



Mi'kmaw Wills & Estates:

A Guide For Nova Scotia Mi'kmaq Book Three: How to Write a Power of Attorney and Personal Directive

Revised January 2017



IMPORTANT

This guide contains general information and educational material for Nova Scotia Mi'kmaq who want to write their own Power of Attorney and Personal Directive. This publication is a general, plain-language guide to rules, documents and processes for writing a Power of Attorney and Personal Directive if you are a Status Indian and you live on reserve. While every effort has been made to ensure accuracy, this guide is neither a complete technical description nor an official interpretation of the subjects it discusses. This publication does not provide legal advice; if you have specific legal questions you should contact a lawyer.

The Legal Information Society of Nova Scotia offers a Lawyer Referral Service. This service provides an individual with an initial consultation of up to 30 minutes for a fee of \$20 plus tax. Please note that the lawyer will not do legal work for you during the initial 30-minute consultation. The lawyer is there to review your legal questions and talk about the options you may have, and how much it may cost to have the legal work done.

For more information about hiring a lawyer, please see Part Seven: *Hiring a Lawyer* on page 25 of this guide.

Lawyer Referral Service: (800) 665-9779 (toll free) or (902) 455-3135 (Halifax area).

Mi'kmaw Wills & Estates:

A Guide for Nova Scotia Mi'kmaq

Book Three: How to Write a Power of Attorney and Personal Directive
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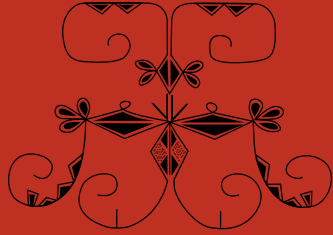
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List of Acronyms

CP	Certificate of Possession
CRA	Canada Revenue Agency
EPOA	Enduring Power of Attorney
<i>FHRMIRA</i>	<i>Family Homes on Reserve and Matrimonial Interests and Rights Act</i>
INAC	Indigenous and Northern Affairs Canada
MRP	Matrimonial Real Property
PD	Personal Directive
POA	Power of Attorney



Introduction

You may be well organized and have all your financial papers ready to access if something should happen to you. You may have your Will in place, so that your family is well taken care of in the event of your death. However, what would happen if you suddenly became incapable of managing your own affairs (you become very ill)? Who would manage your financial affairs and who would make tough decisions regarding your health care?

Having a **Power of Attorney (POA)**, an **Enduring Power of Attorney (EPOA)**, and a **Personal Directive (PD)** in place ensures that your legal, financial, and medical decisions are taken care of on your behalf. This guide provides information about POAs, EPOAs and PDs for **Status Indians** who are **Ordinarily a Resident on Reserve**. It also provides guidance for those who want to prepare their own documents. Among other things, this guide answers the following questions:

- What are POAs and EPOAs? How are they different?
- What is a PD?
- What is an Attorney? A Delegate? What responsibilities do they have?
- How do I revoke or cancel a POA, an EPOA, and a PD?
- What events will result in the termination of a POA, an EPOA, and a PD?
- How do I write my own POA, EPOA, and PD?

It is important to have these documents in place as part of your planning for a safe comfortable future. Use this guide as a tool to prepare your own POA, EPOA, and PD if:

- You are a Status Indian;
- You are Ordinarily a Resident on Reserve;
- You are 19 years of age or older;
- You are of sound mind (not Mentally Incompetent).

Power of Attorney: A legal document that allows you to give another person authority to make financial decisions on your behalf.

Enduring Power of Attorney: A legal document that allows you to give another person authority to make financial decisions on your behalf if you become Mentally Incompetent.

Personal Directive: A legal document that allows you to name a person to make personal and home care decisions for you when you are not capable of making those decisions for yourself.

Status Indian: A person who is registered as an Indian, in accordance with the *Indian Act* (Canada).

Ordinarily a Resident on Reserve: Is when a person habitually makes the reserve their home. A person who must spend time in a hospital or prison; or leaves the reserve in order to attend school, work, to go hunting or to serve in the military; or lived off-reserve for most of their life, but moved to the reserve and was living on the reserve at the time of death may still be "Ordinarily a Resident on Reserve".

Mentally Incompetent: The *Indian Act* defines a Mentally Incompetent Indian to be someone who has been declared mentally defective or incompetent for the purposes of any laws of the province in which that person lives.

This guide does not provide specific legal advice; it only provides general information. You may have a unique set of circumstances that will require you to talk to a lawyer, especially if:

- You are concerned about a loved one whose health is failing and who seems unable to manage their personal and financial affairs; or
- You have been managing the personal and financial affairs of someone who has been diagnosed as Mentally Incompetent, and they do not have a EPOA or PD in place.

You and your lawyer should also contact Indigenous and Northern Affairs Canada (INAC). The **Minister** has exclusive jurisdiction over the **Property** of a Mentally Incompetent Status Indian who is Ordinarily a Resident on Reserve.¹

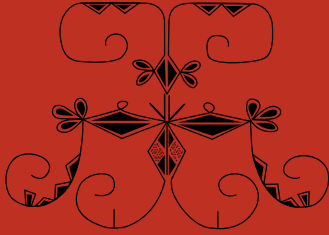
Minister: Means the Minister of INAC.

Property: Land, possessions and other items a person has legal ownership of. There are two forms of property: Real Property and Personal Property.



Part One

What is a Power of Attorney?



A POA is a legal document that gives another person the power to manage your Property and legal affairs when you are unable to do so on your own. In a POA the person you appoint to act on your behalf is called an **Attorney**, while you are known as the **Donor**.

Depending on your preference, your POA may grant specific powers, or it may grant a general power to your Attorney to do anything they need to do to manage your affairs. Appointing someone to act under your POA does not remove your legal ability to act on your own behalf, as long as you remain Mentally Competent. However, if you become Mentally Incompetent, your POA becomes invalid, unless it is an EPOA,² which is discussed on page 6 of this guide under Part Two – *What is an Enduring Power of Attorney?*

Why Do I Need a POA?

Some reasons for having a POA in place include:

- You are too ill, have a disability or intend to travel and will not be able to manage your own affairs, and you would like someone to help you; or
- You want to give someone the power to deposit and withdraw money from your bank account, pay bills, and so forth.

Attorney: A person authorized under a POA and EPOA to make decisions, on the Donor's behalf, concerning the Donor's financial and legal affairs.

Donor: The person granting the authority for someone to act on behalf of them under a POA.



How Do I Make Sure My POA is Valid?

