

# CHAPTER FIFTEEN: GUARDIANSHIP – POWER OF ATTORNEY, REPRESENTATION AGREEMENTS AND COMMITTEESHIP

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# CHAPTER FIFTEEN: GUARDIANSHIP – POWER OF ATTORNEY, REPRESENTATION AGREEMENTS AND COMMITTEESHIP

## I. GOVERNING LEGISLATION AND RESOURCES

### A. *Governing Legislation*

Adult Guardianship Act, R.S.B.C. 1996, c. 6 [AGA].

Business Corporations Act, S.B.C. 2002, c. 57, ss. 386-396 [BCA].

Evidence Act, R.S.B.C. 1996, c. 124 [EA].

Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].

Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181 [HCCCFCA].

Land Title Act, R.S.B.C. 1996, c. 250, ss. 45, 51-57, 283(2) [LTA].

Mental Health Act, R.S.B.C. 1996, c. 288 [MHA].

Patients Property Act, R.S.B.C. 1996, c. 349 [PPA].

Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA].

Property Law Act, R.S.B.C. 1996, c. 377, ss. 16, 26-7 [PLA].

Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383 [PGTA].

Representation Agreement Act, R.S.B.C. 1996, c. 405 [RAA].

Wills Act, R.S.B.C. 1996, c. 489 [WA].

### B. *Secondary Sources of Law*

CLE Wills Precedent, Continuing Legal Education Society of British Columbia, 2005.

Adult Guardianship Update, Continuing Legal Education Society of British Columbia, 2005.

O'Brien's Encyclopaedia of Forms, 11th ed. V. I., c. 45, 1988.

- This chapter is a good reference for examples of specific clauses one could include in a Power of Attorney document.
- The document may be accessed online through our Law library website at: <http://toby.library.ubc.ca/resources/infopage.cfm?id=1146>

Enduring Powers of Attorney: Areas for Reform, Western Canada Law Reform Agencies, 2004.

Review of Representation Agreements and Enduring Powers of Attorney Undertaken for the Attorney General of the Province of British Columbia, A. J. McClean, 2002.

Adult Guardianship and Elder law issues, Continuing Legal Education Society of British Columbia, 2005.

Take Charge - It's Your Life! (Make a Representation Agreement), The Representation Agreement Resource Centre & The People's Law School, Vancouver, March 2000.

Vanguard – A project examining inter-agency protocols for capacity and vulnerability in B.C. Visit the CCEL website under “Projects” and “Publications” for more information ([www.bcli.org/ccel](http://www.bcli.org/ccel)).

### **C. Resources**

#### **Community Legal Assistance Society (CLAS)**

300-1140 West Pender Street  
Vancouver, B.C. V6E 4G1

Telephone: (604) 685-3425  
Fax: (604) 685-7611

- Provides information and help with forms.

#### **Canadian Center for Elder Law (CCEL)**

Annex 1 - Faculty of Law  
1822 East Mall  
Vancouver, B.C. V6T 1Z1

Telephone: (604) 822-0142  
Fax: (604) 822-0144  
Web site: [www.bcli.org/ccel](http://www.bcli.org/ccel)  
E-mail: [lwatts@bcli.org](mailto:lwatts@bcli.org)

- An excellent resource at the UBC campus with information on Wills, Power of Attorney, Representation Agreements, Committeeship/Guardianship, Elder Law and other related legal issues.

#### **Public Guardian and Trustee of B.C.**

700 - 808 West Hastings Street  
Vancouver, B.C. V6C 3L3

Telephone: (604) 660-4444  
Web site: [www.trustee.bc.ca](http://www.trustee.bc.ca)

- The Public Guardian and Trustee is an excellent source of advice on Power of Attorney and Committeeship, as well as Adult Guardianship legislation. The website is clearly laid out and contains useful resources. The office has publications available that deal with Power of Attorney and Committeeship:
  - a) “How You Can Help People Manage Their Finances and Legal Matters When They Cannot Manage on Their Own”
  - b) “It's Your Choice – A Guide to Making A Representation Agreement”
  - c) “The Private Committee Handbook”

#### **Nidus Personal Planning Resource Centre and Registry**

411 Dunsmuir Street  
Vancouver B.C. V6B 1X4

Telephone: (604) 408-7414  
Web site: [www.nidus.ca](http://www.nidus.ca)

- This organization provides general information on Representation Agreements. It also provides information to help clients draft their own Representation Agreements and a registry for Representation Agreements and Enduring Powers of Attorney. The web site is extremely comprehensive and easy to navigate.
- Sample Power of Attorney and s.7 Representation Agreement forms located at this end of this chapter were generously provided by the Nidus Centre.

#### **PLAN (Planned Lifetime Advocacy Network)**

Suite 260 – 3665 Kingsway  
Vancouver B.C. V5R 5W2

Telephone: (604) 439-9566  
Web site: [www.plan.ca](http://www.plan.ca)

- This nonprofit society offers long-term planning advice for families of people with disabilities. This includes wills and estate planning, financial planning (including Registered Disability Savings Plans (RDSPs)) and building networks of support.
- PLAN provides a free publication entitled “Safe and Secure: RDSP Edition.” This publication is available free of charge at London Drugs pharmacies and is an excellent resource for families of persons with disabilities.

**B.C. Centre for Elder Advocacy and Support (BCCEAS)**

411 Dunsmuir Street  
Vancouver, B.C. V6B 1X4

Toll Free: 1-866-437-1940  
Telephone: (604) 437-1940  
Fax: (604) 437-1929  
Website: [www.bcceas.ca](http://www.bcceas.ca)  
Email: [info@bcceas.ca](mailto:info@bcceas.ca)

- BCCEAS is a provincial organization dedicated to providing legal information on issues related to older adults and the law, particularly issues involving abuse, POA, Representation Agreements and consumer fraud. BCCEAS now staffs lawyers and runs an Elder Law clinic.

**Community Legal Assistance Society - Mental Health Law Program**

300-1140 West Pender Street  
Vancouver, B.C. V6E 4G1

Telephone: (604) 685-3425  
Fax: (604) 685-7611  
Website: [www.clasbc.net](http://www.clasbc.net)

- This organization provides free legal information and advocacy to people who have been certified under the MHA, especially in assisting them with review panels. However, their services are not for the families of these persons. They also provide legal information to former mental health patients (but not advocacy).

**Vancouver Coastal Health – Re: Act**

Corporate Office  
11<sup>th</sup> Floor, 601 West Broadway  
Vancouver, B.C. V5Z 4C2

Toll Free: 1-877-REACT-99  
Telephone: (604) 984-5958  
Website: [www.vchreact.ca](http://www.vchreact.ca)

- This organization provides education and a response program to help VCH frontline care providers recognize and report abuse, neglect and self-neglect of vulnerable adults.

**Dial-a-Law**

Telephone: (604) 687-4680

- This service provides pre-recorded overviews of the following legal areas:
  - #425: Civil Commitment of the Mentally Ill
  - #426: Committeeship
  - #180: Power of Attorney

**B.C. Association of Community Response Networks**

Website: [www.bccrns.ca](http://www.bccrns.ca)

- This association creates a support structure for the benefit of local Community Response Networks and adults in their communities experiencing abuse, neglect and self-neglect.

#### ***D. Web Sites***

- [www.bcli.org/ccel](http://www.bcli.org/ccel) – The Canadian Centre for Elder Law
- [www.trustee.bc.ca](http://www.trustee.bc.ca) – The Public Guardian and Trustee
- [www.nidus.ca](http://www.nidus.ca) – Nidus Personal Planning Resource Centre and Registry
- [www.cle.bc.ca](http://www.cle.bc.ca) – The Continuing Legal Education Society of B.C.
- [www.bcli.org](http://www.bcli.org) – The B.C. Law Institute
- [www.bcceas.ca](http://www.bcceas.ca) – B.C. Centre for Elder Advocacy and Support
- [www.plan.ca](http://www.plan.ca) – Planned Lifetime Advocacy Network
- [www.bccrns.ca](http://www.bccrns.ca) – B.C. Association of Community Response Networks
- [www.vchreact.ca](http://www.vchreact.ca) -- Vancouver Coastal Health Re: Act

#### ***E. Mental Health Teams***

**NOTE:** Other medical sources are included in **Chapter 23: Referrals**.

- Riverview Hospital, 500 Lougheed Highway, Port Coquitlam, (604) 524-7000.
- Mental Health Emergency Services, (604) 874-7307 (24 hour assistance).
- Kitsilano Fairview Mental Health, 400 - 1212 W. Broadway, Vancouver, (604) 736-2881.
- Mount Pleasant Mental Health Team, 2450 Ontario Street, Vancouver, (604) 872-8441.
- West End Mental Health Team, 1555 Robson Street, Vancouver, (604) 687-7994.
- Richmond Community Mental Health Team, 200–6061 No. 3 Road, Richmond, (604) 273-9121.
- Chilliwack Crisis Line, 45826 Wellington Avenue, Chilliwack, (604) 792-4267 or (604) 792-7242.
- Coquitlam Lifeline Crisis and Information Centre, Box 1142, Coquitlam, (604) 931-7456.
- Mission Crisis Line, 40 33070 5th Avenue, Mission, (604) 826-3534 or (604) 853-5355.
- Surrey Community Services, 9815 140th Street, Surrey, (604) 584-5811 or (604) 588-0188. Crisis line: (604) 951-8855

## II. INTRODUCTION TO GUARDIANSHIP

The reader should note that for the purposes of this manual, there is no distinction between “incapability” in this chapter, and “incapacity” in other chapters.

The reader should be aware that B.C. legislation affecting Guardianship is in a transitional period. At the time of writing, the old Patients Property Act (PPA) is still in effect. However, modern Guardianship legislation has been passed but is not yet in force; see the Adult Guardianship Act (AGA), as amended by the Adult Guardianship and Planning Statutes Amendment Act. According to government announcements, this legislation is unlikely to come into force until April of 2010. Guardianship will be governed by the old PPA until the new legislation comes into force.

Guardianship law deals with the incapability of an individual to make their own decisions regarding their health, life, property, assets, financial arrangements, etc. In British Columbia there is a presumption that all adults are capable of making their own decisions unless the contrary is demonstrated. However, guardianship law recognizes that an individual may be born incapable because of illness, genetics or disability, or they may become incapable at a point in their lives due to illness, disability or accident. Incapability can refer to any condition that removes an individual’s ability to make decisions for him or herself. If an adult is, or becomes incapable during their lives, another capable adult (or adults) can become the incapable adult’s substitute decision maker. Thus guardianship law is significant for all adults over the age of 19, of any gender, or ethnic background, whether or not that individual is currently capable of making decisions about these important life matters.

The various statutes involved in Guardianship Law provide a means whereby:

1. a capable person can plan for the possibility of incapability in **their own future** by designating another to become a substitute decision maker in matters of finance, health care, or both by way of planning instruments such as Powers of Attorney or Representation Agreements;
2. a default system is created to ensure that proper decisions are made for a now incapable adult who did not create the above planning instruments while they were capable, or because of ongoing incapability could never create such planning instruments; and
3. a capable, interested person can apply to become the guardian (“Committee”) **of another** who is currently incapable of making important decisions, and who did not complete any future planning for such an event when they were capable.

The **future planning** aspect of substitute decision-making law primarily involves Powers of Attorney and Representation Agreements in British Columbia. These tools are proactive and allow an individual to plan, **while they are still capable**, for the possibility of being incapable to make important decisions.

**NOTE:** The B.C. Government has passed but not proclaimed Advance Directives legislation that will create a new planning instrument for health care choices only. This instrument was passed in 2007 as Bill 29, Adult Guardianship and Planning Statutes Amendment Act, but is not currently in effect.

The default/court appointed substitute decision-making law currently consists of Committeeship (pronounced **kaw-mi-tee-ship**). Committeeship is retroactive in that it **can occur only after an individual becomes incapable** of making their own life decisions and upon the application of a capable adult to become their court appointed substitute decision maker.

As you read about the specifics of Power of Attorney, Representation Agreements (Advance Directives in the future) and Committeeship, keep the important distinction above clear in your mind. While the first two are instruments for future planning by a capable individual, the third is an arrangement that arises usually at the behest of another person when an individual who did not complete any future planning becomes incapable of making their own important decisions.

### III. PROACTIVE PERSONAL PLANNING TOOLS FOR SUBSTITUTE DECISION MAKING IN B.C.

There are two primary, legislated methods by which an individual can proactively plan for the possibility of future incapability by appointing a substitute decision maker either immediately, or if certain events come to pass. They deal for the most part with different areas of decision-making.

**Power of Attorney** documents grant an individual (called the attorney) the authority to act on behalf of another individual (called the donor) **only** in matters of property, finance, banking, business, etc. They have no purview over issues of substitute health care decision-making.

**Representation Agreements** grant an individual (called a representative, or “Rep”) the authority to act as a substitute decision maker primarily in health or personal matters where the adult is incapable of making those decisions for herself but also over some areas of financial and legal substitute decision making.

Both of these tools must be **completed before the donor becomes incapable** of making decisions (although different levels of capability are required for different kinds of arrangements).

In other words, a donor makes either a Power of Attorney, or a Representation Agreement (or both) while they are still capable, to plan or prepare for possible incapability in the future.

If an adult is no longer capable of making financial decisions, then the reactive default system is Committeehip, which requires a court to appoint a guardian for financial affairs. If an adult is no longer capable of making health care decisions, then the Health Care (Consent) and Care Facility (Admission) Act [HCCCEFA], provides a default list of Temporary Substitute Decision Makers, or alternatively, an interested adult can apply to become the court-appointed substitute decision maker for health care choices (Committee of the person).

Currently, a “**living will**” or “**health care directive**” or “**advance directive**” is not a stand-alone legal document; rather, it is a written expression of prior capable wishes of the now incapable adult. The correct substitute decision maker will interpret these written wishes. However, the Adult Guardianship and Planning Statutes Amendment Act (Bill 29), not yet proclaimed in force, will give these directives legal force if created in the proper manner. Advance directives will have the same effect whether directed orally, written, gestured or by other means to the decision maker or representative. However, if written they should be dated, revised often and kept to a minimum number of copies in order not to end up with conflicting orders. Because of the shifting nature of people’s wishes and desires **oral instructions may be superior to written ones.**

#### ***A. Power of Attorney (POA) and Financial/Legal Planning***

##### **1. Introduction**

A Power of Attorney (POA) is a document that grants an individual (the attorney) the authority to act on behalf of another (the donor) in decisions regarding financial, property, business, legal, estate and other non-corporeal matters.

Powers of Attorney are governed by the Power of Attorney Act [PAA].

Note that attorney does not refer to a lawyer. Nor does a person need to be a lawyer in order to be appointed an attorney and act on behalf of a donor for the purpose of a POA.

Clients should be made aware that the executor named in their will is **not** their attorney unless a POA exists. A POA is created in a document separate and distinct from a person’s will and ceases to be in effect on the donor’s death.

A POA is very flexible and can be as broad or as narrow as is necessary to meet the specific needs of the donor. For example, a POA can be so broad that it gives the attorney the power to do all (financial and business) acts that the donor herself could do, effective immediately and continuing indefinitely. Alternatively, it can be so narrow as to only allow the attorney to do one very specific act (such as cashing a cheque or transferring property) during a specified period of time.

