matters but does not need a guardian or trustee.

Participants Included

- *Dependent adults*
- *Legal community*
- *Health care providers*
- *Financial institutions*
- *Advocacy groups for persons with disabilities*
- *Court services*
- *Ethics organizations*
- *Long-term care centres and lodges*
- *Mental health agencies*
- *Physicians*
- *Police and other government personnel*
- *Private guardians and trustees*
- *Professional organizations (e.g., nursing and social work)*
- *Government representatives from other provinces and territories*
- *Members of the public*

76 per cent of survey participants said they would want someone else to make decisions for them informally if they were not capable and no one was appointed as their substitute decision-maker.

Survey

I agree with supported decision-making. Most dependent adults can have input into their day-to-day lives.

Survey

You have to build in respect for the fact that there is a continuum of capacity – that capacity may diminish over time.

Focus group

Grant access to funds in bank accounts for paying everyday living expenses

- Provide a framework for a streamlined procedure under which a person could be authorized to administer funds of an adult to meet the ordinary living expenses of the adult and the adult's dependents (if any).

Investigate an unmet need for a guardian or trustee

- If an adult who needs a guardian or trustee does not have one, allow any person to request an investigation. If the investigation indicates that the person needs a substitute decision-maker, appoint the Public Guardian or Public Trustee if no one else is likely to apply within a reasonable period of time.

Abolish certificates of incapacity

- Discontinue the existing mechanism for two physicians to issue a certificate of incapacity for a person who is a resident of a facility.

Establish a new process for determining incapacity

- Provide a new process for determining an adult's cognitive and functional capacity using standardized assessment tools and a new regulated form. Require the assessor to specify the areas in which the adult has lost the capacity to make (a) personal or (b) financial decision(s) and the reasons for his or her conclusions.
- Allow an adult's capacity to be re-assessed if a guardian, trustee or service provider believes the adult has regained the capacity to make a decision or if there has been a significant or material change in the adult's condition. Allow the adult to request a re-assessment of his or her capacity.
- Ensure a medical expert is included in the process.

Allow for the expansion of the scope of who may determine incapacity

- Allow for the expansion of the current scope of who may assess capacity to include not only members of the College of Physicians and Surgeons and the College of Psychologists (the only professionals who may currently assess capacity), but also members of the following Colleges: Registered Nurses, Registered Psychiatric Nurses, Registered Social Workers and Registered Occupational Therapists. Establish requirements for assessors such as training and quality assurance.

Refine the process for guardianship/trusteeship appointments

- Simplify the documents and clarify the court process for guardianship and trusteeship appointments so applicants without legal knowledge or experience can navigate the system without legal counsel, if they choose.
- Allow an application to be made for a guardianship or trusteeship order for a person who is close to but not yet 18. The order will come into effect when the person reaches 18 years of age.
- Encourage the participation of the adult in the appointment process and ensure their views and wishes are considered.
- Specify the matters that should be considered by the court in deciding whether a proposed guardian or trustee is suitable. Where relevant, include credit checks, criminal record checks and character references.
- Allow non-residents to be appointed as trustee but require them to provide a bond or other approved form of security to ensure the proper performance of their duties, unless the court dispenses with this requirement.
- As part of the application documentation, require a prospective guardian or trustee to prepare a guardianship plan and/or trusteeship management plan.

We don't have access to psychologists in rural Alberta. It's the nurses that know the person.

Focus group

Legal fees, court costs and a slow, complex process make the current court-based system frustrating to work through. Any new system should be reliable, efficient and low-cost.

Survey

The process of both appointment and review should be simplified within the existing court framework. We would strongly endorse the streamlining of the dependent adult applications so they are more user-friendly. We are not convinced that a special tribunal would eliminate the expense of the current process.

Written submission

We would strongly recommend that only those powers required by the guardian and/or trustee should be sought. In the spirit of maintaining the dignity of the proposed dependent adult, it is absolutely essential that the applicant ask only for the powers that are necessary based on the physician's statement and the functional assessment. Often we find lawyers following a precedent. They include all the legislated powers particularly so in the case of a guardianship application when such powers are unnecessary or irrelevant given the age or lack of capacity of the proposed dependent adult.

Written submission

Reduce areas of decision-making authority for guardians

- Reduce the areas of decision-making authority for guardians to: health care, residential arrangements, personal contacts, participation in social activities, non-financial legal matters, employment, education and training (where relevant) and any other matter ordered by the court. The authority to make decisions in the areas of licenses and permits and day-to-day living routines (diet, dress, etc.) should be removed.
- Require the court to be satisfied that each area of decision-making authority granted is necessary, based upon a functional assessment of the adult's capacity and on a guardianship plan developed by the prospective guardian.

Powers and duties of trustees

- Give trustees the same power to deal with assets of the adult that the adult would have if they had full capacity, subject to any specific restrictions imposed by the Act or the court.
- Give trustees limited discretion to make gifts or charitable donations without specific court authority, within monetary limits.
- Provide for a prescribed schedule of trustee compensation.

Length of guardianship/trusteeship appointments

- Give the court the authority to determine the necessity and the appropriate timeline for a guardianship or trusteeship review.

Enforcing guardianship orders

- Allow a guardian to have a decision enforced through the court, particularly when there are significant health or safety concerns.

Periodically review accounts

- Provide for the Public Trustee to periodically review a trustee's accounts.
- If a trustee does not submit their accounts for approval, and does not promptly remedy their default, provide an expeditious mechanism to bring their default to the attention of the court for appropriate action.

Investigate complaints

- Require the Public Guardian and Public Trustee to investigate and take appropriate action on complaints or concerns about private guardians and trustees.

Assist in resolving disputes

- Authorize the use of alternate dispute resolution processes, such as mediation, to help resolve a dispute between a guardian or trustee and an incapable adult or family member prior to having to take the matter to court.

Establish temporary emergency interventions

- Authorize financial institutions to freeze funds in an adult's account for a short period of time if the institution has reasonable grounds to believe that the adult is suffering financial abuse or is in danger of suffering a serious financial loss because of diminished decision-making capacity.
- Authorize the Public Guardian to interview an incapable adult and all relevant parties if they receive a complaint or concern about the actions of a private guardian regarding the care or safety of an incapable adult. When the assistance of the police is necessary, authorize the Public Guardian to obtain a court order instructing the police to assist in removing and transporting an incapable adult to a place of safety on a temporary basis.

I feel that to apply to the court every six years for a new guardianship or trusteeship order is an onerous expense. The legal fees are around \$3,500 and could be better spent for the care of my daughter.

Online survey

I don't think accounting is something the court should be dealing with.

Focus group

As a police officer, I see many elderly people being taken advantage of by their families. It's not uncommon for an adult child with a gambling addiction to convince an aging parent that they need a trustee to look after their money. It takes months before you can get a court date to stop the drain on the account. By that time, there's nothing left.

Public meeting

I am concerned about the time factor if courts have to be involved. Abuse can become so dangerous so quickly.

Survey

It's a question of timeliness. If you suspect there is an abuse of funds, it must be investigated before all the funds are gone. We need a more timely process of investigation.

