

Advance Health Care Directives



A NEW BRUNSWICK GUIDE

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This guide does not contain a complete statement of the law on the topic of advance health care directives. Anyone needing specific advice on their situation should consult a lawyer.



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1 BACKGROUND Information

In December 2016, a law was introduced in New Brunswick called the *Advance Health Care Directives Act*.

It is intended to help simplify the process for individuals who wish to set out their health care wishes and ensure they are known and respected by health care professionals, especially if a time comes when a person is unable to communicate those wishes themselves.

This guide explains who can create a health care directive, how to create it, where to keep it, how to update it or revoke it and so on. It briefly describes how a health care directive relates to other legal tools for planning for the future, such as a power of attorney for personal care.

Throughout this guide, when referring to advance health care directives, we will simply use the term **health care directive**.





2 WHAT YOU SHOULD KNOW ABOUT *Health Care Directives*


What is a health care directive?

A health care directive is a legal tool that allows you, the maker, to:

- Name a person or persons (called the proxy) to make health care decisions on your behalf when you are no longer able;
- Set out your specific instructions for your future health care;
- Include a general statement about your values, beliefs and wishes; and
- Identify persons to be notified when your directive comes into effect.

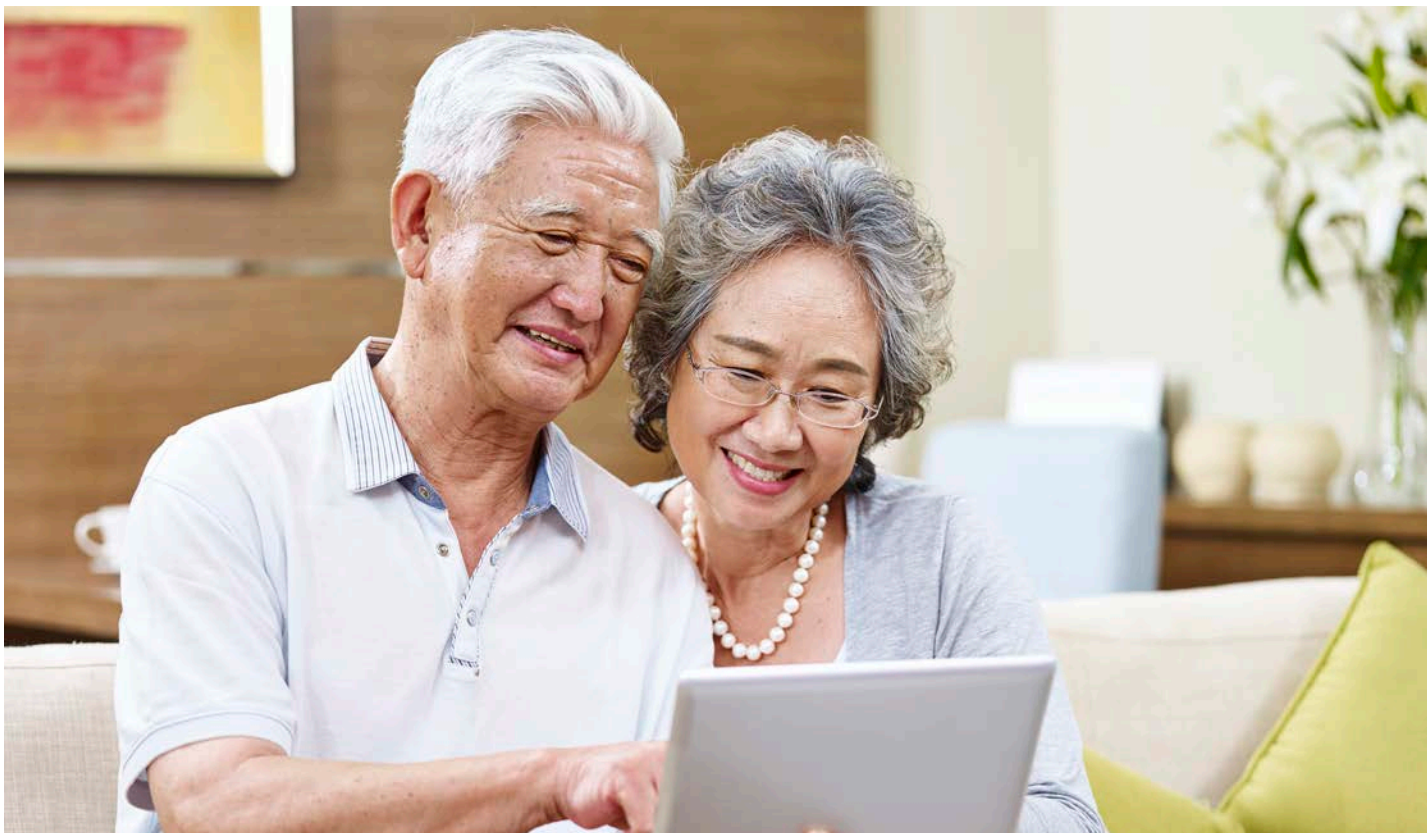
What kinds of health care decisions can I make?

