

# CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

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# CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

## 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 Law Act, S.B.C. 2011, c. 25 [FLA].

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

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]. (Note, the Wills, Estates, and Succession Act comes into force on March 31, 2014)

### B. SECONDARY SOURCES OF LAW AND PRACTICE

Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2011 (Bogardus/Hamilton). This book includes precedents for wills, nominations of committee, powers of attorney, representation agreements, and more. Available online through HeinOnline.

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

Incapacity Planning: The New Law, Continuing Legal Education Society of British Columbia, 2011.

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?pid=1146>.

Enduring Powers of Attorney: Areas for Reform, Western Canada Law Reform Agencies, 2004, online at: [www.law.ualberta.ca/alri/docs/WCLRA\\_epa\\_fr.pdf](http://www.law.ualberta.ca/alri/docs/WCLRA_epa_fr.pdf).

Review of Representative 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 Representative Agreement), The Representative Agreement Resource Centre & The People's Law School, Vancouver, March 2000.

The Interplay Between Aging, Death & Divorce, Continuing Legal Education Society of British Columbia, 2013.

Provincial Strategy Document: Vulnerable Adults and Capability in BC, BC Adult Abuse and Neglect Prevention Collaborative, 2009, online at [www.bcli.org/ccel/projects/vanguard](http://www.bcli.org/ccel/projects/vanguard).

Elder Mediation Course Materials, Continuing Legal Education Society of British Columbia, 2012.

Elder and Guardianship Mediation Report, Canadian Centre for Elder Law, 2012, online at [www.bcli.org/ccel/publications/elder-and-guardianship-mediation-report](http://www.bcli.org/ccel/publications/elder-and-guardianship-mediation-report).

Practice Guidelines for Certificate of Incapability Assessments under the *Patients Property Act*, Public Guardian and Trustee of BC, March 2005, online at <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/376575/incapabilitypackage.pdf>

Public Guardianship & Trustee Handbook, 4<sup>th</sup> edition, Continuing Legal Education Society of British Columbia.

## C. RESOURCE ORGANIZATIONS

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

380 - 1199 West Pender Street  
Vancouver, B.C. V6E 2R1

### **Seniors Advocacy and Information Line (Confidential)**

Toll Free: 1-866-437-1940  
Telephone: (604) 437-1940  
Fax: (604) 437-1929  
Website: <http://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, Powers of Attorney, Representative Agreements, and consumer fraud. BCCEAS also staffs an Elder Law clinic that provides free legal services to older adults who would not otherwise be able to access justice due to low income or other barriers which prevent them from finding legal help.

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

Faculty of Law, University of BC  
1822 East Mall  
Vancouver, B.C. V6T 1Z1

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

- CCEL is a national non-profit that conducts legal research, law reform, outreach and public education on the law as it relates to older adults. The CCEL has produced a number of practical tools and guidance for legal professionals, financial service providers, social workers, health care workers, caregivers, advocates, volunteers and the public.

## **B.C. Association of Community Response Networks (B.C. CRNs)**

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

- CRNs are located throughout B.C. and provide essential support for adults who are experiencing abuse, neglect and self-neglect and are in need of support or assistance to protect themselves. They seek to increase community coordination in response to abuse and neglect, through a focus on community development, education, prevention and advocacy. They work to establish networks of community and government agencies, and local businesses to facilitate these goals.

### **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)  
E-mail: [react@vch.ca](mailto:react@vch.ca)

- Vancouver Coastal Health is a Designated Agency under the Adult Guardianship Act, R.S.B.C. 1996, c. 6 [AGA] that provides educational materials to help health care providers recognize and respond to abuse, neglect and self-neglect of vulnerable adults.

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

1440 West 12<sup>th</sup> Avenue  
Vancouver B.C. V6H 1M8

Telephone: (604) 408-7414  
Toll Free: 1-877-267-5552  
Fax: (604) 801-5506  
Website: [www.nidus.ca](http://www.nidus.ca)  
E-mail: [info@nidus.ca](mailto:info@nidus.ca)

- Nidus provides a registry for Representation Agreements and Enduring Powers of Attorney. They have also produced many useful public legal education tools which are available on their website.

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

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

Telephone: (604) 660-4444  
Fax: (604) 660-0374  
Website: [www.trustee.bc.ca](http://www.trustee.bc.ca)  
E-mail: [mail@trustee.bc.ca](mailto:mail@trustee.bc.ca)

- The Public Guardian and Trustee provides advice and produces publications on various aspects of adult guardianship, and can conduct investigations where there are concerns of financial abuse, neglect or self-neglect. In some situations, the Public Guardian and Trustee may agree to act as an Attorney, and serve as committee of the person or estate. The Public Guardian and Trustee remains bound by statutory law, and is established under the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383 [PGTA].

## **1. Designated Agencies**

In B.C., anyone can make a report to a Designated Agency when there are concerns that an adult is experiencing abuse, neglect or self-neglect, and needs support or assistance to protect themselves. For more information about the statutory role of Designated Agencies and the Public Guardian and Trustee, refer to section **VIII: Adult Abuse and Neglect**, below.

The Designated Agencies for B.C. are: (see s. 61 of the AGA) and the Designated Agencies Regulation.

**Community Living BC**  
Toll Free: 1-877-660-2522  
Website: [www.communitylivingbc.ca/](http://www.communitylivingbc.ca/)

**Vancouver Coastal Health Authority**  
Phone: (604) 736-2033  
Toll Free: 1-866-884-0888  
Website: [vchreact.ca/report.htm](http://vchreact.ca/report.htm)

**Fraser Health Authority**  
Phone: (604) 587-4600  
Website: [www.fraserhealth.ca/your\\_care/adult\\_abuse\\_and\\_neglect](http://www.fraserhealth.ca/your_care/adult_abuse_and_neglect)

**Vancouver Island Health Authority**  
Phone: (250) 370-8699  
Toll Free: 1-877-370-8699  
Website: [www.viha.ca/](http://www.viha.ca/)

**Interior Health Authority**  
Phone: (250) 862-4200  
Website: [http://www.interiorhealth.ca/Northern Health Authority](http://www.interiorhealth.ca/Northern_Health_Authority)

**Northern Health**  
Phone: (250) 565-2649  
Website: [www.northernhealth.ca/](http://www.northernhealth.ca/)

**Providence Health Care Society**  
St. Paul's Hospital—Phone: (604) 660-4444  
Mount St. Joseph's Hospital—Phone: (604) 877-8377  
Holy Family Hospital Phone: (604) 322-2311  
Website: <http://www.providencehealthcare.org/about-providence/governance/providence-health-care-society>

## II. INTRODUCTION TO ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

### A. THE SCOPE OF GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING LAW IN B.C.

Adult guardianship laws apply to adults over the age of 19. There are four key legal issues addressed in adult guardianship or substitute decision-making legislation:

1. **Mental Capacity:** The law presumes that an adult is capable of making decisions and provides statutory tests for determining incapacity in different contexts.
2. **Advance Planning Documents:** The law allows a capable adult to appoint a substitute decision-maker and to specify his or her wishes for financial or health care decisions in three types of legal documents: Power of Attorney (for financial decisions only); Representation Agreement (for health care consent, personal care decisions, and routine financial decision-making); and Advance Directives (for health care consent).

3. **Appointed Guardianship:** Where an adult is incapable and does not have Advance Planning Documents in place, the court may appoint a guardian (called a Committee of Estate or Committee of Person) to act on behalf of an incapable adult. Under the PPA the Public Guardian and Trustee may also be appointed Committee of Estate by the director of a provincial health facility issuing a certificate of incapacity (without court order).
4. **Abuse and Neglect:** The law has established a legal framework for Designated Agencies to respond when adults experience abuse, neglect or self-neglect and need support and assistance to protect themselves from further harm.

Under each of these areas of the law, it is crucial that substitute decision-makers, court-appointed guardians, legal and financial advisors, social workers and health care providers consult with the adult to determine how to act in accordance with the person's wishes, values and beliefs. Substitute decision-maker(s) and guardian(s) are legally obligated to act according to the wishes, values and beliefs of the adult who appoints them or is in need of a guardian.

**NOTE:** B.C. legislation concerning adult guardianship is in a transitional period. As of September 1, 2011, many of the changes to the AGA contained in the Adult Guardianship and Planning Statutes Amendments Act, 2007 (Bill 29) (i.e. provisions concerning Advance Planning Documents) are in effect. New provisions concerning statutory and court-appointed guardianship are not yet coming into force. Instead, the Patients Property Act [PPA] remains in effect.

## **B. MENTAL CAPACITY**

**NOTE:** For the purposes of this manual, there is no distinction between “mental capacity”, “capacity” and “capability”, and the terms are used interchangeably.

In B.C. the law presumes that an adult has the ability to make personal and legal decisions (e.g. decisions regarding health, life, property, assets, financial arrangements, etc.), unless there is evidence to the contrary. A person may become incapable at a point in his or her life due to illness, disability or accident. If an adult is, or becomes incapable, another person (or persons) can become the substitute decision-maker(s), who acts on the wishes and values of the incapable adult. A substitute decision-maker can be appointed in either of the following ways:

1. an adult who meets the appropriate test for mental capacity can name the substitute decision-maker(s) in an Advance Planning Document (e.g. in a Power of Attorney, a Representation Agreement, or an Advance Directive); or
2. an adult who is no longer capable of making financial or health care decisions may have a guardian (called a Committee of Estate or Committee of the Person) appointed by the courts (or by other legislated process) to make decisions.

An adult who has drafted a Power of Attorney, Representation Agreement or Advance Directive, could maintain mental capacity to make financial and health care decisions throughout their life. An adult with capacity retains the right to make decisions about legal, financial and health care matters, even after these legal documents are made. Also, the appointed substitute decision-maker has a legal duty to act in accordance with the adult's instructions, values, wishes and beliefs, regardless of capacity.

The appropriate test for incapacity will vary, depending on the particular decision being made. Below is a description of the statutory tests for incapacity, as found in the relevant legislation. In many cases, Advance Planning Documents will specify what is required to determine incapacity (e.g. medical opinion from two medical professionals). In cases where no substitute decision-maker has been



named while the adult is capable, the court may decide whether there is evidence of incapacity, based on these various statutory tests. After an adult becomes incapable, the substitute decision-maker must continue to act on the incapable adult's previous instructions and known values, wishes and beliefs.

