



NOVA SCOTIA  
BARRISTERS' SOCIETY

## MEMORANDUM TO COUNCIL

**From: Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee**

---

**Date:** January 24, 2025

---

**Subject:** Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Personal Directives

---

**For:**      **Approval**                      **Introduction X**                      **Information**

DATE January 24, 2025	Council	Introduction
	Council	Approval

**Recommendation/Motion:**

This is the introduction to Council of a proposed new standard – Personal Directives - by the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee. An equity lens was applied while drafting this standard. Upon being approved for introduction, the proposed standard will be circulated to the membership for comments and will be delivered to the Society’s equity manager for circulation to the equity committees.

**Rationale / Executive Summary:**

Though a standalone document, a Personal Directive is part of estate planning along with a will and a power of attorney. Estate planning includes appointing a designate to make care decisions while a person is alive by way of a Personal Directive pursuant to the *Personal Directives Act*, SNS 2008, c 8. Should a person become incapacitated without having a Personal Directive, it is then too late for that person to appoint another to make care decisions. When drafting a Personal Directive, it is important to follow the process set out in the Act failing which the document could be invalid in its face.

**Exhibit:**

Draft Standard – Personal Directives

Existing Standard	Proposed Standard	Rationale
N/A	<p style="text-align: center;"><b>PERSONAL DIRECTIVE PRACTICE STANDARD</b></p> <p>When doing estate planning with a client, a lawyer should discuss the necessity of having a <b>personal directive</b> and advise of the consequences of not having one.</p> <p>Before executing a personal directive, a lawyer must assess whether the client has the <b>capacity</b> to make a personal directive <i>[link to the capacity standard]</i>.</p> <p><b>PRACTICE NOTES</b></p> <p>A <b>personal directive</b> is a written document that sets out instructions, or an expression of the maker's values, wishes and beliefs, about future <b>personal care decisions</b> to be made on their behalf<sup>1</sup> by a <b>delegate</b> named by them in the document.</p> <p>A person with <b>capacity</b> may make a personal directive<sup>2</sup>.</p> <p><b>Capacity</b> means the ability to understand information that is relevant to the making of a personal care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or a lack of a decision<sup>3</sup>.</p> <p><b>Assessments of capacity</b> under section 10, 11 or 13 of the <i>Personal Directives Act</i> can only be done by a 'physician'<sup>4</sup> on the form prescribed in the legislation. <i>Note there is some discussion on expanding this to include allied health professionals who have completed training in capacity assessment.</i></p> <p><b>Delegate</b> means a person authorized under a personal directive to make, on the maker's behalf, decisions concerning the maker's personal care<sup>5</sup>.</p>	<p>Though a standalone document, a Personal Directive is part of estate planning along with a will and a power of attorney. Estate planning includes appointing a designate to make care decisions while a person is alive by way of a Personal Directive pursuant to the <i>Personal Directives Act</i>, SNS 2008, c 8. Should a person become incapacitated without having a Personal</p>

<sup>1</sup> *Personal Directives Act* s.3(1)(a)

<sup>2</sup> *Ibid* s.3(1)

<sup>3</sup> *Ibid* s.2(a)

<sup>4</sup> *Personal Directives Act* Regulations 2(1) and 4

<sup>5</sup> *Personal Directives Act* s. 2(e)