You can set out your decisions and instructions for a time when you may be unable to make your own health care decisions or communicate them. You can include detailed information about your instructions such as consent, refusal or withdrawal of consent to treatment, services or procedures.



The **maker** is the person who has created a health care directive. As the maker, you can set out specific decisions permitted under the *Act*, or you can name a proxy to act for you, or both!

The **proxy** is the person you “name” in your health care directive to make decisions on your behalf when you are no longer able to do so.



How will I know what kinds of treatments to expect?

It can be difficult to anticipate the various treatments that you might need. It may depend on your health conditions. You should talk to your doctor about the options. Be sure to ask questions about conditions, treatments and possible outcomes. This may help you decide how detailed or general you wish to be in your instructions.

What are some reasons to have a health care directive?

- You are concerned about future illness, disease or advanced age and the treatments you might receive when you are unable to express your wishes. The directive lets you state your wishes for health care when you are not able to do so;
- The directive may give your family or caregivers peace of mind knowing they are being guided by your wishes when asked to make difficult health care decisions;
- The directive may give you peace of mind knowing that health care professionals must respect your wishes;
- Health care directives can be easy to make and easily revised or updated;
- You do not need a lawyer to make the directive;
- Once signed and witnessed, they are a legally binding document;
- You may create your own health care directive or use a form available online. If you wish, you can use the form at the end of this guide.

Will health care professionals respect the content of my health care directive?