Under the *Powers of Attorney Act*,³ a POA is only valid if:

- You are 19 years or older when making your POA;
- The appointed Attorney is 19 years old or older;
- It is in writing;
- You are Mentally Competent; and
- You sign the POA.⁴

Your POA may not be valid if you move outside of Nova Scotia. In this case, you should draft a new POA in accordance with the laws of the province or territory you are moving to.

How Do I Begin Writing My POA?

The *Indian Act*⁵ does not describe how a POA should be written. However, a POA should generally contain the following:

- A statement that the document is a Power of Attorney. Include your full name, any nicknames you are known by should be included in brackets, and your address (“This is a Power of Attorney given by me, [LEGAL NAME] (NICKNAME) of [ADDRESS] ...”);
- A statement that you cancel or revoke all previous Powers of Attorney made by you;
- A statement appointing your first named Attorney (“I appoint, [LEGAL NAME] of [ADDRESS], to act as my Attorney”);
- A statement that names an alternate Attorney in the event that your first named Attorney is unable or unwilling to act;
- The date when the POA is to become effective (a specific future date or immediately);
- The date when the POA will end (a specific future date or after the completion of a specific transaction);
- A list of what powers and responsibilities your Attorney will have (general powers or specific powers);
- Your signature and the date.



In order to prevent someone from altering your POA you can take an extra step and initial and number each page. Although not legally required, it is also a good idea to have your signature and initials witnessed by someone who is 19 years of age or older and of sound mind, who is not your named Attorney or your spouse.

Where Should I Store My POA?

Your document should be kept in a safe place (a fireproof safe). Make sure your Attorney knows where you keep your POA. You should not keep your POA in a safety deposit box at a bank. Doing this will make it difficult for your Attorney to access it should something happen to you.

Additionally, if you want your Attorney to step into the role immediately, you or your Attorney should give copies of your POA to any parties (including financial institutions) that your Attorney will be dealing with on your behalf. However, if your POA is only going to take effect after you have become Mentally Incompetent, then have someone you trust hold onto a **Certified Copy** of the POA until it is needed.

An EPOA grants the same powers as an ordinary POA, but it will also state that your Attorney will be able to act on your behalf even after you have become Mentally Incompetent.⁶

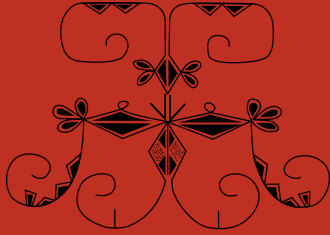


Certified Copy: A photocopy of a document that contains a statement made by a professional affirming that they have seen the original document, the information on the copy matches the original, and the photocopy has not been altered in any way.



Part Two

What is an Enduring Power of Attorney?



A POA will end and cannot be used if you become Mentally Incompetent. If this were to happen, loved ones would have to have a **Guardian** appointed over you and your Property. Alternatively, INAC may appoint a person or a group to look after your legal and financial affairs. INAC or the court could appoint someone you do not know or trust. This is why it is important to have an EPOA.

Why Do I Need an EPOA?

Just as a **Will** is important for having someone administer your **Estate** after death, an EPOA is equally important for having someone manage your affairs in the event that you become Mentally Incompetent. You should consider writing an EPOA if:

- You want to avoid involving INAC in your personal affairs.
- You have been diagnosed with an illness that will reduce your mental capacity or physical mobility (cancer, dementia, Alzheimer's).
- You simply want to make arrangements now, just in case, while you are healthy and mentally competent. Planning for something unforeseen that may limit your ability to manage your own affairs is always a good idea.



Guardian: The person named in a Will or appointed by the court to care for Minor children or Mentally Incompetent dependants of the deceased.

Will: A signed written or typed document stating how a person wants his or her property to be distributed and debts paid after they die. The Will also names an Executor, who will be responsible for carrying out the deceased's final wishes.

Estate: Any property the deceased owned at the time of death (that may include your home, car, bank accounts, household goods, investments).

How Do I Make Sure My EPOA is Valid?

In addition to the rules set out for an ordinary POA, an EPOA has three additional requirements:

- It must be witnessed by someone who is 19 years or older and of sound mind;
- Your witness must not be the Attorney or the spouse of the Attorney;⁷
- It must state that it is to continue to be effective in the event that you become Mentally Incompetent.⁸



How Do I Begin Writing My EPOA?

Writing an EPOA is very similar to writing an ordinary POA (see page 4). However, there are a few differences in wording, which is outlined below. An EPOA generally contains the following:

- A statement that the document is an Enduring Power of Attorney. Include your full name, any nicknames you are known by should be included in brackets, and address (“This is a **Enduring Power of Attorney** given by me, [LEGAL NAME] (NICKNAME) of [ADDRESS] ...”);
- A statement that you cancel or revoke all previous ordinary and Enduring Powers of Attorney made by you;
- A statement identifying your first named Attorney (“I appoint, [LEGAL NAME] of [ADDRESS], to act as my Attorney”);
- A statement naming an alternate Attorney in the event that your first named Attorney is unable or unwilling to act;
- The date when the POA is to become effective and a **statement that it shall continue even if you become Mentally Incompetent**;
- A list of what powers and responsibilities your Attorney will have;
- Your signature and the date;
- **A witness signature and the date.**



As with an ordinary POA, it may be a good idea to initial and number each page of your EPOA so it cannot be altered by anyone other than you.

INAC's Role and Your EPOA

Section 51 of the *Indian Act* provides specific rules for dealing with the Property of Mentally Incompetent Indians. This section of the *Indian Act* can apply to an individual who has suffered a severe head injury due to an accident or a person who is suffering from an ongoing mental or cognitive illness (such as dementia). When a Status Indian is declared Mentally Incompetent, INAC assumes jurisdiction and authority over their Property.

In the past, INAC has been closely involved in managing the Property of a Mentally Incompetent Indian who is Ordinarily a Resident on Reserve through the Living Estates Program. INAC considers Living Estates administration to be a private family matter. As a result, INAC has reduced its role to an Administrator of Last Resort, meaning a departmental administrator will only be appointed if there are no eligible **Heirs** or family members willing and able to manage the Estate.

Heir: For the purposes of the *Indian Act*, an Heir is a person who is legally entitled to a share of the deceased's Estate when there is no Will.



A. Declaration of Mental Incompetence

If you become Mentally Incompetent there is a process that must be followed to ensure your Estate is being managed properly. First and foremost, INAC must be notified and provided proof.