	<p><b>Personal care</b> includes but is not limited to health care, nutrition, hydration, shelter, residence, clothing, hygiene, safety, comfort, recreation, social activities, support services and any other personal matter that is prescribed by the regulations<sup>6</sup>.</p> <p>Except in the case of a minor spouse, <b>a delegate must be</b><sup>7</sup>:</p> <ul style="list-style-type: none"> <li>•of the age of majority</li> <li>•have capacity and</li> <li>•cannot be a person who provides personal care services for compensation to the maker (unless they are the maker’s spouse or a relative listed in section 2(j) of the <i>Personal Directives Act</i> or unless the personal care services for compensation was specifically authorized in the personal directive).</li> </ul> <p>A personal directive that appoints <b>two or more delegates</b> must assign to each of the delegates authority with respect to different matters.<sup>8</sup></p> <p>An <b>alternate delegate</b> named in a personal directive has authority to act if a delegate<sup>9</sup>:</p> <ul style="list-style-type: none"> <li>•declines to act</li> <li>•is unavailable</li> <li>•resigns, dies, becomes incapable of acting as delegate</li> <li>•has their authority removed by the court or as otherwise provided in the personal directive document.</li> </ul> <p>A delegate is not entitled to <b>remuneration</b> for exercising any authority under a personal directive<sup>10</sup> unless expressly authorized in the personal directive. This does not include reimbursement for reasonable out-of-pocket expenses incurred by a delegate in exercising their authority under a personal directive<sup>11</sup>.</p> <p>A delegate <b>cannot delegate decision-making authority</b> under a personal directive<sup>12</sup> unless the personal directive expressly authorizes the delegation of authority.</p>	<p>Directive, it is then too late for that person to appoint another to make care decisions. When drafting a Personal Directive, it is important to follow the process set out in the Act failing which the document could be invalid in its face.</p>
--	--	--

<sup>6</sup> *Ibid* s. 2(l)

<sup>7</sup> *Ibid* s.3(1) & (4)

<sup>8</sup> *Ibid* s.3(5)

<sup>9</sup> *Ibid* s. 3(6)

<sup>10</sup> *Ibid* s.8

<sup>11</sup> *Personal Directives Act* Regulation 2(3)

<sup>12</sup> *Personal Directives Act* s.7

	<p>An individual can make <b>more than one personal directive</b><sup>13</sup>. If the provisions of the two personal directives cannot reasonably be reconciled, then to the extent they conflict the most recent provision will prevail.<sup>14</sup></p> <p>Unless the personal directive expressly provides otherwise, where, after making a personal directive in which the maker's spouse is appointed as delegate, <b>the spouse is no longer a spouse</b>, the appointment of the spouse as delegate is revoked.<sup>15</sup></p> <p>The <b>elements</b> of a valid <b>personal directive</b> are<sup>16</sup>:</p> <ul style="list-style-type: none"> <li>•Must be in writing</li> <li>•Dated</li> <li>•Signed by the maker or, where the maker is unable to sign, by a person who is not a delegate or a spouse of a delegate on behalf of the maker at the maker's direction and in the maker's presence and in the presence of a witness</li> <li>•Must be signed in the presence of a witness who is not the delegate or the spouse of the delegate and the witness must also sign the document.</li> </ul> <p>Subject to the <i>Hospitals Act</i> and the <i>Involuntary Psychiatric Treatment Act</i>, <b>when making any decision a delegate shall</b><sup>17</sup>:</p> <ul style="list-style-type: none"> <li>•follow any instructions in a personal directive unless <ul style="list-style-type: none"> <li>(i) While they still had capacity the maker subsequently expressed a contrary wish</li> <li>(ii) Technological changes or medical advances make the instruction inappropriate in a way that is contrary to the intentions of the maker or</li> <li>(iii) Circumstances now exist that would have caused the maker to set out different instructions had the circumstances been known.</li> </ul> </li> <li>•in the absence of instructions, act according to what the delegate believes the wishes of the maker would be based on what they know of the values and beliefs of the maker and any other written or oral instructions they received; and</li> </ul>	
--	---	--

<sup>13</sup> *Ibid* s.4(1)

<sup>14</sup> *Ibid* s.4(2)

<sup>15</sup> *Ibid* s.6

<sup>16</sup> *Ibid* s.3

<sup>17</sup> *Personal Directives Act* s.15(1) & 15(2)

•where the delegate does not know the wishes, values and beliefs of the maker, make the personal care decision they believe would be in the **best interests of the maker**. Factors to be considered by the delegate when deciding “**best interests**” are<sup>18</sup>:

- whether the individual’s condition or well-being is likely to be improved by the proposed care or will not deteriorate because of it
- whether the individual’s condition or well-being is likely to improve without the proposed care or is not likely to deteriorate without it
- whether the benefit the individual is expected to obtain from the proposed care is greater than the risk or harm or other negative consequences
- whether the benefit of a less restrictive or less intrusive form of available care is greater than the risk of harm or other negative consequences.