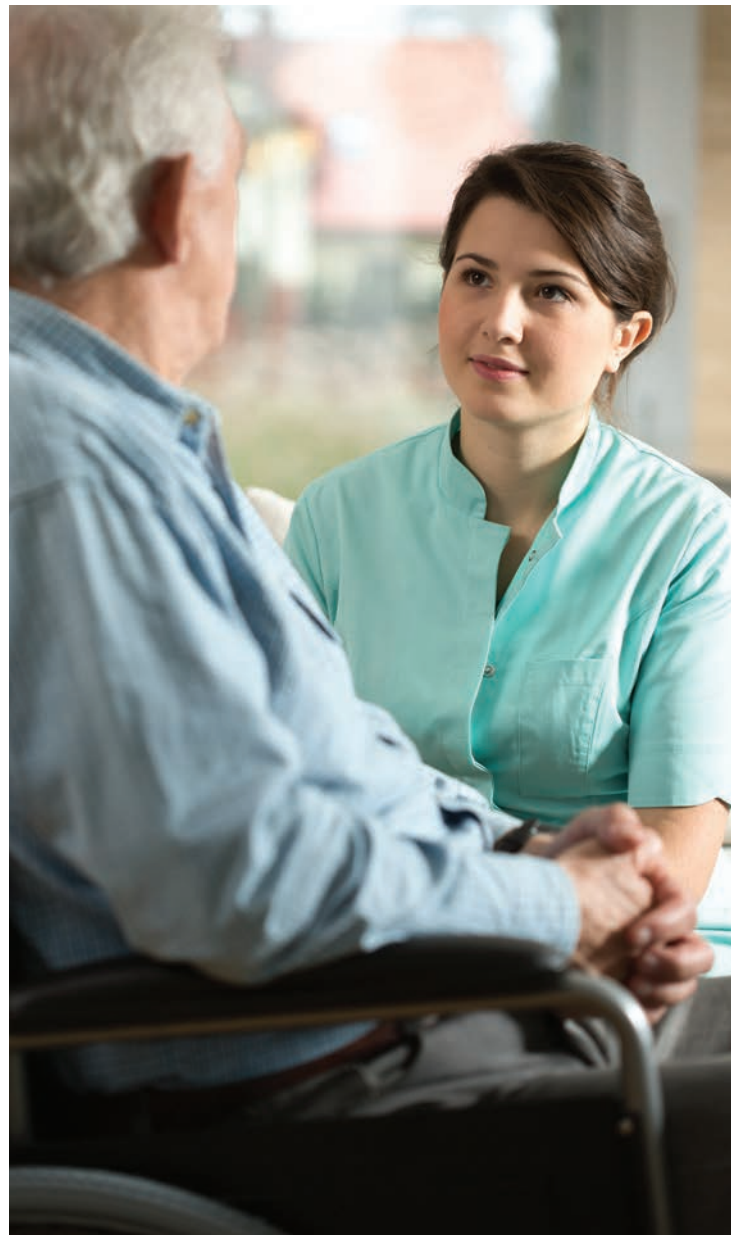
A properly created health care directive is a legally-binding document. With certain exceptions, health care professionals must respect the contents of your directive. Health care professionals under the Act include medical practitioners or registered nurse practitioners.

Do I need a lawyer to prepare my health care directive?

Not necessarily. The law permits individuals to set out their health care instructions with or without a lawyer. However, if you have created other legal documents, such as a **power of attorney for personal care**, you should consult your lawyer to find out if there are any potential conflicts in roles and duties.

According to the *Advance Health Care Directives Act* if a person makes a health care directive and a power of attorney for personal care and there is a conflict between provisions in one or more of the documents, health care professionals must follow the most recent document.

In light of this, if you, the maker, decide to appoint different people, you may wish not to include health care provisions in your power of attorney for personal care. It's a good idea to make your attorney and proxy aware of your plans. See page 14 for more information.





3 MAKING A *Health Care Directive*

Who can make a health care directive?

Anyone who has capacity, as defined in the *Act*, is able to make a health care directive.

What does it mean to have capacity?

The *Act* defines a person with capacity as one who is able to make decisions about their health care treatment and appreciate the reasonable consequences of their decisions or lack of decision. The *Act* presumes that individuals have capacity. [See the PLEIS-NB booklet on *Mental Competence*].

How do I create a health care directive?

You can create a health care directive by obtaining and completing a form for that purpose, or creating one yourself. Under the *Advance Health Care Directives Act* you can create a valid directive if you follow these formal requirements:

- You (the maker) must sign and date the directive
- You must have an independent witness who watches you sign and date the directive



- The witness must be at least 19 years of age
- The witness cannot be the person you appoint as your proxy or their spouse
- The witness cannot be your spouse or common law partner (**Note:** Under this *Act*, a common-law partner is someone you have been in a conjugal relationship with for at least two years).



What if I am unable to sign the directive?

You can direct someone else to do this for you. The person who signs and dates a health care directive on your behalf cannot be your spouse or common-law partner. As well, it cannot be a proxy appointed by you in the directive or your proxy's spouse. You must document in your directive who you named to sign the directive for you.