## 1. Power of Attorney (POA)

As mentioned above, an adult is presumed to have capacity, unless proven otherwise. According to s. 11 of the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA]. An adult is presumed capable of making decisions about financial affairs and understanding the nature and consequences of making, changing, or revoking a POA.

Difficulties or barriers in communicating are not adequate grounds for determining that an adult is incapable. Instead, incapacity is determined by a more thorough assessment, often as specified in Advance Planning Documents (i.e. a Springing POA will normally specify under what conditions a person is considered incapable, such as on the basis of medical opinions from two doctors or by an assessment of the court.).

The PAA sets out a specific statutory test of incapacity in s. 12, which reaffirms that an adult is presumed able to make an Enduring Power of Attorney (EPOA), unless there is evidence that the adult is unable to understand the nature and consequences of the EPOA. According to s. 12(2), an adult is considered incapable of understanding the nature and consequences of an EPOA if the adult cannot understand all of the following:

- the property the adult has and its approximate value;
- the obligations the adult owes to his or her dependants;
- that the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- that, unless the attorney manages the adult's business and property prudently, their value may decline;
- that the attorney might misuse the attorney's authority;
- that the adult may, if capable, revoke the enduring power of attorney; and
- any other prescribed matter.

**NOTE:** This is a complex and rapidly changing area of the law. This above statutory test for incapacity in s.12(2) of the PAA came into effect on September 1, 2011. This test is significantly broad in scope and appears to only apply to an EPOA. However, it remains to be seen how this test will be interpreted by the courts. As at May 19, 2013, there has been no judicial interpretation of this test. Consult your supervising lawyer for guidance on assessing capacity for other types of Powers of Attorney, or if there is a greater need for clarity about the validity of these documents. In addition, there are will be amendments to definitions in s. 10 of the PAA through BC Reg 148/2013 (Wills, Estates and Succession Amendment Act) expected to be in force March 31, 2014, which may affect interpretations of this statute.

## 2. Health Care Consent

The Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181 [HCCFA] states that every adult who is capable of giving or refusing consent to health care has the right to (s. 4):

- give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death;

- select a particular form of available health care on any grounds, including moral or religious grounds;
- revoke consent;
- expect that a decision to give, refuse or revoke consent will be respected; and
- be involved to the greatest degree possible in all case planning and decision making.

According to s. 3 of the HCCFA, an adult is presumed capable, unless proven otherwise, when:

- giving, refusing or revoking consent to health care; and
- applying for admission to a care facility, accepting a facility care proposal, or moving out of a care facility.

Difficulties or barriers in communicating are not adequate grounds for deciding that an adult is incapable. Instead, incapacity is determined in accordance with s. 7 of the HCCFA, which requires a health care provider to decide whether or not the adult understands the information given by the health care provider and that the information applies to the situation of the adult in need of health care.

If a person is determined to be incapable, then the health care provider will need to obtain consent from another adult, who is able to give or refuse consent on behalf of the incapable adult. The health care provider can get consent from a substitute decision-maker named in a Representative Agreement. An individual may also document consent or refuse consent in advance through an Advance Directive. If neither of these documents are in place (or the AD does not address the medical issue for which consent is needed), and there is no appointed guardian (called a Committee of Person), then the health care provider will need to get consent from a Temporary Substitute Decision-maker (TSDM). The HCCFA provides a hierarchical, default list of TSDMs, as follows (s. 16):

- spouse/partner
- adult child (over 19 years old)
- parent
- brother or sister
- grandparent
- grandchild
- other relatives by birth or adoption (not in-laws or step-children)
- close friend
- person immediately related by marriage (includes in-laws or step-children)

A TSDM has authority to decide whether to give or refuse consent, in accordance with the adult patient's wishes, values and beliefs. This authority of a TSDM to give or refuse consent is generally valid for 21 days, but the time period may be extended upon written confirmation by the health care provider. If the health care provider has reasonable grounds to believe that the adult patient may be capable, then the health care provider must again determine whether the adult is incapable. Further, if an adult patient becomes capable again during this time period, then consent must be given or refused by the adult patient. For more information, refer to section **V.H.1: Temporary Substitute Decision-makers (TSDM)** in this chapter below.

### 3. Representation Agreement (RA)

An adult who meets the requisite mental capacity test may create a Representation Agreement (RA), which is a legally-binding document that appoints a substitute or supportive decision-maker and provide instructions with respect to health care decisions, personal care, and/or routine financial decisions. See s. 7 and 9 of the Representation Agreement Act, R.S.B.C. 1996, c. 405 [RAA]. Section 7 and 9 RAs deal with different types of decisions (see section **V.A: Types of Representation Agreements**) and are subject to distinct different mental capacity standards.

In British Columbia, an adult is presumed to have capacity, unless proven otherwise. According to s. 3(1) of the [RAA], an adult is presumed to have capacity to:

- decide to make, change or revoke a s. 7 or s. 9 RA;
- choose personal care, health care and legal matters; and
- conduct the routine management of their own financial affairs.

The statutory test to determine incapacity for a standard s. 7 RA is set out in s. 8 of the RAA. In determining whether an adult is incapable of making a s. 7 RA, the following factors will be relevant:

- whether the adult communicates a desire to have a Representative make, help make or stop making decisions;
- whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the Representative may make, or stop making, decisions or choices that affect the adult; and
- whether the adult has a relationship with the Representative that is characterized by trust.

An adult who has diminished capacity may still be allowed to make, change or revoke a s. 7 RA, even when the adult is incapable of:

- making a contract;
- managing his or her health care , personal care or legal matters; or
- the routine management of his or her financial affairs.

The statutory test to determine incapability for non-standard, s. 9 representation agreements, is set out in s. 10 of the RAA. An adult may be considered incapable of making a s. 9 RA if “incapable of understanding the nature and consequences of the proposed agreement”.

For more information and an explanation of the differences between a s. 7 RA and a s. 9 RA, refer to section **V. A: Types of Representation Agreements** in this chapter.

#### 4. **Advance Directive (AD)**

A capable adult may also choose to make an Advance Directive (AD), which is a legally-binding document that provides instructions with respect to giving or refusing consent to health care treatment or procedures.

In B.C., an adult is presumed to have capacity, unless proven otherwise. According to s. 19.1 of the HCCFA, an adult is presumed to have capacity to make an AD, unless there is evidence that he or she is incapable of understanding the nature and consequences of the AD.

An adult is incapable of understanding the nature and consequences of an AD, if the adult cannot understand:

- the scope and effect of the health care instructions set out in the AD; and
- that a temporary substitute decision-maker (TSDM) may not be chosen by the health care provider.

For more information about the requirements and scope of ADs, refer to section **VI: Advance Directives** in this chapter.

**NOTE:** Health care consent is a complex and rapidly changing area of the law. Although previously used by many health care providers, ADs only become legally binding on or after September 1, 2011. Consult your Supervising Lawyer for guidance on assessing capacity to make an RA or AD, or if there is a greater need for clarity about the legal validity of these documents.

## 5. Designated Agencies – Support and Assistance

Another area where the issue of capacity may be raised is when an adult is experiencing abuse, neglect or self-neglect. Under Part 3 of the AGA, anyone can make a report to a Designated Agency who will meet with the adult, investigate whether or not the adult is experiencing abuse, neglect or self-neglect, and, if necessary, establish a support and assistance plan to protect the adult.

An adult who is in need of support and assistance does not necessarily lack mental capacity. In fact, according to s. 3(1) of the AGA, an adult is presumed to be capable of making decisions about personal care, health care and financial affairs, regardless of whether the adult is vulnerable to abuse, neglect or self-neglect.

A way of communicating with others is not grounds for determining that an adult is incapable. Instead, the statutory tests of incapacity apply. For applications concerning guardianship, a formal assessment of capacity must be done in accordance with the Adult Guardianship (Abuse and Neglect) Regulations [AGR]. According to s. 3(4) of the AGR, a capacity assessor must base the decision of incapacity on whether the adult understands:

- the services described in the support and assistance plan
- why the services are being offered to the adult; and
- the consequences of not accepting the services.

The AGA states that the adult who is in need of support and assistance must be involved in decisions about how to seek and provide whatever support and assistance is needed to prevent abuse or neglect. It is also important to remember that an adult with capacity has the legal right to refuse support or assistance. For more information about responding to abuse and neglect, refer to section **VIII: Abuse and Neglect** in this chapter.

## C. ADVANCE PLANNING DOCUMENTS

An adult who has mental capacity can execute various documents to appoint another person to make financial and health care decisions on his or her behalf. These documents may come into effect immediately, or only when certain events come to pass (e.g. upon loss of capacity), as follows:

- **Power of Attorney (POA):** an adult (called the ‘adult’ in the legislation) with capacity may choose to appoint another person (called the Attorney) to act on his or her behalf, only in matters concerning financial affairs (e.g. property, finance, banking, business, etc).
- **Representative Agreement (RA):** an adult with the requisite mental capacity may choose to appoint another person (called a Representative) to act as a substitute decision-maker or as a supportive decision-maker to act on his or her behalf with respect to health or personal matters and /or routine financial decisions, under a s. 7 RA.
- **Advance Directive (AD):** an adult with capacity may choose to give or refuse consent to health care or give health care instructions in an AD, which will only come into effect when the adult is incapable and in need of health care.

In B.C., various laws define what is required to validly execute each of these documents, the duties and powers held by the appropriate substitute decision-maker(s), and the legal authority or scope of decisions made.

### III. OVERVIEW OF INCAPACITY

Capacity or incapacity relate to the effect of mental disability, illness, or impairment on a person’s capacity to create or enter into legal relations. A person’s capacity to make a legally binding decision depends on the type of decision at hand. The various legal capacity standards for carrying out transactions, entering into relationships, or managing a person’s affairs, are set out in different legal sources—some are created by statute and others find their expression in court decisions. The various common law capacity standards are discussed in great length in the upcoming BC Law Institute’s Report on the Common Law Tests of Incapacity, which covers capacity to do the following:

- make a will;
- make an *inter vivos* gift;
- make a beneficiary designation;
- nominate a committee;
- enter into a contract;
- retain legal counsel;
- marry;
- form the intention to live separate and apart from a spouse; and
- enter into an unmarried spousal relationship.