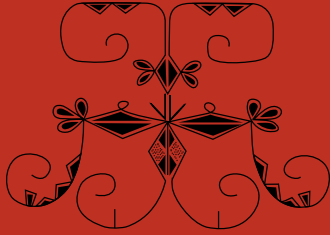
To get proof of your incompetence, the Provincial Court must declare you Mentally Incompetent. The court must be provided with two medical certificates from doctors that state they have examined you and have come to the conclusion that you are Mentally Incompetent. The court will then review the evidence and decide whether or not to declare you Mentally Incompetent. If the court declares you Mentally Incompetent, it will issue a Court Order and appoint a Guardian. The Guardian appointed by the court is someone who takes care of your healthcare needs, but they will not be responsible for managing your Property.

Once INAC has received Certified Copies of the Court Order and the two doctors' certificates, they will freeze all of your accounts. Next, they will determine if there is an EPOA in place. If there is, INAC will request a Certified Copy of your EPOA and the Attorney you have named will officially be appointed. If there is no EPOA in place, INAC will contact your family members and ask if anyone wishes to be appointed as your Attorney. While INAC has control, they will have the same powers and responsibilities as an Attorney.



Court Order: A written direction, finding, or command delivered by a court or judge.





Part Three

Your Attorney under a POA and EPOA

What Is an Attorney?

The person you appoint under a POA and an EPOA is called your Attorney. This is the person you authorize to act on your behalf in legal and financial matters. In a POA and EPOA, you are known as the Donor because you are the person giving the authority.

Do not let the word Attorney confuse you; the person you choose to act does not have to be a lawyer; in fact, it can be any person you trust (your spouse, son, daughter, or friend). Do not appoint a person you are currently paying to provide you personal or health care, unless that person is a family member. Appointing a care provider could create a conflict of interest where your Attorney is acting as employer and employee.

You can name one person you trust to make these decisions for you, or you can name multiple people.⁹ If you decide to name more than one person, you need to specify in the document how the Attorneys must act. For example, do you want them to act **Unanimously** or by a **Majority Decision**? You should also specify what should happen if one or more Attorney is unable or unwilling to act. If one of your Attorneys is unable or unwilling to act, do you still want the remaining Attorneys to continue to act?

A. Is My Attorney Paid?

Generally, your Attorney is only paid or reimbursed for reasonable out-of-pocket expenses associated with acting as your Attorney (such as, postage and parking). However, payment will depend on whether you have appointed a loved one, friend, lawyer, or trust company. You can pay a loved one or friend if you want, but they will only be paid if you have specifically stated it in your POA and EPOA. They are not automatically entitled to receive a payment. In contrast, a lawyer or a trust company will charge a fee to act as your Attorney. Prior to accepting the appointment, a lawyer or trust company will usually have a fee agreement for you to sign as the Donor.

Unanimously: All of your Attorneys are in agreement.

Majority Decision: More than half of your Attorneys agree on a decision.

Who Should I Choose to Be My Attorney?

It is very important that the person you choose is someone who understands your financial affairs and will use good judgment when acting on your behalf. The person you appoint as your Attorney has a legal duty to act only in your best interest. Your Attorney cannot use your Property for their own benefit and must be able to resolve all conflicts of interest in your favour. A POA can cause financial hardship for you if misused.

When choosing who will act as your Attorney, you should consider:

- Whether or not this person will want to act as your Attorney;
- Whether or not the person will be easy to get in touch with (lives reasonably close to you);
- Whether or not the person can handle stressful situations;
- Whether or not the person is in good health; and
- Whether or not the person is familiar with managing money and Property.

It is a good idea to name an alternative Attorney, just in case your original Attorney is unable or unwilling to act.

What Powers Can I Give to My Attorney in a POA and EPOA?

As mentioned earlier, you have control over what powers your Attorney will have. You can be very specific, or you can be general in what powers you grant your Attorney. A **General POA** allows your Attorney to make any type of decision with respect to managing your financial affairs. In this case, you can give your Attorney the power to deal with all your financial matters at any time. On the other hand, a **Specific POA** is more restricted. You may only want a POA in place so your Attorney can complete a specific financial transaction while you are, for example, away on vacation or ill or hospitalized. Additionally, you can limit the powers granted in a POA to a specific period of time. The following sets out what powers you might want to grant your Attorney.



General POA: This gives your Attorney full authority to manage all of your legal and financial affairs.

Specific POA: This sets out specific powers that you are giving your Attorney. It limits what they can do on your behalf.

A. *Banking*

When drafting a POA or an EPOA, you can include a Banking clause. With this clause in your POA or EPOA will be accepted at all banks. For example, your Attorney could do all of your banking, including opening an account, managing your investments, signing cheques, borrowing money, and accessing your safety deposit boxes. Your Attorney would also be able to access any bank account with any financial institution you deal with on a day-to-day basis.

Most banks have their own POA process and forms for you to fill out (they do not have EPOAs, generally). The Bank will ask you to provide them with your Attorney's signature. Unfortunately, a bank's forms will only allow your Attorney to deal with that particular bank. If you have bank accounts at more than one bank, you will need to fill out a POA form for each of the banks. Additionally, these forms may limit your Attorney's power to deal with particular accounts, investments, and so forth.



It is recommended that you give all your banks a Certified Copy of your POA and EPOA to have on file in the event that something happens to you.

B. *Real Property*

Your POA or EPOA can be used to grant your Attorney the power to buy and sell **Real Property**. It is important to note, however, that the way in which Real Property is dealt with on reserve and off reserve are different. For example, not everyone on reserve owns their land; in fact, most reside in a band owned homes. A band owned home cannot be sold.

Real Property: An interest in land, a home, or a building.

Some individuals hold a **Certificate of Possession (CP)**. A CP is the highest form of ownership one can hold over Property located on reserve. If you hold a CP, then you may grant your Attorney the power to sell your CP Property to another band member. To do this, your Attorney will need to comply with certain procedures set out in the *Indian Act*, the *Family Homes on Reserve and Matrimonial Interests and Rights Act (FHRMIRA)* or a Bands Matrimonial Real Property (MRP) laws. Your Attorney will also have to comply with any restrictions or conditions placed on the sale by the Band Council. In most cases, INAC or the Band must complete the actual sale. Your Attorney can also purchase a CP on your behalf. However, you should make sure INAC has a Certified Copy of your POA or EPOA so they are aware your Attorney has been granted this power.