Where can I find a form for making a directive?

You can find forms in many places. Your doctor may have them. They may be available on the government of New Brunswick website and other places on the Internet, at the hospital or at your lawyer's office. You can use whichever form you like. However, if you are using forms that were not specifically created for people in New Brunswick, they may not follow the rules and requirements of legislation in this province.


At the end of this guide is a **New Brunswick specific form.**

A fillable, printable version is available at:
www.legal-info-legale.nb.ca
(search - health care directives)

When does a health care directive take effect?

Your health care directive comes into effect when you no longer have the capacity to make treatment decisions for yourself or to communicate such decisions. Before a directive comes into effect, two health care professionals must decide and document that a maker ceases to have capacity and one of them must inform the maker of their finding, if possible.

A directive is only in effect for the period in which you do not have capacity or can't communicate. If you become capable again, the proxy's decision-making authority ceases.



It's important to give a copy of your health care directive to health care professionals so that they know your wishes for treatment in any health care situation.

Where should I keep my health care directive? Who should get a copy?

You should keep the original somewhere that is easy to find. Since there is no registry for directives in New Brunswick, it is important that you give a copy of your directive to interested parties. This could include your doctor, your proxy, and family members or friends. As well, give a copy to the Health Records Department of the hospital that you go to.

Consider keeping a copy of your directive on your refrigerator or at your bedside table so that it can be shared with health care professionals in an emergency situation.

Some people register their health care directive with Medic Alert and wear a bracelet stating this. This may be another way people in New Brunswick can inform health care professionals, especially in an emergency situation.



4 CHOOSING A Proxy

What is a proxy?

A proxy is a person appointed in a health care directive by the maker to make health care decisions on their behalf when they may be unable to make their own decisions or communicate them.

Do I have to name a proxy?

It's your decision. You can include detailed instructions in your directive to inform health care professionals of your wishes. However, you can also choose a proxy to carry out the instructions in your health care directive.

Without a proxy, a health care professional will implement your written instructions when the directive becomes effective. Unfortunately, written instructions can sometimes be insufficient to determine your preference. Health care professionals will do their best to follow your wishes. However, having a proxy may be beneficial as you can choose someone whose judgment you trust to advocate for the wishes you previously expressed and act in your best interests.



Who could be my proxy?

A proxy should be someone you trust and you know will make decisions in your best interest and in keeping with your wishes and values. A proxy has a very important role. He or she has the authority to make life-altering decisions on your behalf. Proxies are often a family member, a spouse, or a friend. It's good to choose someone who can be available to act on your behalf.

A proxy must be at least 19 years of age unless the proxy is your spouse or common-law partner.

Can I name more than one proxy?

Yes, you can name more than one person as a proxy. However, only one person at a time can act as your proxy. If you are unable to make or communicate your own health care decisions, then health care professionals must start by contacting the first person named on your health care directive. If that person is unable or unwilling to act at that time, the second person on your list of proxies will be contacted to act on your behalf, and so on.

It's a good idea to name alternate proxies just to be sure someone is available when called on to make decisions on your behalf.

What powers can I give a proxy?

You can give your proxy the power to advocate on your behalf in keeping with the health care values, beliefs and wishes that you expressed in your health care directive. Where decisions are not explicit in the directive, the proxy must act in accordance with any wishes they know the maker expressed when they had capacity or would express were they still capable. A proxy is not permitted to delegate their authority.

In order to make decisions about your care, your proxy has the right to be provided by health care professionals with all the information necessary to make an informed decision. This would be subject to any limitations on accessing information that you might include in your health care directive.



You should know that...
your proxy does not have the authority to make decisions outside the scope of health care decisions. They are not authorized to deal with financial or property matters or personal care directly – only as they relate to health care decisions.

This is why it is important to have other documents such as **power of attorney for financial matters** and/or **personal care**.