There are primarily four types of POAs, each with different starting and ending points in time. Sometimes the point in time that will determine that a POA begins or ends will be an event that brings about incapability in the donor. However, sometimes incapability has no effect on a POA.

The four types of POA are: General Power of Attorney; Enduring Power of Attorney (sometimes called a Continuing or Durable Power of Attorney in other jurisdictions); Springing Power of Attorney; and Limited Power of Attorney.

**a) *General Power of Attorney***

- A general POA is created by a capable adult, who becomes the donor, and grants authority to act on her behalf to a designated person (the attorney).
- As with all POAs, this authority only extends to matters of finance, business, etc. and the attorney has no purview over substitute health care decisions.
- A general POA is **effective immediately upon execution** granting the attorney the immediate authority to act on behalf of the donor for whatever tasks and business are specified in the document.
- Again these can be broad, or narrow, depending on the wishes of the donor.
- A general POA **ends automatically upon the incapability of the donor**. The attorney has no more authority to act on the donor's behalf after the donor becomes incapable.
- As with all POAs, they can be ended at will by the decision of the capable donor, and they will end automatically upon the death of either the donor or the attorney.
- The general POA is the oldest variety. However, due to its abrupt ending point in the event of incapability, it does not provide what most individuals are looking for when they want to create a POA.

**b) *Enduring Power of Attorney***

- An enduring POA is created by a capable adult, who becomes the donor, and grants authority to the attorney to act on her behalf in matters of finance, business, etc.
- An enduring POA is **effective immediately on creation**, granting the attorney immediate authority to make decisions about the affairs of the donor, to whatever extent the wording of the POA allows.
- The powers granted to the attorney can be broad or narrow, depending on the wishes of the donor.

- The primary difference between a general POA and an enduring POA is that the latter **does not end automatically upon the donor becoming incapable**. It is in this way, that an enduring POA “endures” or survives incapability.
- An enduring POA will end if it is revoked by the capable donor, or upon the death of the donor or attorney.
- Enduring POAs were created to present a desirable alternative to general POAs for donors who were planning for future incapability. Before the use of enduring POAs, a donor who wished to have a substitute decision maker for financial decisions before and after incapability would have to create a POA for before, and the loved one would have to apply for Committeeship after the donor had become incapable.
- An enduring POA does not end if the donor again becomes capable.

**c) *Springing Power of Attorney***

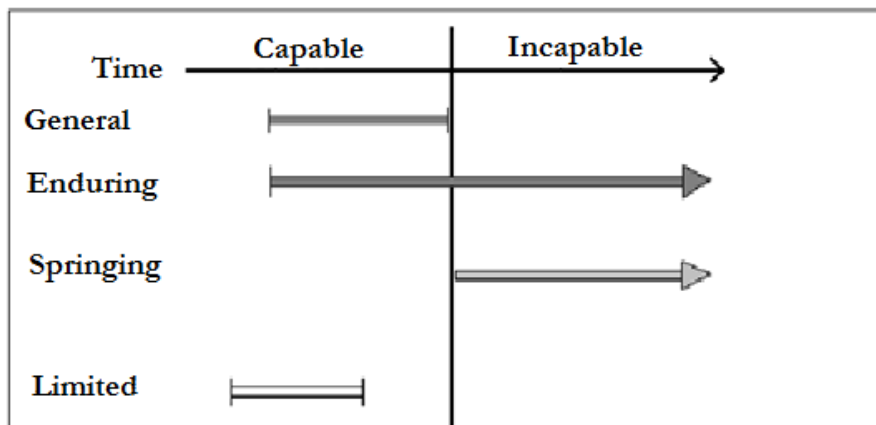
- A springing POA is created by a capable adult (the donor) granting **conditional future authority** to the attorney to act on her behalf in matters of finance, business, property on the occurrence of a specific identified event, which is usually the incapability of the donor, but may be another event such as hostage-taking, medical transport requirements etc.
- Thus the POA is generally used to “spring” into effect upon the subsequent incapability of the donor.
- A springing POA is technically effective as of the date it is created. This means that the attorney’s authority is created by the execution of the agreement
- However, the use of that authority is restricted by the donor, who imposes a clause that the authority may not be used unless and until certain conditions are met; even if those conditions may or may not take place in the future.
- The revocation by a donor while they are still capable, or by the death of either donor or attorney, will end a springing POA.
- A springing POA **will end if the donor becomes capable again**.
- For the majority of individuals interested in planning for their futures, the springing POAs may present an attractive option. The donor retains full and autonomous control of their financial affairs while capable, and has the assurance that if they should become incapable, a chosen attorney will handle their financial affairs, thus avoiding the necessity of Committeeship. See *Parnall (Attorney of) v. British Columbia (Registrar of Land Titles)*, 2004 BCCA 100.

**NOTE:** Although the other forms of POA are recognized by statute and by case law, springing POA are not yet legislated by statute. However they are recognized by case law in many Canadian jurisdictions, including British Columbia. Legislation formalizing springing POAs was passed in 2007 but is not yet in force (Bill 29).

**d) Limited Power of Attorney**

- Limited POAs are the most restrictive, but also the most flexible type of POA.
- A limited POA is created by a capable adult (the donor), and grants authority to a designated person (the attorney) to act on her behalf in matters of finance, business, etc.
- In a limited POA, the dates (or events) of when the power to act on the donor’s behalf both begins and ends are built into the wording of the document. Thus a limited POA is for a **fixed term** and has its own lifetime or expiry date built in from the beginning.
- The specific powers and authority given to the attorney to act as the donor can also be broad or narrow, covering a wide variety of tasks, or one specific transaction.
- A limited POA can be revoked at any time by a capable donor, before or during the period when the limited POA is in effect. The death of either party to the POA will automatically bring the limited POA to an end.
- Due to their flexibility and built-in limitations on time, limited POAs are used by capable adults who are not necessarily planning for future incapability, but rather need someone to help them with a specific task, or series of transactions that they are unable to do themselves.
- For example, an individual traveling in a foreign country who must complete a banking transaction in person at home can, in theory, appoint an attorney at home to deal only with the transaction, and only over a specific three day period, after which the authority to act is ended.

The four types of POA can be conceptualized graphically as follows:



**2. Who is Involved in a Power of Attorney?**

To grant a power of attorney (i.e. become “the donor”) an individual must:

- be at least 19 years of age;

- be capable (i.e. be of sound mind and able to make informed decisions); and
- grant the power of attorney voluntarily of their own free will;

To be an attorney an individual must:

- be at least 19 years of age at the time of appointment;
- be a capable person, able to carry out the tasks the donor wishes them to do on his or her behalf;
- have the capacity to enter into an arrangement with the donor; and
- be willing to act as the donor's attorney.

The donor should carefully consider their choice of attorney. They should also consider the kind of POA they are seeking, the necessary implications, and whether the relationship they have with their preferred attorney would interfere with the eventualities that the donor wishes to prepare for. Once executed, a POA grants the attorney considerable power over the donor's financial affairs, potentially including the ability to remove funds from the donor's accounts, and commit the donor to binding contractual agreements. It essentially allows an attorney to sign the name of the donor in that person's stead.

Although loved ones are often a first choice to act as attorney, the donor should consider whether they are placing the potential attorney in a situation which will create a conflict of interest, or whether the relationship between the parties will make it painful, problematic, or otherwise unlikely that the attorney will carry out their appointed duties efficiently and effectively, and in accordance with the donor's wishes. For example, if a donor wishes to create a springing POA for the possible event of future incapability, and they wish to appoint a spouse as attorney, they should consider whether it will cause undue strain on the relationship; the attorney-spouse will necessarily be involved with the decision to assess the donor's capability, which may involve some sensitive issues.

**a) *Multiple Attorneys***

**A donor can appoint more than one person as their attorney.** Where there are two or more attorneys acting for a single donor, **all the attorneys must be in agreement** regarding decisions made for the donor under the POA unless otherwise specified in the POA. Appointing more than one individual to be your attorney has potential advantages and disadvantages. It can reduce the potential for the misuse of power by the attorney. It might in some cases, however, tend to make the decision-making process complicated and inefficient.

**b) *Separate Responsibilities***

Alternatively, a donor can appoint one adult as the attorney for certain affairs (e.g. personal banking) under POA #1, and a second individual as their attorney over different affairs (e.g. property) under POA #2. These two attorneys will represent the donor in different areas agreed upon in different POA documents. Each is autonomous in their authorized area; they do not require the other's consent to take action.

**c) *The Public Guardian and Trustee as Attorney***

If a person has no relatives or friends who are willing and able to serve as attorney, the donor may approach the Public Guardian and Trustee, a provincial office that is tasked with providing assistance and guardianship to vulnerable persons in B.C. They may, under limited circumstances, agree to act as an attorney.

The Public Guardian and Trustee (currently Mr. Jay Chalke, Q.C.) and the office of the PGT can accept the request to act as attorney after completing an assessment of the potential donor (see **Section I.B: Resources** at the start of the chapter). The PGT accepts applications for POA primarily from the following groups:

- individuals with developmental disabilities;
- individuals who have suffered a brain injury; and
- individuals who are vulnerable adults, as defined in Part 3 of the Adult Guardianship Act.

The assessment of the PGT proceeds as follows:

1. A medical assessment by a doctor to determine if the potential donor is capable for the purposes of granting a POA.
2. If capable of granting a POA, the donor is sent to consult with independent legal counsel with a copy of the PGT's fee schedule for two purposes:
  - a) To determine that the donor is fully informed of the Pros and Cons of a POA and that granting a POA is really what the donor wants
  - b) To review the PGT fee schedule with the donor in order to confirm that they understand the fees they will be charged for the service provided by the PGT
3. If the donor wishes to proceed with granting POA to the PGT, a representative of the PGT will arrange to meet with the donor (usually at the donor's home) and will draw up the POA document with the donor. For the sake of consistency, the PGT prefers to draw up its own documents, rather than use pre-drafted POAs prepared by independent counsel.

### **3. Creating a Power of Attorney**

The requirements for creating a POA are relatively simple. The most important concern is drafting the document carefully so as to convey to the attorney only those powers and authority that the donor wishes to give.

- Any adult, including a lawyer, the donor, or an LSLAP student can draft a POA.
- A POA requires the signature of the donor and the attorney(s). The donor and attorney need not sign the document at the same time.
- For most POAs, notarization by a lawyer or notary is not required.

**NOTE:** Under the Land Title Act [LTA] a POA that confers the power to deal with the transfer of land and registration of land titles must have the signatures of the donor

and attorney witnessed and notarized by a lawyer. Also, under s. 56 of the LTA, a POA that grants authority to the attorney to deal with land transfers and registration of title expires after 3 years of its execution, unless it is an enduring POA, or it expressly exempts itself from these provisions.

- The PAA has, at the end of the legislation, statutory POA forms that can be used to create a POA.
- LSLAP also maintains its own standard POA form, which can be altered to suit the needs of the specific donor.
- This chapter contains a list of clauses to be added to the statutory form as appropriate in the circumstances (See **Appendix H**).
- Although there is no legal requirement to register a POA, an enduring POA can be registered through the Nidus e-Registry. For more information, contact the Representation Agreement Resource Center at [www.rarc.ca](http://www.rarc.ca), or call (604) 408-7414.

**NOTE:** It is important to circulate a POA to the banks or other institutions that the donor uses. Once the donor has properly drafted the POA, it is important to circulate it to the necessary companies, institutions, and individuals to notify them that a POA was granted. The same is true if a POA is revoked – due diligence may be required to ensure that the banks and other institutions are aware of the revocation.

**a) *Banking Standard Power of Attorney Forms***

Many institutions and agents (such as bankers, insurance agents etc.) may not be familiar with the laws of POAs, and may ask your client to complete their own internal form. This is happening with slightly less frequency. **There is no need to complete an institution's POA and this can, in fact, create conflict between instruments.**

If the donor wishes to grant the attorney access to bank accounts for the purpose of paying bills, making transfers, etc. the Bank will often request that the donor and attorney fill out the bank's own limited POA document. Banks prefer using their own documents, which they supply.

If the donor wishes to confer authority to the attorney only for banking purposes, and only at one specific banking institution, then using the bank's POA form may be acceptable.

If the donor wishes to confer limited authority as described above, but the institution does not supply a standard banking POA form, this chapter contains a suitable form (see **Appendix G**).

If the authority to access accounts is only a part of a more comprehensive POA, then it is in the best interests of the donor to try to persuade the bank to accept the fully drafted, statutory POA form. However in some situations, a bank may require the donor and attorney to sign their own form in addition to the fully drafted statutory POA form.

A client should **never** sign a banking standard Power of Attorney form without seeking legal advice. They should be aware of the potential effects of signing, such as the possible revocation of a previous Power of Attorney.

**b) *Land Transactions Pursuant to a Power of Attorney***

POAs authorizing the attorney to transact with the donor's land and title require more care, capability and consultation than is the case with POAs that do not. Although LSLAP can help to draft these documents, we always recommend that the client obtain independent legal advice with regard to the gravity of their wishes before executing the POA. Furthermore, for land transactions, a lawyer must witness signatures of donor and attorney. This is not the requirement of the PAA, but rather, the requirement of the Land Title Office.

If the attorney is given the power to engage in land transactions, before doing so he or she must comply with the requirements of Part 6 (ss. 51 – 57) of the LTA:

- Section 51 requires a formal written POA, or its certified copy, be filed at the Land Title Office.
- Certification in such a case must be by the “Registrar” as defined in the LTA or by the Registrar of Companies. In the second instance, the Registrar of Companies must have custody of the original document (LTA, s. 51(1)). Certification by either a notary public or a lawyer will not be accepted. A copy of the title certificate must be brought into the Land Title Office when filing the formal written POA. The name on the title certificate must exactly match to the name printed on the written POA.
- Section 52 provides that in the POA the powers conferred on the attorney apply to lands and interests in land owned by the principal at the time of the attorney's appointment as well as lands acquired thereafter, unless a contrary intention appears in the instrument.
- POAs can be worded so as to restrict the powers of the attorney in any way the principal requires. The power may apply to the execution of a single instrument or confer unrestricted power to deal with all of the interests in land of the principal, whether existing at the time of the appointment or acquired afterward.
- As mentioned above, s. 56 provides that unless the POA granted is expressly an enduring POA or it expressly excludes the operation of s. 56.
- The principal may revoke a POA by filing a notice in Form 8 with the Registrar and the Registrar will endorse receipt of that notice on his or her index of Powers of Attorney (s. 57). With regard to an unregistered POA, the grantor may lodge a caveat pursuant to s. 262.
- The execution of a subsequent POA does not act to revoke a previous POA unless it expressly states that it does and s. 57 is complied with.

**NOTE:** Powers granted under the PAA may not be valid in other jurisdictions, which may require, as British Columbia formerly did, that the powers be specifically enumerated. Furthermore, foreign jurisdiction would be unlikely to have immediate recourse to our PAA, and therefore would be unable to give the authority any real meaning. In addition, the power to sell will not of itself imply the power to execute the conveyance.