Focus group

We strongly recommend that... you consider putting "teeth" in the legislation to make these individuals (who do not comply with review orders) accountable to the court as directed by the court.

Written submission

- Authorize the court to hear applications for emergency protective orders either in a situation where a guardianship or trusteeship order has been granted or in a situation where there is no guardianship or trusteeship order but there is reason to believe the adult is incapable and there is a need for protective measures.

Provide a mechanism for dealing with guardians or trustees who do not comply with review requirements

- If a guardian fails to have a guardianship order reviewed within the required review period and a reminder notice has been sent, allow the authority of the guardian to be terminated following a reasonable grace period. Allow for the appointment of an alternate guardian or the Public Guardian.
- If a trustee fails to apply for a review, provide an expeditious mechanism for the Public Trustee to bring this to the attention of the court for appropriate action.

B. Recommendations: *Personal Directives Act*

The *Personal Directives Act* and the *Personal Directives Regulation* should be revised to incorporate the following recommended changes:

Encourage voluntary use of a standard form

- Include a standard form for writing a personal directive in the Regulation.

Require a maker to give a copy of the personal directive to the agent(s) and encourage agent(s) to consent to being named

- Require a maker to give a copy of their personal directive to any and all persons they name as agent and encourage the agent(s) to consent to being named in the personal directive.

Encourage voluntary registration of personal directives

- Allow, but do not require, the maker to register a personal directive by having it connected or added to his or her electronic health record. The registration information should only include the fact that a personal directive exists, its date, location and contact information for the agent(s). Require the maker to be responsible for updating the registration information if the personal directive is changed.

Recognize personal directives from outside of Alberta

- Recognize personal directives or other similar advance-planning documents for personal decision-making, provided they meet the requirements for being a valid personal directive under Alberta's Act.

Having a standard form without involving a lawyer would be extremely helpful.

Focus group

It is important for the agent to sign off on the personal directive. We often hear of children who are named as agents but have no knowledge of their parents' personal directives.

Focus group

Care providers are at a loss to know if a personal directive exists or not, as there is no central registry. I would agree that some form of identification needs to be placed on a driver's license and/or health care card.

Survey

Personal/advance directives done in other jurisdictions should be valid in Alberta provided they meet our own minimal requirements.

Online survey

The assessment process would be sped up if other professions were allowed to perform these assessments.

Focus group

Right now, some doctors write on their scratch pad that someone is mentally incapable. This is a bit scary. Are there plans to make declaration forms mandatory?

Focus group

We should allow for re-assessment upon request by the dependent adult, where another professional having the authority to assess that adult concurs.

Survey

Allow for the expansion of the scope of who may determine capacity

- Allow for the expansion of the current scope of who may assess incapacity to include not only members of the College of Physicians and Surgeons and the College of Psychologists, but also members of the following Colleges: Registered Nurses, Registered Psychiatric Nurses, Registered Social Workers and Registered Occupational Therapists. Establish requirements for assessors that may include training and peer review.

Create a new process for determining incapacity

- Outline a new process for determining an adult's cognitive and functional capacity using standardized assessment tools and a new regulated form. Require the assessor to specify the areas in which the adult has lost the capacity to make personal decisions and the reasons for his or her conclusions.
- Require an assessment to be carried out by two assessors or by a person named in the personal directive to assess capacity, after consulting with an assessor. In both cases, the persons conducting the assessments must agree that the individual is incapable of making a personal decision.
- Ensure that a medical expert is involved in the process.
- In emergency situations, allow an Emergency Medical Technician or paramedic to make a temporary determination of incapacity, after consulting with another assessor, for the purpose of bringing a personal directive into effect for 72 hours.

Allow for the re-assessment of capacity or determination of regained capacity

- Allow an adult's capacity to be re-assessed if an agent or service provider believes the adult has regained the capacity to make a decision or if there has been a significant or material change in the adult's condition. The adult should also be able to request a re-assessment of his or her capacity.
- Outline a process to determine how a personal directive is deactivated when the maker regains capacity to make a personal decision.

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- Require a re-assessment of capacity to be conducted if there is a disagreement between the maker, agent and/or service provider about a significant or material change in the maker's capacity.
 - Limit the number of times a maker may request a re-assessment of capacity to one within a six month period.

The agent shouldn't be the only one that can trigger a re-assessment. There are some bad apples in the barrel.

Focus group

Allow a personal directive to include directions about the care and education of minor children in the care of the maker

- Allow a personal directive to include directions for (an) individual(s) to undertake the temporary care and education of a maker's dependent child(ren) until the guardianship of such dependent child is determined under the *Family Law Act* or other legislation, or the maker regains capacity, whichever occurs first.

This proposal should be enacted to ensure minimal disruption in the lives of minor children in the event that their guardian/parent is incapacitated.

Online survey

Appoint temporary substitute agents

- Where no agent is named in a personal directive or the named agent is unavailable, unable or unwilling to act, allow a service provider to choose the first person in a list of available and qualified people to make a personal decision on behalf of the maker. The list should be: spouse or adult interdependent partner, adult child, parent, sibling, another relative or the Public Guardian.

We... accept the potential for there to be, at times, legitimate questions about the agent's decisions. We could support the court having power to order an assessment of the agent's capacity.

Written submission

Review the actions or decisions of agents

- Allow for the review an agent's actions or decisions if the maker, an alternate agent, a service provider or other individual believes, on reasonable grounds, that they are not being made in the best interests of the maker.

IV. DETAILED RECOMMENDATIONS:

Dependent Adults Act

The *Dependent Adults Act* and the *Dependent Adults Regulation* should be repealed and replaced by a new Act and Regulation which will incorporate the following recommended changes:

1. New provision to add guiding principles

The new Act should begin with the following principles to guide decision-making under the Act and to assist in interpreting and applying the Act:

- An adult is presumed to be capable of making a decision about a matter unless he or she has been determined to be incapable of making such a decision;
- The right to autonomy of an adult who is incapable of making a decision about a matter should be acknowledged by providing the least restrictive and intrusive form of support or substitute decision-making authority necessary to protect the adult's interests in relation to that matter;
- An adult who is unable to make a decision about a matter is entitled to be informed about and, to the best of his or her ability, participate in decisions that affect him or her; and
- When making a decision on behalf of an incapable adult, a substitute decision-maker should give significant consideration to the wishes expressed by the adult, the known values and beliefs of the adult, and the best interests of the adult.

2. New provisions for implementing innovative proposals by regulation

The new Act should provide for certain innovative proposals to be implemented by regulation, which would facilitate modification of the program (or even termination of the program) based on operational experience.

