

Subject: **MENTALLY INCOMPETENTS – DEPENDENT ADULTS ACT,
ORDERS AND PUBLIC TRUSTEE ACT CERTIFICATES OF
INCAPACITY**

The Dependent Adults Act was repealed on October 30, 2009. Orders issued prior to the repeal date are still in effect. Certificates of Incapacity issued prior to the repeal date as well as a continuance of a Certificate of Incapacity are applicable.

For registration procedures issued under the Adult Guardianship and Trusteeship Act, please refer to [AGT-1](#) in our Land Titles Procedures Manual.

BACKGROUND

The SPIN document The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Order – Endorsement

The code used for registration at Land Titles is: ORDE

A. Dependent Adults Act, R.S.A. 2000, c. D-11

The Dependent Adults Act makes provision for the appointment of a trustee and/or guardian in respect of an adult who is unable to make reasonable judgments in respect of matters relating to his estate or person. The trustee may be an adult individual, a trust corporation or the Public Trustee (1) appointed by the Court of King's Bench of Alberta. (2) Once a trustee is appointed, he has the authority to sign and do all things necessary to give effect to any power or authority vested in him.(3)

B. Public Trustee Act, R.S.A. 2000, c. P-44

The Public Trustee Act provides that the Public Trustee may issue and register a Certificate (4) (5) (6) (7) (FORM A) when he considers it to be in the interests of a mentally incompetent person to do so. A "mentally incompetent person" is defined as "a person in respect of whom a certificate of incapacity has been issued or is deemed to have been issued pursuant to the Mental Health Act or the Dependent Adults Act". A certificate of incapacity can be issued by two physicians in accordance with Part 4 of the Dependent Adults Act or Part 2 of the Mental Health Act. The Public Trustee becomes the trustee of the estate of the person named in the certificate and may then deal with the real property of the person without court sanction.

REGISTRATION PROCEDURE

A. Court Order Under the Dependent Adults Act

1. A certified copy of the court order appointing the trustee must be presented for registration. An address for the dependent adult should be provided. An address for the trustee is to be included as part of the particulars endorsed on the certificate of title. Once the order is registered, no further documents executed by the dependent adult or pursuant to a power of attorney granted by the dependent adult may be registered.

2. The terms of the order must be examined to determine whether compliance with section 191 of the Land Titles Act is required. When the immediate effect of the order is not to cancel a certificate of title or terminate an interest in land, but the order may ultimately result in these circumstances, appropriate evidence under section 191 is required. Because the dependent adult will normally not have the capacity to consent to the order, the section 191 requirements are usually satisfied by a certificate indicating the appeal period has expired or by a provision in the order stating the order shall be registered notwithstanding section 191 of the Land Titles Act. If the Public Trustee has been appointed as trustee, an undertaking by the Public Trustee will be accepted as substantial compliance with section 191. The undertaking must state that the trustee

will not dispose of any real property interest unless the appeal period has expired and the Public Trustee is unaware of any notice of appeal of the order having been filed.

3. If a proper legal description is provided either in the Document Registration Request form (D.R.R.) or in the court order and the name of the dependent adult named in the court order is consistent with the name of the registered owner or the owner of an interest in the land, the order is registered against the certificate(s) of title affected. An example of the particulars of the endorsement is:

"DEPENDENT ADULTS ACT ORDER RE JOAN SMITH
APPOINTING JOHN BROWN TRUSTEE (RE MORTGAGE
832123456 (if applicable))".

4. If the court order is required for a document registration, the order registration number may then be referred to either in the subsequent document presented for registration or in the D.R.R.

5. **Powers of the Trustee** - When a document executed by the trustee is presented for registration, the order must be examined to ensure that the court has granted the trustee the power being exercised. Orders often direct that the trustee be permitted to exercise the powers given in a specific section without enumerating the specific powers. Or, an order may be presented appointing a Trustee without reference to sections 38, 39 and 40 of the Dependent Adults Act. Reference to those sections is not essential as long as the order is clear as to the power given. If it is restricted those details are included in the details of the endorsement.

a) **Section 38 Powers** - Although this section appears to give a trustee the ability to do anything which the dependent adult could have done if he were able to make reasonable judgments in respect of his estate, the section is expressed to be "subject to this Act" and therefore is to be interpreted in light of the specific powers enumerated in sections 39 and 40. For example, if a trustee were granted powers only under sections 38 and 39, the trustee would not have the power to mortgage or dispose of real property, except property held in trust by the dependent adult, as these powers fall within section 40.