In accordance with the *Land Registration Act*,¹⁰ in order to permit your Attorney to buy or sell Real Property located off reserve, you will need to register your POA or EPOA with the Land Registration Office of Nova Scotia.¹¹ The POA or EPOA must be signed under seal and have an **Affidavit of Execution** attached before it can be accepted for registration. Once the POA or EPOA has been accepted, your Attorney will be able to sell or purchase lands or buildings, execute deeds, and obtain a mortgage on your behalf.

C. Canada Revenue Agency

You can give your Attorney the authority to prepare and file income tax returns on your behalf. Additionally, you can include statements that give your Attorney the authority to:

- Obtain information and documents (such as, any previous tax assessments) in the possession of the Canada Revenue Agency (CRA).
- Execute any income tax return or other documents relating to any tax liability or refunds you may be entitled to.
- Accept and endorse any cheque for refund or other amounts you receive from the CRA.

However, in order for your Attorney to have these powers, you need to state specifically in your POA or EPOA that you permit them to deal directly with the CRA on your behalf.

Certificate of Possession: A document prescribed under the *Indian Act* confirming that a band member is legally entitled to occupy and possess a specific piece of reserve land defined in the document.

FHRMIRA or a Bands MRP Laws can place restrictions on the sale of Matrimonial Real Property. It is important for your Attorney to know if your band has MRP laws. INAC maintains a list of bands that have MRP laws online at: <http://www.aadnc-aandc.gc.ca/eng/1408981855429/1408981949311>

Affidavit of Execution: A statement sworn by a witness in which the witness confirms that they saw you sign the POA.

D. Collect Income

In a POA or EPOA, you can grant your Attorney the authority to collect your income from an employer. You may also want to grant your Attorney the authority to collect any pension benefits, rents, dividends, bonuses, profits, interest, commissions, fees and debts owed to you. If this is a power you would like to grant to your Attorney, then you should also include the authority to give receipts and to initiate legal proceedings for the recovery of any debts owed to you.

E. Professional Assistance

If you feel that managing your affairs may become too overwhelming for your Attorney, then it may be a good idea to grant your Attorney the right to employ and pay professionals to assist them in carrying out their responsibilities. For example, if your Attorney must go to court on your behalf they may require the assistance of a lawyer. Other professionals your Attorney may hire include investment bankers or real estate agents.

F. Litigation Guardian

It is a good idea to give your Attorney the authority to act as your **Litigation Guardian**. A Litigation Guardian is someone who makes decisions for you in a court proceeding or initiates a court proceeding on your behalf. For example, if you are incapacitated because of a motor vehicle accident, your Attorney could sue the other party and appear in court on your behalf. Additionally, your Attorney could settle any new or ongoing lawsuits on your behalf (such as a Residential School Survivor claim). There are other circumstances when a Litigation Guardian would be useful such as family or criminal matters. Since there are many circumstances where a Litigation Guardian could be useful, it is important to use language that is broad and not too specific and restrictive when giving this authority.

Litigation Guardian: A Guardian appointed by the court to appear in a lawsuit (or any matters involving court procedures) on behalf of an incompetent person or minor.



What Legal Duties Will My Attorney Have?

An Attorney under a POA and an EPOA has a number of legal duties, these include:

- Act honestly and in good faith;
- Act in your best interest, while taking into account your known beliefs and values, as well as, any directions you may have left them in writing;
- Not to sell, gift, or get rid of any Property that they know you have gifted in your Will, unless it is in your best interest to do so;
- Keep your **Assets** separate from their own Assets; and
- Keep a proper accounting of all your Property and debt.

There is a larger burden put on your Attorney under an EPOA than under an ordinary POA. Under an ordinary POA, your Attorney is able to receive guidance from you, whereas under an EPOA after you have become Mentally Incompetent your Attorney must use their own good judgment when making legal or financial decisions on your behalf.

What If My Attorney Mismanages My Financial Affairs?

If you or a loved one suspects that your Attorney is mismanaging your financial affairs, you or a loved one should:

- Request an accounting of all financial transactions completed to date;
- Pay close attention to what your Attorney is doing;
- Have your Attorney removed (see page 16 and 17);
- Name more than one Attorney to manage your affairs and require them to make decisions together;
- Contact a lawyer or the police – it is a criminal offence (fraud, theft, criminal breach of trust) for an Attorney to use a POA or EPOA for their own financial gain.

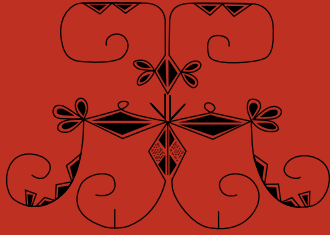


Assets: Everything a person owns, including Real and Personal Property (such as land, vehicles, bank accounts, pensions, jewelry, art, crafts, household goods).



Part Four

How Do I Change or Cancel My POA or EPOA?



You should review your POA or EPOA regularly. You may want to change or cancel it if you experience significant life changes, such as marriage, divorce, your children are no longer minors, or a death in the immediate family.

How Is a POA and EPOA Cancelled or Revoked?

A. Notice by the Donor

You can end a POA or EPOA by giving written notice to your Attorney. This procedure is called ending by Notice by the Donor. The notice document must be dated and signed by you. The people and banks that may have dealt with your Attorney will have to be informed of the change. You should also contact INAC and the Land Registration Office (Nova Scotia) to inform them that the POA or EPOA is no longer in effect. Keep a copy of the letters you send out to these individuals and intuitions.

B. Notice by the Attorney

Under an ordinary POA, your Attorney can give you notice that they no longer want to act on your behalf. If this happens, you must write to the people and intuitions mentioned above to notify them that your current Attorney no longer has the authority to act on your behalf. If you have not named an alternate Attorney, your POA will cease to have legal force once your Attorney gives you their notice.

If you have named an alternate Attorney, then you should ask if they are willing to act on your behalf. If they agree, your alternate Attorney takes over as the Authority to act on your behalf, and your POA remains valid (in force). In this case, you should inform all relevant parties of the change. Most banks will ask for your new Attorney's signature to keep on file.

If you are Mentally Incompetent and your Attorney no longer wants the role and you have not named an alternate Attorney, then your Attorney will need to give notice to INAC. INAC will then follow the process set out in the *Indian Act* and either appoint someone to act on your behalf or directly manage your Property.



C. Mental Incompetence

If you become Mentally Incompetent, your POA will automatically be cancelled; however, your EPOA will remain in effect. Additionally, if your Attorney becomes Mentally Incompetent and you have not named an alternate, your POA will automatically be cancelled. To make sure that you are protected it is a good idea to name an alternate Attorney, just in case something unforeseen should happen.