3. New provisions for obtaining one-time consent to health care treatment

- (a) The new Act should allow family members on a ranked list to consent to major or minor health care treatment, including surgery on behalf of an adult who has been determined by a health care professional to be incapable of giving consent for the treatment. The provision would apply only when an adult did not have a guardian or an agent under a personal directive to consent on their behalf and only to a one-time decision or a decision on a specific course of treatment. The provision would also not affect the law relating to consent for sterilization that is not medically necessary or the removal of organs or tissue for donation.
- (b) The ranked list of persons who may make a personal decision on behalf of an incapable adult should be: spouse or adult interdependent partner, adult child, parent, sibling, another relative or the Public Guardian as a last resort.
- (c) The Public Guardian should be given the authority to designate a person, including a friend, as a temporary substitute decision-maker if there is no other person on the list in (b) that meets the requirements in the Act for being a temporary substitute decision-maker (see (d) below).
- (d) A one-time substitute decision-maker should:
- Be at least 18 years of age (unless they are the spouse of the person on whose behalf they are to make a decision);
 - Be capable of making a decision about health care treatment or admission to a care facility;
 - Be available to make the decision, be willing and suitable to assume the responsibilities imposed by the Act;
 - Have a trusting relationship with the adult;
 - Have no conflict with the adult that raises a reasonable doubt about whether they will comply with the duties imposed by the Act;
 - Have knowledge of the adult's circumstances; and
 - Have had contact with the adult in the last 12 months.

The one-time decision-maker must sign a written declaration stating that they meet all the criteria in the Act and are willing to follow the decision-making guidelines in the Act.

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- (e) The health care professional would assess whether the adult understood that the decision to be made is about him or her, the nature of the decision and the risks and benefits of the decision. If the adult did not understand, the health care professional would canvass the first person on the list to see if he or she meets the above requirements and is willing to make the decision on behalf of the adult. If the first named person is unwilling, unable, unavailable or unqualified, the health care professional will contact the next person(s) on the list until a qualified person is found and is willing to make the decision.
- (f) The Act should contain parameters within which the one-time substitute decision-maker can make a decision to consent or refuse to consent about things like the wishes expressed by the adult while capable, the values and beliefs of the adult, if known, and the best interests of the adult. The Act should also require the one-time substitute decision-maker to consider the following factors:
- Whether the treatment is likely to improve the incapable person's condition or well-being, prevent the incapable person's condition or well-being from deteriorating or reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate;
 - Whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment;
 - Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her; and
 - Whether a less restrictive or less invasive treatment would be as beneficial as the treatment that is proposed.
- (g) Before giving or refusing consent to a treatment on behalf of an incapable person, a one-time substitute decision-maker is entitled to receive all the information required to make a decision. This provision should prevail despite anything to the contrary in the *Health Information Act*, the *Personal Information Protection Act* or the *Freedom of Information and Protection of Privacy Act*.

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- (h) The substitute decision-maker must keep a record of any decision made on behalf of an incapable adult for a period of two years after the decision was made.
 - (i) The Act would allow any interested person to ask for a review of the substitute decision-maker's decision if the person feels the decision made was not based on the parameters in the Act. The review would be conducted by the Dependent Adults Appeal Panel under this Act. The Act should provide that the matter be heard expeditiously.
 - (j) For the purposes of the new provisions, the Act should protect from liability any person who acts in good faith and uses reasonable care in the performance of a duty or the exercise of a power or function relating to the one-time consent to health care. A health care professional should be entitled to rely on the accuracy of the information given to him or her to establish someone's eligibility to act as a one-time substitute decision-maker and someone's authority to give or refuse consent.

4. New provisions for obtaining one-time consent for health care placement

- (a) The new Act should allow family members on a ranked list to consent to admission to a care facility on behalf of an adult who has been determined by a health care professional to be incapable of giving consent for the admission. The provision would only apply when an adult did not have a guardian or agent under a personal directive to consent on their behalf and only to a one-time decision about admission to or placement in a health care facility.
- (b) The ranked list of persons who may make a personal decision on behalf of the incapable adult should be: spouse or adult interdependent partner, adult child, parent, sibling, another relative or the Public Guardian as a last resort.

(c) The Public Guardian should be given the authority to designate a person, including a friend, as a temporary one-time substitute decision-maker if there is no other person on the list in (b) that meets the requirements in the Act for being a temporary substitute decision-maker (see (d) below).

(d) A substitute decision-maker should:

- Be at least 18 years of age (unless they are the spouse of the person on whose behalf they are to make a decision);
- Be capable of making a decision about health care treatment or admission to a care facility;
- Be available to make the decision, be willing and suitable to assume the responsibilities imposed by the Act;
- Have a trusting relationship with the adult;
- Have no conflict with the adult that raises a reasonable doubt about whether they will comply with the duties imposed by the Act;
- Have knowledge of the adult's circumstances; and
- Have had contact with the adult in the last 12 months.

The one-time decision-maker must sign a written declaration stating that they meet all the criteria in the Act and are willing to follow the decision-making guidelines in the Act.

(e) The health care professional would assess whether the adult understood that the decision to be made is about him or her, the nature of the decision and the risks and benefits of the decision. If the adult did not understand, the health care professional would canvass the first person on the list to see if he or she meets the above requirements and is willing to make the decision on behalf of the maker. If the first named person is unwilling, unable, unavailable or unqualified, the health care professional will contact the next person(s) on the list until a qualified person is found and is willing to make the decision.

(f) The Act should contain parameters within which the one-time substitute decision-maker can make a decision to consent or refuse to consent to admission to a care facility and/or the choice of care facility about things like the wishes expressed by the adult while capable, the values and beliefs of the adult, if known, and the best interests of the adult.

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- (g) The Act should also require the one-time substitute decision-maker to consider the following factors:
- Whether admission to the care facility is likely to improve the quality of the incapable person's life, prevent the quality of the incapable person's life from deteriorating or reduce the extent to which, or the rate at which the quality of the incapable person's life is likely to deteriorate;
 - Whether the quality of the incapable person's life is likely to improve, remain the same or deteriorate without admission to the care facility;
 - Whether the benefit the incapable person is expected to obtain from admission to the care facility outweighs the risk of negative consequences to him or her; and
 - Whether a course of action that is less restrictive than admission to the care facility is available and is appropriate in the circumstances.
- (h) Before giving or refusing consent to admission to a care facility on behalf of an incapable person, a one-time substitute decision-maker is entitled to receive all the information required to make a decision. This provision should prevail despite anything to the contrary in the *Health Information Act*, the *Personal Information Protection Act* or the *Freedom of Information and Protection of Privacy Act*.
- (i) The one-time substitute decision-maker should keep a record of any decision made on behalf of an incapable adult for a period of two years after the decision was made.
- (j) The Act should allow any interested person to ask for a review of the substitute decision-maker's decision if the person feels the decision made was not based on the parameters in the Act. A review would be conducted by the Dependent Adults Appeal Panel under an expanded role in the Act, within seven days of the application for review.

(k) For the purposes of the new provisions, the Act should protect from liability any person who acts in good faith and uses reasonable care in the performance of a duty or the exercise of a power or function related to the one-time consent to care facility admission. A health care professional should be entitled to rely on the accuracy of the information given to him or her to establish someone's eligibility to act as a one-time substitute decision-maker and someone's authority to give or refuse consent.

5. Granting access to funds in bank accounts for paying everyday living expenses

The new Act should provide a framework for a streamlined procedure under which a person (called an "administrator" below) could be authorized to administer the funds of an adult to meet the ordinary living expenses of the adult and the adult's dependents (if any).