What follows is an overview of the interplay of incapacity with various legal decisions and responsibilities.

#### A. GUARDIANSHIP AND COMMITTEESHIP

When an individual is mentally incapable of managing his or her affairs, it is possible for someone else to be legally enabled to manage the individual’s affairs or to make decisions about his or her personal care. The PPA operates to appoint a person called a “Committee” (pronounced caw-mi-tay, with emphasis on the end of the word) to manage the affairs of an individual who was a patient in a mental health facility. The committee can also be court appointed. Changes were made to the PPA in

September 2011 regarding committees and representation agreements. See section **VII: Guardianship and Committee**.

## **B. MARRIAGE AND GUARDIANSHIP OF CHILDREN**

### **1. Marriage**

A person entering into a marriage contract must have the mental capacity to understand the nature of the contract and the duties and responsibilities it creates. Mental disability may be grounds for annulment if, at the time of the marriage, the mentally disabled person did not understand the nature and consequences of marriage (e.g. that a partner can marry only one person, has a financial obligation to that person and marriage can only end by death or divorce).

### **2. Divorce and Separation**

To proceed with a divorce, a person must have the capacity to form the intention to “live separate and apart”. For more information, refer to **Chapter 3** (Family Law) of this manual.

### **3 Children**

The new Family Law Act, S.B.C. 2011, c. 25, came into force March 18, 2013. Under section 55 of this act, a child’s guardian who is facing permanent mental incapacity may appoint a person to be the child’s guardian in addition to the appointing guardian. As per section 55(4), in carrying out his or her parental responsibilities, a guardian appointed under s. 55 must consult with the appointing guardian to the fullest possible extent regarding the care and upbringing of the child. The guardian appointed under s. 55 continues as the child’s guardian on the death of the appointing guardian unless the appointing guardian revokes to appointment while still capable, or the appointment conditions provide otherwise (s. 55(5)).

In addition, s. 51(1) provides generally that a court may appoint a person as a child’s guardian if there is sufficient evidence that it is in the best interests of the child.

## **C. CAPACITY TO MAKE A CONTRACT**

To enter into a contract, a person must have the mental capacity to understand both the nature of the contract and its effect on his or her interests. If a contractor is unaware that the contractee has an impairment or illness that impacts capacity, the contract may be enforceable against the contractee and/or the committee. Some cases indicate, however, that even if the contractor had no notice of the contractee’s incapacity, the contract may still be set aside as “unfair”. If the contractor knows or a reasonable person would have known that the contractee was mentally ill, the contract is voidable.

## **D. DRAFTING A WILL**

The capacity to draft a will, also known as testamentary document is not set out in statute, but has rather been developed by court judgments. When the Wills, Estates and Succession Act (WESA)

comes into force (March 31, 2014) it will set out some parameters for capacity. Section 36(1) provides that “[a] person who is 16 years of age or older *and who is mentally capable of doing so* may make a will.”

To possess testamentary capacity an individual must be of “sound mind, memory and understanding” (*Banks v. Goodfellow*. (1870), LR 5 QB 549 at 560 (Eng. CA), A testator must be capable of understanding the following at the time the will is created, both at the time of providing instructions and executing the will:

- the nature and effect of making a will;
- the extent of the testator’s property that may be disposed by a will;
- the persons who are to receive the property under the will, and the moral claims of persons (such as family members and others who are close to the testator) who should receive a share of that property; and
- the way in which the assets are to be distributed under the will.

For more information, please refer to the Making and Executing a Will section in **Chapter 16** (Wills and Estates) of this manual.

There is no statutory authority specifically declaring that a person with a developmental disability or cognitive impairment cannot draft a will. However, it is advised that a mentally disabled person have a written doctor’s opinion confirming his or her capacity to draft a will. The appointment of a committee prior to the testator having made the will in question does not in itself demonstrate incapacity to make a will, though there is a much heavier burden on the person making the will to prove testamentary capacity under such circumstances.

## **E. CAPACITY TO RETAIN AND INSTRUCT COUNSEL**

The test of capacity to retain legal counsel lacks a defining court case. Capacity is presumed unless circumstances indicate otherwise, and the capacity to retain (and instruct) legal counsel is strongly linked to the matter for which the legal counsel is being retained. Law students may wish to consider the standards for dealing with individuals with diminished capacity set out in the *Code of Professional Conduct for British Columbia*.

## **IV. POWER OF ATTORNEY**

A Power of Attorney (POA) is a legally-binding document that allows a capable adult (called the Adult) to grant the authority to other capable adult(s) (called the Attorney(s)) to make financial and legal decisions on their behalf. A mentally capable adult does not give away their authority to an attorney. Rather, the effect of a POA is to share the authority with the attorney. POAs can vary in scope, depending on the:

- specific needs of the Adult;
- types of decisions an Attorney is permitted to make;
- time period (i.e. ongoing or set for a limited period);
- how many Attorneys are appointed; and
- need for unanimous decisions or task-specific roles.

The Adult can make very individualized and specific provisions in a POA. For example, a POA can be very narrow in scope, allowing the Attorney(s) to do one specific act (e.g. cashing a pension cheque, transferring property, or paying insurance). Alternatively, the Adult can make a POA that is intentionally broad in scope, allowing the Attorney(s) to handle all financial decisions on behalf of the Adult.

Students should confer with their Supervising Lawyer if there is any doubt that the client understands and appreciates the nature and consequences of a POA. Also, note that an adult should not be required to have a POA as a condition of receiving any good or service.

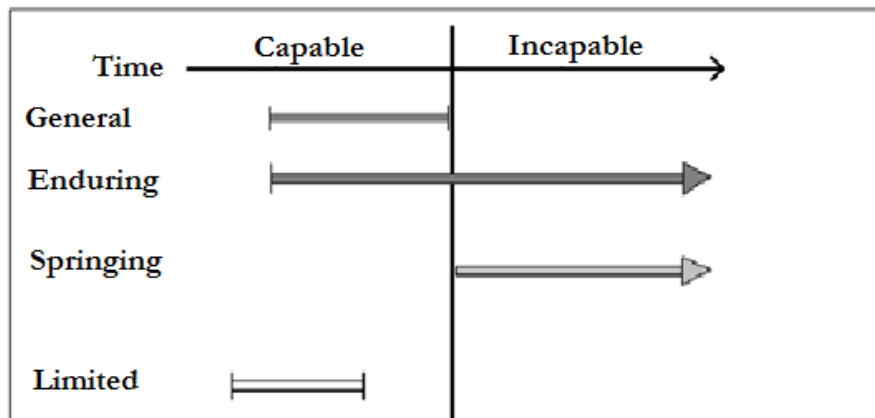
The following sections explain in more detail: what type of POAs can be made; who is involved in a POA; how a POA can be made, changed, or revoked; the duties and powers of an Attorney; and what can be done if an adult is incapable and does not have a valid POA in place.

## A. TYPES OF POA

There are four types of POAs. It is important to find out what type of POA would best suit the client's needs. Questions to ask include:

- What tasks does the Adult want the Attorney to be able to perform?
- When does the Adult want the Attorney to begin to act?
- Does the Adult want the POA be used for a limited time only?
- Does the Adult want the POA to be in effect immediately or only when he or she becomes incapable?
- How will incapacity be decided?
- Does the Adult's powers terminate if and when the Adult becomes incapable?

The four types of POA can be conceptualized graphically as follows. Immediately following the figure is a narrative explanation of the differences:



1. **General:** effective immediately and ongoing until loss of capacity, revocation or death.
2. **Enduring:** effective immediately and ongoing until revocation or death (continues in the event of the Adult's incapacity).
3. **Springing:** dormant until a future date or event (i.e. the loss of capacity) and ends only upon death (must define a "triggering event" for when the POA comes into effect).
4. **Limited:** effective only during a specified time period and for a specific purpose (e.g. payment of insurance premiums or payment of bills).



These are not mutually exclusive categories: e.g. a POA could be both limited (in scope of powers) and enduring. In most cases, the POA will be effective immediately, once signed and witnessed by the Adult and Attorney(s), and will continue on an ongoing basis. The most common POA is the Enduring Power of Attorney (EPOA), which allows the Attorney to act while the Adult is capable and **continues** when/if the Adult becomes incapable. General POAs are rarely used in incapacity planning, as they become **no longer in effect** when an adult becomes incapable (which is often when a POA is most needed).

Some types of POAs will come into effect or terminate upon the occurrence of specific events. For example, where a Springing or Limited POA is made, the Attorney may not need to act until a certain “triggering event” or date is reached.

Like an enduring POA, a Springing POA is also an advance planning instrument in that it will be used if the adult loses capacity (the ‘triggering event’). The adult can decide in advance how capacity is to be determined, such as by requiring the agreement of a family member and two doctors. The difference between an enduring POA and a Springing POA is essentially that the Springing POA is not active until the adult loses capacity.

## **B. WHO IS INVOLVED IN A POWER OF ATTORNEY?**

Only a capable adult (called an ‘Adult’ in the legislation) may make a POA. A POA requires at least one person to act as an Attorney. The Adult may name multiple or alternate Attorneys.

In some situations, the Public Guardian and Trustee can be appointed as the Attorney, particularly where an adult does not have family or friends who can act on his or her behalf. The Public Guardian and Trustee may also become involved where there is financial abuse, neglect or self-neglect, particularly if there are concerns that an Attorney is misusing a POA, or concerns that an Attorney is failing to fulfill their legal duties.

Below is a brief description of how an Adult, Attorney(s) and the Public Guardian and Trustee are involved in a POA. For more detailed information about the mental capacity of an Adult, refer to section **II.B.1: Mental Capacity – Power of Attorney**, above. For more information about reporting abuse or neglect to the Public Guardian and Trustee, refer to section **VIII: Abuse and Neglect** in this chapter.