Should I talk to the proxy before I create my directive?

Yes. It is very important that you talk to the individual or individuals you want to act as proxies. A proxy has the right to refuse their appointment. Discuss your future health care wishes to ensure that the person you choose understands your values and wishes and would be willing to act on your behalf if it becomes necessary.

Can I give the proxy specific instructions about my care?

Yes. A health care directive may give the proxy the right to act on your specific

instructions regarding your health care decisions. Remember, a general statement of wishes and desires without reference to medical conditions or treatments may be too vague and might not be helpful to health care professionals.

Do I have to pay my proxy?

There is no obligation to pay your proxy.

If you do wish to compensate your proxy for acting in this role, you must specifically indicate that in your directive.



What if I have no one to be my proxy?

Under the *Advance Health Care Directives Act* it is not required that you appoint a proxy. A maker may include specific instructions in their directive to be applied by the health care professional. However, if you do not have anyone you can appoint as your proxy, you may be able to apply to the **Public Trustee** to act on your behalf.

Contact the **Public Trustee** for more information on their services.



5 **REVOKING OR CHANGING A** *Health Care Directive*

Can I change my health care directive?

Yes. A health care directive may be changed at any time. This is done by creating a new document stating your intention to revoke all prior directives.

When creating a new directive it is important that you inform all parties who received a copy of the previous directive. You must provide them with an updated version or they may follow instructions in the previous document. This will ensure compliance with your instructions.

How do I revoke a health care directive?

You can revoke an existing directive by making a new one that includes a written statement declaring your intention to revoke the previous directive. The destruction of an existing directive and all original signed copies with the intention of making it inoperative is another way you can revoke a directive. Only you or someone you authorize can revoke a health care directive. You must have the capacity to do this and the revocation must be properly signed and witnessed.

Health problems and treatments change over time. Think about reviewing and updating your health care directive on a regular basis. Be sure to replace all outdated copies with the new version.

What if I become incapacitated and my proxy is making decisions that are not in my best interest?

If a health care professional believes your proxy is making decisions that are not in your best interest, they may take steps to revoke your proxy's status.

An application can be made to the Court of Queen's Bench asking that the proxy be removed. The court has the authority to do that if they find the proxy to have behaved in bad faith or contrary to their obligations.

Divorce or separation

If you split up with your spouse or common-law partner, it automatically revokes their right to act as your proxy unless you have stated otherwise in your directive.



6 HEALTH CARE DIRECTIVES AND *Other Legal Tools*

Living Wills

What if I already have a “living will”?

A living will is similar in concept to a health care directive. Living wills are documents that are intended to set out the wishes and desires of an individual for their health care, particularly at end of life when they can no longer communicate those wishes themselves.

However, living wills have no legislative authority in New Brunswick and they do not include a substitute decision-maker or proxy. Rather they spell out the wishes and desires of the maker with regard to treatment. Under the *Advance Health Care Directives Act*, a previously existing living will that is mostly consistent with the *Act* will be enforced as a health care directive.

What if I have a health care directive that I made in another province?

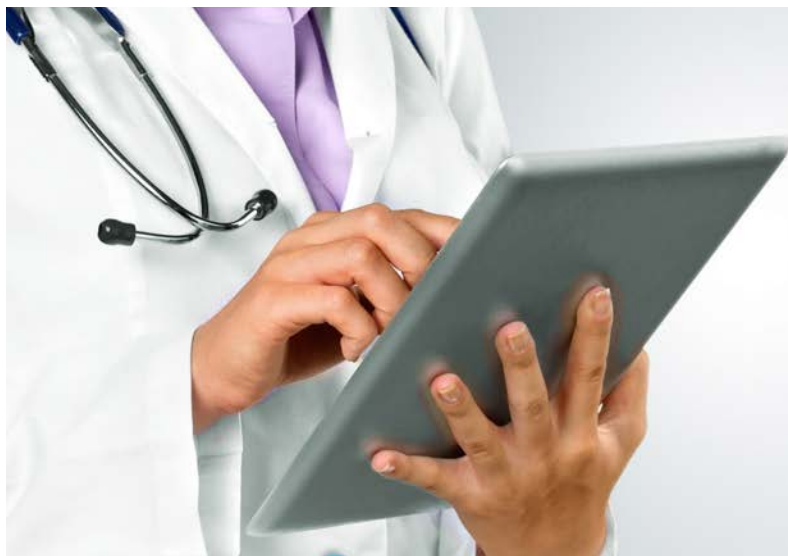
As with living wills, directives created in another province that express your decisions, instructions or wishes for health care treatment would be considered valid if they are mostly consistent with the provisions for making a health care directive in New Brunswick.