Executor: The person or corporation named in a Will to carry out the instructions in the Will or to administer the Estate. More than one Executor can be named in a Will.

D. Death

Your POA and EPOA will end with your death, and all powers that your Attorney holds ends. Upon death, your Will takes effect, and your **Executor** administers your Estate in accordance with the instructions in your Will.

If your Attorney dies (unless you have named an alternate Attorney), your POA or EPOA is cancelled. In the case of Mental Incompetence, the management of your affairs will revert back to INAC. They will appoint someone new to act or manage your affairs on your behalf.

E. Bankruptcy

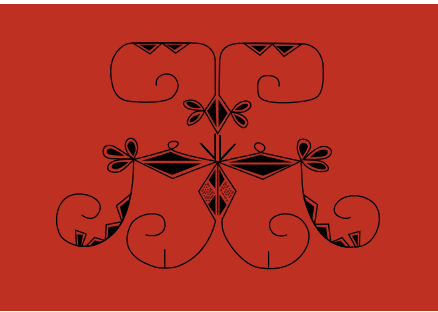
If you declare bankruptcy, your POA or EPOA is cancelled, and someone else is appointed by the courts to administer your affairs. That person is known as a Trustee in Bankruptcy, and they take control of all your financial affairs.

If your Attorney declares bankruptcy, your POA or EPOA is not automatically cancelled, unless the bankruptcy makes your Attorney unfit to carry out their duties. If your Attorney is unfit and incapable of managing your financial affairs, then your alternate Attorney, if one is named, will take over the authority to act on your behalf.



How Can I Change My POA and EPOA?

You can only change your POA or EPOA by creating a new document and including a statement that revokes or cancels all previous POAs or EPOAs made by you. Be sure to destroy all copies of your previous POAs or EPOAs.



Part Five

What is a Personal Directive?

A PD is a legal document that allows you to set out what, how, and by whom personal and home care decisions will be made for you if you cannot make those decisions for yourself. In a PD, the person you appoint to make these decisions is called a **Delegate**, whereas you are known as the Maker.

Delegate: A person authorized under a PD to make decisions concerning the personal and home care of the Maker.

Why Do I Need a PD?

Imagine you have been in an accident and have suffered severe brain damage and you have been placed on life support. The machines could keep you alive for years despite the fact that you may never regain consciousness, but would you want to remain on life support indefinitely?

Whenever you consent to any kind of medical treatment, your doctor must be sure that you are competent and capable of agreeing to the treatment. This means that you must understand the risks and benefits of a treatment. If your doctor feels that you may be confused about what is taking place or do not understand the treatment options, a doctor can receive directions from your Delegate as set out in your PD.

How Do I Make Sure My PD is Valid?

Under the *Personal Directives Act*,¹² a PD must follow certain rules in order to be valid. Your PD will be valid if:

- At the time of signing, you are competent and capable of understanding what a PD is and what it means to have a PD;
- Your PD is in writing and dated;
- You sign the PD in the presence of a witness – if you are physically unable to sign the PD but are mentally competent, then another person can sign for you, as long as you and a witness are present; however, the person who signs for you cannot be your spouse or your appointed Delegate.¹³



Your witness cannot be any of the following individuals:

- Your Delegate;
- The spouse of a Delegate;
- The person who signed the PD on your behalf; or
- The spouse of the person who signed the PD on your behalf.¹⁴

Each province and country has different PD laws. Whether or not your PD is valid depends on where you live. If you have a PD in place and move to a new province, you should consider writing a new one to make sure it complies with the laws of your new place of residence.

How Do I Begin Writing a PD?

Similar to a POA and an EPOA, the *Indian Act* does not describe how a PD should be written. As a result, PDs are governed by provincial legislation, the *Personal Directives Act*.

If you want to write your own PD, the Government of Nova Scotia provides templates online at: <http://novascotia.ca/just/pda/>



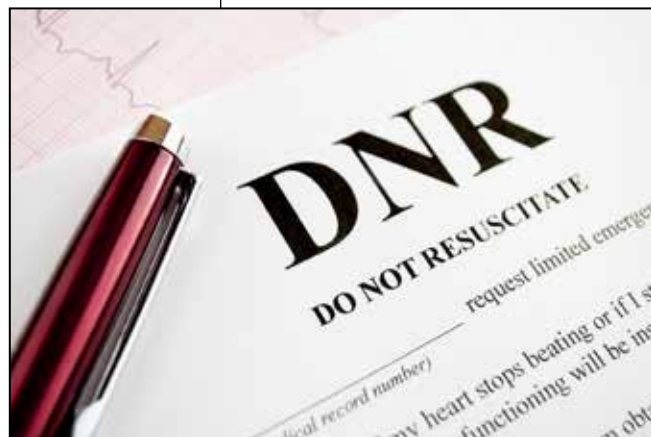
Medical Assistance in Dying: Is when a medical practitioner administers or provides you with a substance to self-administer; at your request that causes death.

Medical Assistance in Dying
The *Criminal Code of Canada* (RSC, 1985, c C-46) now includes a provision allowing for medical assistance in dying (s 241.2). Because of some of the limits and safe guards in placed around this provision it is unknown, at this time, if someone can add a term for Medical Assistance in Dying in their PD.

The *Personal Directives Act*¹⁵ provides basic guidelines for what a PD must contain. These include:

- A statement that the document is a Personal Directive. Include your full name, any nicknames you are known by should be included in brackets, and address (“This is a Personal Directive given by me, [LEGAL NAME] (NICKNAME) of [ADDRESS] ...”);
- A statement that you cancel or revoke all previous Living Wills, Medical Consents, and Personal Directives made by you;
- A statement identifying your first named Delegate (“I appoint, [LEGAL NAME] of [ADDRESS], to act as my Delegate”);
- A statement naming an alternate Delegate who will act in the event that your first named Delegate is unable or unwilling;
- Broad or specific instructions to help guide your Delegate in making decisions concerning your personal or home care (do not resuscitate, no life support, placement in a continuing-care facility);
- If desired, a statement that directs your Delegate to consult with someone before making any decisions on your behalf and name that individual;
- Your signature and the date; and
- The witness’s signature and the date.

Remember, your PD does not take effect until you are unable to make your own decisions. If you regain the capacity to make personal and home care decisions on your own, then your PD is no longer valid or in force.



How Do I Change or Cancel a PD?