### **1. The Adult**

The Adult (as referred to in the legislation) is any adult who makes a POA to appoint another adult (called an Attorney) to make financial decisions on his or her behalf. The Adult must be:

- an adult (i.e. at least 19 years of age);
- mentally capable to make a POA; and
- acting voluntarily, or on their own.

The Adult must have mental capacity at the time that the POA is signed, understanding the nature and implications of a POA. An adult who has mental capacity has the legal right to make decisions, including the legal right to choose whether to:

- determine the type, scope or purpose of the POA;
- define the roles and authority of the appointed Attorney(s);
- provide instructions to the Attorney(s);

- express wishes, values and beliefs; and
- change or revoke a POA.

## 2. Attorney(s)

An Attorney is an adult who is capable and willing to carry out the financial tasks and/or make financial decisions on behalf of another person (the Adult). An Attorney must be: (see PAA)

- an adult (i.e. at least 19 years of age), the Public Guardian and Trustee or a financial institution;
- mentally capable to carry out the financial tasks;
- able to understand and fulfill their legal duties;
- able and willing to act in accordance with the instructions, wishes, values and beliefs of the Adult; and
- acting voluntarily, or on their own.

Section 18 of the PAA states who may act as an Attorney. One or more of the following persons can be named:

- an individual, other than an individual who provides personal care or health care services to the adult for compensation or is an employee of a facility in which the adult resides and through which the adult receives personal care or health services (exception: if individual described is a child, parent or spouse of the adult, in which case they may be named as attorney);
- the Public Guardian and Trustee;
- a financial institution authorized to carry on trust business under the Financial Institutions Act.

The “Attorney” in a POA does **not** need to be a lawyer. However, in some circumstances the Adult may wish to appoint his or her lawyer to act as an Attorney.

More than one person can act as an Attorney. According to s. 18(5) of the PAA, where an Adult appoints multiple Attorneys, the Attorneys must act unanimously in exercising their authority. The exception to this unanimous decision-making rule is where the Adult specifically does the following in the POA:

- describes circumstances where the Attorneys do not have to act unanimously;
- sets out how a conflict between Attorneys is to be resolved; or
- authorizes an Attorney to act only as an alternate .

Where a POA appoints two or more attorneys to act for an Adult, all the Attorneys will need to be in agreement regarding decisions made for the adult, **unless otherwise specified in the POA**. The Adult might prefer to define distinct roles for each Attorney (i.e. appoint one adult as the Attorney for certain transactions (e.g. personal banking) and a second individual as their attorney over different matters (e.g. property). The POA should be clear about the roles and responsibilities of each Attorney and whether or not unanimous consent is necessary in each type of transaction.

Appointing more than one person has potential advantages and disadvantages. The practice can reduce the potential for an Attorney to misuse his or her power, providing in a sense for built in scrutiny by a second Attorney. But, having multiple Attorneys may make the decision-making process complicated and inefficient.

**NOTE:** As of September 1, 2011, a signature by the Attorney(s) on the POA is required to signify acceptance of the role and responsibility. If an Attorney is not willing to accept this role, then the Attorney should not sign the POA.

### **3. The Public Guardian and Trustee (PGT)**

An adult who does not have relatives or friends who are willing and able to serve as an Attorney may ask the Public Guardian and Trustee to act as an Attorney. According to s. 6(c) of the AGA, the Public Guardian and Trustee may agree to act as Attorney for a fee. If a client needs to appoint the Public Guardian and Trustee as Attorney, then contact the Public Guardian and Trustee to arrange a meeting.

Another circumstance where the Public Guardian and Trustee may become involved is where an Attorney is misusing a POA or otherwise failing to fulfill his or her legal obligations. Any person may notify the Public Guardian and Trustee if there is a reason to believe that fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke financial or legal document. Any person may also notify the Public Guardian and Trustee where an Attorney is:

- incapable of acting as Attorney;
- abusing or neglecting the adult;
- failing to follow the instructions in the POA; or
- otherwise failing to comply with legal duties of an Attorney.

For more information about the role of the Public Guardian and Trustee where there is financial abuse, neglect or self-neglect, refer to section **VIII: Abuse and Neglect** in this chapter.

## **C. CREATING A POWER OF ATTORNEY**

The most important aspect of drafting a POA is to ensure that the document accurately reflects the adult's specific wishes. Questions to ask include:

- What does the client want to do?
- Does the client have capacity to make this POA?
- Does the client understand the nature of this POA?
- Does the client understand the potential legal impact of this POA?
- Has the client received suitable independent legal advice?
- What type of authority does the Attorney need?
- Does the Adult want to limit the Attorney's authority?
- When should the POA be in effect (i.e. ongoing or limited?)
- Has the client created other POAs?

Any adult can draft a POA. However, it is advised that an adult consult a lawyer or notary prior to finalizing a POA. Independent legal advice will help ensure that the POA only grants an Attorney the powers and authority that the Adult wants to give.

An adult with capacity must be free to choose – or not to choose – to sign a POA. It is important to be aware of situations where a person may be putting undue pressure (including physical, financial or emotional threats, manipulation or coercion). For more information, refer to the discussion of undue

influence below in section **III.H (A PRACTICAL CLINIC APPROACH TO POAs FOR LSLAP STUDENTS)** and section **VIII: Abuse and Neglect** in this chapter. Also refer to the BCLI guide on Undue Influence, which, though created to assist wills practitioners, is helpful for understanding the social dynamics surrounding undue influence in relation to other legal documents like POAs. The Guide can be found at [www.bcli.org/bclrg/projects/project-potential-undue-influence-recommended-practices-wills-practitioners](http://www.bcli.org/bclrg/projects/project-potential-undue-influence-recommended-practices-wills-practitioners). The Appendix to the Guide contains a short, useful Reference Aid.

## 1. Formalities

Formalities are the specific requirements for a POA to be considered valid (i.e. whether the POA has to be signed or witnessed). According to s.16 and s. 17 of the Power of Attorney Act [PAA], an enduring POA must be:

- in writing;
- signed and dated by the Adult in the presence of two witnesses (only one witness is required if that witness is a lawyer who is a member of the Law Society of British Columbia or a notary who is a member in good standing of the Society of Notaries Public of British Columbia); and
- signed and dated by the Attorney(s) who agree to act in the presence of two witnesses (unless one witness is a lawyer or a notary).

A new POA will need to be signed by both the Adult and the Attorney(s). These signatures do not need to be in each other's presence. In other words, the Attorney and Adult may sign the document separately. However, these signatures must each be witnessed by two capable adults (unless one witness is a lawyer or notary).

As of September 1, 2011, an Attorney must sign an EPOA in the presence of two witnesses before assuming their authority (PAA, s. 17). If a person who is named as an Attorney does not sign the POA, then the person is **not required or legally able** to act as an Attorney. If a person named as Attorney does not sign, the authority of any other named Attorney is not affected (unless the POA states otherwise).

According to s. 16(6), the following persons must not act as a witness to the signing of an EPOA:

- a person named as an Attorney;
- a spouse, child or parent of a person named as an Attorney;
- an employee or agent of a person named as an Attorney, unless the person named as an Attorney is a lawyer, a notary, the Public Guardian or Trustee or a financial institution authorized to carry on trust business under the Financial Institutions Act;
- a person who is not at least 19 years of age; or
- a person who does not understand the type of communication used by the Adult (unless interpretive assistance is used).

The Power of Attorney Act [PAA] provides a standard form that can be used to create a POA. The most up-to-date version of this form is generally also posted on the government of B.C. website: [www.bclaws.ca](http://www.bclaws.ca).

Although there is no legal requirement to register a POA, an EPOA can be registered through the Nidus e-Registry. More information about this service is available on their website: <http://www.nidus.ca>.

## 2. Land Transactions

An Adult might authorize the Attorney(s) to make a transaction involving land (i.e. transfer of title, closure of sale of property, etc.) on behalf of the Adult. If the authority of an Attorney involves transactions concerning land and land title, then the POA must be executed and witnessed in accordance with the Land Title Act [LTA].

A POA that grants authority to the Attorney to make land transactions will expire after 3 years of its execution. There is an exception to this where an Adult signs an EPOA, or the POA expressly exempts itself from these provisions (s. 56 of the LTA).

A POA that confers the power to deal with land transactions and registration of land titles must be witnessed and notarized by a lawyer who is a member of the Law Society of British Columbia or a notary who is a member of the Society of Notaries Public of British Columbia. This is because POAs that involve land transactions require more care and consultation to ensure that the Adult is aware of the legal impact of conveying this authority to the Attorney(s).

## 3. Banks, Credit Unions and Other Financial Service Providers

Financial institutions and agents (e.g. banks, credit unions, investment advisors, customer service Representatives, estate planners, etc.) may ask your client to complete their institution's POA. This request normally occurs where, for example, an Adult wishes to grant the Attorney access to bank accounts for the purpose of paying bills, making transfers, etc. The financial institution may request that the Adult and Attorney to fill out their institution's Limited POA. If the client signs an institution's POA, this can sometimes create a conflict between POAs. These important questions should be asked:

- What does the client want to do?
- What kind of POA should apply?
- Is the financial institution's form suitable?
- Has the client received suitable independent legal advice?

A client should **not** sign a POA form without seeking legal advice. The client must also be made aware of the legal effect of signing, such as the possible revocation of a previous POA. Examples of suitable forms are available in **Appendix B** in this chapter.

**NOTE:** It is good practice for the client to notify financial institutions and agents that a new POA has been made and/or that the previous POA has been revoked. This can be done in writing, with a copy of the new POA.

## D. OTHER JURISDICTIONS

As of September 1, 2011, Enduring POAs (EPOAs) that have been made in some jurisdictions outside of B.C., including other Canadian provinces and territories, or in some other countries (e.g. United States, United Kingdom, Australia and New Zealand) may be recognized as legally valid in B.C. These new provisions are set out in s. 38 of the PAA, and subject to the Power of Attorney Regulation [PAR].

Extrajurisdictional EPOAs must be certified. Section 4(3) of the PAR currently requires that the EPOA from another jurisdiction must be accompanied by a certificate, which is from a solicitor who is

permitted to practice in the jurisdiction where the EPOA was made. The certificate must indicate that the EPOA meets the requirements set out in s. 2(a) to (c) of the PAR.