Anticipated features of the mechanism include the following:

- Any person may apply to be appointed as administrator.
- The adult must be given notice of the application, and if the adult objects, the streamlined mechanism could not be used.
- The applicant must provide a written reference from a person meeting certain criteria and must consent to a credit check and criminal records check.
- The application documents must specify the funds that the applicant is seeking authority to administer and the specific purposes for which the funds will be used. This must include the amounts estimated to be required for each purpose.

The application must include documentary evidence of the adult's inability to deal with the matters for which the applicant is seeking authority to apply the funds.

- If the application is granted, limits on the administrator's authority and his or her responsibilities will be specified in the appointment.

This would be implemented by regulation to establish and evaluate the effectiveness and costs of this proposal.

6. Duty to review application and provide input to the court

The new Act should require the Public Guardian or Public Trustee to review the material submitted in connection with an application to appoint a guardian or trustee and to provide input to the court. In particular, the court would receive input regarding:

- Alternatives that might be available to the appointment of a guardian or trustee;
- The proposed guardianship plan or trusteeship management plan;
- The suitability of the proposed guardian or trustee, including the results of criminal record checks, credit checks or character references and any other inquiries that are conducted; and
- The proposed scope of the guardian or trustee's authority and on any restrictions that might be placed on the trustee's authority.

7. New provisions for authorizing supported personal decision-making agreements

- (a) Before appointing a trustee or guardian for an adult, the new Act should require that the court is satisfied that the adult could not make the relevant personal decision(s) even with the assistance of another person.
- (b) The Act should allow an adult to enter a supported personal decision-making agreement with an associate decision-maker (trusted friend or relative) if the adult understands the nature and effect of entering into the agreement. The form, content and method for approving supported decision-making agreements should be prescribed in the regulations. The responsibilities of an associate decision-maker should be:
 - To assist the adult in making and expressing personal decisions;
 - To assist in obtaining relevant information, to advise the adult by explaining relevant information and considerations;
 - To ascertain the wishes and decisions of the adult;
 - To assist in communicating the adult's wishes and decisions; and

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- To try to ensure that the adult's decision is implemented. The Act would also outline the legal effect of decisions made with the assistance of an associate decision-maker under such agreements.
 - (c) Before assisting the adult with a personal decision, the associate decision-maker is entitled to receive all the information required to support the adult in making the decision. This provision should prevail despite anything to the contrary in the *Health Information Act*, the *Personal Information Protection Act* or the *Freedom of Information and Protection of Privacy Act*.
 - (d) The Act should state that the Public Guardian cannot act as an associate decision-maker.

8. New provisions for appointing a co-decision-maker

- (a) The new Act should allow the court to make an order appointing one or more persons as personal or financial co-decision-makers for an adult. Such an appointment should be in the best interests of the adult, and the court should be satisfied that the adult requires assistance in making reasonable decisions regarding the personal or financial matters identified in the order but does not require a guardian or trustee.
- (b) Before appointing a co-decision-maker, the applicant should obtain a capacity assessment report for the adult and provide it to the court. The court should consider the types of decisions the adult will likely need to make regarding personal care or property, the resources available to assist the adult in making those decisions, including less intrusive forms of support or assistance in decision-making, the wishes of the adult and the extent, nature and complexity of the adult's estate.
- (c) The Act should set out the criteria for determining the suitability of a co-decision-maker, including requiring a criminal records check, credit check (for property co-decision-maker) and character references. Neither the Public Guardian nor the Public Trustee may be appointed as co-decision-makers.

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- (d) The Act should also clarify the duties and responsibilities of the co-decision-maker and the legal effect and authority of decisions made by the co-decision-maker (e.g. signing documents).

9. Duty to investigate an unmet need for a guardian or trustee

The new Act should allow any person who believes that an adult has an unmet need for a guardian or trustee to request the Public Guardian or Public Trustee to investigate the matter.

- After completing its investigation, the Public Guardian or Public Trustee should be required to apply to be appointed as guardian or trustee if:
 - The investigation provides reasonable grounds to believe the adult needs a guardian or trustee;
 - No less intrusive mechanism will address the adult's best interest; and
 - No one else is likely to apply within a reasonable period of time to be appointed as guardian or trustee.

10. Abolish certificates of incapacity

- (a) The new Act should not continue the existing mechanism in which two physicians may issue a certificate of incapacity regarding a person who is a resident of a facility. Anyone who has a concern that an adult has an unmet need for a trustee would be able to bring those concerns to the attention of the Public Trustee, as provided for in recommendation 9.
- (b) For those adults who have the Public Trustee as their trustee by virtue of a certificate of incapacity under the current Act, the new Act should include a transitional process for reviewing the certificates and either allowing them to lapse or replacing the certificate with a trusteeship order.

11. Appointing a guardian or trustee

A. New process for determining incapacity

- (a) The new Act should provide a new process for determining an adult's cognitive and functional capacity using assessment tools that are standardized and applied consistently by professionals designated as capacity assessors under the Regulation.
- (b) The Act should set out a mechanism with appropriate safeguards that would allow the court to order the assessment of an adult for the purpose of an application for appointment of a guardian or trustee where the adult objects to being assessed.
- (c) The assessment process should incorporate the following principles:
- The assessment should be specific to the areas(s) of decision-making needed (e.g. health care, accommodation, property, finances, etc.);
 - The process should take into consideration the fact that capacity can fluctuate, and that an adult may be capable of making a decision at one time but not at another; and
 - The inability to communicate by spoken word or in writing should not necessarily mean the adult is incapable of making a personal decision if other means of communication can be used to convey a decision.
- (d) The process should require an assessment be carried out by one assessor who completes an assessment in the prescribed form and gives an opinion about whether the adult is incapable of making (a) personal or (a) financial decision(s) or both. At the time of the assessment, the assessor should indicate whether the adult's capacity should be re-assessed and if so, when, based on the clinical or other circumstances of the adult. The new Act should also ensure that a medical expert is involved in the process.

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- (e) The Regulation should include a new form to replace the current *Form 1 (Report of Physician or Psychologist)*. One of the major components of the form should be the written reasons given by the assessor for concluding that the individual lacks capacity. The assessor will be required to assess the maker's ability to acquire information, process information, retain information, communicate a decision and identify the consequences of making or not making the decision, as well as assessing the areas in which the adult has lost the capacity to make personal or financial decisions.
- (f) Any person, including the adult, should be able to request the court to review the determination of incapacity of an adult. The Act should limit the requests for re-assessment to one within a six month period unless there is clear evidence that the adult has regained decision-making capacity.

B. Allowing the expansion of the scope of who may determine incapacity

- (a) The new Act should allow for the expansion of the current scope of who may assess capacity to include a person designated in the Regulation as being qualified to complete assessments of capacity. This list would not only include members of the College of Physicians and Surgeons and the College of Psychologists, but also members of the following Colleges: Registered Nurses, Registered Psychiatric Nurses, Registered Social Workers and Registered Occupational Therapists.
- (b) To be designated as a qualified assessor, the Regulation should require certain conditions be met such as training and quality assurance. Any training requirements should not apply to members of the College of Physicians and Surgeons, but the College should be encouraged to update its guidelines in the area of capacity assessment and ensure continued competency in this area of practice.