**c) *Power of Attorney Under Seal***

A POA may be made under seal (i.e. stamped with the official seal of the person executing the document). A POA made under seal will be strictly construed. It is not necessary to use a seal in every case. However, where the attorney has been given the power to execute a Deed, the POA must be under seal and the attorney's authority must be expressly created in the Deed. According to this common law rule, a POA must be under seal for any transactions that still require a Deed, namely:

- agreements conferring a benefit on another that is not supported by consideration; and
- transfers of an interest in land when the agent is an attorney for a corporation.

Since land transactions in B.C. do not require a Deed according to the Property Law Act, R.S.B.C. 1996, c. 377 [PLA], apart from the transactions above, a Deed is not necessary to create a valid POA.

**4. *Serving as Attorney***

An attorney holds a **fiduciary duty** to the donor. A fiduciary duty is the highest legal level of responsibility that one individual can have towards another.

An attorney must comply with the wishes and requests of the donor for as long as the donor is capable. They must do those things, and only those things which the capable donor requires, and in the manner which the donor specifies.

An attorney must:

- act only within the authority given to her by the donor in the POA;
- use the utmost care, skill and diligence in acting for the benefit of the donor;
- avoid any transactions and relationships which would conflict with the attorney's duty to the donor under the POA (avoid conflicts of interest);
- report and make full disclosure to the donor of any interests which may conflict with the attorney's duty under the POA;
- keep proper accounts and deliver them upon request to the donor, except where the donor is no longer capable;
- not do anything which would inappropriately jeopardize any of the donor's property, assets, title which is held by the attorney on the donor's behalf;
- not delegate powers and authorities to others unless:
  - a) expressly empowered to do so, or
  - b) such delegation can be inferred as permitted under the circumstances; and
- not, even after the POA has terminated, use information gained in his or her capacity as attorney for private or personal benefit.

**a) *Limits on Authority***

POA can be very broad or very narrow, depending both on the type of POA used, and the powers and authorities delegated to the attorney in the wordings of the POA.

There are three general ways in which a POA can be limited:

1. Limited as to the time that the POA is valid;
2. Limited as to the powers and authorities which it grants to the attorney; this can include limitations on the way in which certain tasks and powers must be exercised; and
3. Limited in regard to who the powers are conferred upon; and in the case of more than one attorney, limited in that all attorneys must be in agreement to exercise the power.

An attorney must do only those acts and tasks which he or she is authorized to do by the POA. The attorney must also do those tasks in the manner prescribed by the POA.

If no method is prescribed, the attorney must use reasonable methods and be guided by any established custom or practices, where the custom is either known to the attorney, or reasonable to infer in the circumstances.

Where the POA is ambiguous, and the attorney acts on a reasonable interpretation, he or she is protected when acting in the bona fide capacity of his or her duty as a fiduciary.

Where an attorney acts reasonably, the donor is bound by the acts and the attorney is protected. However, where the attorney acts on an unreasonable interpretation of the POA, the donor is not bound and the attorney is liable for third party breach of warranty of authority.

**b) *Standard of Care***

While attorneys are commonly compensated for expenses and disbursements, it is highly uncommon for an attorney to be paid.

The unpaid attorney has to use such skill as he or she possesses and show such care and diligence as he or she would use when conducting his or her own affairs. A gratuitous attorney is typically only liable for misfeasance and not for nonfeasance.

However, if a gratuitous attorney holds him or herself out as having the requisite skill for the duties undertaken, that person will be judged by a higher standard.

**c) *Good Faith and Disclosure***

An attorney, as a fiduciary, must act in good faith for the benefit of the donor. This includes:

- using utmost care and diligence in seeing to the affairs of the donor;
- avoiding conflicts of interest where possible;

- disclosing to the donor the nature and extent of any interest that may conflict with his or her duty – except where the donor was aware of a pre-existing conflict when they executed the POA.

A donor whose attorney has not made full disclosure of a conflict of interest has several remedies available, including:

- recouping profits from the attorney which were made by the conflict; and
- terminating the POA.

**d) *Protection of Donor's Title***

An attorney must not take action which will threaten assets or title to goods or property. This includes:

- paying bills on time; and
- complying with relevant laws, regulations and private (contractual) obligations.

**e) *Accounting***

- The donor's assets and accounts must be kept separate from those of the attorney and any third parties;
- all assets belonging to the donor which are held by the attorney must be paid to a **capable** donor when demanded;
- the accounts must be kept up to date; and
- books, documents, and account records entrusted to the attorney must be available for production to the capable donor at a reasonable time. (Usually this is done in an annual review.)

**f) *Delegation of Authority***

Authority is only very rarely delegated to a sub-attorney if at all; in those rare cases where it is, this is usually done in order to deal with property in locations far removed from the donor and attorney. An attorney may delegate powers and duties only when expressly or impliedly authorized to do so. Delegation can occur by express wish of the donor or by necessary implication of the POA.

Delegation by implication is **very** rarely found by courts construing documents. Implied authorization occurs when the act is purely concerned with carrying out the attorney's orders, and does not involve any decision-making component. In this event, it must also be reasonable to presume, based on the original contract of agency, normal business practice, or the nature of the particular business involved, that the original parties intended that the attorney should have the power to delegate powers. Alternatively, implied authorization to delegate powers may be recognized where, in the course of employment, unforeseen emergencies arise that make it necessary for the attorney to employ a substitute (Thesiger L.J., in *De Bussche v. Alt*, (1878) 8 Ch. D. 286).

***g) Receiving Remuneration***

Payment to an individual (as opposed to the PGT) for service as an attorney under a POA is **rare**. Occasionally, it can occur where expressly specified by the donor in the POA. Although extremely rare, where payment is not specified in the execution of the POA, an attorney can claim for remuneration on a *quantum meruit* basis.

***h) Duty after Termination***

Even after a POA has come to an end, an attorney may not use any information gathered during the course of duties as attorney for personal or private profit. Nor can an attorney solicit customers from the donor's business.

**5. Duration of Power of Attorney**

A POA can be open ended (springing, enduring), or it can be for a fixed term (limited). The length of time a POA is valid depends on the type of POA, and the specific terms of the POA.

- All POAs, regardless of type, expire upon the death of the donor or the attorney.
- All POAs, regardless of type, expire upon the bankruptcy of the donor.
- POAs can come to an end as a result of a frustrating event, similar to contractual obligations.
- All POAs, regardless of type, are terminated when the donor becomes a "patient" by court order. Unless the court orders otherwise, all representation agreements are also terminated. "Patient" is defined in the Patients Property Act.
- All POAs expire if they are revoked by the donor, as long as he or she is still capable. The capable donor can revoke an existing POA at any time while they are capable.

***a) General POA***

- Expires upon any of the standard conditions above.
- Expires automatically upon the incapability of the donor.

***b) Enduring POA***

- Expires upon any of the standard conditions.
- Does not expire upon the incapability of the donor.
- Expires if superseded by the appointment of a Committee of the Estate, or of body and estate.

***c) Springing POA***

- Expires upon any of the standard conditions.

- Usually only comes into existence in the event of the incapability of the donor.
- Expires if superseded by the appointment of a Committee of the Estate, of body and estate.

**d) *Limited POA***

- Expires upon any of the standard conditions.
- Expires upon the date or occasion which marks the end of the fixed term originally specified by the wordings of the POA as bringing an end to the attorney's authority to act for the donor.
- Expires if superseded by the appointment of a Committee of the Estate, or of body and estate.

**NOTE:** **Regarding POAs dealing with land:** Under the LTA, s. 56, a POA which authorizes the attorney to deal in land transactions for the donor will expire automatically after three years from the date of its execution, unless it is an enduring POA under s. 8(1) of the PAA, or it expressly exempts itself from that requirement in s. 56 of the LTA.

**6. Revocation and Termination of Power of Attorney**

The verbal revocation of a POA by a capable donor is sufficient to legally terminate the POA. However, there is an important practical consideration for donors to remember:

- when the POA was created, it was likely circulated to various businesses, institutions, and individuals to give notice that an attorney had been appointed with the authority to perform certain tasks and actions on the donor's behalf;
- many of the businesses and institutions will have kept a copy of the POA, either as a hard copy on file, or as a digital copy stored as a PDF file;
- while the verbal revocation by the donor ends the POA **at law**, these **institutions will continue to believe in the status quo (i.e. that a valid POA exists) until otherwise notified;**
- during this time, a dishonest or unaware ex-attorney could continue to make transactions using the donor's accounts and finances, because as far as the institution knows, there still exists a valid POA concerning the donor, and the individual claiming to be the attorney;
- therefore, it is very important that a capable donor who wishes to revoke an existing POA, not only verbally revoke the POA and destroy the original document, but also:
  - a) inform the attorney in writing that the POA is revoked effective immediately;
  - b) contact all businesses, institutions, and individuals to whom the existence of the POA was known and notify them in writing that it has been revoked, effective immediately, and require that they destroy all copies of the document which they possess;
- termination of POA can also be registered at the Land Title Office for those POA who dealt with land transactions;

- an attorney can terminate the POA by giving notice of renunciation, in writing, to the donor;
- a donor can give notice of revocation to the attorney via a standard form (see **Appendix E**); and

There are limits on when a donor can terminate/revoke an existing POA. For the protection of the attorney and third parties, a donor cannot revoke an existing POA:

- where the attorney has done or has started doing a task, transaction or activity that she was expressly instructed to do by the donor, or one which was specified in the wordings of the POA;
- where the POA was granted to the attorney as a security for a liability owed by the donor to the attorney; and
- where this is the case, the donor cannot revoke without the attorney's consent. (These are rare circumstances.)

## 7. **Liability of Attorney**

To protect innocent persons from liability that would arise from transactions made after the POA relationship has been terminated, British Columbia's PAA modifies the common law with regard to the effects of termination. If the attorney or a third party has acted in good faith, the Act shifts the loss from the attorney or third parties to the donor.

Section 3 of the PAA protects the attorney from liability for any act done in good faith and in ignorance of the termination of his or her authority. Section 4 protects third parties who deal in good faith with the attorney where the third party, as well as the attorney, is unaware of the termination.

**NOTE:** Section 57 of the LTA provides that the principal may file the termination of the agency in the Land Title Office. Filing the notice protects the principal from registration of "instruments" (as defined in the LTA) executed by the attorney after the termination of his or her authority even though the attorney and a third party may have been ignorant of the termination.

## 8. **Protecting the Donor from Liability**

If the donor gives the attorney proper notice of revocation, the PAA will not apply. Such revocation must expressly refer to the PAA, and state that it does not apply. However, the donor is liable if she creates an "apparent authority" in the agent. To protect him or herself after the termination of the agency relationship, the donor should:

- notify the attorney in writing of the revocation of authority;
- notify all persons with whom the attorney has had dealings on behalf of the principal that the agency has been revoked; and
- publish the revocation in the B.C. Gazette.

## 9. Where an Incapable Person has No Power of Attorney

If an individual does not complete an enduring or springing POA while they are capable, and later becomes incapable of managing their financial affairs and making decisions related to those affairs, it is too late for prospective planning. The incapable individual is not permitted to create and execute a POA. A capable, interested person will then likely apply to the court for Committeeship, in order to manage the incapable donor's affairs.

If there is no enduring or springing POA and the individual is incapable, their case will be referred to the Public Guardian and Trustee, who will charge a mandatory fee, calculated following item 9(a) of the Fee Schedule in the Public Guardian and Trustee Fees Regulation, B.C. Reg. 312/2000.

## 10. A Practical Clinic Approach to POA for LSLAP Students

When a client approaches LSLAP for assistance with creating a POA, the following series of questions should be asked to ascertain the kind of POA that would best suit the needs of the client without putting them at undue risk of being taken advantage of:

1. Is the client capable (mentally) in the view of the clinician, of granting a POA? The presumption is that all adults are capable. The test is the ability to understand and appreciate the meaning of what they are trying to do in this particular case.
2. Why does the client want a POA?
3. For what purpose does the client require someone else to manage their financial affairs?
4. Does it need to authorize broad powers, or can it be narrowly defined and still meet the needs of the client?
5. What tasks does the attorney need to be authorized to do in order to meet the needs of the client?
6. When does the POA need to start?
7. Is it appropriate for the POA to have a built-in expiration date?
8. Has the client thought about who they wish to appoint as their attorney?

Abuse of Power of Attorney is a criminal act and can be prosecuted under ss. 331 and 380 of the Criminal Code. For more information on abuse of Power of Attorney and on elder abuse, please consult the Advocacy Centre for the Elderly website ([www.aclelaw.ca](http://www.aclelaw.ca)), the CCEL website ([www.bcli.org/ccel](http://www.bcli.org/ccel)), and the Public Guardian & Trustee ([www.trustee.bc.ca](http://www.trustee.bc.ca)).

**NOTE:** It is possible, and even common, for a donor to have an attorney under the POA to handle their financial affairs, and a Rep, under the RAA, to make decisions regarding health and treatment. This commonly happens where the person who knows the personal wishes and values of the donor best is adept at handling finances, and a more financially astute individual is chosen as attorney.

Power of attorney fraud is a constant concern. You must meet with your client alone. Make sure to inquire about the relationship between the client and the proposed attorney and be on alert for possible undue influence or fraud.

## ***B. Representation Agreements and Advance Health Care Planning***

### **1. Introduction**

Representation Agreements (RA) are another instrument by which an individual can proactively plan for the possibility of future incapability that would prevent them from making important decisions by appointing a substitute decision maker. In this respect, they are very much like a POA.

POAs are the primary method by which adults in B.C. can plan for future financial substitute decision making. Representation Agreements are the primary method by which adults in B.C. can plan for future **health care** substitute decision making. Representation Agreements also allow a **limited** amount of routine financial substitute decision making.

In the B.C. health care system, health care providers must speak to an individual in order to inform them about health care choices and consequences, and to gain consent for treatments. In most cases this is the individual who requires medical advice or treatment. However, due to illness, accident or disability the individual needing health care may not be capable of understanding the advice, making informed decisions, or providing meaningful consent to the proposed treatment.

A Representation Agreement allows a capable adult to appoint a substitute decision maker to make health care (and perhaps some limited financial) decisions for them, if the adult becomes incapable.

Because an individual making a Representation Agreement may be in a vulnerable position, there is potential for abuse. Students must meet the client alone and ensure that the client understands and appreciates the meaning of the RA and the effects that it will have. Students should take detailed notes of their interview with the client and should consider multiple meetings with the client to ensure that the client understands and appreciates the process. Students should confer with their supervising lawyer if there is any doubt that the client understands and appreciates the RA.

Representation Agreements may come into effect immediately or upon future incapability. The vast majority of registered RAs come into effect immediately. This practice is justified because of the first duty of a representative to consult and abide by the wishes of the adult.

The creation of a RA is governed by the Representation Agreement Act [RAA].

### **2. Types of Representation Agreements**

Under the current RAA, there are two levels of RAs that an adult can choose to create, named for the section which governs them: s. 7 Representation Agreements and s. 9 Representation Agreements. Both types of RAs allow the adult to select any or all areas of decision making created by the statutory section in which he or she will authorize the Rep to act on his or her behalf.

#### ***a) Section 7 Representation Agreements***

Section 7 RAs designate a substitute decision maker in the event of the adult's incapacity. The Rep is authorized by the RA to make **major and minor health care decisions** for the adult, as well as some routine minor legal and financial decisions.