According to s. 4(2)(a) to (c) of the PAR, a POA from outside B.C. will be deemed a valid EPOA in B.C. where it:

- grants authority to an Attorney that comes into effect or continues to have effect while an adult is incapable of making decisions about his or her own affairs;
- was made by a person who was, at the time of its making, ordinarily resides elsewhere in Canada or in the United States, the United Kingdom, Australia or New Zealand; and
- is in accordance with the laws and continues to have legal effect in the jurisdiction in which it was made.

An Attorney and the Adult must both be at least 19 years of age before the Attorney can exercise any powers or perform any duties.

## **E. ACTING AS AN ATTORNEY**

Below is a description of the various duties and powers held by an Attorney. In most POAs, the Attorney(s) will immediately be able to act on behalf of the Adult. However, in some types of POAs (e.g. a Springing or Limited), the terms of the POA will specify a “triggering event” or date that will signify when an Attorney has the authority to act on the Adult’s behalf. Regardless of when an Attorney is permitted to act, the following duties and powers apply.

### **1. Duties**

The primary responsibility of an Attorney is to act in accordance with the Adult’s instructions, wishes, beliefs and values. The PAA explicitly sets out a number of statutory duties and powers. According to s. 19(1) of the PAA, an Attorney must:

- act honestly and in good faith;
- exercise the care, diligence and skill of a reasonably prudent person;
- act within the authority given in the POA; and
- keep prescribed records and produce these records for inspection and copying upon request.

An attorney must act in the Adult’s best interest, taking into account the Adult’s current wishes, known beliefs and values and explicit directions in the POA (s. 19(2)). Where reasonable, an Attorney must give priority to meeting the personal care and health care needs of the adult, foster the independence of the Adult, and encourage the Adult’s involvement in any decision-making (s. 19(3)).

Concerning the Adult’s personal property and real property, an Attorney must keep the Adult’s property separate from his or her own property (s. 19(4)). If the property is jointly owned by the Adult and the Attorney as joint tenants, or has been substituted for, or derived from, property owned as joint tenants, an Attorney must also:

- only make investments in accordance with the Trustee Act [TA];
- **not** dispose of property that is subject to an Adult’s will; and
- keep the Adult’s personal effects at the disposal of the Adult.

If an EPOA explicitly says that an Attorney will be exempt from these provisions, then the Attorney is not legally obligated to fulfill these duties.

## 2. Powers

An Adult may grant general or specific powers to an Attorney in a POA. An Attorney may also be permitted to exercise statutory powers to act on behalf of the Adult. According to s. 20 of the PAA, an Attorney named has the statutory power to:

- make a gift or loan, or charitable gift, if the POA permits or certain conditions set out in the PAA are met (see section 3 below);
- receive a gift or loan, if the POA permits;
- retain the services of a qualified person to assist the Attorney; and
- change or make a beneficiary designation, in limited circumstances (see 4 below)

The scope of an Attorney's powers can be limited or expanded in the express wording of a POA. An Attorney is **exercising authority improperly** if the Attorney acts when the authority of the Attorney is suspended or has ended; or the EPOA is not in effect, is suspended, terminated or invalid.

## 3. Gifts, Loans and Charitable Donations

An Attorney may make a gift or loan, or a charitable gift from the Adult's property if the EPOA permits the Attorney to do so, or if (s. 20):

- the Adult will have sufficient property remaining to meet the personal care and health care needs of themselves and their dependents and to satisfy other legal obligations;
- the Adult, when capable, made gifts or loans or charitable gifts of that nature; and
- the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.

According to s. 20(2) of the PAA, an Attorney may receive a gift or loan, if the EPOA permits.

## 4. Creating a Will and Designating Beneficiaries

Attorneys are **not allowed to make a will** on behalf of an Adult. According to s. 21 of the PAA, any will that is made or changed by the Attorney on behalf of an Adult is not legally valid. Further, if the Adult has given instructions prohibiting delivery of the Will to the Attorney(s), then a person must not provide the Will to the Attorney(s).

An Attorney is also **not allowed to dispose of property** that is designated as a testamentary gift in the Adult's will. Section 19(3)(d) of the PAA provides an exception to this only where the disposition is necessary to comply with the Attorney's duties. According to s. 20(5), an Attorney is allowed to change a beneficiary designation, in an instrument other than a will, in very limited circumstances set out in s. 20(5)(b) of the PAA. These limited circumstances include:

- a change to a beneficiary designation if the court authorizes the change; or
- the creation of a new beneficiary designation if the designation is made in:
  - an instrument that is renewing, replacing or converting a similar instrument made by the capable adult, and the designated beneficiary remains the same; or
  - a new instrument that is not renewing, replacing or converting a similar instrument made by the capable adult, and the newly designated beneficiary is the adult's estate.

## 5. Deeds

An Attorney may execute a deed under the seal of the Attorney on behalf of the Adult (whether an individual or a corporation). According to s. 7 of the PAA, as long as it is within the scope of the Attorney's authority, such a deed is binding on the Adult and is of the same effect as if it were under the seal of the Adult.

## 6. Delegating and Retaining Services

An Attorney is not allowed to delegate their authority to another person. According to s. 23 of the PAA an Attorney must not delegate powers and authorities to others, unless expressly empowered to do so in the POA. An Attorney may delegate financial decisions concerning investment matters to a qualified investment specialist (e.g. mutual fund manager) in accordance with the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383 [PGTA] or the Trustee Act, R.S.B.C. 1996, c. 464 [TA], s. 15.5.

Despite the inability to delegate authority, an Attorney is permitted to retain services. According to s. 20(4) of the PGTA, an Attorney may retain the services of a qualified person to assist the Attorney in doing anything the Adult has authorized.

## 7. Liability

An Attorney who acts in the course of their legal duties is not liable for any loss or damage to the Adult's financial affairs, if the Attorney complies with (s. 22):

- the statutory duties of the Attorney, as set out in s. 19 of the PAA;
- any directions given by the court under s. 36(1)(a) of the PAA; and
- any other duty that may be imposed by law

To protect innocent persons from liability that would arise from transactions made after the POA relationship has been terminated, B.C.'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 adult.

Section 3 of the PAA protects the attorney from liability for acts 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 and attorney are 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. Records and Accounts**

The Adult’s assets and accounts must be kept separate from those of the attorney and any third parties, and

- all assets belonging to the adult which are held by the Attorney must be paid to a capable Adult 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 adult at a reasonable time (usually done in annual reviews).

## **9. Expenses and Remuneration**

Payment to an individual (as opposed to the Public Guardian and Trustee) for service as an attorney under a POA is less common. However, s. 24 of the PAA allows for an Attorney to be compensated for acting as Attorney where authorized in an EPOA, provided that the rate or amount is set out in the EPOA. An Attorney may also be reimbursed for reasonable expenses properly incurred in acting as the Attorney.

## **F. CHANGING, REVOKING, OR ENDING A POA**

A POA will expire in the following circumstances (see s. 29(2) of the PAA):

- death of the Adult or the Attorney;
- bankruptcy of the Adult;
- frustrating event, similar to contractual obligations;
- court appointment of a Committee;
- revocation by the Adult, who is still capable; or
- resignation of the Attorney(s).

Clients who are making a POA should be informed of the procedure for ending (revoking) or changing the POA. Likewise, clients should also know how an Attorney may resign. In many situations, clients are unaware of their right to end a POA. As long as an Adult has capacity, he or she can revoke a POA. Details of how this is done appear below.

### **1. Revocation by an Adult**

An Adult who has capacity can change, revoke or end a POA at any time. A POA must be revoked in writing. This is called a Notice of Revocation. Telling someone that the POA is no longer in effect is not enough. Each attorney must be given a signed Notice of Revocation (PAA, s. 28(2)), and the revocation will not be effective until such notice has been given s. 28(4) PAA.

Although the PAA does not set out how a Notice of Revocation is to be delivered to the attorney(s), it is suggested that the adult deliver it by one of the following methods:

- by registered mail to the person's last known address; or
- by leaving it:
  - with the person,
  - at the person's address,
  - with an adult who appears to reside with the person;
  - if the person operates a business, at the business, with an employee of the person; or
  - by transmitting it by fax to the person with the number they provided for notification purposes.

An Adult should check if their POA lists other requirements or steps related to revoking in addition to the requirements from the legislation.

In addition to informing the Attorney(s) in writing of the revocation, a capable Adult who wishes to revoke an existing POA should:

- request that the original POA be returned, if it has been given to someone;
- contact all businesses, institutions, and individuals to whom the existence of the POA was known, and notify them in writing that the POA has been revoked, effective immediately, requesting that they destroy all copies of the document which they possess;
- register the revocation (or termination) at the Land Title Office (only applies where the POA deals with land transactions); and
- inform Nidus, if the POA was registered with Nidus.

An Adult can give a notice of revocation to the Attorney via a standard form (see **Appendix E**).

## 2. Resignation of the Attorney(s)

An Attorney can also formally resign at any time. An Attorney must give written notice to the Adult and any other Attorney(s). The resignation of an Attorney is effective when written notice is given, or on a later date specified in the notice.

An Attorney who loses the capacity to fulfill legal duties should resign. Likewise, if an Attorney is unable or unwilling to act on behalf of the Adult, according to the Adult's instructions, wishes and values, then the Attorney should resign.

As of September 1, 2011, an Attorney who does not sign a POA is not obligated or authorized to act as an Attorney. As such, if a person does not wish to become an Attorney, he or she simply should not sign the POA. The person who chooses not to sign the POA does not have to provide written notice of resignation. However, if a person *does* sign the POA, and wishes to resign from acting as Attorney, then written notice is required.

If an Adult who has capacity does not want the Attorney to act, then the Adult can revoke or change the POA. If an Adult no longer has capacity and others are concerned about the conduct of an Attorney, then you may wish to contact the Public Guardian and Trustee. Refer to section **VIII.B.2: Responding to Adult Abuse and Neglect—Public Guardian and Trustee**.