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- (c) Assessments of capacity done by physicians who are currently paid for by the Alberta Health Care Insurance Plan should continue to be covered when an adult is receiving a health care service and an assessment of capacity is part of the health care services being provided. The Regulation should contain a *Schedule of Fees* to control the costs of other capacity assessments. The costs could be borne by the Ministry of Seniors and Community Supports for low-income adults or hardship cases.

C. Improving the process for guardianship/trusteeship appointments

(i) Simplifying documentation

Simplify the documentation and clarify the court process for guardianship and trusteeship appointments so applicants without legal knowledge or experience can navigate the system without legal counsel, if they choose.

(ii) Application regarding a minor nearing the age of 18 years

The new Act should allow the court, in appropriate circumstances, to appoint a guardian or trustee for a person who is close to but has not yet reached the age of 18 years by an order that will come into effect when the person reaches the age of 18 years.

(iii) Participation of adult in process

The new Act should encourage the participation of the adult in the application process. The procedure should ensure that the views and wishes of the adult regarding the proposed appointment are ascertained and considered as much as possible.

(iv) Giving notice of an application

- (a) Rather than requiring the “nearest relative” to be notified of an application, the new legislation should require the applicant to notify, by ordinary mail, all close family members whose address is known. The legislation should require that notice be given to the Chief of a First Nation or the Chair of a Métis Settlement Council, and the Minister of Indian and Northern Affairs (for trusteeship of a First Nation member).
- (b) The new Act should provide for certain persons (i.e. next of kin) to be notified of an application without being given all of the supporting documentation (e.g. other than the adult and the proposed guardian/trustee).
- (c) The adult must be given a copy of the application and supporting documents, an explanation of the purpose of the application and notice of their right to oppose it unless the court has dispensed with this requirement.

(v) Factors to consider when appointing a guardian or trustee

The new Act should clarify that the criteria for appointing a guardian, trustee or both should be similar. The appointment criteria should be:

- A determination that the adult is incapable of making reasonable judgments or decisions in matters relating to his or her person or his or her property;
- Whether guardianship and/or trusteeship is in the best interests of the adult. The criteria for evaluating “best interests” would be set out in the Act; and
- That no less intrusive or restrictive form of order is likely to adequately address the adult’s best interest.

(vi) Determining suitability/eligibility of proposed guardian or trustee

- (a) The new Act should specify the matters that should be considered by the court in deciding whether the proposed guardian or trustee is suitable. Where relevant, these should include risk-assessment measures such as credit checks, criminal record checks and character references. The court should also consider matters such as the nature, length and stability of the relationship between the applicant and the adult, the relationship between the applicant and the guardian or trustee (if different person), and the views of the adult regarding the proposed guardian or trustee.
- (b) The Act should allow a non-resident of Alberta to be appointed as a trustee if they are otherwise considered to be suitable. A non-resident trustee should be required to provide a bond or other form of security approved by the court for the proper performance of their duties, unless the court dispenses with this requirement.
- (c) The Act should set out criteria for determining whether there is likely to be a conflict between the proposed guardian or trustee's duties and their interests. The proposed guardian or trustee should be required to provide information that will assist the court in assessing potential conflict. The court should have the discretion to appoint someone notwithstanding a potential conflict if they are otherwise considered to be suitable.

(vii) Requiring the preparation of guardianship or trusteeship (management) plans as part of the application process

The new Act should require a prospective guardian or trustee to prepare a guardianship plan and/or trusteeship management plan. A template, with easy to follow instructions, should be available to assist prospective guardians and trustees in developing their plans. The plans could be used to assist the court in determining whether the applicant is likely to be a suitable guardian or trustee and as an evaluation tool when a guardianship or trusteeship order is reviewed or a complaint about a guardian or trustee is being investigated.

D. Clarifying certain aspects of appointment orders

(i) Areas of decision-making authority for guardians

(a) The new Act should reduce the areas of decision-making authority for guardians to:

- Health care;
- Residential arrangements (where to live);
- Personal contacts;
- Participation in social activities;
- Non-financial legal matters;
- Employment, education and training, where relevant; and
- Any other matter ordered by the court.

The authority to make decisions about licenses and permits is included in non-financial legal matters. Authority to make decisions about and day-to-day living routines (diet, dress, etc.) that is contained in the existing Act should be removed.

- (b) The Act should require the court to be satisfied that each area of decision-making authority or power granted is necessary, based on a functional assessment of the adult's capacity and on a guardianship plan developed by the prospective guardian.
- (c) The Act should require the court to be satisfied that the guardian's authority is no more intrusive or extensive than is necessary to effectively provide the adult with the assistance that he or she requires.

(ii) Powers and duties of trustees

- (a) Subject to any specific restrictions imposed by the Act, the Regulations or the court, a trustee should have the same power to deal with the adult's property and financial matters that the adult would have if they had full capacity.
- (b) The Act should provide that the trustee must not sell a residence of the adult unless specifically authorized to do so by the court.

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- (c) The Act should authorize a prescribed schedule of private trustee fees, but the court would be authorized to set the allowable fee at a higher or lower level in a particular case.
 - (d) Private trustees should not be authorized to take the prescribed fees in advance without prior approval. The Public Trustee could authorize trustees to take the prescribed fee on periodic review of the trustee's accounts.
 - (e) The Act should require trustees to exercise the care, skill and diligence that a person of ordinary prudence would exercise in managing their own financial affairs.
 - (f) Trustees should be governed by the prudent investor rule, but its application in a particular case to a particular trustee should be subject to the terms of the trustee's appointment.
 - (g) The Act should give trustees limited discretion to make gifts or charitable donations without specific authority from the court when the trustee has reasonable grounds to believe that the adult would have made the gifts, if capable, and sufficient property will remain after making the gift to meet the adult's needs. The Act should place monetary limits on the value of gifts or donations that a trustee can make without specific authorization from the court.
 - (h) The Act should enable regulations that would allow a trustee to authorize the adult to enter into certain transactions that otherwise would be void because of the adult's incapacity.
 - (i) The Act should state that upon the adult's death, the trustee's authority continues, to the extent necessary to preserve and protect the adult's property, until a person with authority to administer the estate takes possession of the property.

(iii) Length of guardianship/trusteeship appointments

- (a) The new Act should not require a guardianship or trusteeship order to specify a period within which the order must be reviewed. Instead, the court would have the discretion to require a review within a certain period or not. The court should determine whether it is in the best interests of the adult to require a review of the order and, if required, to specify the period within which the review is to take place. The purpose of a review of an appointment order is to re-evaluate the continuing need for the order and the appropriateness of its terms in light of any changes in the adult's condition or circumstances.
- (b) If the assessment of the adult indicated that the capacity of the adult is likely to improve, the Act should state that the court must require a review, including a re-assessment of capacity, within a specified period of time.
- (c) Any interested person may request the court to review the order based on a change in circumstances of the adult or the guardian or the trustee, a change in the capacity of the adult, and/or a concern about the decisions or actions of the guardian or trustee.