A Personal Directive may be **combined with an Enduring Power of Attorney** in one document provided the instrument conforms to the form and execution requirements of the *Personal Directives Act*<sup>19</sup>. A lawyer should consider the possible negative implications of combining these documents, including the different standards of capacity for creating a personal directive and a power of attorney document, different triggering events and that certain people may be precluded from acting under a power of attorney as per the legislation.

**A personal directive ceases to have effect**<sup>20</sup>:

- whenever the maker has capacity
- on the maker’s death
- where the personal directive is revoked by the maker who has capacity and makes the revocation in writing, executed in the same way as the personal directive
- on a determination by the court
- when a maker with capacity destroys the originals of the personal directive with the intention of revoking it.

If an **individual lacks capacity, has no legal representative, no Power of Attorney and has not made a personal directive** authorizing a delegate or setting out instructions or wishes regarding health

<sup>18</sup> *Personal Directives Act* Regulation 6

<sup>19</sup> *Personal Directives Act* s. 23

<sup>20</sup> *Ibid* s.12

care, a decision to accept an offer of placement in a continuing-care home or home-care services, **these decisions** may be made on behalf of the person by<sup>21</sup>

- the “nearest relative” who has **capacity** and **is willing** to make the decision; or
- where there is **no nearest relative** who has capacity and is willing to make the decision, **the Public Trustee may act as the substitute decision maker (SDM) of last resort.**

“**nearest relative**” means the highest ranking relative of the person listed in the following hierarchy<sup>22</sup>:

- (i) spouse,
- (ii) child,
- (iii) parent,
- (iv) person standing in loco parentis,
- (v) sibling,
- (vi) grandparent,
- (vii) grandchild,
- (viii) aunt or uncle,
- (ix) niece or nephew,
- (x) other relative,

who, except in the case of a minor spouse, is of the age of majority.

**A nearest relative shall not exercise SDM authority unless** they<sup>23</sup>

- have been in contact with the person over the preceding twelve-month period or has been granted a court order to shorten or waive the twelve-month period (does not apply if they are the spouse);
- is willing and able to assume the responsibility for making the decision;
- knows of no person of higher rank in priority on the nearest relative hierarchy who is willing and able to make the decision; and
- makes a statement in writing certifying the relationship to the person and that they know of no higher-ranking person

---

<sup>21</sup> *Ibid* s.14(1)

<sup>22</sup> *Ibid* s.2(j)

<sup>23</sup> *Personal Directives Act* s.14(2)

Section 21 of the ***Personal Health Information Act*** allows a substitute decision-maker to access and consent to the collection, use or disclosure of personal health information when it is in the best interests of the individual who is the subject of the information to do so.

### **CASE LAW**

The *Personal Directives Act* has been cited a number of times in reported decisions in Nova Scotia, Alberta and BC courts. In the majority of those decisions, the Act was not in issue before the court. Rather, it was generally referenced for the definitions in the legislation, but the matter involved another issue.

*Bentley v. Maplewood Seniors Care Society*, 2014 BCSC 165

*Vernon v. Sutcliffe*, 2014 NSSC 376

*Baird Estate (Re)*, 2014 NSSC 266

*NS (Public Trustee) v. I.W.*, 2014 NSCA 10

*B.M. v. K.S.*, 2015 NSSC 105

*Nova Scotia (Health and Wellness) v. F.S.*, 2017 NSCC 262

*Cameron v. NSAHOLTTDP*, 2018 NSSC 90

*Nova Scotia (Department of Community Services) v. C.R.*, 2019 NSSC 84

*C.R. v. Nova Scotia (Department of Community Services)*, 2019 NSCA 89

*Sorenson v. Swinemar*, 2020 NSCA 62

*Withenshaw v. Withenshaw*, 2020 NSSC 208

*Rana v. Rana*, 2022 ABQB 440

**ADDITIONAL RESOURCES**

*Personal Directives Act* S.N.S. 2008, c.8  
<https://nslegislature.ca/sites/default/files/legc/statutes/persdir.htm>