### 3. Duties 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 Adult's business.

**Regarding POAs dealing with land:** a POA which authorizes the Attorney to deal in land transactions for the adult will expire automatically after **three years from the date of its execution**, unless it is an EPOA or the document expressly exempts itself from that requirement in s. 56 of the LTA.

### G. NO CAPACITY AND NO POA

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, the adult may be able to create a RA, which has a slightly lower capacity test. But the incapable individual is not permitted to create and execute a POA. Alternatively, a capable, interested person can apply to the court for Committeeship, in order to manage the incapable adult's affairs.

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

### H. A PRACTICAL CLINIC APPROACH TO POAs FOR LSLAP STUDENTS

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

1. Is the client (mentally) capable, in the view of the clinician, of granting a POA? The presumption is that all adults are capable. The general test is the ability to understand and appreciate the meaning of what they are trying to do in this particular case. Warning signs of temporary or ongoing incapacity can include the following—bear in mind the list below is not comprehensive and the indicators below do not necessarily indicate incapacity:
  - sudden confusion, short term memory problems, disorientation;
  - signs of depression;
  - appears worried, distressed, overwhelmed;
  - signs of substance abuse; and
  - inability to answer open ended questions.

Refer to BCLI Guide on Undue Influence for a full checklist at:  
[www.bcli.org/bclrg/projects/project-potential-undue-influence-recommended-practices-wills-practitioners](http://www.bcli.org/bclrg/projects/project-potential-undue-influence-recommended-practices-wills-practitioners)

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 the client need to authorize broad powers, or can powers be narrowly defined and still meet the needs of the client?
5. What tasks does the Attorney need to be authorized to do to meet the client's needs?
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 Attorney(s)?

It may be helpful for students to provide information or guidance to clients on who the client should appoint as Attorney, in order to reduce the risk of financial abuse, based on the following considerations:

- Appoint someone who will respect the client's unique values and interests.
- Appoint someone who is familiar with the duties and limitations of the role of Attorney, or who will take the time and initiative to become educated about them.
- Consider who is best placed to carry out the responsibility of handling the client's financial matters: Does the person live nearby? Is the person easy to communicate with? Does the person like to deal with finance and money, or have some training or education in this regard?
- A spouse is not always the best choice – a partner could be in a situation of crisis when the older adult becomes incapable and the client should consider whether it is best for the partner to take on the additional responsibility at such a difficult time.
- Appointing more than one Attorney could create practical problems. For example, appointing all of the client's children can create a situation of conflict where it may be challenging for the adult children to come to an agreement. Having two Attorneys under a joint power of attorney can also make it harder to make decisions quickly as consultation and discussion will be required to make any decision. However, multiple attorneys can be appropriate in some contexts.

Students should confer with their Supervising Lawyer if there is any doubt that the client understands and appreciates the POA. Also note that an adult should not be required to have a POA as a condition of receiving any good or services, such as residence in an assisted living or community care facility.

## **1. Misuse and Abuse of a POA**

The misuse or abuse of a Power of Attorney is a criminal act and can be prosecuted under s. 331 (Theft by person holding Power of Attorney), s. 332 (Misappropriation of money held under direction), s. 215 (Failure to provide necessities of life), or s. 380 (Fraud) of the Criminal Code.

If a student or client has concerns that a person may be abused or neglected, or is at risk of being abused or neglected, then in most instances the student should discuss these concerns with the client and provide him or her with access to appropriate support services (e.g., the Seniors Help & Information Line at: 604-437-1940 or 1-866-437-1940).

If a crime is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority. Students need to remember their legal responsibility to maintain professional conduct and client confidentiality.

Power of Attorney abuse is a constant concern and an unfortunately frequent occurrence. The abuse may manifest in pressure to grant a POA, or misuse of funds or property under a POA. Try to meet with the client alone, or at least without the potential Attorney in the room, in order to be certain that the client truly wishes to create a POA and grant powers to the potential Attorney in question. Make sure to inquire about the relationship between the client and the proposed Attorney, and be on alert for possible undue influence or fraud. Refer to BCLI Guide on Undue Influence, above, for a full checklist of considerations and what to watch for. For more information about abuse and neglect of older adults, you can also consult the following resources:

- B.C. Centre for Elder Advocacy and Support: [www.bcceas.ca](http://www.bcceas.ca)
- Canadian Centre for Elder Law: [www.bcli.org/ccel](http://www.bcli.org/ccel)
- Public Guardian & Trustee: [www.trustee.bc.ca](http://www.trustee.bc.ca)
- Vancouver Coastal Health: Resource: [www.vchreact.ca](http://www.vchreact.ca)
- Advocacy Centre for the Elderly website: [www.ancelaw.ca](http://www.ancelaw.ca)

**NOTE:** It is possible, and even common, for an Adult to appoint an Attorney under the PAA (to make financial decisions) and appoint a different person as a Representative, under the RAA (to make health care decisions). This commonly happens where a person who knows the personal wishes and values of the adult is adept at handling health care decisions, and a more financially astute person is chosen as Attorney.

## V. REPRESENTATION AGREEMENTS

The RAA has a significant historical connection to the developmental disability community. A primary reform goal was to give legal recognition to substitute decision-makers, and status for informal helpers to adults that are family and friends. Another primary change was a shift of focus toward support for capacity rather than assessments of incapacity, as the latter can take away an individual's personal autonomy.

Refer to Representation Agreements and Supported Decision Making: ([www.wcmhn.org/position\\_papers\\_files/Representation%20Agreements%20and%20Supported%20Decision.pdf](http://www.wcmhn.org/position_papers_files/Representation%20Agreements%20and%20Supported%20Decision.pdf))

Representative Agreements (RA) are governed by the RAA. RAs are an instrument by which an individual can proactively plan for the possibility of future incapacity, by appointing another person to make decisions on their behalf. RAs are the primary method by which adults in B.C. can plan for future health care substitute decision making. A RA can also be used to give legal authority to a person's **supportive decision-maker**—a person appointed under the RA to help the adult make their decisions, not necessarily to make their decisions for them. As the capacity test for creating a RA is lower than the test for creating a POA, a person with limited cognitive capacity may have the capacity to create an RA.

Some RAs allow a routine financial substitute decision making. This includes all s. 7 RAs, as well as some s. 9 RAs executed prior to September 1, 2011 which authorize a representative to make financial support arrangements as described in s. 9(1)(f) of the repealed provisions of the RAA (see s. 44.2 of the current RAA). After September 1, 2011, a s. 9 RA may only be made concerning personal and health care decisions.

In the B.C. health care system, health care providers must speak directly to an individual in order to inform them about health care choices and consequences. An adult with capacity has the right to give or refuse consent for treatments. Due to illness, accident or disability, an individual needing health care may not be capable of understanding advice, making informed decisions, or providing meaningful consent to proposed treatment. If the adult has previously enacted a RA, then the Representative(s) will be able to give or refuse

consent on behalf of the capable adult, acting as appointed substitute decision-maker(s) to make decisions according to the incapable adult's personal wishes, values and beliefs.

An individual making a RA may be in a vulnerable position due to family dynamics, cognitive challenges, discriminatory beliefs about people with disabilities, or other factors. Vulnerability may create more opportunities or potential for abuse. Students must be aware of indicators of abuse and follow procedures that will help them to notice abuse. If possible, the student should meet the client alone and ensure that the client truly wishes to create a RA and give powers to the potential representative. The student must ensure that the client understands and appreciates the meaning of the RA and its effects. Students should take detailed notes of the client interview, and should consider multiple meetings with the client to ensure that the client understands and appreciates the process and the document.

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the RA. Also note that, according to s. 3.1 of the amended RAA, an adult must not be required to have a RA as a condition of receiving any good or service.

RAs may come into effect immediately or upon future incapability. The vast majority of registered RAs come into effect immediately. Students should be aware that the first duty of a Representative is to consult and abide by the personal wishes, values and beliefs of the adult, at all times.

## **A. 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 RAs and s. 9 RAs. 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 Representative to act on his or her behalf.

### **1. Section 7 Representation Agreements**

Section 7 RAs designate a substitute or supportive decision-maker to make personal care decisions, **major and minor health care decisions** for the adult, and routine 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. The list of decisions includes decisions regarding:

- personal care, including where and with whom the adult is to reside;
- 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 Representative to take care of **routine financial affairs** of the adult, including:

- paying bills;
- receiving and depositing a pension and other income;
- purchasing food and other services necessary for personal care; and

- making investments.

\*See *RA Act Regulation 2(1)* for full list of what constitutes routine financial affairs. This section of the regulation is repeated at **Appendix H**. The concept of routine management of the adult's financial affairs excludes, for example (s.2(2), RA Reg):

- (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.

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, as can a notary. However, students must be aware that a s. 7 RA for the adult does not permit a Representative to make health care and personal decisions that involve decisions to refuse health care necessary to preserve life, or to physically restrain, move or manage the adult.

If there is a conflict between an enduring POA and a s. 7 RA which includes routine management of financial affairs, the enduring POA will take priority.

## 2. Section 9 Representation Agreements

Section 9 RAs designate a substitute decision-maker for significant and sometimes very personal or more controversial health or personal care decisions, including:

- where the adult is to live and with whom, including whether the adult should live in a care facility;
- whether the adult should work and, if so, the type of work, the employer, and any related matters;
- whether the adult should participate in any educational, social, vocational or other activity;
- whether the adult should have contact or associate with another person;
- whether the adult should apply for any licence, permit, approval or other authorization required by law for the performance of an activity;
- day-to-day decisions on behalf of the adult, including decisions about the diet or dress of the adult;
- giving or refusing consent to health care for the adult, including giving or refusing consent in the circumstances specified in the RA to specific kinds of health care, even where the adult refuses to give consent at the time the health care is provided; and
- physically restraining, moving and managing the adult and authorizing another person to do these things, if necessary to provide personal care or health care to the adult

Students should be aware that a representative under s. 9 RA must not do the following, unless expressly provided for in the RA:

- give or refuse treatment in accordance with s. 34(2)(f) of the HCCFA.
- make arrangements for the temporary care and education of the adult's minor children, or any other person who is cared for or supported by the adult; or
- interfere with the adult's religious practices.