These health care decisions cover the majority of health and personal care related choices that an individual can make over the course of their life. It includes decisions regarding:

- consent to treatment;
- medication;
- minor OR major surgery;
- diagnostics and tests;
- palliative care; and
- living arrangements of the adult.

A s. 7 RA may also allow the Rep to take care of **routine financial affairs** of the adult, including:

- paying bills;
- depositing pension;
- purchasing food and other services necessary for personal care; and
- making investments.

Due to its broad powers, a s. 7 RA may be sufficient to meet the needs of a client looking to transfer decision making powers.

The creation of a s. 7 RA does not require the services of a lawyer. LSLAP is able to draft s. 7 RAs for clients. However, a Rep with a s. 7 RA for the adult is not permitted to make health care and personal decisions which are covered by s. 9 of the RAA, which include end of life decisions.

## ***b) Section 9 Representation Agreements***

Section 9 RAs designate a substitute decision maker for **significant and often controversial health care decisions**, including:

- the decision to have the adult confined or physically restrained against his or her will;
- refusal of life saving or life supporting treatment;
- admittance to any care facility;
- temporary custody and arrangements for the adult's children;
- end of life decisions;
- abortion and sterilization; and
- experimental medicine.

A section 9 RA also gives the Rep **all the legal and financial powers that an attorney would have under a POA**, if there is not a POA in existence.

Section 9 RAs generally include the powers of a s. 7 RA.

At present, a s. 9 RA requires the services of a lawyer to be executed. The cost is usually between \$1000 and \$5000, depending on complexity. LSLAP students may draft a s. 9 RA, but the client still must see a lawyer to have it executed. Some lawyers will only execute an RA that they have drafted themselves.

**NOTE:** When the new Guardianship legislation comes into force (Bill 29), the requirement of execution by a lawyer for a Section 9 RA will be removed.

### 3. Who Can Be a Representative?

Section 5(1) of the RAA states that the following individuals/entities can be appointed as representatives by a RA:

- another adult;
- the Public Guardian and Trustee; and/or
- a credit union or trust company only to serve under the financial provisions of a s. 7 RA.

Under s. 5(2) of the RAA, an adult can also name more than one representative either:

- over different areas of authority; and/or
- over the same area of authority, in which case, the representatives must be unanimous in exercising their authority.

Section 5(4) requires that all Reps complete a certificate in the prescribed form (see **Appendix K**).

### 4. Acting as a Representative

A Representative's first duty is to carry out the expressed wishes of the adult. In the event that the adult is incapable of expressing their wishes a Rep must "stand in the shoes" of that individual and make health care decisions based on the Rep's knowledge of the adult's values, beliefs, and wishes.

A Rep, like an attorney, owes a fiduciary duty to the adult. They cannot make decisions based on their own values and wishes, but must effectively try to **represent** the adult's own wishes to health care providers and others.

An adult can communicate her wishes to her Rep before the RA is created, or afterward before the adult becomes incapable. Values, beliefs, and wishes can be communicated to the Rep orally, in person, over the telephone, in writing, by e-mail, by recorded transmission, or by any other means that can act to inform the Rep of the wishes of the adult.

### 5. Capacity/Capability and Representation Agreements

Section 3 of the RAA contains a rebuttable presumption that every adult is capable of making or changing a Representation Agreement and making his or her own decisions.

The section states that any adult can make a Representation Agreement unless incapable of doing so. This does not mean incapable of managing their affairs, but rather incapable of legally granting authority to make an RA.

The RAA sets no minimum threshold of capacity to make a standard Representation Agreement, although s. 8 states that the level of mental capacity required to make a standard RA is lower than required to make a contract or to manage a person's health care, personal care, legal matters, financial affairs, or business assets.

Because of the presumption contained in s. 3, the onus is on the party challenging the capacity of the adult to prove he or she is incapable of making a Representation Agreement. Section 8 lists factors that may be considered when deciding whether an adult is incapable, and therefore unable to make an RA.

This non-exhaustive list includes:

- the adult's communicated wishes;
- the adult's demonstrated choices and preferences and expressions of approval or disapproval;
- the awareness the adult displays concerning the consequences of making, altering or revoking a Representation Agreement; and
- whether the representative is already in a position of trust in relation to the adult.

Under s. 8, an adult **can** make a standard Representation Agreement without understanding the full nature and effect of the authority he or she is giving to the representative.

The primary responsibility for assessing whether the adult is capable of making a standard Representation Agreement rests with the representative, who must ensure that the adult is capable of making the agreement.

The monitor (see immediately below) must confirm that he or she has no reason to believe the adult is incapable. In addition, each witness must be satisfied that he or she has no reason to believe the adult is incapable based on the s. 8 requirements.

## **6. Alternatives and Monitors of Representation Agreements**

Section 6 of the RAA authorizes the adult to appoint an alternative Rep to act for the adult should the primary Rep be unable to fulfill their duties when called upon.

The alternative Rep must be qualified to serve as a representative. The specific circumstances in which the alternative Rep will be allowed to exercise authority in place of the primary Rep must be expressed in the RA (such as the death of the primary, for example).

Section 12 of the RAA, governs the appointment of a third party to act as a monitor for a RA. A monitor supervises the performance of the Rep to ensure that the terms of the RA, and the provisions of the RAA are being adhered to.

- Section 12(1) requires a monitor if the adult authorizes the Rep to have financial authority under a s. 7 RA except for spouses or where there are two or more reps with joint signing authority;

- s. 12(3) provides that an adult may appoint an individual to monitor the Rep, to ensure that the wishes and values of the adult are being adhered to;
- s. 12(4) requires that a monitor be at least 19 years of age, capable and willing to bear the responsibility of a monitor of a RA; and
- s. 12(5) requires that a monitor complete the prescribed form of a monitor's certificate.

## 7. Executing a Representation Agreement

The requirements for the execution of a RA are that it must:

- be in writing; and
- be signed by the adult, representative, and any alternate representatives. Two adults must witness the signatures, unless, it is being witnessed by a lawyer or notary public consulted under ss. 9(2) or 12(1)(c), who completed the consultation certificate in the prescribed form. The signatures of the representative and alternative representative need not be witnessed, and all parties need not be together when they sign the agreement.

Each representative must also complete a certificate (Form 1 and Form 5 respectively) (see **Appendix K: Certificate of Representative or Alternative Representative** and **Appendix N: Certificate of Witness**). The section in the RAA requiring registration of Representation Agreements is not yet effective, so for now a Representation Agreement becomes effective on the day it is executed, unless the Agreement itself specifies that it is to become effective at some later time based upon a triggering event (RAA, s. 15).

Although there is no legal requirement to register an RA, registration may be undertaken through the Nidus e-Registry. When a person registers, he or she can decide which organizations can access his or her record. Nidus charges \$25 for the initial set-up and first registration and \$10 for additional registrations for the same person. For more information contact Nidus Personal Planning Centre online at [www.nidus.ca](http://www.nidus.ca) or by telephone at (604) 408-7414.

## 8. Witnesses to the Representation Agreement

Witnesses cannot be:

- one of the representatives;
- an alternate representative;
- a spouse, child, or parent of anyone named in the Representation Agreement as a representative or alternate representative;
- an employee or agent of a representative or alternate representative;
- anyone under 19 years of age; or
- anyone who doesn't understand the type of communication used by the adult who wishes to be represented.

## 9. Termination of a Representation Agreement

A Representation Agreement is revocable and/or alterable by the adult if the adult is capable.

Written notice must be given to the representative, the alternate representative, and the monitor (RAA, s. 27). Subsection 3.1 provides that revocation is effective either when written notice is given to each of these persons, or on a later date specified in the written notice.

Section 29 of the RAA lists several cases where a Representation Agreement automatically terminates:

1. death of the adult;
2. an order of Committeeship over the adult;
3. a court order requiring termination;
4. divorce of the adult and spouse if the spouse is the representative; or
5. the representative loses capacity, resigns, or dies.

Note that this section does not mention that making a new Representation Agreement will terminate a prior Agreement, which implies an adult could have more than one valid Representation Agreement at the same time.

**NOTE:** See **Chapter 14: Mental Health Law** if the Representation Agreement concerns an individual who is involuntarily detained under the Mental Health Act.

## 10. Remuneration of Representative

As of September 1, 2001, a representative, alternative representative, or monitor is not entitled to remuneration unless the Representation Agreement provides for compensation and sets the amount or rate of compensation (RAA, s. 26). Furthermore, the court must authorize the payment of this remuneration and the adult must have consulted with a lawyer or qualified notary who completed a consultation certificate. A representative, alternative representative, or monitor is also entitled to reimbursement for reasonable expenses incurred in the course of his or her duties but must be recorded and accounted for. When drafting a Representation Agreement, the issue of remuneration of representatives, alternative representatives, and monitors should be discussed with the adult.

## 11. No Representative Appointed When the Donor Becomes Incapable

A number of other statutory schemes impact the health care guardianship law, among them the Health Care (Consent) & Care Facility (Admission) Act, R.S.B.C. 1996, c. 181 [HCCFA], the Adult Guardianship Act R.S.B.C. 199, c. 6 [AGA], and the Public Guardian and Trustee Act R.S.B.C. 1996, c. 383 [PGTA]. This last section will briefly comment on how these statutes affect health care guardianship.

**NOTE:** The B.C. Government has passed but not proclaimed Advance Directives legislation that will create a new planning instrument for health care choices. This instrument was passed in 2007 as Bill 29, Adult Guardianship and Planning Statutes Amendment Act, but is not currently in effect.

a) ***The Health Care (Consent) & Care Facility (Admission) Act [HCCFA]***

The HCCFA confirms the right of a capable adult to give or refuse consent to health care treatment, and outlines specific procedures for health care providers to follow when an adult is unconscious or confused, or otherwise not capable of providing a valid consent.

Remember that in B.C., a health care provider must speak to either the individual in need of health care themselves, or a substitute decision maker in order to receive consent to treat the patient. (In practice, this does not always happen and lawyers need to be alert to the possibility that treatment may be undertaken, in fact, without proper consent, whether direct or substituted.)

The HCCFA also sets out what is popularly known as the “**default list**,” which sets out for health care providers the procedural order of individuals which the provider can contact to act as a temporary, substitute decision maker (TSDM) for consent when the adult patient is unable to provide consent, and does not have a Committee or a Rep under the RAA.

Pursuant to s.16 of the HCCFA:

- (1) To obtain substitute consent to provide major or minor health care to an adult, a health care provider must choose the first, in listed order, of the following who is available and qualifies under subsection (2):
  - (a) the adult's spouse;
  - (b) the adult's child;
  - (c) the adult's parent;
  - (d) the adult's brother or sister;
  - (e) anyone else related by birth or adoption to the adult.
- (2) To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must
  - (a) be at least 19 years of age,
  - (b) have been in contact with the adult during the preceding 12 months,
  - (c) have no dispute with the adult,
  - (d) be capable of giving, refusing or revoking substitute consent, and
  - (e) be willing to comply with the duties in section 19.
- (3) If no one listed in subsection (1) is available or qualifies under subsection (2) or if there is a dispute about who is to be chosen, the health care provider must choose a person authorized by the Public Guardian and Trustee (which can include a person employed in the office of the Public Guardian and Trustee).

- (4) A health care provider is not required to do more than make such effort as is reasonable in the circumstances to comply with this section.

A TSDM's authority lasts for 21 days, but can extend beyond this period if the health care begins before the 21<sup>st</sup> day has passed (HCCFA s.17).

**NOTE:** Changes passed but not yet proclaimed have elongated this list to include Grandparents, Grandchildren and In-laws (Bill 29).

***b) The Adult Guardianship Act (Part 3)***

**NOTE:** The current AGA will be amended by Guardianship legislation that has been passed but is not yet in force (Bill 29).

The AGA is, at present, only part of a statutory package that was proposed in 1993. Some of it came into force in 2000, such as Part 3 – Support and Assistance for Abused and Neglected Adults. Bill 29 continues the process of modernizing the Act, and is set to be proclaimed into force in 2010.

Section 46(1) of the AGA states that anyone may report to the health care authorities if they have information regarding an adult who is being abused or neglected. Abuse can be reported by contacting a Designated Responder in the adult's Health Service Delivery Area. For lists of responders in each area, please visit the Vancouver Coastal Health Re:Act website ([www.vchreact.ca](http://www.vchreact.ca)) under “report abuse and neglect.” The website also provides a helpful Response Flow Chart.

In case of emergency, please **call 9-1-1**.

The remaining subsections of s.46 provide legal protection to anyone who makes such a report.

Under s. 47, a designated agency, which is a public body, organization or person designated by the Public Guardian and Trustee under s.61(a.1), may investigate the report to determine if the adult needs assistance. Should they discover such a need, a designated agency may take any of the following courses of action:

- refer the adult to any health care, social, legal, accommodation or other services;
- assist in obtaining those services; and/or
- inform the Public Guardian and Trustee.

Under ss. 48-50, the agency is given broad powers of investigation of reported abuse or neglect.

In ss. 51-59, a variety of remedies and resources are available should it be determined that an adult is abused or neglected, including:

- assisting the adult in obtaining a Rep under the RAA;
- court orders prohibiting a specified person from living with and/or visiting, and/or contacting and/or communicating with the abused adult;
- applying to the court for an order for the adult's maintenance; and

- preparing and implementing a support and assistance plan for the adult.

**c) *The Public Guardian and Trustee Act (PGTA)***

The PGTA authorizes the PGT to investigate the financial, legal, health and personal care decisions made by attorneys under the PAAs, Reps under the RAA or Committees under the PPA.

The Public Guardian and Trustee can:

- protect a person’s financial affairs and assets in urgent situations for up to seven days and can extend the freeze period;
- apply to court for a temporary guardianship order;
- ask the court for an order allowing access to information previously denied when undertaking an audit or investigation; and
- act as representative, associate or substitute decision maker or guardian for an adult where there is no one available to make necessary decisions.

The PGTA requires that the Public Guardian and Trustee regularly report on service delivery and financial issues to the Attorney General. It also provides that the Trustee will be audited by the Auditor General annually, and will be able to call on the assistance of an advisory board that can give advice on service delivery matters.

**NOTE:** The powers of the Public Guardian Trustee (e.g. with respect to asset protection, statutory guardianship) will be augmented when new Guardianship legislation, which was passed in 2007, comes into force (Bill 29).

**12. A Practical Clinic Approach to RA for LSLAP Students**

It is imperative that the clinician meet with the client alone and be satisfied that the client understands the document and appreciates its implications. The clinician should be sure to take detailed notes of the interview with the client.

When a client approaches LSLAP for assistance with creating an RA, clinicians must ask the following series of questions in order to ascertain the kind of RA that the client needs and whether LSLAP can assist them:

1. Is the client capable of creating an RA?
2. Why does the client want to create an RA?
3. Who is the client considering to be their Rep?
4. What is the relationship between the client and their chosen Rep?
5. Where does that person fit on the default list?
6. Will the authorities available under a s. 7 RA be sufficient to meet the needs of the client?