If you want to change or cancel your PD, you must create a new document. To cancel an old PD, you have to specifically write that you intend to cancel your old PD. You must sign the document and have it witnessed. To avoid confusion, you should destroy the older version. Before you destroy your old PD, make sure the new one ready to put in place.

It is a good idea to review your PD every year to ensure it still reflects your wishes. At the very least, you should review your PD whenever you, or your Delegate, experience a significant change in health.

Where Should I Store My PD?

Your PD should be kept in a safe place. Wherever you decide to store it, make sure your Delegate knows where it is. It is a good idea to give a copy of your PD to your Delegate; they will need it should a medical emergency occur. You may also want to leave a copy with a trusted family member and your family doctor. If you are travelling, it is a good idea to take a copy of your PD with you.

What Will Happen If I Do Not Have a PD?

If you become incapable of making decisions about your personal care (whether or not to keep you on life support) or home care (whether or not to use a continuing-care facility or homecare services) the *Personal Directives Act* of Nova Scotia applies. Under the *Personal Directives Act*, your doctor will ask an eligible person (your nearest relative) to make personal and home care decisions for you.¹⁶ The doctor will start at the top of the list and work their way down until they find a decision maker. A decision maker should be someone who has been in regular contact with you over the past year and who is willing and able to act on your behalf:¹⁷

- Spouse (married, common-law and registered domestic partner);
- **Child** (adopted, including a **Custom Adopted Child**);
- Parent;
- Person who stands in place of a parent;
- Sibling;
- Grandparent;
- Grandchild;
- Aunt or Uncle;
- Niece or Nephew;
- Other relative;
- Last resort: the Public Trustee's office.¹⁸

It is important to have a PD in place along with your Will and EPOA. You do not want someone you do not trust making important health care decisions on your behalf. Plan ahead, speak to the people that you are close to and make sure they are willing to take on these responsibilities.

Ankwe'aq (Ankweyaq):
“to take care of, to bring up as your own.” *This word is used in reference to foster families in L'nu communities. Foster children are raised as part of the family, treated no differently from other children, but always reminded of who their kin relations are.**

Child: Includes a legally adopted child and a child adopted in accordance with Mi'kmaw custom.

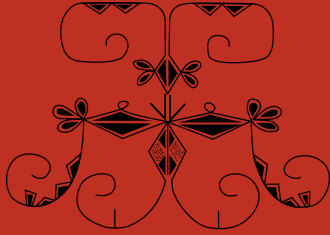
Custom Adoption: is the practice of transferring the on-going primary care and responsibility for an Aboriginal child from a current parent or caregiver to a new caregiver according to the traditions, practices and customs of the band. The *Indian Act* (Canada) recognizes this type of adoption, providing certain criteria are met.



* Tuma Young, “L’nuwita’simk: A Foundational Worldview for a L’nuwey Justice System” (2016) 13: 1 Ind LJ 75 at 96.

Part Six

Your Delegate under a PD



What Is a Delegate?

Under the *Personal Directives Act*, a Delegate is authorized to make decisions about your medical treatments, as well as, your personal or home care.¹⁹ In a PD, you can name one person you trust to make all personal and home care decisions for you.

A. Is My Delegate Paid?

Generally, your Delegate is only reimbursed for reasonable out-of-pocket expenses (for example, postage and parking) associated with acting as your Delegate. They are not automatically paid for taking on the role. However, if you choose to pay your Delegate you must set up a payment agreement in your PD.²⁰

Who Should I Choose To Be My Delegate?

Your Delegate needs to be someone you trust, someone who knows, and is willing to respect, your wishes and values. They should also be someone who can make difficult decisions at a difficult time. Most people will name a loved one, but this is not always the best choice: a loved one may be too emotionally attached to make decisions in your best interest. Your Delegate must also be at least 19 years old.²¹

You should name an alternate Delegate who will act in the event that your first named Delegate is unable or unwilling to act.²² In Nova Scotia you are allowed to name different people to act as your Delegate for different types of decisions.²³ However, you cannot name two people to make the same type of decisions. For example, you cannot have your spouse and Child make the decision about whether or not to take you off life support. Legally, only one of the two can make this decision.



What Powers Can I Give a Delegate in a PD?

Your Delegate can be tasked with making different types of decisions with respect to your personal and home care.²⁴ These may vary depending on your circumstances. You can give your Delegate specific powers to deal with the following healthcare decisions:

- Medication
- Nutrition
- Clothing
- Shelter (continuing home care)
- Surgical procedures, etc.

These are decisions that will be made when you are, for example, hospitalized or undergoing surgery. Alternatively, you may become Mentally Incompetent due to an ongoing illness (such as dementia or Alzheimer's) and need someone to give consent on your behalf. As a result, it is important to speak to your Delegate and inform them of your wishes.

What Legal Duties Will My Delegate Have?

The *Personal Directives Act* defines the duties of a Delegate. A Delegate's most important duty is making personal and home care decisions that are best for you. When making these decisions, it is your Delegate's responsibility to follow the instructions you have set out in your PD.²⁵ If an unforeseen circumstance arises, your Delegate must base their decision on their knowledge of your values and beliefs, as well as the instructions you have given them.²⁶

If your Delegate is unsure of what you would have wanted in a given situation, they will need to make a decision that they believe is in your "best interests."²⁷

Medical Assistance in Dying

The *Criminal Code of Canada* (RSC, 1985, c C-46) now includes a provision allowing for medical assistance in dying (s 241.2). Because of some of the limits and safe guards in placed around this provision, it is unknown, at this time, if someone can add a term for Medical Assistance in Dying in their PD.



Your Delegate should consider the following when making decisions that are in your best interests:

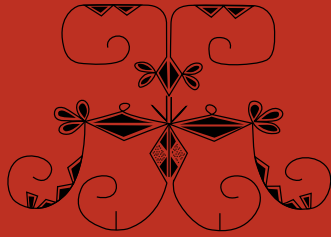
1. Whether your health is likely to improve with the proposed care or deteriorate because of it;
2. Whether your health is likely to improve without the proposed care or likely to deteriorate without it;
3. Whether or not the benefits you are expected to get from the proposed care outweigh the risk of harm or other negative consequences of the care; and
4. Whether or not the benefits of a less restrictive or less intrusive form of available care outweigh the risk of harm or other negative consequences of the proposed care.

Finally, if you set out instructions stating that you want your Delegate to talk to a particular person (your family doctor or child) when making decisions on your behalf, it will be their responsibility to do so. However, your Delegate will make the final decision.

What Happens If My Doctor Cannot Locate My Delegate?