(iv) Enforceability of guardianship orders

- (a) The new Act should provide that decisions of guardians made within the terms and conditions of the order are enforceable. A guardian may bring an application for enforcement of a decision to the court especially when the need to enforce the decision is due to significant health or safety concerns.
- (b) The Act should require the matter to be brought before a court if the police are needed to enforce an order or a decision made under the authority of an order.

12. Responsibilities of substitute decision-makers (including guardians/trustees)

The new Act should set out the responsibilities and duties of all levels of substitute decision-makers, including guardians and trustees. These should include being informed about their role and responsibilities as substitute decision-maker, keeping records of decisions made on behalf of the incapable adult and consulting with the adult before making a decision, where practical.

13. Protective safeguards

A. Informing guardians/trustees about their responsibilities

Prior to being appointed, the applicant should be informed about the duties and responsibilities of being a guardian or trustee and be prepared to carry out those duties and responsibilities.

B. Requiring a periodic review of accounts

- (a) The Act should require trustees to submit statements of their accounts at prescribed intervals to the Public Trustee, who would have primary responsibility for reviewing and approving routine accounts. The form in which statements of account are to be submitted would be prescribed.
- (b) If a trustee does not submit their accounts for approval when required to do so, the Act should provide an expeditious mechanism for the Public Trustee to take steps to bring the matter to the attention of the court for appropriate action. The Act should provide a mechanism to remove the trustee and appoint a replacement if the trustee does not promptly remedy their default.

C. Investigating complaints

- (a) The new Act should clearly define the role and powers of the Public Trustee and Public Guardian to receive, investigate and take action on complaints or concerns about private guardians and trustees, including the power to ask the court for advice, directions or review.
- (b) The Act should authorize the court to issue an order requiring any person who has possession of or control over property of the adult not to dispose of or deal with that property except in accordance with the instructions of the court. Such an order may be issued for a period of up to 30 days.

D. Assisting in resolving disputes

The new Act should authorize the use of alternate dispute resolution processes, such as mediation, to help resolve a dispute between a guardian or trustee and an incapable adult or family member prior to having to take the matter to the court for resolution. Mediation or other dispute resolution processes could be informal (e.g. carried out by the Office of the Public Guardian) or more formal, using existing alternate dispute resolution mechanisms, where available.

E. Removing the private guardian or trustee

The new Act should clarify that the court may remove a guardian or trustee and appoint a suitable replacement. This remedy could be sought where an investigation by the Public Guardian or Public Trustee showed that the guardian or trustee was not capable of making reasonable decisions, was taking advantage of or abusing the adult, or was not complying with an order or with the Act. It could also be sought in a situation where no investigation was conducted.

F. Temporary emergency interventions

- (a) If a financial institution has reasonable grounds to believe that an adult is suffering financial abuse or is in danger of suffering a serious financial loss because of diminished decision-making capacity, the Act should authorize the financial institution to suspend payment or withdrawal of funds from the adult's account for a short period (e.g. five business days). The financial institution should be required to notify the Public Trustee of the action and the reason for doing so.
- (b) When the Public Trustee is notified that a financial institution has suspended payment or withdrawal of funds from an adult's account, the Public Trustee should be required to investigate the matter.
- (c) The new Act should authorize the Public Guardian to interview the adult and all relevant parties if they receive a complaint or concern about the actions of a private guardian. When the assistance of the police is necessary, the Act should authorize the Public Guardian to obtain a court order instructing the police to assist in removing and transporting an incapable adult to a place of safety on a temporary basis. Public Guardians should be able to access the justice system on a 24-hour-per-day basis for the purpose of initiating or enforcing temporary protective measures, as necessary. The Act should require the Public Guardian to determine whether any further action or order is required from the court.
- (d) The new Act should authorize the court to hear applications for emergency protective orders either (i) in situations where a guardianship or trusteeship order has been granted or (ii) in situations where there is no guardianship or trusteeship order, but there is reason to believe the adult is incapable and there is a need for protective measures.

G. Consequences for failing to review appointment order when required

- (a) Where a guardian fails to have an order reviewed within the period ordered by the court, after a reminder notice has been sent to the guardian, the new Act should state that the guardianship order is terminated and the authority of the guardian lapses. The Act should allow for a reasonable grace period, as defined in the regulations, before terminating the order. The Act should provide an expeditious mechanism to appoint an alternate guardian or the Public Guardian as a replacement guardian.
- (b) If a trustee does not apply for a review when required to do so, the Act should provide an expeditious mechanism for the Public Trustee to bring the matter to the attention of the court for appropriate action.

14. Powers and duties of Public Guardian and Public Trustee

Except as otherwise specifically indicated previously in the recommendations, any provisions of the *Dependent Adults Act* that apply specifically to the Public Guardian as guardian or the Public Trustee as trustee and any provisions of the *Public Trustee Act* that apply specifically to the Public Trustee as trustee would remain unchanged.

15. Access to personal/confidential information and protection of personal information

- (a) The new Act should provide a mechanism for a prospective private guardian or trustee to obtain information (e.g. financial or health care records) relevant to making their application for a guardianship/trusteeship order. The Act should ensure that if the provisions for accessing personal information are inconsistent with or conflict with the *Freedom of Information and Protection of Privacy Act*, the *Health Information Act*, the *Personal Information Protection Act* and the *Personal Information Protection and Electronic Documents Act* (if legally possible), they will operate despite the provisions of the above Acts.

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- (b) The Act should specify who may examine the contents of court files relating to incapable adults.
 - (c) Subject to (d) below, the Act should restrict the publication of information identifying someone as the subject of proceedings under the Act or that otherwise describes proceedings under the Act.
 - (d) The new Act should provide for the establishment of a registry of information pertaining to the appointment of substitute decision-makers. The registry should be maintained by the Public Guardian or the Public Trustee. The regulation should specify the information to be recorded in the registry and who should have access to it.
 - (e) The Act should impose specific restrictions and duties on all guardians and trustees relating to the use, disclosure, protection and destruction of records and personal information that they acquire in connection with their duties.

16. Repeal provisions regarding compulsory care orders and certificates

- (a) The provisions in the current Act regarding the granting of compulsory care orders and compulsory care certificates should not be added to the new Act since they duplicate existing provisions in the *Mental Health Act*.
- (b) The new Act should contain transitional provisions to deal with existing compulsory care orders and certificates.

V. DETAILED RECOMMENDATIONS:

Personal Directives Act

The *Personal Directives Act* and the *Personal Directives Regulation* should be revised to incorporate the following recommended changes:

1. New provision for adding guiding principles

The *Personal Directives Act* should begin with the following principles to guide decision-making under the Act and to assist in interpreting and applying the Act:

- An adult is presumed to be capable of making a decision until he or she has been determined incapable of making that decision;
- An adult has the right to autonomy and to plan for the making of future personal decisions but cannot be compelled to make a personal directive nor to be an agent under a personal directive;
- An adult who lacks the capacity to make a decision about a matter is entitled to be informed about and, to the best of his or her ability, participate in decisions that affect him or her; and
- An agent must make informed decisions on behalf of the maker based on the written instructions of the maker and, where none are available, on the previously expressed preferences of the maker. Decisions must be based on the known beliefs and values of the maker and be in best interests of the maker.