7. Which specific authorities would the client like their Rep to have?
8. Have they spoken to their chosen Rep to see if they are willing to serve?
9. What is the status of the client's will? Explain that a will does not provide direction or authority if the testator becomes incapable, and a POA/RA does not function like a will.

Typically, a client may wish to have both an enduring or springing POA for their financial affairs and an RA for their health care choices.

It is possible for a donor to have an attorney under the POA to handle their financial affairs, and a Rep, under the RAA, to make decisions regarding health and treatment. This commonly happens where the person who knows the personal wishes and values of the donor best is not so good with finances, and so a financially adept individual is chosen as attorney.

### ***C. Advance Directives (Living Wills and Health Care Directives)***

Advance directives are not currently recognized by statute. They were included in part of the statutory package introduced under Bill 29 in May 2007. However, due to the public controversy that arose primarily regarding advance directives, this bill has been passed but not yet proclaimed into law.

Briefly, the portion of Bill 29 that affected advance directives will allow an individual to draft legal documents which would communicate their values, wishes, beliefs and decisions regarding health care choices (for example, whether to accept or reject life support should their higher functions be irreparably damaged).

Essentially, it would supplement the current scheme, where an individual person must be consulted to make health care decisions, with a scheme that would allow health care providers to consult a document prepared by the patient while they were capable to determine the values of the patient.

The fact that these advance directives represent values, wishes and beliefs which are frozen in time at the date of creation is part of the reason there was a great deal of opposition to the predecessor bill, Bill 32, but less to the revised Bill 29, which was substantially reworded and clarified.

However, advance directives have been and still are used by those who wish to inform their health care providers, and/or their Rep, Committee, or members of the default list of their values, wishes, and beliefs. For example, an individual could draft an informal document which stated that **if a time came when** their brain functions were irreparably damaged, and there was no chance of recovery of a certain quality of life, **then they did not wish to be kept on life support.**

Clients may request an advanced directive that is too general to fully address the variety of situations that could arise with incapability. For example, an advance directive could state, "No life supporting care at any time," but the client might need life support after a minor surgery to aid basic recovery. This was not the type of life support the client sought to avoid. Clinicians should explore in detail the directives the client wishes to include in the document.

The individual should then have the document added to their doctor's patient files, their hospital records, and any other relevant agencies. However, if revoked or altered all these agencies must be re-contacted and updated.

While this document **has no legally binding effect** on health care providers, it can be taken as a written expression of the patient's values, wishes and beliefs, which are to be respected by Temporary Substitute Decision Makers and health care providers alike. The Temporary Substitute Decision

Maker would interpret the information within its current context and make an appropriate health care decision.

## IV. REACTIVE/COURT APPOINTED GUARDIANSHIP

It is often the case that an individual who has not executed a POA or RA becomes **incapable** of managing their affairs and needs to create a guardianship document to appoint an Attorney or Rep to assist them.

If that individual is still **legally capable**, they can still create either or both of a POA (which has a medium threshold of capability) or a RA (which has a low threshold of capability under s.7 and a medium to high threshold under s.9).

However, a person who is unable to manage their financial or health care affairs may also be **legally incapable**, meaning that they do not meet the threshold of mental capability required to execute a legal document such as a POA or RA.

If that is the case, then the individual (called a “patient”) is no longer able to lead their advance financial or advance health care planning. At this time in B.C., the law is dichotomous: either an individual is mentally capable for the purposes of the law and they can execute their own personal planning documents (POAs or RAs), or they are mentally incapable for the purposes of the law and another person must be appointed as their guardian by the court, although in the case of RA’s there is no conclusive case law on this point.

**Another interested person (relative or friend) who is legally and practically capable of caring for the patient must take action in order to be granted the authority to act on behalf of the now incapable patient.**

This process is called Committeeship, and the person appointed by the court to be the guardian of the patient is called a Committee.

Clinicians may consult CCEL, CLAS and the Public Guardian and Trustee for more information on Committeeship. Clients may be advised to contact an Estate and Guardianship Litigation lawyer. This may be done through the Law Society’s Lawyer Referral Service (604-687-3221).

### A. *Committeeship*

#### 1. Introduction

A Committee is a person appointed by the court to make decisions for an individual (the patient) who is incapable of making those decisions for him or herself.

An individual may be incapable from birth, or they may become incapable at some point later in their life, without having prepared a POA or RA. An individual may be rendered incapable due to an accident, illness, or a disability.

Being a Committee is the highest form of fiduciary obligation that one person can hold to another. If a Committee is appointed, it overrules and ends any previous POA documents and/or Representation Agreements.

**However, Committeeship is rarely necessary where there are valid proactive personal planning measures for incapability.** If there is either/both an attorney, or Rep, then a Committee can only be appointed if these representatives are failing to properly fulfill their duties under the PAA and RAA, respectively.

Committeeship is governed by the Patient’s Property Act, R.S.B.C. 1996 c. 349 [PPA].

The law of Committeeship is very old, paternalistic and outdated. It originally stems from the 1870 Lunacy Act, which later became the Patient's Act, followed by the Patient's Estate Act, before finally becoming the current PPA.

Bill 29 (2007) will entirely replace the PPA with modern guardianship legislation.

**NOTE:** Committeeship and its application is a Supreme Court procedure. Provincial courts do not have the jurisdiction required. Consequently, **LSLAP cannot represent clients who are applying for Committeeship, nor can LSLAP complete the required forms and documents required for applications.** The role of LSLAP in assisting clients with Committeeship matters is strictly informational and advisory.

## 2. The Types of Committeeship

There are two forms of Committeeship, which correspond roughly with the areas of authority under POA and Representation Agreements. A Committee may have one, or both of these authorities.

### a) *Committee of the Estate*

A Committee of the Estate has the authority to make **financial and legal decisions** on the patient's behalf. This routinely includes:

- controlling the patient's income;
- conducting banking;
- paying expenses; and
- budgeting for the patient's family.

As circumstances dictate it can also include the authority to:

- dispose of personal and real property through sale or gift;
- enter into contracts on the behalf of the patient;
- operate the patient's business; or
- bring and defend against all lawsuits in which the patient is a party;

### b) *Committee of the Person*

A Committee of the Person also holds the authority to make decisions regarding the patient's **health and well-being**, place of residence, and admission to a health care facility. This can include such decisions as:

- medical treatment;
- medication;
- consent to treatment.

A Committee of the Person can only be appointed by the court.

A patient may have either a Committee of the Estate, a Committee of the Person, or both. Usually, **but not always**, a person who is incapable of managing their personal health care decisions is also incapable of handling financial and legal decisions. Therefore, a Committee of the Person is frequently coupled with a Committee of the Estate. It may be that the same individual is appointed to a Committeeship comprising both estate and person, or it may be that separate individuals are appointed to each Committeeship.

### **3. Becoming a Committee**

There are two steps involved in becoming a Committee for an individual who is incapable:

1. an application must be made to the court to have the patient declared incapable; and
2. if the individual is ruled as incapable by the court, an application is then made for the court to appoint an individual as Committee.

Both of these may be filed as a single application.

### **4. Declaration of Patient Incapability**

An individual must be declared incapable of managing his or her affairs (either financial, personal, or both) before the court can appoint a Committee.

1. Generally, the first step in the process is to obtain the opinion of two separate doctors on the capability of the proposed patient (the subject).
2. The next step is a formal application to the court for an order declaring the subject incapable of managing his or her affairs.
  - a) Section 2 of the PPA provides that the Attorney General, a near relative of the subject, or any other person may file an application to the court for an order declaring incapability.
  - b) This application must be accompanied by the affidavits of two duly qualified medical practitioners setting forth their opinion that the subject is incapable of managing his or her affairs.
3. Notice of the application to the courts must be personally served on the subject not less than 10 days prior to the date of the application hearing. See s.2 of the PPA.
  - a) However, in rare cases, a judge may dispense with this requirement. An *ex parte* hearing can be held wherein the notice requirement may be waived if the court is satisfied that to serve notice of the application would injure the subject's health, or would otherwise be inadvisable.
  - b) In order for a waiver of notice to be granted, there must be a medical practitioner advising the court that it would harm the subject to be served with notice of the application.
  - c) In light of s. 7 of the Canadian Charter of Rights and Freedoms which prohibits restrictions on life, liberty, and security of person which are not in accordance with the principles of fundamental justice (this impliedly includes the right to be notified of legal action concerning you), a failure to provide notice may be unconstitutional.

4. If the subject is already a patient in a mental health facility or a psychiatric unit, he or she can be declared incapable without application to the court. The Director of the facility or the officer in charge of the psychiatric unit can sign a certificate that states that the subject is incapable of handling their affairs.
  - a) In this process, the Public Guardian and Trustee automatically becomes the Committee of the patient.
  - b) This ends any pre-existing enduring or springing POA or Representation Agreements.

## 5. Resisting a Declaration of Incapability

The subject of the application is usually aware of the application to the court for a declaration of incapability. If the subject wishes to oppose the application, he or she should engage a lawyer for the hearing of the application. The judge may direct that the issue of incapacity be tried in Supreme Court (PPA).

### a) *Challenging Affidavits*

The affidavits of the medical practitioners may be challenged. Under the PPA s. 5(2), the judge may order that the subject be examined by one or more duly qualified medical practitioners other than those whose affidavits were before the court. The judge may also order an examination by a board of three or more duly qualified medical practitioners designated by B.C.'s College of Physicians and Surgeons.

Section 5(3) of the PPA provides that the judge shall order such an examination if the subject asks, unless the court or judge is satisfied that the person is not mentally competent to form and express the request.

### b) *Appeals*

If the subject is unsuccessful opposing the application, an appeal can be made to the B.C. Court of Appeal. The PPA does not preclude the power of *habeas corpus* and other prerogative writs. The MHA specifically preserves the power of prerogative writs.

### c) *Subsequent Applications*

Except by leave of a judge, a patient shall not be the subject of an application for an order declaring him or her incapable more than once a year (PPA, s. 4(2)).

## 6. Appointment of a Committee

Once the subject has been declared incapable, the judge can consider an application for the appointment of a Committee. This appointment is governed by the PPA.

### a) *Private Committee*

A family member, friend, or any other person can apply to the court to become a Committee of the patient.

The application must include:

- Petition *Praevipe*;
- Affidavit of Service (unless notice requirement was waived);
- Affidavit of Kindred and Fortune;
- Affidavit from Doctor (two);
- Notice of Application to Appoint a Committee;
- Chamber Order to Appoint a Committee;
- consents of next-of-kin to comply with Rule 51A of the Rules of Court.

If the Committee was nominated by the patient prior to incapability, then the written nomination should also be included (see **Section IV.A.6.c: Nomination of Committee by Patient**, below).

***b) Notice to the Public Guardian and Trustee***

Section 7 of the PPA provides that notice in writing of the application must be served on the Public Guardian and Trustee 10 days prior to the hearing of the application and, if applicable, to a Committee already appointed.

The Public Guardian and Trustee can review the application and oppose the appointment if the applicant is considered unsuitable. The Public Guardian and Trustee may also impose terms on the Committee.

If the Public Guardian and Trustee does not oppose the appointment, it will issue a letter to that effect. The applicant must present this letter to the judge at the time of the Committee application.

***c) Nomination of Committee by Patient***

Under s. 9 of the PPA, an individual has the power to nominate a Committee of his or her choice. However, the person nominated cannot serve as a Committee until appointed by the court.

The nomination must be in writing and signed by the person when he or she was of full age and of sound and disposing mind (i.e. before the court declares him or her incapable).

A person may want to execute a nomination and have a lawyer hold it in reserve to be released if there is an application for the appointment of a Committee.

The nomination must be executed in accordance with the requirements for the making of a will under the Wills Act, R.S.B.C. 1996, c. 489 [WA]. The requirements are:

- that it must be in writing;
- that it must be signed by the nominator; and

- that it must be properly witnessed (WA, ss. 3, 4).

Note that members of the armed forces, ship workers, and fishers are exempt from some of the formal requirements; see the WA, s. 5.

Other than compliance with the WA, there are no formal requirements for the nomination of a Committee. Therefore, a brief, clear statement may be best. For Example: “In the event of my becoming mentally incapacitated, I hereby nominate <name of nominee> as my Committee. <Signed and Dated.> Witnessed in the presence of the signatory, who signed in our presence. <Signature of Witnesses>.” Each witness must be present at the time the other witness ascribed his or her name on the document.

If the nomination is in proper form, it will later be submitted with the application for the appointment of a Committee. The judge shall appoint the Committee that has been so nominated “unless there is good and sufficient reason for refusing the appointment” (PPA, s. 9).

**d) *Costs***

The costs of all proceedings are in the discretion of the court (PPA, s. 27). Generally, the court orders payment of all the Committee’s reasonable legal fees from the patient’s estate so the applicant does not suffer losses for doing what, in many cases, is considered his or her moral obligation. Even though the patient’s estate initially pays costs, the Public Guardian and Trustee later reviews the costs to ensure they are reasonable. If the fees paid by the patient’s estate are inaccurate, the Committee must return the excess amount to the patient’s estate. The Committee should have legal fees reviewed by the registrar of the court if unsure of their reasonableness.

**e) *Public Guardian and Trustee as Committee***

The Public Guardian and Trustee of B.C., a branch of the provincial Attorney General’s Office, will act as a Committee when no other party is willing or able to act, or where there is conflict among family members about Committeeship and a neutral party is preferred.

The PGT acts as Committee of the Estate in many more cases than as Committee of the Person.

Most often, incapable persons require assistance with their financial and legal matters but do not require assistance with their personal health needs. The Office of Public Guardian and Trustee is also at a disadvantage providing the latter services because they require considerable personal supervision.

The Public Guardian and Trustee can become involved in one of two ways:

1. a person can make an application to declare the individual incapable. This can be filed along with a request that the Public Guardian and Trustee be appointed Committee;
2. alternatively, an interested party may contact the Public Guardian and Trustee directly and office personnel will investigate the matter and begin proceedings. The advantage of personally commencing the proceedings is time, because the matter will almost invariably be dealt with more quickly. The disadvantage is effort, as some steps must be taken to begin the proceedings.

The Public Guardian and Trustee's legal staff needs to know:

- the client's full name, address and relationship to the patient;
- the names and addresses of the patient's spouse and other next of kin;
- the patient's age and occupation;
- the patient's current address;
- as complete an inventory as possible of the patient's assets, including such items as real property, bank accounts, safety deposit boxes, automobiles, bonds, shares, etc.;
- whether the patient has a will, and if so, its location;
- the patient's rights to any income;
- the patient's debts; and
- the approximate monthly cost of providing for him or her.

## 7. Serving as Committee

### a) *Powers*

The Committee of the Estate has all the rights, powers, and privileges over the patient's estate as the patient would have if he or she were of full age and of sound and disposing mind (PPA, s. 15).

This includes those powers that would have been exercisable by the patient as a trustee, guardian of a person, holder of power of appointment or as the personal representative of a person (PPA, s. 17). However, the court has discretion to place limits on those powers. In such a case, those powers that were withheld would fall to the Public Guardian and Trustee.

A Committee of the Person has the "custody of the person" of the patient. This means the Committee is responsible for the person's welfare and well-being.