S. 34(2)(f) pertains to refusing substitute consent to health care necessary to preserve life (s. 18, HCCFA.) In a s. 9 RA, if a Representative is provided the power to give or refuse consent to health care for the adult, then the Representative may give or refuse consent to health care necessary to preserve life (s. 9(3), RAA). Some other health decisions are also excluded from potential powers, e.g. "sterilization for non-therapeutic purposes" (s. 11(2), RAA).

The creation of a s. 9 RA no longer requires the services of a lawyer. LSLAP is able to draft s. 9 RAs for clients. However, refer to your Supervising Lawyer to clarify the appropriate scope and purpose of the RA: which type of RA appropriately meets the needs of the client?

Prior to September 2011, a s. 9 RA could include broad financial powers, equivalent to those given in a POA. The new PAA says this broad authority in an RA is now treated as if it were a enduring POA, and the Representative must follow the requirements under the PAA to use these powers (s. 44.2 Transitional Provision).

## **B. WHO CAN BE A REPRESENTATIVE?**

Section 5(1)(a) of the RAA specifies that an individual who is 19 years of age or older can be appointed as Representative unless that person is:

- providing personal care or health care services to the adult for compensation, unless the caregiver is a spouse, adult child, parent, grandparent, an adult brother or sister or any other adult relation by birth or adoption; or
- working as an employee of a facility in which the adult resides and through which the adult receives personal care or health care services.

The Public Guardian and Trustee can also be named as a Representative. According to s. 5(1)(c), a credit union or trust company can only have authority to make (limited) financial decisions listed in a s. 7 RA. A credit union or trust company cannot make decisions regarding health care or personal care.

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

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

Section 5(4) requires that all Representatives for RAs made under section 7 complete a certificate in the prescribed form (see **Appendix I**).

## **C. ACTING AS A REPRESENTATIVE**



The law defines several duties that Representatives owe to the adult. There are several statutory parameters with respect to what a Representative must do (e.g. consult with the adult) and what a Representative must not do (e.g. make a will). Below is an outline of the legal “do’s and don’ts” that a Representative must follow.

## 1. Duties

Under s. 16(1) of the RAA, a Representative must:

- act honestly and in good faith;
- exercise the care, diligence and skill of a reasonably prudent person; and
- act within the authority given in the RA.

When making decisions with the adult or on behalf of the adult, the Representative must consult with the adult to determine his or her current wishes, and comply with the wishes of the adult if reasonable (s. 16(2)).

If the current wishes of the adult cannot be determined, then the Representative needs to comply with the instructions or wishes the adult expressed while capable (s. 16(3)). A Representative cannot make decisions based on their own opinion, but must represent the adult’s own wishes to health care providers and others. In other words, a Representative must “stand in the shoes” of the adult and base health care decisions on what the adult would want.

If the adult’s instructions or wishes are not known, the Representative must act on the basis of the adult’s known beliefs and values, or in the adult’s best interests, if his or her belief and values are not known (s. 16(4)).

Upon application by a Representative, the court may exempt the Representative from the duty to comply with the instructions or wishes the adult expressed while capable.

Students should encourage an adult to communicate instructions and wishes to the named Representative(s). This should be done in writing (including by e-mail or recorded transmission), but can also be done orally, for as long as the adult has capacity. It is best that the Representative(s) know exactly what the adult would want.

## 2. Delegation of Authority

A Representative is not permitted to delegate authority to another person (s. 16(6)). The exception to this is that a Representative who has been appointed to make financial investments on behalf of an adult may delegate authority to qualified investment specialist, including a mutual fund manager (s. 16(6.1)). A Representative may also retain the services of a qualified person to assist in carrying out the adult’s instructions or wishes.

## 3. Accounts and Records

A Representative must also keep accounts and records concerning the exercise of authority s. 16(8). These accounts and records must be produced upon request of the adult, the appointed monitor, or the Public Guardian and Trustee. A Representative who has been appointed to make financial decisions must keep the adult’s assets separate from their own (s. 16(9)). An exception to this exists where the assets are owned by the adult and the

Representative as joint tenants or have been substituted for, or derived from, assets owned by the adult and the Representative(s) as joint tenants.

#### **4. Access to Information**

A Representative may request information and records respecting the adult, if the requested information or records relate to the incapacity of the adult or an area of authority granted under the RA (s. 18).

A Representative also has a duty to keep information confidential. A Representative must not disclose information or records, except where it is necessary to perform the duties owed to the adult, for the purposes of an investigation by the Public Guardian and Trustee, or to make an application to or to comply with an order of the court (s. 22).

#### **5. Creating a Will**

A Representative must not make or change a Will for the adult for whom the Representative is acting, and any change to a Will that is made for an adult by his or her Representative has no force or effect (s. 19.1).

#### **6. Remuneration and Expenses**

A Representative (or an alternative Representative or monitor) is not entitled to be paid for acting on behalf of the adult, unless the RA expressly sets out and authorizes the amount or rate of remuneration, or upon application by a representative, the court authorizes the remuneration (s. 26(1)). In addition, an RA cannot authorize a representative to be paid for making any decision under Part 2 of the *Health Care (Consent) and Care Facility (Admission) Act* (s. 26(1.1)).

A Representative, alternative Representative, or monitor is also entitled to reimbursement for reasonable expenses incurred in the course of performing the duties or exercising the powers. Accounts and records of the reasonable expenses paid must be kept.

### **D. MONITORS**

The role of the monitor is to ensure that the Representative appointed under an RA is carrying out his or her duties. The monitor acts as an extra safeguard and support to ensure that the RA is working for the adult.

#### **1. Appointment and Resignation**

An adult may appoint a monitor to oversee their chosen representative who is acting under a s. 7 or s. 9 RA (s. 12(3)). The monitor can be appointed to oversee personal, health care and financial decisions.

If an adult has a s. 7 RA which authorizes their representative to make routine financial decisions, the adult **MUST** appoint a monitor to oversee their chosen representative unless the representative is the adult's spouse, the Public Guardian and Trustee, a trust company or

a credit union OR the adult has appointed two representatives who must act unanimously (s. 12(1)). Failure to comply with this requirement will make the provision of the RA authorizing the Representative to make routine financial decisions invalid (s. 12(2)).

A monitor must be 19 years or older and must be willing and able to perform the duties and to exercise the powers of a monitor (s. 12(4)). An individual named in a representation agreement as a monitor must complete a Monitor's Certificate – see **Appendix J** for precedent of Monitor's Certificate.

A monitor may resign by giving written notice to the adult, each representative and any alternate representatives. The resignation will be effective upon giving notice or at a later date specified in the written notice (s. 12(6)). See section 12 of the RAA for general provisions regarding the appointment and resignation of a monitor.

## 2. Duties and Powers

The monitor's duties and powers are outlined in Section 20 of the RAA. The monitor must:

- make reasonable efforts to ensure that the representative is fulfilling his or her duties (these duties are set out in s. 16) (s. 20(1));
- act honestly and in good faith and use the care, attention and skill of a responsible person.

However, a monitor cannot make decisions on behalf of the adult.

If the monitor is concerned that the representative is not fulfilling his or her duties, the monitor must raise their concern with the representative(s) and the adult and try to solve the problem through discussion and communication. The monitor may require the representative to report to them or produce accounts (s. 20(4)). The monitor has a right to visit and speak with the adult at any reasonable time (s. 20(2)) and any person with custody or control of the adult is prohibited from hindering the monitor's access to the adult (s. 20(3)). If, after checking and discussion, the monitor believes that the representative is not following their duties or is abusing the adult in any way, the monitor is legally required to contact the Public Guardian and Trustee to make a complaint (s. 20(5)).

## 3. Payment and Expenses

The monitor can be reimbursed for expenses incurred in carrying out their duties (s. 26(2)), but can only be paid a fee if provided for in the RA and authorized by the B.C. Supreme Court (s. 26(1)). Alternatively, if the Public Guardian and Trustee appoints a replacement monitor, the Public Guardian and Trustee may authorize payment of a fee (s. 21(3)).

## 4. Replacement Monitor

The Public Guardian and Trustee may appoint a replacement monitor at the request of the representative or other interested person if the initial monitor is unsuitable, no longer able to act or has ceased acting and the adult is no longer capable of making a new RA (s. 21(1)).

## **E. CREATING A REPRESENTATION AGREEMENT**

The adult who executes the Representation Agreement (RA) must have mental capacity. For guidance on mental capacity, refer to section **II.B.3: Mental Capacity—Representative Agreement** in this chapter.

The RA must also be in writing, signed and witnessed (s. 13). The adult and each of the Representative(s) must sign the RA (s. 13(2)). Two adults must witness the signatures, unless it is being witnessed by a lawyer or notary.

Witnesses cannot be (s. 13(5)):

- one of the Representatives;
- an alternate Representative;
- a spouse, child, or parent of anyone named in the RA 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 does not understand the type of communication used by the adult who wishes to be represented.

Each Representative and each witness for a s. 7 RA must also complete a certificate (s. 13(6)). See **Appendix K: Certificate of Representative or Alternative Representative**.

A RA becomes effective on the day it is executed, unless the RA specifies that it is to become effective at some later time based upon a triggering event (e.g. loss of capacity). According to s. 15 of the RAA, the RA must specify how a triggering event is to be confirmed and by whom (e.g. loss of capacity confirmed by two medical professionals).

Although there is no legal requirement to register a RA, registration may be done through the Nidus e-Registry. When a person registers, he or she can decide which organizations can access his or her record. For more information contact Nidus Personal Planning Centre online at [www.nidus.ca](http://www.nidus.ca) or by telephone at (604) 408-7414.

## **F. CHANGING, REVOKING OR ENDING A REPRESENTATION AGREEMENT**

A RA can be changed or revoked by the adult at any time (as long as the adult has mental capacity). The adult must provide written notice to the Representative(s), alternative Representative(s) and the monitor. The change or revocation is effective either when written notice is given to each of these persons, or on a later date specified in the written notice.