2. New provision for voluntary use of a standard form

The Regulation under the *Personal Directives Act* should include a standard form that may be used to write a personal directive. The standard form should be clear, easy to read and contain (in the form of options) all of the elements that a maker may wish to include in the directive.

3. New provision to require a maker to give a copy of the personal directive to the agent(s) and encouraging the agent(s) to consent to being named as agent(s)

The *Personal Directives Act* should require a maker to give a copy of his or her personal directive to the person(s) selected as his or her agent. The Act should encourage the named agent(s) to consent to being named as the agent(s). Agents will be required to follow the instructions of the maker, and to act in accordance with the guiding principles of the *Personal Directives Act*.

4. New provision for voluntary registration of personal directives

- (a) The *Personal Directives Act* should allow, but not require, the maker to register a personal directive. The method of registration will be determined by Regulation. The registration information should include the fact that a personal directive exists, its date, location and contact information for the agent(s). The method for registration should ensure ease of access to the information by those persons who need it but also respect the privacy of the maker and agent(s). The Act should require the agent to consent to having his or her contact information added to the registration.
- (b) If the maker updates or revokes and replaces his or her personal directive, makes a personal directive about a personal matter that was not covered in another directive, changes a named agent or the agent's contact information has changed, the maker is responsible for updating the registration information about his or her personal directive.

5. New provision to recognize personal directives from outside Alberta

The *Personal Directives Act* should recognize personal directives or other similar advance-planning documents for personal decision-making, provided they meet the requirements for being a valid personal directive under Alberta's Act.

6. *New provision for allowing for the expansion of the scope of who may determine incapacity*

- (a) The *Personal Directives Act* should allow for the expansion of the current scope of who may assess capacity. Currently, either two service providers, one of whom must be a physician, psychologist or a person designated in a personal directive to determine the maker's capacity, after consulting with a physician or psychologist, may make a written declaration that the maker lacks capacity to make a personal decision. It is recommended that the scope of capacity assessors be expanded to include a person designated in the Regulation as being qualified to do assessments of capacity. This list would not only include currently registered members of the College of Physicians and Surgeons and the College of Psychologists, but also currently registered members of the following Colleges: Registered Nurses, Registered Psychiatric Nurses, Registered Social Workers and Registered Occupational Therapists.
- (b) To be designated as a qualified assessor, the Regulation should require the member to take certain initial and annual training, carry a prescribed amount of comprehensive general liability insurance, conduct a prescribed number of assessments within a two-year period and submit two assessments for review by experts in the field. The training requirements would not apply to members of the College of Physicians and Surgeons. Members of the College of Physicians and Surgeons who do not wish to be certified as assessors should not be prohibited from conducting assessments of capacity. However, the College should be encouraged to update its guidelines for members in the area of capacity assessment and to include the need to ensure continued competency in this area in its peer review requirements.
- (c) Assessments of capacity done by physicians that are currently paid for by the Alberta Health Care Insurance Plan should continue to be covered when an adult is receiving a health care service and an assessment of capacity is part of the health care services being provided. The Regulation should contain a schedule of fees to control the costs of other capacity assessments and to control the costs paid by the adult or by whoever is requesting the assessment. The costs could be borne by the Ministry of Seniors and Community Supports for low-income adults or in hardship cases.

7. *New process for determining incapacity*

- (a) The *Personal Directives Act* should outline a new process for the cognitive and functional assessment of capacity using assessment tools that are standardized and applied consistently by professionals who are designated as qualified capacity assessors in the Regulation (see recommendation 6).
- (b) The assessment process should incorporate the following principles:
- An adult is presumed to be capable of making a decision until he or she has been determined to be incapable of making that decision;
 - The assessment should be specific to the areas(s) of decision-making needed (e.g. health care, accommodation, etc.);
 - The process should take into consideration the fact that capacity can fluctuate and that an adult may be capable of making a decision at one time but not at another; and
 - The inability to communicate by spoken word or in writing should not necessarily mean the adult is incapable of making a personal decision if other means of communication can be used to convey a decision.
- (c) The process should require an assessment to be carried out by two assessors or by a person named in the personal directive to assess capacity, after consulting with an assessor. In both cases, the persons conducting the assessments must agree that the individual is incapable of making a personal decision. The Act should also ensure that a medical expert is involved in the process.
- (d) In emergency situations, an emergency medical technician or paramedic should be able to make a temporary determination of incapacity, after consulting with another assessor, for the purpose of bringing a personal directive into effect for 72 hours. During that time, a *Determination of Incapacity to Make a Personal Decision Form* must be properly completed for the personal directive to continue to be in effect.

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- (e) The Regulation should include a new *Determination of Incapacity to Make a Personal Decision Form* to replace the current *Declaration of Incapacity Form*. One of the major components of the form should be the written reasons given by the assessor for concluding that the individual lacks capacity. The assessor will be required to assess the maker's ability to acquire, process and retain information, communicate a decision and identify the consequences of making or not making the decision, as well as assessing in which areas the adult has lost the capacity to make personal decisions.
- (f) The assessor must provide a copy of the *Determination of Incapacity to Make a Personal Decision Form* to the maker and all agents.

8. New provision to clarify that a personal directive is only in effect when it has been activated in accordance with the Act and Regulation

- (a) The *Personal Directives Act* should clarify that a personal directive is not in effect unless the *Determination of Incapacity to Make a Personal Decision Form* has been properly completed. The Act should provide for an exception to this requirement in the case of an emergency medical technician or paramedic who is authorized to make a temporary determination of incapacity for the purpose of bringing a personal directive into effect.
- (b) The Act should clarify that an agent has no authority to make a decision for a maker until a personal directive has been activated (or has come into effect as set out in (a) above).
- (c) The Act should clarify that a service provider cannot act on the basis of a decision made by an agent unless the agent provides proof that the personal directive has been brought into effect by producing a copy of the completed *Determination of Incapacity to Make a Personal Decision Form*.

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- (d) If, at the time of making a personal directive, the maker does not understand the nature and effect of making a personal directive, the Act should state that the personal directive is not valid.
 - (e) The Act should clarify that in the event that a maker regains the capacity to make a personal decision, a *Determination of Regained Capacity Form* must be signed, using the process outlined in the Regulation. The agent and/or maker are responsible for keeping track of and providing a copy of the *Determination of Regained Capacity Form* to a service provider.