For investing money, a Committee is a trustee within the meaning of the Trustee Act, R.S.B.C. 1996, c. 464 (PPA, s. 15(2)). Therefore, a Committee has considerably less freedom to invest the patient's money than an attorney has to invest a principal's money. When advising a client which procedure is preferable, keep this in mind.

As a consequence of this transfer of rights, every gift, grant, conveyance, or transfer of property made by the individual after he or she has been declared a patient may be deemed fraudulent (PPA, s. 20). This will occur where full and valuable consideration has not been given, or where the donee, grantee, or transferee had notice of the patient's mental condition.

**NOTE:** An enduring Power of Attorney is terminated when the incapable person is declared a "patient" under the PPA when a Committee is appointed by court order under s. 19 of the PPA. If an incapable person is declared a "patient" under PPA s. 19(1), an enduring Power of Attorney is suspended

until the principal ceases to be a patient. Hence, the authority of a Committee will never conflict with that conferred by a Power of Attorney.

## **b) Duties**

The Committee's general duty is to exercise his or her powers for the benefit of the patient, having regard to the nature and value of the patient's property, and the patient's circumstances and needs and those of his or her family (PPA, s. 18). **The Committee is not allowed to use or take any benefit from his or her position.** When the patient has assets, the court generally will require that the Committee post a bond to secure the proper performance of these duties (PPA, s. 10(1)(c)). If the Committee is unable to post a bond that person will only have access to the money required to care for the patient's day-to-day needs.

The Committee may use professional services to assist him or her in some duties. However, professionals cannot be retained to do actions an ordinary person could perform. The cost of professional services is paid for by the patient's estate.

Specific duties of the Committee include:

- passing accounts before the Public Guardian and Trustee at the times directed by the Public Guardian and Trustee (PPA, s. 10(d)), including, if the Public and Guardian Trustee requires it, a true inventory of the whole estate of the patient. The patient's assets are not the Committee's and thus, the Committee must account to the Public Guardian and Trustee for all transactions. Provisions regulating this duty are contained in s. 10 of the PPA and in Rule 4 of the rules governing the Act in the B.C. Supreme Court Rules of Court, B.C. Reg. 311/76;
- upon the patient's death, the Committee is no longer required to pass accounts before the Public Guardian and Trustee, but must provide the Committee's accounts to the executor or administrator of the patient's estate, or, if the Committee and the executor or administrator of the patient's estate are the same person, to the beneficiaries of the patient's estate (PPA, s. 24);
- paying the cost of maintenance, care and treatment of the patient out of the estate (s. 23);
- bringing an action, if necessary, on behalf of the patient as his or her guardian *ad litem* (s. 22);
- exercising the rights, powers, duties, and privileges of the patient after the patient's death as if he or she had not died, and serving as executor or administrator until letters probate of the will or letters of administration to the estate of the patient are granted and notice in writing is served upon the Committee (s. 24); and
- filing income tax returns and applying for pensions.

## **c) Remuneration**

According to s. 14 of the PPA, a person is allowed "reasonable" compensation from the estate of the patient for services rendered as Committee. However, a person does not have to claim compensation. The amount of compensation is fixed on the passing of the accounts to the Public Guardian and Trustee.

If the Public Guardian and Trustee acts as the Committee, an administration fee will be charged to the estate. A commission of 5 percent of the gross value of the estate, and 5 percent of income earned will be charged. In addition, an asset management fee of 0.04 percent will be charged yearly on the gross value of all assets. However, fees may be reduced or waived where the Public Guardian and Trustee is satisfied that hardship or injustice would result from charging the full fee.

A Committee has a first lien upon the estate of the patient or the person who has ceased to be a patient.

**NOTE:** There is simple, straightforward information available through the web site of the Public Guardian and Trustee that includes a discussion of the Committee's powers and responsibilities (see [www.trustee.bc.ca](http://www.trustee.bc.ca)). Also, see the Rules Governing the PPA in the B.C. Supreme Court Rules of Court.

## **8. Discharge of a Committee**

### ***a) Committee Other Than the Public Guardian and Trustee***

On application by the Attorney General, the Public Guardian and Trustee, or any other person, a judge may rescind the appointment of a person (other than the Public Guardian and Trustee) appointed as Committee (PPA, s. 6(2)). This application may be filed along with an application for a new Committee. This cancels the Committee's authority to act for the patient.

If a person regains his or her mental capability and ceases to be a "patient," that person, or the Committee, may apply to the court for the discharge of the Committee (PPA, s. 12).

Notice in writing of this application must be provided to the Public Guardian and Trustee 10 days prior to the application.

The judge who hears the application may, and shall if asked by the Public Guardian and Trustee, order the Committee to pass accounts. There will almost always be outstanding accounts. The fees payable will be rescinded as of the date of the order and discharged on the passing of accounts.

An order of discharge or a discharge by the passing of accounts before the Public Guardian and Trustee is required before a security bond, if any, can be cancelled.

### ***b) Release from Liability***

A discharged Committee is released from liability concerning the management of the estate except in respect of undisclosed acts, neglects, defaults, or accounts; or where the Committee was dishonest or unlawful in his or her conduct (PPA, s. 13(4)(b)). A difference of opinion between the person and the Committee as to how the estate should have been handled is not by itself a reason to support the discharge of a Committee.

The Public Guardian and Trustee is liable for payments made out of an estate that were not mandated by court order if they were not reasonable in the circumstances. The existence of a court order mandating payments at a lower level would make voluntary higher payments unreasonable: see *Wood v. British Columbia (Public Trustee)*, (1986) 25 D.L.R. (4th) 356.

## V. APPENDIX INDEX

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***APPENDIX A: POWER OF ATTORNEY CHECK LIST***

LSLAP'S SUPERVISING LAWYER **MUST** SIGN THIS FORM AND IT MUST ACCOMPANY THE POWER OF ATTORNEY FORM BEFORE THE PROGRAM SECRETARY WILL TYPE IT.

Client: \_\_\_\_\_  
Donor's Name

Student: \_\_\_\_\_  
Student's Name

- I met with the proposed Donor separate and apart from the proposed Attorney.
- I explained to the proposed Donor the risks and benefits of granting this Power of Attorney.
- In my opinion, the proposed Donor understood and appreciated the implications of creating this Power of Attorney.

**NOTE:** If attorney is present, student **MUST** inform Supervising Lawyer.

Supervising Lawyer: \_\_\_\_\_

**APPENDIX B: POWER OF ATTORNEY SAMPLES**

Provided courtesy of Nidus Personal Planning Resource Centre and Registry, www.nidus.ca.

**(Enduring) Power of Attorney  
(Appointment of one attorney) with revoke clause**

This General Power of Attorney is given on [date].

By [name of donor] of [address]

I hereby revoke any and all Powers of Attorney at any time heretofore given by me.

I appoint the following person, [name of attorney] of [attorney's address], to be my attorney in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

In accordance with the *Power of Attorney Act* I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

\_\_\_\_\_  
(Donor's Signature)

WITNESSED BY:

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Print Name of Witness)

\_\_\_\_\_  
(Address of Witness)

**(Enduring) Power of Attorney  
(Appointment of two attorneys) with revoke clause, acting separately**

This General Power of Attorney is given on [date].

By [name of donor] of [address]

I hereby revoke any and all Powers of Attorney at any time heretofore given by me.

I appoint the following persons, [name of attorney] of [attorney's address] and [name of attorney] of [attorney's address], who may act separately to be my attorneys in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

In accordance with the *Power of Attorney Act* I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

\_\_\_\_\_  
(Donor's Signature)

WITNESSED BY:

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Print Name of Witness)

\_\_\_\_\_  
(Address of Witness)

**(Enduring) Power of Attorney  
(Appointment of two attorneys) with revoke clause, acting together**

This General Power of Attorney is given on [date].

By [name of donor] of [address]

I hereby revoke any and all Powers of Attorney at any time heretofore given by me.

I appoint the following persons, [name of attorney] of [attorney's address] and [name of attorney] of [attorney's address], who must act together to be my attorneys in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

In accordance with the *Power of Attorney Act* I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

\_\_\_\_\_  
(Donor's Signature)

WITNESSED BY:

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Print Name of Witness)

\_\_\_\_\_  
(Address of Witness)

**APPENDIX C: DECLARATION**

CANADA PROVINCE OF BRITISH ) IN THE MATTER OF a Power of  
COLUMBIA ) Attorney granted by [name of donor]  
) unto [name of attorney]  
)

TO WIT:

**DECLARATION**

I, [name of attorney], of [full address of attorney including postal code], do solemnly declare that:-

1. I am the attorney appointed by the foregoing Power of Attorney.
2. At the time of such appointment, namely, on [insert date], I was of the full age of nineteen years.

AND I make this solemn Declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

\_\_\_\_\_  
[name of attorney]

DECLARED BEFORE ME at \_\_\_\_\_ in the Province of British Columbia,  
this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Commissioner for taking Affidavits  
for British Columbia.

***APPENDIX D: AFFIDAVIT OF EXECUTION***

**LAND TITLE ACT  
FORM 2  
(Sections 43(a) and 44(a))**

**AFFIDAVIT OF WITNESS**

I, \_\_\_\_\_, of \_\_\_\_\_, in British Columbia, make oath and say:

1. I was present and saw this instrument duly signed and executed by \_\_\_\_\_, the party(ies) to it, for the purposes named in it.
2. The instrument was executed at \_\_\_\_\_.
3. I know the party(ies), who is (are) 19 years old or more.
4. I am the subscribing witness to the instrument and am 16 years old or more.

\_\_\_\_\_  
Sworn before me at \_\_\_\_\_ in British Columbia,  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
A Notary Public in and for the Province of British Columbia  
A Commissioner for taking Affidavits for British Columbia

***APPENDIX E: NOTICE OF REVOCATION OF POWER***

TO WHOM it may concern,

I, \_\_\_\_\_, the undersigned, hereby give notice that the Power of Attorney given to me by \_\_\_\_\_, on the [date], and registered [state particulars] authorizing [set out powers briefly], is hereby revoked and cancelled.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

[Signature]

***APPENDIX F: APPOINTMENT OF SUBSTITUTES UNDER AUTHORITY  
CONTAINED IN POWER***

WHEREAS \_\_\_\_\_, of \_\_\_\_\_ duly made and executed under his or her hand and seal a Power of Attorney, dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, whereby he or she appointed me his or her attorney, for him or her and in his or her name to do the acts therein specified, with power from time to time to substitute any person or persons to act [under me, or] in my place, as attorney or attorneys in all matters aforesaid and from time to time every such substitution and appointment at pleasure to revoke:

NOW THEREFORE, I the said \_\_\_\_\_, by virtue and in execution of the authority in that behalf contained in the said Power of Attorney, do hereby appoint \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, and each of them, to be the attorneys and attorney jointly and severally of my said principal, \_\_\_\_\_, for him or her and in his or her name, to execute and perform all and every matters and things mentioned and contained in the said Power of Attorney to me, in the same manner and as fully and effectually as he or she, my said principal, or as I might or could have done if personally present, and as they, the attorneys, or either of them, might or could have done if they had been appointed the attorneys jointly and severally of my said principal in and by the said Power of Attorney, instead of me.

I, the said \_\_\_\_\_, hereby confirm and agree to confirm whatsoever the said attorneys jointly, or either of them separately, shall do, or cause to be done, by virtue of these presents.

IN WITNESS, etc. [include date]

SIGNED, SEALED, etc. [Signature]

[Here insert affidavit of execution, see **Form D**, above]

***APPENDIX G: FORM OF BANK MANDATE***

To \_\_\_\_\_ Bank, Ltd.

Please accept this letter as my formal authority to consider \_\_\_\_\_ until further notice is received from me, to be empowered on my behalf and in respect of my account and in my name:

1. To draw, sign and endorse cheques notwithstanding that the payee of any such cheques may be the said \_\_\_\_\_ and further notwithstanding that upon debiting such cheques to my account my account shall be overdrawn to a sum not exceeding \$ \_\_\_\_\_.
2. To lodge and withdraw any security on my behalf or of mine and generally in all dealings with the said account to act as effectively as I myself can do and this authority shall be binding upon my personal representatives in the event of my death so as to authorize any of the said \_\_\_\_\_ from the date of my death until the receipt by you of written notice of my death.

IN WITNESS, etc. [include date]

SIGNED, SEALED, etc.

[Signature]

[Here insert Affidavit of Execution, see **Appendix D**, above]

## ***APPENDIX H: SPECIAL POWER OF ATTORNEY CLAUSES***

Special clauses may be included in any of the general Power of Attorney forms to expand or delineate the power being conferred. Remember, powers granted under seal are very strictly construed, so a power under seal should have all the authority to be conferred specifically provided for. **If a special power of attorney clause is included, then the Power of Attorney will be construed to be limited to the precise powers detailed in the clause.**

### **1. General**

#### *a) To Execute a Particular Instrument*

To sign, seal and deliver in my name, and as my act and deed, a certain instrument bearing date on or about the \_\_\_\_\_ day of \_\_\_\_\_, intended to [convey to \_\_\_\_\_ of \_\_\_\_\_ all (describe land), for the consideration of 1 \_\_\_\_\_ dollars, and to receive the purchase money thereof for me and on my behalf].

#### *b) General Powers*

To act generally as my attorney at \_\_\_\_\_, in relation to the premises and other matters in which I am interested or concerned, and on my behalf to execute all necessary instruments, and to do all such acts, as fully and effectually in every respect as I myself could do if personally present.

#### *c) To Provide for Spouse*

Without limiting the generality of the foregoing, my attorney may make payments out of my estate for the support, maintenance, comfort, and general well-being of my spouse, [name], as my attorney thinks appropriate. When exercising this discretion, it is my wish that my attorney consider my financial circumstances and anticipated needs and the circumstances of my family.

#### *d) Former Powers Not Affected*

Provided that these presents or the powers hereby given shall in no ways extend or be deemed or construed to extend, to revoke or make void any former or other Power of Attorney by me at any time heretofore given to the attorney or any person or persons whomsoever for any distinct or other purpose, but such other powers shall still remain and be of the same authority, validity, force and effect as if these presents had not been made.

#### *e) Confirmation of Acts of Attorney*

I, the said \_\_\_\_\_, hereby agree and covenant for myself, my heirs, executors and administrators, to ratify and confirm whatsoever my attorney [or his or her lawful attorney or attorneys or substitute or substitutes] shall lawfully do or cause to be done in the premises by virtue of these presents.

#### *f) To Give Receipts and Discharges*

Upon recovery or receipt of all and every sum or sums of money, goods, chattels, effects or things due, owing, payable or belonging to me, to sign, seal, execute and deliver such goods and sufficient receipts, releases, certificates, re-conveyances, surrenders, assignments or other good and effectual discharges as may be requisite.