b) **Section 39 Powers** - Subject to any restriction imposed by the court, the trustee possesses section 39 powers by virtue of his appointment and may do the following in respect to land:

- (i) grant or accept leases of real and personal property for a term not exceeding 3 years,
- (ii) transfer property held in trust by the dependent adult, either solely or jointly with another, to the person beneficially entitled to it,
- (iii) give a consent to the transfer or assignment of a lease if the consent is required, and
- (iv) give or receive a notice that relates to his estate on behalf of the dependent adult.

c) **Section 40 Powers** - If the order grants the trustee power pursuant to section

40, he is authorized to exercise certain powers including the following:

- (i) purchase, sell, mortgage, grant or accept leases for more than 3 years or otherwise dispose of real or personal property,
- (ii) exchange or partition property and give or receive money for equality of exchange or partition, or
- (iii) surrender a lease, with or without accepting a new lease, or accept a surrender of a lease.

A dower consent and acknowledgment can be accepted from a trustee who has been given powers under section 40, as section 40(b) specifically allows for this. A release of dower rights can only be accepted from a trustee, if the court order expressly gives that power to the trustee pursuant to section 40. Otherwise, dower compliance in respect of a dependent adult requires a court order dispensing with consent pursuant to section 10(1)(f) of the Dower Act, R.S.A. 2000, c. D-15. See previous section A(2) re: s.191 of the Land Titles Act compliance.

Upon registration of a transfer by the trustee, the order will be dropped.

6. The Court may grant an order appointing a trustee/guardian without conferring any powers relative to Land Titles, such orders are registrable. They are endorsed as ORDE on ALTA with document particulars "NOTICE ONLY." (Prior to registration, the examiner should contact the registrant to advise that this type of order will not authorize execution of documents by the trustee/guardian.)

PUBLIC TRUSTEE ACT

A court order appointing the Public Trustee allows the Public Trustee to manage, handle, administer, sell the estate of a dependent adult or mentally incompetent person without further court sanction. (8)

7. **Alternate Trustee** - When making the trusteeship order or reviewing it, the Court may appoint an alternate trustee (9) who is to assume the office of the trustee on the death of the original trustee without further proceedings, or if authorized in writing by the trustee during the temporary absence of the trustee. (10) Once his appointment is effective, his authority is the same as that of the original trustee. Before documents executed by an alternate trustee may be accepted, one of the following must be registered:

- a) a certified copy of a court order appointing the alternate trustee with the request on the D.R.R. or in a separate letter that the substitution be effected on the certificate(s) of title.
- b) if the alternate trustee was appointed in the original order, a death certificate of the original trustee issued by the *Vital Statistics Registry, medical examiner's certificate, cremation certificate, or a funeral director's certificate* together with the request as indicated in item a), or
- c) if the alternate trustee was appointed in the original order, a notice or letter of authorization signed by the trustee which indicates the period during which the alternate trustee may act as a trustee. Attestation requirements must be complied with.

In respect of items a) and b), the original trustee's name is substituted under authority of the registration number of the further order or death certificate.

In the case of the temporary appointment of the alternate trustee, an endorsement with the following particulars is entered on the title(s) in question:

"NOTICE OF TEMPORARY APPOINTMENT OF JOHN SMITH
AS TRUSTEE RE #871456789"

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Order – Endorsement

The code used for registration at Land Titles is: ORDE

The endorsement may be discharged by the registration of a revocation executed by the original trustee, which complies with execution requirements. If the period of appointment indicated in the authorization has expired, the original trustee may apply by written request in a letter or on the D.R.R. to have the endorsement of temporary appointment expired. The letter or copy of the D.R.R. is given a registration number and registered as a discharge.

[Tariff item 11\(6\)](#) is charged for the registration of the order, notice or letter of authorization. [Tariff item 11\(5\)](#) is charged for the registration of the revocation or request to expire the notice.

8. **Death of Trustee** - On the death of a trustee and in the absence of an alternate trustee, the Public Trustee, on receiving notice of the death of the trustee, becomes the trustee of the estate of the dependent adult with the same authority as the former trustee. A letter from the Public Trustee advising of these circumstances with proof of death of the former trustee attached can be registered. The former trustee's name is substituted in the manner outlined in item 7. The Public Trustee continues to be the trustee of the estate until either a new trustee is appointed by the court or the court orders the discharge of the Public Trustee. [\(11\)](#)

9. **Resealing of Foreign Orders** - Certain foreign orders (any order issued outside of Alberta) may be resealed by an order of the Court of King's Bench of Alberta and are then of the same effect as if they were issued by the Court of King's Bench and are subject to any order of that court to which a trusteeship order is subject. [\(12\)](#) A certified copy of a re-sealed order is registrable. The order must be reviewed to ascertain what powers the trustee has been granted and to ensure general registration requirements are met including compliance with section 191 of the Land Titles Act.