9. New process for re-assessing capacity and determining regained capacity

- (a) The *Personal Directives Act* should clarify that an agent has a duty to consider whether the maker is capable of making a personal decision before making a decision on behalf of the maker.
- (b) The Act should provide that where an agent and service provider both agree that the maker has regained the capacity to make personal decisions over a sustained period of time, the agent and service provider must complete a written *Determination of Regained Capacity Form*, stating that the personal directive is no longer wholly or partially in effect. *The Determination of Regained Capacity Form* should be evidence of the fact that the personal directive is not in effect. The personal directive should lie dormant until it needs to be brought back into effect, if ever.
- (c) A copy of the *Determination of Regained Capacity Form* should be given by the person completing the form to the maker, the agent (if any), the service provider and to any other person designated in the personal directive as needing to receive a copy.
- (d) If there is a disagreement between the agent, maker and/or service provider about a significant or material change in the maker's capacity, the capacity of the maker must be re-assessed (as in recommendation 7). If the agent does not request a re-assessment, the maker or a service provider can contact the Office of the Public Guardian to investigate.

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- (e) The maker may request a re-assessment of capacity if he or she believes that he or she has regained the capacity to make a personal decision, but may only have one re-assessment of capacity done within a six-month period unless there is clear evidence that the maker has regained decision-making capacity.
 - (f) The costs of a re-assessment should be covered in the same way as assessments of capacity (see recommendation 6(c)).

10. New provision for allowing an adult with capacity limitations to make a personal directive with safeguards

- (a) The *Personal Directives Act* should allow an adult with capacity limitations to make a personal directive if they understand the nature and effect of making a personal directive, but only in those areas in which a guardian does not have decision-making authority.

11. New provision for automatically reviewing the authority of an agent upon separation, divorce or termination of an adult interdependent relationship when the sole agent is a spouse or adult interdependent partner

- (a) Once a personal directive is in effect and where a spouse or adult interdependent partner is the sole named agent, upon the separation or divorce of the maker from the spouse and upon the termination of an adult interdependent relationship, the Act should allow an interested party to apply to the court for a review. The purpose of the review would be to determine whether the authority of the agent should be revoked.
- (b) The definitions section of the Act should contain a new definition of “separation.”
- (c) If the authority of the agent is revoked, the court should be required to provide written notice of the revocation to any agent or alternate agent named in the personal directive and to any current service provider. The court should also be given the authority to appoint a temporary substitute agent using the criteria set out in recommendation 13.

12. New provision for allowing a personal directive to include directions about the care and education of minor children in care of maker

- (a) The *Personal Directives Act* should allow a personal directive to include directions for (an) individual(s) to undertake the temporary care and education of a maker's dependent child(ren) who has (have) not finished high school or alternative education until the guardianship of such dependent child(ren) is determined under the *Family Law Act* or other legislation or the maker regains capacity, whichever occurs first.
- (b) The *Family Law Act* (section 22) should be amended to allow for the appointment of an individual in a personal directive who will temporarily care for and provide for the education of minor children during any period of time in which the maker lacks capacity.
- (c) The definitions section of the Act should contain new definitions for "dependent child" and "personal matter" and the section of the Act that prescribes the contents of a personal directive should be amended to add this area of instructions.
- (d) At the time of making the personal directive, the Act should require the consent of the individual named in the personal directive to undertake the temporary care and education of a dependent child during a period of time in which the maker lacks capacity.

13. New provision for appointing temporary substitute agents

- (a) The *Personal Directives Act* should provide that where no agent is named in a personal directive or the named agent is unavailable, unable or unwilling to act, a service provider may choose the first person in a list of persons who are available and qualified under the Act to make a personal decision only in the areas of health care treatment and admission to a care facility on behalf of the maker. The list should be: spouse or adult interdependent partner, adult child, parent, sibling, another relative or the Public Guardian.

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- (b) The Public Guardian should be given the authority to designate a person, including a friend, as a temporary substitute agent if there is no other person on the list in (a) that meets the requirements in the Act for being a temporary substitute agent (see (c) below).
 - (c) A temporary substitute agent should be at least 18 years of age, unless they are the spouse of the person on whose behalf they are to make a decision, be capable of making a personal decision, be available to make the decision, be willing to comply with the powers, duties and responsibilities of an agent (see recommendation 15), have no conflict with the maker that raises a reasonable doubt whether they will comply with the duties imposed by the Act, have knowledge of the maker's wishes regarding the decision or the maker's values and beliefs, and have had contact with the maker in the last 12 months.
 - (d) The service provider must canvass the first person on the list to see if he or she meets the above requirements and is willing to make the decision on behalf of the maker. If the first named person is unwilling, unable, unavailable or unqualified, the service provider will contact the next person(s) on the list until a qualified person is found and is willing to make the decision.
 - (e) The Act should provide the same protection from liability for a temporary substitute agent as an agent now has under section 28.
 - (f) If there is a dispute about the decisions of the temporary substitute agent, any interested person may have the matter reviewed by the Dependent Adults Appeal Panel under an expanded role under the *Dependent Adults Amendment Act*. The person who requests the review must state in writing that they are a suitable temporary agent who is willing to follow the requirements of the Act.

14. New provision for allowing the Public Guardian to be named as an agent in a personal directive

The *Personal Directives Act* should allow the Public Guardian to be named as the agent or alternate agent in a personal directive if the Public Guardian has consented to this role and is given a copy of the personal directive.

15. New provision to clarify the powers, duties and responsibilities of agents

The *Personal Directives Act* should clearly outline the rights, powers, duties and responsibilities of agents and temporary substitute agents including:

- An agent or temporary substitute agent is entitled to receive any and all information relevant to making a decision;
- An agent must be given a copy of the maker's personal directive;
- An agent is encouraged to consent to being named as the agent (or alternate agent). The agent is required to follow the instructions of the maker in the personal directive;
- An agent must agree to comply with the guiding principles in the Act and with the duties and responsibilities of agents under the Act;
- An agent may follow the verbal wishes of a maker that are more recent than the written instructions in a personal directive if:
 - the wishes relate to the same kind of personal matter the agent must make a decision about;
 - the wishes were expressed when the maker was capable and the agent is aware of them; and
 - the agent believes that the maker would still act upon those wishes if he or she was capable of making the decision;
- If the more recent verbal wishes of the maker are in direct opposition to the written instructions in the personal directive, the agent must communicate his or her evidence of this to the service provider and to any other agents. Any interested person may ask the Public Guardian to investigate the matter and prepare a report for the court. The court may review a decision of an agent that has been made based on the more recent verbal wishes of the maker;

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- The agent must account for personal decisions made by the agent under a personal directive;
 - An agent who is not incapacitated may resign as agent at any time but must do so in writing;
 - If an agent is incapable of resigning, an assessor should make a statement in writing that the agent can no longer make personal decisions on behalf of the maker because the agent has lost capacity; and
 - If there are concerns about the capacity of an agent, the matter should be reviewed by the court, if warranted, after an investigation and report by the Public Guardian.

16. Reviewing the actions or decisions of agents

- (a) The *Personal Directives Act* should provide for the review of an agent's action(s) or decision(s) if the maker, an alternate agent, a service provider or other individual believes, on reasonable grounds, that the action(s) or decision(s) of the agent are not being made in the best interests of the maker.
- (b) The review may be carried out by the court, with the power to order an assessment of the agent's capacity, if warranted, following an investigation and report by the Public Guardian.
- (c) The court may confirm the decision of the agent, revise or modify the decision, terminate the designation of the agent, substitute its own decision for that of the agent or find a temporary substitute agent.