Personal Directives Regulations, made under Section 32 of the *Personal Directives Act* S.N.S. 2008, c. 8  
<https://novascotia.ca/just/regulations/regs/pdpersdir.htm>

Personal Directives in Nova Scotia  
<https://novascotia.ca/just/pda/>

Personal Directives App - Legal Information Society of Nova Scotia  
<https://www.legalinfo.org/forms/personal-directive>

Personal Directives Booklet  
[https://novascotia.ca/just/pda/docs/PersonalDirective\\_Booklet.pdf](https://novascotia.ca/just/pda/docs/PersonalDirective_Booklet.pdf)

Dalhousie Health Law Institute  
[Advance Directives - End-of-Life Law and Policy in Canada | End-of-Life Law and Policy in Canada \(dal.ca\)](#)

**Sample Personal Directive**

*Note: Not all provisions in this sample document will be applicable to your client and may be removed.*

I, \_\_\_\_\_, of \_\_\_\_\_ in the Province of Nova Scotia make this personal directive pursuant to the *Personal Directives Act* (S.N.S. 2008 c.8). I revoke all previous personal directives and authorizations concerning personal care decisions being made by me with the exception of \_\_\_\_\_.

**Delegate Authorization**



I name the following person(s) to act as my delegate to make personal care decisions for me:

- \_\_\_\_\_

If my named delegate is unable or unwilling to act, then I name the following person to act as my delegate to make personal care decisions for me:

- \_\_\_\_\_

*Personal care as defined in section 2(l) of the Personal Directives Act includes, but is not limited to health care, nutrition, hydration, shelter, residence, clothing, hygiene, safety, comfort, recreation, social activities, support services and any other personal matter that is prescribed by the regulations.*

My delegates may  may not  sub-delegate their decision-making authority.

If my delegate is my spouse and we separate or divorce after I complete this personal directive, I do not wish my spouse to act as my delegate.

**The following people are NOT to be asked to make any personal care decisions for me:**

- 

**Instructions and wishes about personal care**

I want my delegate, statutory decision maker or health care providers to carry out the following instructions or wishes:

--	--	--	--

Prolonging my life would be unacceptable if my condition is irreversible and I am:

--

If I have a severe and irreversible condition, a terminal condition, or if I am in a permanent vegetative state:

--

In summary: \_\_\_\_\_  
\_\_\_\_\_

The following information is to help my delegate, statutory decision maker, or health care providers to understand my values and beliefs about my personal care:

**I value:**

When my delegate is making decisions about my personal care, I want them to talk with the following people, depending upon what is reasonable in the circumstances:

- 
- 

I instruct any person who is assessing my capacity to confer with the following person or people, who I feel know me well:

- 
- 

If I lose capacity, the following people must be told:

- 
- 

If I lose capacity, the following people must **NOT** be told:

- 
- 

**Renumeration**

I do  do not  want my delegate to be paid for making decisions under this personal directive.

I do  do not  want my delegate to be reimbursed for reasonable costs they incur while acting as my delegate.

**Signatures**

Signed in \_\_\_\_\_, Province of Nova Scotia on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Signature of individual completing the personal directive

**Witness**

I witnessed the above noted individual signing this Personal Directive.

\_\_\_\_\_  
Signature of witness

Printed name of witness: \_\_\_\_\_

Address and telephone number: \_\_\_\_\_

\*The witness cannot be the person named as a delegate or the spouse of a delegate.  
\*A spouse includes a person who is cohabiting with that person in a conjugal relationship, a registered domestic partner or common law partner.