If your PD sets out specific instructions that relate to a decision that needs to be made and your Delegate cannot be reached, your Doctor will follow your instructions set out in your PD. For example, imagine you go in for a routine surgery and your heart stops. Your doctor will respect your wishes as you have set out in your PD. If your PD states that you do not want to be resuscitated, your doctor will not perform CPR. However, in the case of a non-emergency that does not require an “on-the-spot” decision, your doctor will make the effort to contact your Delegate so that they can make the decision on your behalf. It is important to make sure your doctor is aware of your PD and your wishes should an emergency situation arise.





Part Seven

Hiring a Lawyer

Before meeting with a lawyer make sure to ask if you will be charged for the initial meeting. Below are questions you may want to ask the lawyer during the initial visit:

- How long have you been practicing Wills & Estates law?
- What are the procedures involved in administering an Estate, and how long will it take?
- What are the complications that might arise in administering this particular Estate?
- Do you bill at an hourly rate or on a flat fee?
- Will I be charged for disbursements (faxing, phone calls, photocopying, postage fees)?

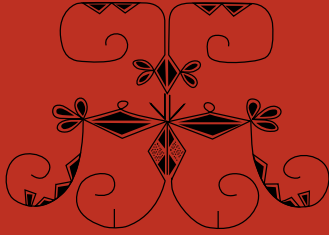
You should request a retainer letter stating what legal services the lawyer agrees to provide and the fee for those services. If things change and the fees increase, your lawyer should let you know immediately. The lawyer should stop working and obtain instructions from you before doing any other work on your behalf.

You should bring all the documents and information you have collected to your first visit with the lawyer. You should be prepared to answer a lot of questions. If a lawyer asked for something and you do not have the information, you should make a note of it and bring it to the next meeting. If you do not understand what the lawyer is asking or saying, make sure you let the lawyer know.

For more information on how to hire a lawyer, contact the Nova Scotia Barristers' Society at (902) 422-1491 or visit them online at <http://www.nsbs.ns.ca/why.html>.

Lawyers often bill their clients on an hourly rate, but some lawyers will bill you a flat fee for their service. Be sure to ask your lawyer what their fee structure is in order to avoid surprises. When you hire a lawyer, you should receive a retainer letter. In the retainer letter the lawyer will set out what legal services they are agreeing to provide to you and how they will bill you for their time. A retainer letter is the best way to make sure you and the lawyer are both clear in your expectations and obligations.





For More Information

Indigenous and Northern Affairs Canada

10 Wellington, North Tower Gatineau, Quebec

Postal Address:

Ottawa, Ontario K1A 0H4

Toll-Free: 1-800-567-9604

Website: <http://www.aadnc-aandc.gc.ca/eng/1100100010002>

Band Governance & Estates of Lands and Trust Services

PO Box 160

40 Havelock St

Amherst, Nova Scotia B4H 3Z3

Toll-Free: 1-800-567-9604

Tel: 1- 902-661-6200

Legal Information Society of Nova Scotia

5523 B Young Street Halifax, NS

Toll-Free: 1-800-665-9779

Tel: 1-902-454-2198

Website: <http://www.legalinfo.org/>

The Confederacy of Mainland Mi'kmaq

PO Box 1590 Truro, NS B2N 5V3

Toll-Free: 1-877-892-2424

Tel: 1-902-895-6385

Website: www.cmmns.com

Appendices

Appendix A: Enduring Power of Attorney

DISCLAIMER

The author and the publisher of this sample EPOA do not make any representations or warranties regarding the outcome or the use to which this sample is put and are not assuming any liability for any claims, losses, or damages arising out of the use of this sample. The user of this sample should not rely on the author or publisher of this sample for any professional legal advice.

Enduring Power of Attorney

This is an Enduring Power of Attorney made by me, **[LEGAL NAME] (NICKNAME)**, of **[ADDRESS]**, Nova Scotia.

1. **Revocation.** I revoke all Powers of Attorney and Enduring Powers of Attorney previously made by me.
2. **Appointment.** I appoint, **[LEGAL NAME]**, of **[ADDRESS]**, Nova Scotia, to be my Attorney. If my first named Attorney is unable or unwilling to act as my Attorney or is unable or unwilling to continue to act as my Attorney, I appoint, **[LEGAL NAME]**, of **[ADDRESS]**, Nova Scotia, to act as my Attorney.
3. **Effective Date.** This Enduring Power of Attorney shall become effective immediately and may be exercised during any legal incapacity on my part. I intend this to be an Enduring Power of Attorney under the *Powers of Attorney Act* of Nova Scotia, and it is not terminated by or invalidated by reason of my legal incapacity.
4. **Proof of My Incompetence, if Required.** If you are required to prove that I am incompetent before you act under this appointment, you may prove my incompetence by a certificate from a qualified medical doctor certifying that I am incompetent. That certificate shall be sufficient proof of my incompetence for those relying on this appointment without further inquiry.
5. **Authority.** You have a general authority to make all decisions and to do all acts and things as fully and effectively on my behalf as I could do if personally present, including all acts of ownership generally. You have general authority to make decisions and act on my behalf to manage all my property and affairs.
6. **Hospitals.** You will manage my property and affairs for the purposes of the *Hospitals Act* in the event that there is a declaration of my incompetency; therefore, the provisions of that *Act* permitting the Public Trustee to manage my property and affairs will not apply.

7. **Compensation.** You are entitled to receive compensation from my property for acting as my Attorney during any legal incapacity on my part at the rates permitted, by law, for trustees. At reasonable intervals, you may take amounts that you reasonably anticipate you will request on passing your accounts. However, if the amount subsequently awarded by a court is less than the amount taken, you will repay the difference immediately without interest.

IN WITNESS WHEREOF I have subscribed my name to this my Enduring Power of Attorney, this **[DATE]** day of **[MONTH]**, **[YEAR]**.

[LEGAL NAME]

Witness [Insert Name]

Appendix B: Personal Directive

DISCLAIMER

The author and the publisher of this sample PD do not make any representations or warranties regarding the outcome or the use to which this sample is put and are not assuming any liability for any claims, losses, or damages arising out of the use of this sample. The user of this sample should not rely on the author or publisher of this sample for any professional legal advice.

Personal Directive

This is a Personal Directive made by me, [LEGAL NAME] (NICKNAME), of [ADDRESS], Nova Scotia.