#### *g) To Submit to Arbitration*

In case of any difference or dispute with any person concerning any of the matters herein [or as may be desired] to submit any such differences and disputes to arbitration in such manner as my said attorney shall think fit, and sign, seal and execute any instruments for the purpose of giving effect to such submission.

b) *To Substitute Attorneys*

I empower my attorney to substitute and appoint, from time to time, an attorney or attorneys under him or her, with equal [or more limited] powers, and such substitute or substitutes to appoint or remove at pleasure.

i) *To Substitute Attorneys (Alternate Form)*

I hereby grant my attorney full power and authority to substitute and appoint [from time to time] in his or her place and stead [or under him or her] [on such terms and at such salary as he or she shall think fit] one or more attorney or attorneys to exercise for me as my attorney or attorneys any or all the powers and authorities hereby conferred, and to revoke any such appointment from time to time and to substitute or appoint any other or others in the place of such attorney or attorneys as he or she, my attorney, shall from time to time think fit.

j) *To Employ Agents and Servants*

To appoint, engage and employ any agents, servants or other persons, at such salary or wages or for such compensation as my attorney may think proper, and such persons from time to time to dismiss or discharge, and others to appoint, engage or employ in their stead, as my attorney may deem necessary.

**2. Death or Incapacity of Attorney**

a) *Appointment of Alternate Attorney (Short Form)*

If my attorney shall die or become incapable of acting as my attorney, I hereby appoint \_\_\_\_\_ of \_\_\_\_\_ my attorney in place of \_\_\_\_\_, with power to exercise all of the powers and authority hereinbefore conferred on my attorney, in as full and ample a manner in all respects as if the name of the substituted attorney had been inserted herein instead of my attorney \_\_\_\_\_.

b) *Appointment of Alternate Attorney (Long Form)*

In the event of the said \_\_\_\_\_ [first attorney] dying or becoming incapable of acting, or refusing to act, or becoming bankrupt, during my absence, I hereby appoint \_\_\_\_\_ [second attorney] of \_\_\_\_\_, my attorney from and immediately after the happening of any of the said events during my absence to act in and manage all my affairs in the same or like manner in all respects as the [first attorney] could have done, and I accordingly grant to and vest in the said [second attorney], as from the date of such event, all and every the same or the like powers and authorities in or concerning the premises in all things as are herein given to or vested in the said [first attorney], and as if the same of the said [second attorney] had, throughout these presents, been inserted instead of the name of the said [first attorney], and I hereby undertake to ratify whatsoever the said \_\_\_\_\_ [second attorney] (or his or her attorney or attorneys) shall lawfully do or cause to be done in the premises by virtue of these presents.

c) *Appointment of Alternate Attorney on Death of Attorney: Principal Abroad*

In the event of my said attorney dying while I am living out of the country, I hereby constitute \_\_\_\_\_ of \_\_\_\_\_ my attorney for me and in my name, after the decease of the first attorney, and in my name, and as my act and Deed, to make, sign, seal, execute, and deliver all such acts, Deeds, conveyances, assurances, matters, and things whatsoever, as the said first attorney is hereby authorized to do or perform, and I hereby grant and vest the same powers and authorities in the said second attorney in as full and ample a manner, to all intents and purposes, as by virtue of these presents are hereinbefore granted unto and vested in the said first attorney, and I hereby ratify and confirm all and whatsoever my said attorneys, or either of them, shall lawfully do or cause to be done in the premises.

**3. Death of Principal**

*a) Attorney Continuing to Act*

In the event of my death, this Power of Attorney shall, as to any matter which may be done after my death by my said attorneys, or any or either of them, in pursuance hereof, be as binding upon my executors and administrators as it would have been upon me if I were alive; provided that my said attorneys or attorney had not, previously to the doing of any such matter, received reliable information of my death, so as to effectually inform them that their authority hereunder had ceased.

**4. Duration of Power**

*a) "Springing" from Incapacity*

This power of attorney is subject to the following conditions and restrictions:  
This Power of Attorney shall not be used unless two doctors have provided letters stating that I am either physically or mentally incapable of managing my own affairs.

*b) Permanently Irrevocable*

In consideration of the obligations assumed by my attorney, and his or her interest in the execution of the powers herein conferred, I hereby vest my attorney irrevocably with the said powers, and forever renounce all right to revoke any of my attorney's powers, or to appoint any other person to execute them, or personally to perform any of the acts my attorney is hereby authorized to perform.

*c) Irrevocable for Fixed Period*

I declare that the powers herein shall be irrevocable for the period of \_\_\_\_\_ [months] from the date hereof.

*d) Irrevocable until Notice Given*

The company may continue to deal with the said attorney under this power until notice of the revocation hereof has been given in writing to the manager of the company at the office where my account is kept, and until such notice in writing has been received the acts of the said attorney hereunder with the company shall be binding on me.

**5. Personal Property**

*a) To Prosecute and Defend Actions*

To commence, prosecute and defend all actions or other legal proceedings relating to any of the matters aforesaid, or any other matters in which I am, or may hereinafter be, interested or concerned; and also, if it seems to my attorney to be desirable, to compromise, refer to arbitration, or submit to judgment in any such action or proceeding.

*b) To Exercise Legal Remedies*

In case of neglect, refusal or delay on the part of any person to make and render a just, true and full account, payment, delivery or satisfaction in the premises, to compel him or her or them to do so, and for that purpose to make such claims and demands [arrests, seizures, levies, attachments, distrainments and sequestrations] or to commence and prosecute to judgment and execution such actions as my attorney shall think fit; also to appear before all or any judges, magistrates or other officers of any court, and then and there plead, claim, defend and reply in all matters and causes concerning the premises; and also to exercise and execute all powers of sale or foreclosure, and all other powers and authorities vested in me by any mortgage belonging to me as mortgagee.

c) *To Settle Claims and Disputes*

To settle, compromise, or submit to arbitration any accounts, debts, claims, demands, disputes and matters touching any of the matters aforesaid, or any other matters now subsisting or that may hereinafter arise between me and any other person or persons, or between my attorney and any other persons.

d) *To Compromise Debts Owning to Principal*

To compound, compromise and accept part in lieu of and in satisfaction for the payment of the whole of any debt or sum of money now or hereinafter owing to me, or to grant an extension of time for the payment thereof, either with or without taking security, or otherwise to act in respect thereof as to my attorney shall appear most expedient.

e) *To Pay and Compromise Debts of Principal*

To enter into any agreement, compromise or arrangement with any or every person to whom I am now or shall hereinafter be indebted touching the payment or satisfaction of his or her demand, or any part thereof, and generally to do all lawful acts requisite for effecting such purpose.

f) *To Receive a Particular Sum of Money*

To receive from \_\_\_\_\_ of \_\_\_\_\_ the sum of \_\_\_\_\_ dollars [being the price agreed to be paid by him or her to me for \_\_\_\_\_, and interest that may be due thereon], and to give an effectual receipt and discharge therefor.

g) *To Recover a Particular Debt*

To demand, sue for, recover and receive from \_\_\_\_\_ of \_\_\_\_\_, the sum of \_\_\_\_\_ dollars owing from him or her to me for \_\_\_\_\_, and all interest due in respect thereof, and to give proper receipts and discharges therefor.

h) *To Receive and Recover Debts and Personal Property*

To demand, sue for, recover and receive all debts, moneys, securities for money, legacies, goods, chattels, effects and things whatsoever which now are, or shall hereinafter be, due, owing, payable or belonging to me from any persons whatsoever, and in my name to give effectual receipts and discharges therefor.

i) *To Deal with a Bank*

To negotiate with, deposit with or transfer to The \_\_\_\_\_ Bank [but for credit of the account of the undersigned only] all or any bills of exchange, promissory notes, cheques, or orders for the payment of money and other negotiable paper, and for the said purpose to endorse them or any of them on behalf of the undersigned; also to arrange, settle, balance and certify all books and accounts between the undersigned and the bank, and to receive all paid cheques and vouchers, and to sign the bank's form of settlement of balances and release; and generally, for and in the name of the undersigned, to transact with the bank any business that may be necessary in the premises. The bank may continue to deal with the attorney under this power until notice of the revocation thereof has been given in writing to the manager or acting manager of the branch of the bank at which the account of the undersigned is kept, and until such notice in writing has been given the acts of the attorney hereunder with the bank shall be binding on the undersigned.

**NOTE:** This clause is only to **add** banking authority to a Power of Attorney. If **only** banking authority is to be exercised, one of the limited forms should be used. Be aware that banks may prefer that their own Power of Attorney form be filed (see **Section I.A.1.a: Banking Standard Power of Attorney Forms**).



c) *By Committee of a Mental Incompetent*

IN WITNESS WHEREOF the said \_\_\_\_\_ as Committee of the Estate and in the name and on behalf of the said [incompetent] has subscribed the name and set the seal of the said [incompetent].

SIGNED, SEALED and delivered )  
in the presence of \_\_\_\_\_. ) SEAL  
By [signature of Committee]  
His or her Committee

d) *Statutory Declaration of Attestation*

CANADA ) IN THE MATTER OF  
PROVINCE OF )  
COUNTY [or DISTRICT] OF )

I, \_\_\_\_\_, of \_\_\_\_\_, in the [county] of \_\_\_\_\_, [occupation], do solemnly and sincerely declare:

1. That I was present with ABC of the \_\_\_\_\_ of \_\_\_\_\_, [occupation], on the \_\_\_\_\_ day of \_\_\_\_\_, and did see the said ABC, lately called or known by the name of AB, residing in \_\_\_\_\_, of \_\_\_\_\_, [occupation], sign, seal, and as his or her act and Deed in due form of law deliver, the Deed or instrument hereunto annexed and marked with the letter "A," and bearing date the \_\_\_\_\_ day of \_\_\_\_\_.

2. That the name "ABC", set and subscribed to the said Deed or instrument as the name of the person executing it, is in the proper handwriting of the said ABC, and the names of the persons attesting the due execution thereof are in the respective proper handwritings of EF and me this declarant.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.





**Section 7 Representation Agreement**  
**[For Health and Personal Care, and Routine Financial Management, and Legal Case Management]**  
**[One Rep; One Alternate Rep; One Monitor]**

My name is [name]. I was born in [year]. I live at [address and telephone number].

I appoint my [relationship], [name], to be my representative.

I authorize my representative to assist me or to manage or make decisions on my behalf for minor and major health care as defined in the *Health Care Consent and Care Facility Admission Act*, personal care matters, routine management of my financial affairs as defined in the regulations in effect on the date this Representation Agreement was made, and obtaining legal services and instructing counsel to begin proceedings (except divorce) or to continue, compromise, defend or settle any legal proceedings on my behalf.

As alternate representative I appoint my [relationship], [name]. [Alt rep name] will act if [rep name] is unwilling or unable to act or continue to act as my representative due to illness, death, resignation or other circumstances. Confirmation that [rep name] is unable or unwilling to act will be verified in a letter signed by the monitor.

I appoint my [relationship] [name] as monitor.

This Representation Agreement is effective immediately.

I signed this Representation Agreement on \_\_\_\_\_ in the presence of two witnesses named below.

\_\_\_\_\_  
Signature of adult

We are the two witnesses to the Representation Agreement of [name]. We signed in the presence of [name] and each other on the date shown above.

Print name \_\_\_\_\_ Print name \_\_\_\_\_

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

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

Signed by the representative and alternate representative:

Print name \_\_\_\_\_ Print name \_\_\_\_\_

\_\_\_\_\_  
Signature of representative

\_\_\_\_\_  
Signature of alternate representative

Attached: Certificate of Witnesses; Certificate of Representative or Alternate Representative; Certificate of Monitor.

## ***APPENDIX J: DEFINITION: ROUTINE MANAGEMENT OF ADULT'S FINANCIAL AFFAIRS***

*from the Representation Agreement Act Regulations - September 1, 2001*

(1) For the purposes of section 7 (1) (b) of the Act, the following activities constitute "routine management of the adult's financial affairs":

- (a) paying the adult's bills;
- (b) receiving the adult's pension, income and other money;
- (c) depositing the adult's pension, income and other money in the adult's accounts;
- (d) opening accounts in the adult's name at financial institutions;
- (e) withdrawing money from, transferring money between or closing the adult's accounts;
- (f) receiving and confirming statements of account, passbooks or notices from a financial institution for the purpose of reconciling the adult's accounts;
- (g) signing, endorsing, stopping payment on, negotiating, cashing or otherwise dealing with cheques, bank drafts and other negotiable instruments on the adult's behalf;
- (h) renewing or refinancing, on the adult's behalf, with the same or another lender, a loan, including a mortgage, if
  - (i) the principal does not exceed the amount outstanding on the loan at the time of the renewal or refinancing, and
  - (ii) in case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;
- (i) making payment on the adult's behalf on a loan, including a mortgage, that
  - (i) exists at the time the Representation Agreement comes into effect, or
  - (ii) is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;
- (j) taking steps under the Land Tax Deferral Act for deferral of property taxes on the adult's home;
- (k) taking steps to obtain benefits or entitlements for the adult, including financial benefits or entitlements;
- (l) purchasing, renewing or canceling household, motor vehicle or other insurance on the adult's behalf, other than purchasing a new life insurance policy on the adult's life;
- (m) purchasing goods and services for the adult that are consistent with the adult's means and lifestyle;
- (n) obtaining accommodation for the adult other than by the purchase of real property;

- (o) selling any of the adult's personal or household effects, including a motor vehicle;
- (p) establishing an RRSP for the adult;
- (q) making contributions to the adult's RRSP and RPP;
- (r) converting the adult's RRSP to a RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;
- (s) making, in the manner provided in the Trustee Act, any investment that a trustee is authorized to make under that Act;
- (t) disposing of the adult's investments;
- (u) exercising any voting rights, share options or other rights or options relating to shares held by the adult;
- (v) making donations on the adult's behalf to registered charities, but only if
  - (i) this is consistent with the adult's financial means at the time of the donation and with the adult's past practices, and
  - (ii) the total amount donated in any year does not exceed 3% of the adult's taxable income for that year;
- (w) in relation to income tax,
  - (i) completing and submitting the adult's returns,
  - (ii) dealing, on the adult's behalf, with assessments, reassessments, additional assessments and all related matters, and
  - (iii) subject to the Income Tax Act and the Income Tax Act (Canada), signing, on the adult's behalf, all documents, including consents, concerning anything referred to in subparagraphs (i) and (ii);
- (x) safekeeping the adult's documents and property;
- (y) leasing a safety deposit box for the adult, entering the adult's safety deposit box, removing its contents and surrendering the box;
- (z) redirecting the adult's mail;
- (aa) doing anything that is
  - (i) consequential or incidental to performing an activity described in paragraphs (a) to (aa), and
  - (ii) necessary or advisable to protect the interests and enforce the rights of the adult in relation to any matter arising out of the performance of that activity.

(2) For greater certainty, the activities that are under subsection (1) constitute "routine management of the adult's financial affairs" do not include any of the following:

- (a) using or renewing the adult's credit card or line of credit or

obtaining a credit card or line of credit for the adult;

(b) subject to subsection (1) (h), instituting on the adult's behalf a new loan, including a mortgage;

(c) purchasing or disposing of real property on the adult's behalf;

(d) on the adult's behalf, guaranteeing a loan, posting security or indemnifying a third party;

(e) lending the adult's personal property or, subject to subsection (1) (v), disposing of it by gift;

(f) on the adult's behalf, revoking or amending a beneficiary designation or, subject to subsection (1) (r), creating a new beneficiary designation;

(g) acting, on the adult's behalf, as director or officer of a company.