10. **Discharge** - An order may be discharged upon the registration of:

- a) a certified copy of a court order discharging the trustee, [\(13\)](#)
- b) a transmission application by the personal representative of a deceased dependent adult, or
- c) other evidence of the death of the dependent adult, such as a statutory declaration accompanied by a death certificate, funeral director's certificate, or a letter

from the Public Trustee advising of the death of a dependent adult for whom the Public Trustee acted.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Discharge by Order

The code used for registration at Land Titles is: DISO

B. Certificates Under the Public Trustee Act for Mentally Incompetent Persons

1. The certificate must be executed by the Public Trustee or an official under the Public Trustees' authority. If executed by the latter, it must contain the appropriate endorsement stating that the individual is acting under authority of the Public Trustee Act. Attestation requirements do not need to be complied with.

2. The certificate is to be registered against the title for which a legal description has been provided in accordance with the instructions of the Public Trustee

3 a) Once the certificate is registered, no document affecting the land of the mentally incompetent person except a court order, a writ of enforcement, a caveat or a document properly registrable in the course of proceedings for foreclosure or sale is registrable unless the certificate has been discharged, or the document being registered is executed or authorized by the Public Trustee. (14) Builders' liens and other instruments with registration deadlines should be accepted even if they are not properly authorized.

b) A Certificate allows the Public Trustee to sell, dispose of otherwise deal with the real and personal property of the mentally incompetent person without further court sanction. (15) Upon registration of a transfer, the Certificate of Incapacity endorsement will be dropped from title.

4. The Public Trustee is the successor in office to the Official Guardian, the Administrator of Estates of the Mentally Incompetent and the Public Administrators appointed pursuant to the Judicature Act before July 1, 1949. Ownership of any property held by any of the above officers vests in the Public Trustee. (16) A letter under letterhead of the Public Trustee is sufficient authority to change the name of the registered owner from one of the above to the Public Trustee. Property held in the name of one of the above may be transferred by the Public Trustee provided the transfer recites section 39 of the Public Trustee Act as authority.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Certificate of Incapacity

The code used for registration at Land Titles is: CER1

5. **Discharge of Certificate** - The authority of the Public Trustee continues until the certificate is:

a) withdrawn by the Public Trustee (a withdrawal is based on the cancellation of a certificate of incapacity pursuant to the Mental Health Act or the Dependent Adults Act

or on the death of the person),

- b) replaced by a trusteeship order made pursuant to the Dependent Adults Act, or
- c) discharged by virtue of a transmission application by the personal representative of the deceased mentally incompetent person. (17)

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Discharge by Order

The code used for registration at Land Titles is: DISO

6. Death of a Mentally Incompetent Person - When the Public Trustee is administering the estate of a mentally incompetent person and that person dies, the Public Trustee retains possession of the estate of the deceased pending the granting of probate or letters of administration, or the appointment of the Public Trustee by Ministerial Order, and may exercise the powers granted to the Public Trustee while the deceased was alive. (18) A copy of the Ministerial Order is acceptable for registration.

The procedure on Transmission on Death (TRA-1) applies when the Public Trustee is appointed the personal representative of the deceased mentally incompetent person.

STATUTE AND CASE REFERENCES

Statute references are to the Dependent Adults Act, R.S.A. 2000, c. D-11, unless otherwise indicated.

- 1. s. 36
- 2. s. 1(d)
- 3. s. 58
- 4. s. 10(3), Public Trustee Act, R.S.A. 2000, c. P-44
- 5. s. 1(e), Public Trustee Act
- 6. s. 72(1)
- 7. s. 10(2) and (4), Public Trustee Act
- 8. s. 25, Public Trustee Act
- 9. s. 51
- 10. s. 52
- 11. s. 55
- 12. s. 66
- 13. s. 53
- 14. s. 10(6), Public Trustee Act
- 15. s. 10(4)(b), Public Trustee Act
- 16. s. 39, Public Trustee Act
- 17. s. 77; s. 11, Public Trustee Act
- 18. s. 15, Public Trustee Act