1. **Revocation.** I revoke all Living Wills, Medical Consents, and Personal Directives previously made by me.
2. **Appointment.** I appoint, [LEGAL NAME], of [ADDRESS], Nova Scotia, to act as my Delegate to make personal care and home care decisions on my behalf for all personal matters, of a non-financial nature, that relate to me. If my first named Delegate is unable or unwilling to act or is unable or unwilling to continue to act, I appoint, [LEGAL NAME], of [ADDRESS], Nova Scotia, to act as my Delegate in their place.
3. **Effective Date.** This Personal Directive is made pursuant to the *Personal Directives Act* of Nova Scotia and takes effect when I am not capable of making a decision regarding my personal care and home care.
4. **Consultation When Assessing Capacity (Optional).** The person making the assessment of my incapacity is to consult with the following person when making the assessment.

Name: _____

Address: _____

Phone: _____

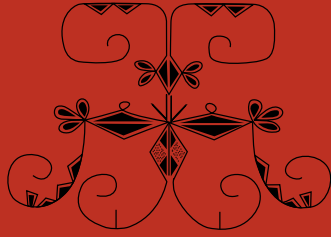
5. **Specific Instructions.** I instruct my Delegate to carry out the following specific instructions when making decisions about my personal care and home care.

6. Values, Beliefs, and Wishes. I provide the following information to help my Delegate understand my values, beliefs and wishes that should be considered when making decisions about my personal and home care.

IN WITNESS WHEREOF I have subscribed my name to this my Personal Directive, this **[DATE]** day of **[MONTH]**, **[YEAR]**.

[LEGAL NAME]

Witness [Insert Name]



About the Authors



Angelina Amaral, BA, MEd, JD, is a member of the Miawpukek (Conne River) First Nation of Newfoundland and Labrador; and is of Portuguese heritage. She has two children, Miguel and Jayden Amaral. Through the help and support of her parents, Adelia (John) and Miguel Amaral, she has been able to earn an undergraduate degree in psychology from Cape Breton University, a Masters of Education: Life Long Learning from Mount Saint Vincent University; and a law degree from the Schulich School of Law.

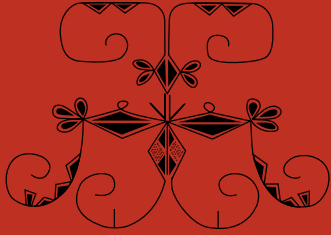
After articling through the *Ku'tawtinu: Shared Articling Initiative*, Angelina, was called to the Bar in June of 2015.



Angeline Gillis, BA, LLB, was born in Sydney, Nova Scotia and was raised in East Bay, Nova Scotia. Although a member of the Eskasoni First Nation, Angeline and her siblings were raised off reserve by her parents, Fred Gillis and Donna Stevens. She is the granddaughter of the late Andrew J. Stevens, a former Keptin of the *Sante' Mawi'omi*.

Angeline earned her undergraduate degree from Dalhousie University in 2005 and her LL B from the Schulich School of Law (formerly Dalhousie Law School) in 2009. After completing her articling with Boyne Clarke Barristers and Solicitors, Angeline was called to the Bar in June 2010, having performed her affirmation in both English and Mi'kmaq. She then went on to become a Senior Will & Estate Planner with Scotia Private Client Group. Angeline has worked in various areas of law; however, her primary focus has been in Wills, Estates and Trusts.

Angeline began practicing with The Confederacy of Mainland Mi'kmaq in October 2011 as a Wills & Estates Legal Advisor. In addition to her work with The Confederacy, Angeline also maintains her own practice as a Barrister & Solicitor. In her free time, Angeline sits as the Vice President and is a coach for the Sackville Storm Minor Basketball Association. She is also a member of the Canadian Bar Association, Halifax's Estate Planning Counsel, and is commissioned as a Notary Public.

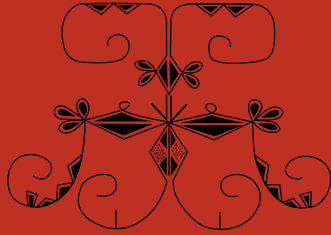


About the Authors



Shelly Martin, BA (Hons), MA, LLB, was born in Halifax, NS and raised in nearby Mount Uniacke. A member of the Millbrook First Nation, she was raised off reserve by her parents, grandparents, many aunts, uncles and cousins.

After completing undergraduate and graduate degrees in history, Shelly enrolled at the Schulich School of Law (formerly Dalhousie Law School) in 2003. After articling with Boyne Clarke Barristers and Solicitors, Shelly was called to the Bar in October 2007, the first Mi'kmaq to swear her oath in English and Mi'kmaq. Shelly, in addition to her work as Chair of the Justice Committee for the Halifax Aboriginal People's Network, has sat on the Advisory Council of the Indigenous Blacks and Mi'kmaq Initiative at the Schulich School of Law and is a member of the board of the Halifax and Region Military Family Resource Centre. She currently resides in Fall River with her son, James, and her daughter, Meadow.



Endnotes

- ¹ *Indian Act*, RSC 1985, c I-5 at s 51.
- ² *Powers of Attorney Act*, RS, c 352 at s 3 [*Powers of Attorney Act*].
- ³ RS, c 352.
- ⁴ Legal Information Society of Nova Scotia, *Powers of Attorney*, online: <http://www.legalinfo.org/wills-and-estates-law/power-of-attorney.html#what-are-the-legal-requirements-for-a-power-of-attorney>.
- ⁵ RSC 1985, c I-5.
- ⁶ *Powers of Attorney Act*, *supra* note 2 at s 3.
- ⁷ *Ibid.*
- ⁸ *Ibid.*
- ⁹ *Ibid* at s 7.
- ¹⁰ SNS 2001, c 6 [*Land Registration Act*].
- ¹¹ *Ibid* at s 71.
- ¹² SNS 2008, c 8 [*Personal Directives Act*].
- ¹³ *Ibid* at s 3.
- ¹⁴ *Ibid* at s 3(3).
- ¹⁵ *Ibid* at s 5(2).
- ¹⁶ *Ibid* at s 14(1)(d).
- ¹⁷ *Ibid* at s 14(2).
- ¹⁸ *Ibid* at s 2(j).
- ¹⁹ *Ibid* at s 14(1).
- ²⁰ *Ibid* at s 8.
- ²¹ *Ibid* at s 3(1)(b).
- ²² *Ibid* at s 3(6).
- ²³ *Ibid* at s 3(5).
- ²⁴ *Ibid* at s 2(f), (h) and (l).
- ²⁵ *Ibid* at s 15(2)(a).
- ²⁶ *Ibid* at s 15(4)(a).
- ²⁷ *Ibid* at s 15(4)(b).



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