Powers of Attorney

If I create a health care directive, does that mean I don’t need to have a power of attorney?

Having a health care directive does not replace the need for other legal tools such as a power of attorney for financial matters or a power of attorney for personal care. Your health care directive is specific to your health care treatment decisions. You cannot delegate power to allow your proxy to deal with financial or personal care or property matters.

A health care directive allows you to dictate specific directions to the proxy or health care professional. This distinguishes the health care directive from a power of attorney for personal care, in which you would typically give your attorney general decision-making powers on personal care and health decisions. When you create a power of attorney, you must name the person who will act as your attorney. When you create a health care directive, you are not required to appoint a proxy. Your written instructions are sufficient.



Typically there is no need for two doctors to agree about a person's capacity for a power of attorney for personal care to come into effect. Generally speaking, a power of attorney for personal care is deemed to be enduring – which means it remains in effect even if the person who made it becomes incompetent.

How do personal care decisions differ from health care decisions?

A power of attorney for personal care can allow your attorney to make decisions about things like your nutrition, where you will live, clothing and personal safety. Your health care directive can allow your proxy to make decisions on your behalf regarding consent, refusal or withdrawal of consent to health care treatment, services or procedures.

A power of attorney for personal care is enforceable under the *Infirm Persons Act* and usually is prepared with the assistance of a lawyer. A health care directive, on the other hand, operates under the *Advance Health Care Directives Act* and has less demanding requirements for signing.

If you already have a power of attorney for personal care, discuss this question with your lawyer. The powers of your attorney may overlap somewhat with the powers of your proxy regarding personal care decisions.

Where these two documents exist and do not conflict, they will operate simultaneously. However, these documents are different legal instruments with different legal requirements.

What if my attorney and my proxy disagree about my care?

Under the *Advance Health Care Directives Act*, if you have more than one health care directive or you have a power of attorney for personal care and there are conflicts between the provisions of these documents, the document that you made most recently will prevail.

For that reason, you should be careful not to inadvertently create a new health care directive that might revoke your previous directive. For example, you should carefully read hospital admission forms. They may contain provisions for your future health care treatment. If you are not sure what you are signing, ask a nurse or administrator for clarification. If you sign this without carefully reading it, you may revoke a more thorough directive without realizing it.



Does my proxy have authority to handle my financial matters?

It is important to distinguish between the roles and powers of an attorney for financial matters, an attorney for personal care, and proxies named in a health care directive.

A proxy can only make decisions within the scope of health care matters found in the *Advance Health Care Directives Act*. This means your attorney has to make any decisions about your financial or property matters or personal care.

If you wish someone to have the authority to handle your financial and property matters, you must appoint one or more persons as your attorney under a power of attorney for financial matters. This person cannot make decisions on your behalf about your personal or health care. If you also create a power of attorney for personal care, that attorney can only make decisions about your personal care, not financial decisions.

Can my attorney and proxy be the same person(s)?