Definition of Routine Management of Adult's Financial Affairs  
from the Representation Agreement Act Regulations, September 2001

**APPENDIX K: CERTIFICATE OF REPRESENTATIVE OR ALTERNATE REPRESENTATIVE**

**Form 1**

**Representation Agreement Act**

*Section 5(4), 6(2)*

(This certificate to be completed by each representative and alternate representative)

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of representative or alternate representative, (address)  
including name of trust company or credit union)

\_\_\_\_\_  
(city) (province) (postal code)

\_\_\_\_\_ Date of Birth: \_\_\_\_/\_\_\_\_/\_\_\_\_  
(telephone) (month) (day) (year)

**certify that:**

**I am named as representative or alternate representative in the Representation Agreement**

**made on \_\_\_\_\_ by**  
(date)

\_\_\_\_\_, of \_\_\_\_\_,  
(name of person) (address)

\_\_\_\_\_  
(city) (province) (postal code)

**I was 19 years of age or older on the date that I signed the Representation Agreement referred to in this certificate.**

**I am not a witness to the Representation Agreement.**

I understand and will comply with the duties and responsibilities of a representative as set out in s. 16 of the *Representation Agreement Act* and described on the reverse of this certificate.

\_\_\_\_\_  
(signature of representative, alternate representative, or (date) \_\_\_\_\_  
authorized signature of a trust company or credit union)

**APPENDIX L: CERTIFICATE OF MONITOR**

**Form 3**

**Representation Agreement Act**  
*Section 12(3)*

(This certificate to be completed by the person named as monitor in a Representation Agreement)

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of monitor) (address)

\_\_\_\_\_,  
(city) (province) (postal code) (telephone)

certify that I am the monitor named in the Representation Agreement made by

\_\_\_\_\_ on \_\_\_\_\_.  
(name of adult making the agreement) (date)

I was 19 years of age or older on the date the Representation Agreement referred to in this certificate was signed. I understand and am willing and able to perform the duties and exercise the powers of a monitor set out in s. 20 of the *Representation Agreement Act*.

I have read and understand s. 30 of the *Representation Agreement Act* and have no reason to make an objection at this time.

\_\_\_\_\_  
(signature of monitor)

\_\_\_\_\_  
(date)

**APPENDIX M: CERTIFICATE OF PERSON SIGNING FOR AN ADULT**

**Form 4**  
**Representation Agreement Act**  
*Section 13(4)(d)*

(This certificate to be completed by the person who signs a Representation Agreement for the adult making the agreement who is physically incapable of signing)

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of monitor) (address)

\_\_\_\_\_,  
(city) (province) (postal code) (telephone)

certify that I signed a Representation Agreement dated \_\_\_\_\_ on behalf of  
(date)

\_\_\_\_\_, of \_\_\_\_\_  
(name of adult) (address of adult)

\_\_\_\_\_,  
(city) (province) (postal code)

The adult making the agreement was present when I signed the agreement on his or her behalf and directed me to sign because he or she was physically incapable of signing.

I understand the type of communication used by the adult when he or she directed me to sign the agreement.

I am not a representative or alternate representative or witness to the signing of the agreement.

I was 19 years of age or older on the date I signed the Representation Agreement.

\_\_\_\_\_  
(signature of person signing for the adult)

\_\_\_\_\_  
(date)

**APPENDIX N: CERTIFICATE OF WITNESS**

**Form 5  
Representation Agreement Act**

**Section 9, 13**

(This certificate to be completed by the people witnessing the signing of a Representation Agreement)

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of witness #1) (address)

\_\_\_\_\_  
(city) (province) (postal code) (telephone)

(i) AND

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of witness #2) (address)

\_\_\_\_\_  
(city) (province) (postal code) (telephone)

**certify that we were present together on \_\_\_\_\_ when**

\_\_\_\_\_ and/or \_\_\_\_\_ and/or

\_\_\_\_\_ and/or \_\_\_\_\_ and/or

**signed the Representation Agreement made by \_\_\_\_\_ dated \_\_\_\_\_.**

The signature of each witness below also certifies the following:

- I am not named in the agreement as a representative or alternate representative;
- I am not a spouse, child or parent of anyone named in the agreement as a representative or alternate representative;
- I am not an employee or agent of a person named in the agreement as a representative or alternate representative;
- I was 19 years of age or older on the date we witnessed the signing of the Representation Agreement; and
- I understand the type of communication used by the adult.

I have no reason to object to the making of this Representation Agreement at this time.

\_\_\_\_\_  
(signature of witness #1)

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(signature of witness #2)

\_\_\_\_\_  
(date)

Notice to Witnesses:

- 1 Grounds for Objecting to the Making of an Agreement  
Section 30 of the Representation Agreement Act provides for a number of reasons to object to the making and use of a representation agreement.
- 2 To Make an Objection  
If you believe that you have grounds to make an objection at this time, you should:
  - (a) not witness the agreement,
  - (b) not execute this certificate,
  - (c) report your objection to the Public Guardian and Trustee.

**APPENDIX O: ENHANCED REPRESENTATION AGREEMENT FOR HEALTH CARE**

**Representation Agreement Act  
Section 9**

This Document made by [name] at \_\_\_\_\_, British Columbia, this \_\_\_\_ day of \_\_\_\_\_, 2004.

- 1.1 (a) I appoint [name] to be my representative in accordance with the *Representation Agreement Act*, R.S.B.C. 1993, c. 67, to act as my representative to make health care decisions for me and, if applicable, decisions about my minor children or other persons cared for and supported by me, if I am unable to do so due to mental incapacity.

**OR**

any persons cared for and supported by me, if I am unable to do so due to mental incapacity.

[If joint reps] I assign each one of them authority to make health care decisions for me.

- (b) If [RepName] should at any time be unable or unwilling to act or continue to act, I appoint [Alt Rep 1] instead.
- (c) [RepName] and [Alt Rep 1] should at any time be unable or unwilling to act to act or continue to act, I appoint [Alt Rep 2] to act instead.
- (d) My alternate representative(s) shall [shall not] not be required to provide evidence of the disqualification of my first named representative(s) before acting on my behalf.
- (e) I refer to my representative(s) hereunder, whether primary or alternate, as my "Representative"

- 1.2 A monitor is not required.

**OR**

- 1.3 I appoint [Monitor name] as monitor.

- 1.4 My Representative shall have full and unlimited authority during my incapacity to, at discretion, give or refuse consents or make decisions respecting my health care including, without limiting the generality of the foregoing, the authority to do any or all of the following, even if I then object:

- (a) make decisions about major health care, minor health care and all dental care matters;
- (b) make decisions about where and with whom I reside;
- (c) physically restrain, move or manage me, or have me physically restrained, moved or managed;
- (d) give consent on my behalf to any type of health care including, without limiting the generality

of the foregoing, CPR, fibrillation, gastrointestinal feeding, intravenous feeding, or connection to life support machinery;

- (e) to refuse consent on my behalf to specific types of medical care, including life support care or treatment;
- (f) to give consent on my behalf to the kinds of health care prescribed under s. 34(2)(f) of the *Health Care (Consent) and Care Facility (Admission) Act*;
- (g) accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for my admission to any kind of care facility;

and, if applicable, authority to make arrangements for the care, education and financial support of

my minor children, my spouse, or any other persons who is cared for and supported by me at the time of mental incapacity.

**OR**

any persons who is cared for and supported by me at the time of mental incapacity.

I direct that [name] shall act as guardian of my minor children and have the care, custody and control of them, in the event of my mental incapacity, should my spouse be unable so to act, and the said [name] shall have all my rights, powers and duties, to the extent that the law permits, respecting my minor children.

1.5 The following words have the following meanings in this Agreement:

- (a) "health care" means anything that is done for a therapeutic, preventative, palliative, cosmetic, or other purpose related to health, and includes:
  - (i) a course of health care, for example, a series of immunizations or dialysis treatments or a course of chemotherapy; and
  - (ii) participation in a medical research program approved by an ethics Committee designated by regulation;
- (b) "major health care" means:
  - (i) major surgery;
  - (ii) any treatment involving a general anesthetic;
  - (iii) major diagnostic or investigative procedures;
  - (iv) radiation therapy;
  - (v) intravenous chemotherapy;

- (vi) kidney dialysis;
  - (vii) electroconvulsive therapy;
  - (viii) laser surgery; and
  - (ix) any other health care designated by Regulation to or defined by the *Health Care (Consent) and Care Facility (Admission) Act*, as major health care;
- (c) "minor health care" means any health care that is not major health care, and includes:
- (i) routine tests to determine if health care is necessary; and
  - (ii) routine dental treatment that prevents or treats a condition or injury caused by disease or trauma, for example:
    - A. cavity fillings and extractions done with or without a local anesthetic; and
    - B. oral hygiene inspections.
- 1.6 The Representative has the authority to do all of the following:
- (a) request, review, and receive any information, oral or written, regarding my physical or mental health, including medical and hospital records;
  - (b) execute on my behalf any documents that may be required in order to obtain this information; and
  - (c) consent to the disclosure of this information.
- 1.7 The Representative may retain the services of qualified persons to assist the Representative to do anything the Representative is authorized to do.
- 1.8 Any costs incurred on my behalf, including services rendered under **Insert Paragraph No. concerning Rep retaining services** of this Agreement, arising out of the performance of the Representative's duties are my debts and will be paid by me.
- 1.9 I indemnify the Representative for any loss or cost incurred by the Representative arising out of the performance of the Representative's duties under this Agreement.
- 1.10 Subject to a specific contrary provision in the Act, when helping me make decisions or when making decisions on my behalf:
- (a) the Representative need only consult with me to the extent that the Representative considers to be reasonable or appropriate in the circumstances, to determine my current wishes;

- (b) the Representative need only comply with those wishes if, in the Representative's opinion, it is reasonable and appropriate to do so;
- (c) if the Representative cannot determine my then current wishes or if it is not reasonable to comply with those current wishes, the Representative must comply with any instructions or wishes set out in this Agreement;
- (d) if my wishes are not known to the Representative, the Representative must act based on what the Representative considers to be in my best interests.

1.11 When deciding whether it is in my best interests to give, refuse, or revoke substitute consent, the Representative must consider whether:

- (a) my condition or well-being is likely to be improved by the proposed health care;
- (b) my condition or well-being is likely to improve without the proposed health care;
- (c) the benefit I am expected to obtain from the proposed health care is greater than the risk of harm; and
- (d) a less restrictive or less intrusive form of health care would be as beneficial as the proposed health care.

1.12 My Representative shall be entitled to claim and be paid the same remuneration for acting as my representative that a trustee would be allowed to charge under the *Trustee Act* of RC.

1.13 I have reviewed the nature, extent and scope of this Health Care Authorization with a member of the Law Society of British Columbia. **[INCLUDE THIS PARAGRAPH ONLY IF REPs. ARE THE SAME IN THE POWER OF ATTORNEY – IS NOT, DELETE IT]** This authorization is to be read and used in conjunction with any Power of Attorney I have given, with the intent that the documents together shall give the person(s) named authority to deal with all my health care, personal care, financial, legal and other matters on my behalf if I am unable to do so due to mental incapacity.

1.14 In accordance with the *Representation Agreement Act* I declare that this Representation Agreement becomes effective upon, and may be exercised during, my subsequent mental incapacity. Such incapacity shall be confirmed by statutory declaration given by a physician or psychiatrist licensed to practice medicine in British Columbia.

**WRITTEN WISHES REGARDING END OF LIFE**  
**“LIVING WILL”**

2.1 Death is as much a reality as birth, growth, maturity and old age - it is one certainty in life. If the time comes when I, [name], can no longer take part in the decisions for my own future, let this statement stand as an expression of my wishes while I am still of sound mind. If the situation should arise in which there is no reasonable expectation of my recovery from physical or mental disability, I wish to be allowed to die naturally

and not be kept alive by artificial means. I therefore ask that medication be mercifully administered to me to alleviate suffering even though this may hasten the moment of death. Throughout, I wish adequate pain medication to manage my pain, including the use of opiates if appropriate.

2.2 This statement is intended to supplement any specific directions or directives I have given.

**NOMINATION OF COMMITTEE**

3.1 Pursuant to Section 9 of the *Patients Property Act* now in effect I confirm that I nominate, constitute and appoint, as Committee of my estate of my person, in the event that I become mentally incompetent for any reason(s) whatsoever, [RepName]. In the event [RepName] is unable or unwilling to act, or continue to act, as Committee of my estate and my person, I HEREBY nominate, constitute and appoint [Alt Rep 1/2] in (his/her) place.

**OR**

63.2 Pursuant to Section 9 of the *Patients Property Act* now in effect I confirm that I nominate, constitute and appoint, as Committees of my estate and of my person, in the event that I become mentally incompetent for any reason(s) whatsoever, [RepName], and [Alt Rep 1/2] In the event either [RepName] or [Alt Rep 1/2] is unable or unwilling to act, or continue to act, as Committee of my estate and my person, **I HEREBY** nominate, constitute and appoint [Alt Rep 1/2] in (his/her) place.

I HAVE SIGNED THIS DOCUMENT IN THE PRESENCE OF THE WITNESSES NAMED:

\_\_\_\_\_  
(CLIENT NAME)

Signed by the said [CLIENT NAME] in my presence, who, at the request of the said [CLIENT NAME], and in (his/her) presence, have hereunto signed my name as witness:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Address

\_\_\_\_\_  
Print Occupation

**ACCEPTANCE BY REPRESENTATIVE**

I HEREBY AGREE TO ACT AS REPRESENTATIVE:

\_\_\_\_\_  
[INSERT NAME OF 1ST REPRESENTATIVE]

**ACCEPTANCE BY 1ST ALTERNATE REPRESENTATIVE**

I HEREBY AGREE TO ACT AS 1ST ALTERNATE REPRESENTATIVE:

\_\_\_\_\_  
[INSERT NAME OF 1ST ALTERNATE REPRESENTATIVE]

**ACCEPTANCE BY MONITOR**

I HEREBY AGREE TO ACT AS MONITOR:

\_\_\_\_\_  
[INSERT NAME OF MONITOR]

**APPENDIX P: CERTIFICATE OF PERSON CONSULTED ABOUT A REPRESENTATION AGREEMENT**

**Form 2**  
**Representative Agreement Act**  
*Section 9(2)(b), 12(1.1)(a) and 27(1)(b)*

I, \_\_\_\_\_, of \_\_\_\_\_,  
(name of person consulted) (address of person consulted)

\_\_\_\_\_  
(city) (province) (postal code) (telephone)

certify that I am a member in good standing of the Law Society of British Columbia and that I was consulted by \_\_\_\_\_, of \_\_\_\_\_,  
(name of adult) (address of adult)

\_\_\_\_\_  
(city) (province) (postal code)

(check one)

- regarding the making of an agreement  
 regarding a change to an agreement

dated \_\_\_\_\_ made by the above named adult under section 9 of the *Representation Agreement Act*.

The consultation took place on: \_\_\_\_\_ at \_\_\_\_\_.  
(date) (place)

I explained the provisions of the Representation Agreement to the adult making or changing the agreement, and he or she appeared to understand the nature of the authority given to his or her representative(s) and the effect of such authority.

\_\_\_\_\_  
(signature of person consulted)

\_\_\_\_\_  
(date)