If you wish, you can appoint the same person to be your proxy and your attorney. You can appoint your attorney for financial matters, and/or your attorney for personal care, in a single document, or in two separate documents. See the PLEIS-NB publication called ***Powers of Attorney***. However, your health care directive would have to be created in a separate document since the rules for making it are different. You should talk to your lawyer about this in order to explore your options. Having the same person responsible for all of these duties may be useful in certain circumstances, such as requesting the Public Trustee to take responsibility for your overall affairs should you become incapacitated.

Can I simply create a power of attorney for personal care and give my attorney the powers of a proxy?

The *Advance Health Care Directives Act* specifically says that a power of attorney for personal care is **NOT** a health care directive. The directive is intended to be a document that lets you, the maker, easily change and update as your health conditions change over time. Having it in a separate document may help to facilitate these updates. As well, it is important to realize that the obligations and protections given to health care professionals under the *Advance Health Care Directives Act* may not be applicable under the *Infirm Persons Act*.

Medical Assistance in Dying

Can I include a request for medical assistance in dying in a health care directive?

No, you cannot.

Your health care directive only comes into effect when you are no longer able to consent to treatment. That means you cannot give advance instructions about medical assistance in dying, nor can you give your proxy the authority to ask for medical assistance in dying on your behalf.

You must be able to make this request yourself to your doctor or nurse practitioner when you are at the end of life and suffering from an incurable disease or condition.



Medical assistance in dying refers to the situation where a physician or nurse practitioner prescribes or administers medication to a competent and consenting adult to intentionally bring about their death.

See the PLEIS-NB booklet called ***Patients' Rights***.

7 Advance Health Care Directive Form

Date _____

Date of birth _____

Medicare# _____

This is my Health Care Directive:

Name _____

Address _____ City _____

Province _____ Postal Code _____

Tel. _____ Cell _____

☐ I revoke any previous health care directives

Part 1 – Appointment of a Health Care Proxy (optional)

I appoint the following person to act as my proxy to make health care decisions if I am not capable:

Proxy

Name _____

Address _____ City _____

Province _____ Tel. _____ Cell _____

If my proxy is unable, unwilling or unavailable to make a health care decision, I appoint the following persons to act as as my alternate proxy:

Alternate Proxy

Name _____

Address _____ City _____

Province _____ Tel. _____ Cell _____

Alternate Proxy

Name _____

Address _____ City _____

Province _____ Tel. _____ Cell _____

OR

☐ No Proxy Appointed

I do not wish to appoint a proxy but have provided instructions for treatment decisions in Part 2.

A Health Care Directive is equally valid whether or not you use this form.

Part 2 – Treatment instructions (optional: skip this part if you do not wish to provide treatment instructions)

I give the following instructions to health care professionals and/or my proxies regarding the health care treatment I do or do not want to receive and the circumstance in which I want or do not want to receive it.

My proxy may make health care decisions on my behalf when I am unable to do so for myself:

- ☐ with no restrictions
- ☐ with restrictions as follows:

Part 3 – Values and beliefs

I provide the following statement of my values, beliefs and wishes in general terms to guide decision-making by health care providers and my proxy (if I chose to appoint a proxy).

Notification (optional) [Attach additional page if desirable]

If it is determined that I lack capacity to make a health care decision, and this health care directive comes into effect, I wish the following persons to be notified:

Name _____

Address _____ City _____

Province _____ Tel. _____ Cell _____

Name _____

Address _____ City _____

Province _____ Tel. _____ Cell _____

Part 4 – Signature and date

Your advance health care directive is complete once you sign it in the presence of your witness. If you are unable to sign, a substitute may sign on your behalf. The substitute must sign in your presence and in the presence of a witness. The proxy or the proxy's spouse or common-law partner cannot be the substitute or witness.

Maker's Signature _____ Date _____

Name of substitute _____

Address _____

Tel. _____ Cell _____

Witness

The directive must be signed by a witness who is at least 19 years of age.

Name of witness _____

Address _____

Tel. _____ Cell _____

Witness Signature _____ Date _____