A RA terminates where:

- the adult who made the agreement revokes the RA;
- the adult who made the agreement or the Representative dies;
- the court issues an order that cancels the RA;
- the Representative becomes incapable or resigns; or
- as provided for under s. 19 of the PPA.

Where the adult who made the agreement and the Representatives are spouses, then a RA will normally end when the marriage or marriage-like relationship ends. However, if the RA explicitly says that the RA

will continue to be in effect after the end of the marriage or marriage-like relationship, then the RA will continue.

## **G. OTHER JURISDICTIONS**

As of September 1, 2011, RAs from other jurisdictions may be accepted in B.C. Subject to any further limitations or conditions set out in the regulations, the criteria for accepting an extra-jurisdictional RA is that it must (s. 41):

- perform the function of a RA
- be made in a jurisdiction outside B.C.; and
- comply with any prescribed requirements.

The certificate in the prescribed form, which requires completion by the extrajurisdictional solicitor, can be found in Schedule 1 of the RA Regulations, Form 5 (See Appendix P).

## **H. NO CAPACITY AND NO RA**

Where there is no Representative previously appointed and an adult no longer has capacity, various provincial laws apply. The statutory framework allows for the appointment of a temporary substitute decision-maker (HCCFA). Designated Agencies must investigate allegations of abuse or neglect and provide necessary support and assistance AGA]. The statutory framework grants investigatory and decision-making power to the Public Guardian and Trustee (PGTA). Below is an outline of the legal parameters for each of these processes.

### **1. Temporary Substitute Decision-makers (TSDM)**

In B.C., a health care provider is legally required to get consent prior to treating a patient.

- A capable adult can give or refuse consent to health care treatment.
- Consent to health care may be expressed orally or in writing or be inferred from conduct (s. 9(1) HCCFA). Where a patient is incapable (i.e. due to illness, loss of consciousness or injury), health care providers are required to get consent from a substitute decision-maker. However, there is an exception when urgent or emergency health care is required (s. 12 HCCFA).
- If the patient has a Representation Agreement (RA) in place, then the instructions for consent will need to be obtained from the Representative (see s. 19.3 HCCFA).
- If the patient has an Advance Directive (AD) in place, then consent may be given in the AD (s. 19.7 HCCFA).
- If no Representative and no Committee are in place, then the health care provider will need to find a temporary, substitute decision-maker (TSDM) to give or refuse consent (s. 19.8 HCCFA).

The HCCFA outlines the specific procedures that health care providers must follow to obtain legally valid consent. Section 16 of the HCCFA sets out the “default list,” which health care providers must follow (in hierarchical order) to determine the appropriate person to act as a TSDM.

The default list provided in s. 16 of the HCCFA is as follows:

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) (subsection 1):

- the adult's spouse or partner;
- the adult's child who is over 19;
- the adult's parent;
- the adult's brother or sister;
- the adult's grandparent;
- the adult's grandchild;
- other relatives by birth or adoption (but not in-laws or step-children);
- close friend;
- persons immediately related by marriage (including in-laws and step-children).

To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must (subsection 2):

- be at least 19 years of age;
- have been in contact with the adult during the preceding 12 months;
- have no disputes with the adult;
- be capable of giving, refusing or revoking substitute consent, and
- be willing to comply with the duties in section 19.

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).

The TSDM must act in accordance with the adult patient's wishes, values and beliefs, when the patient is unable to provide their own consent, and does not have an appointed Committee or a Representative.

## **H. A PRACTICAL APPROACH TO RAs FOR LSLAP STUDENTS**

When a client approaches LSLAP for assistance with creating an RA, students should ask the following 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? The presumption is that all adults are capable. The test for capacity depends on whether it is a s.7 or s.9 agreement at issue.
2. Why does the client want to create an RA?
3. Who is the client considering to be their Representative?
4. What is the relationship between the client and their chosen Representative?
5. Are there signs of abuse, neglect or self-neglect? Does the adult have access to community resources? Is there a need to involve a Designated Agency?
6. Which specific authorities would the client like their Representative to have?

7. Have they spoken to their chosen Representative to see if they are willing to serve?
8. What is the status of the client's will? Explain that wills do not provide direction or authority if testators become incapable, and POAs/RAs do not function like wills.
9. Would the client like to appoint a substitute or supportive decision-maker?

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the RA. Also note that, according to s. 3.1 of the amended RAA, an adult must not be required to have an RA as a condition of receiving any good or service.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Help & Information Line at: 604-437-1940 or 1-866-437-1940).

Students also need to remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how to make a report to the appropriate authority. Refer to sections **I.C: Resource Organizations** and **VIII: Abuse and Neglect** in this chapter.

## VI. ADVANCE DIRECTIVES

An Advance Directive (AD) is a written document made by a capable adult that gives or refuses consent to health care, in the event that he or she becomes incapable of giving health care instructions. The legal provisions for AD's are set out in Part 2.1 of the HCCFA.

**NOTE:** As of September 1, 2011 when significant amendments were made to the HCCFA, a valid AD executed in accordance with the requirements set out in the HCCFA is legally binding upon health care providers and substitute decision-makers. Prior to this date, an AD was useful in that it expressed the wishes of the adult, but it was not legally binding.

### A. SIGNIFICANCE OF AN ADVANCE DIRECTIVE

The law provides detailed guidelines for how a health care provider is to respond when an AD is in place. The new legislation recognizes a written advance directive which, when made in accordance with the HCCFA, provides a valid consent on the basis of which health care provider can provide treatment, without involving any substitute decision-maker.

In order to be valid, the new advance directive must be executed in accordance with the legislation and contain two "informed consumer" acknowledgements in writing to the effect that:

1. the refusal of treatment is binding; and
2. there is no substitute decision-maker.

(See below regarding circumstances where a substitute decision-maker, such as a Committee or Representative, does exist.)

According to s. 19.7 of the HCCFA, health care providers are to rely on the instructions given in a valid AD when:

- the health care provider is of the opinion that an adult needs care;
- the adult is incapable of giving or refusing consent to the health care;
- the health care provider does not know of any personal guardian or Representative who has authority to make decisions for the adult in respect of the proposed health care; and
- the health care provider is aware that the adult has a valid, binding AD that is relevant to the proposed health care.

The health care provider is to make a reasonable effort in the circumstances to determine whether the adult has an AD, Representative or guardian. If the adult has both a RA and an AD, then the health care provider must seek consent from the Representative. According to s. 19.3, instructions in the AD will be treated as wishes expressed while capable, which are binding on a Representative. However, the health care professional can act on the instructions in an AD without the consent of a Representative if the AD expressly states that: “a health care provider may act in accordance with the health care instructions set out in the advance directive without the consent of the adult’s Representative.”

The central purpose of an AD is to give or refuse consent to health care. If the adult has given consent in a valid AD, then the health care provider should provide that health care, and need not obtain the consent of a substitute decision-maker. Similarly, if the adult has refused consent in a valid AD, then the health care provider must not provide that health care, and need not obtain the consent of a substitute decision-maker.

However, it remains necessary for a health care provider to obtain consent from a substitute decision-maker in the following situations:

- if there is a committee of person in existence or a Representative under an RA;
- if there is a verbal instruction or wish;
- if there is a written instruction but it is not in a properly completed AD;
- if there is a written instruction from another jurisdiction;
- if there is a wish in an AD that is not properly signed and witnessed; or
- if there is an AD that does not contain the mandatory informed consumer clause.

In addition, an AD does **not** apply in certain circumstances. According to s. 19.8 of the HCCFA, a health care provider is **not** to rely on an AD where:

- instructions in the AD do not address the health care decision to be made;
- instructions in the AD are so unclear that it cannot be determined whether the adult has given or refused consent to health care;
- since the AD was made, while the adult was capable, the adult’s wishes, values or beliefs in relation to a health care decision significantly changed; or
- since the AD was made, there have been significant changes in medical knowledge, practice or technology that might substantially benefit the adult in relation to health care.

If a health care provider is not aware that the adult has an AD that refuses consent to specific health care and provides that health care to the adult, but subsequently becomes aware of an AD in which the adult has refused consent, then the health care provider must withdraw the health care.

It is possible for an adult who does not complete an AD to still receive health care. Completion of an AD **must not be mandatory** prior to providing any good or service (i.e. health care). In other words, an adult has the right to not complete an AD. For example, where an adult is being admitted to a health care facility and instructed to “fill out these forms” prior to treatment, the adult does not have



to fill out the AD. Students should make their clients aware of this right to refuse to complete an AD and will still be eligible to receive health care treatment.

In the absence of an AD, if the adult has not appointed a Representative, then the health care provider will seek consent from a Temporary Substitute Decision-Maker (TSDM), as set out in s. 16 of the HCCFA.

## **B. MAKING AN ADVANCE DIRECTIVE**

An AD must include or address any prescribed matter and indicate that the adult knows the following:

- a health care provider may not provide any health care for which the adult refuses consent in the AD; and
- a person may not be chosen to make decisions on behalf of the adult in respect of any health care for which the adult has given or refused consent.

For more information, refer to section **II.B.2: Mental Capacity; Health Care Consent** in this chapter.

## **C. CHANGING, REVOKING OR ENDING AN ADVANCE DIRECTIVE**

An adult with capacity is able to revoke or change an AD at any time. According to s. 19.6 of the HCCFA, an adult who has made an AD may change or revoke the AD as long as the adult is capable of understanding the nature and consequences of the change or revocation.

A change must be made in writing. The amended AD must also be signed and witnessed by two capable adults (unless one witness is a lawyer or notary).

A revocation may be made by expressing an intention to revoke an AD and then making another document, including a subsequent AD. Alternatively, an AD may be revoked by destroying the AD with the intention to revoke it.

## **D. EXAMPLES OF ADVANCE DIRECTIVE PROVISIONS**

Examples of directives made in an AD might include consenting or refusing consent to the following:

- CPR (if cardiac or respiratory arrest occurs);
- artificial nutrition through intravenous or tube feedings;
- prolonged maintenance on a respirator (if unable to breathe adequately alone);
- blood cultures, spinal fluid evaluations, and other diagnostic tests; and/or
- blood transfusions.

**NOTE:** The adult should have their AD added to their doctor's patient files, their hospital records, and any other relevant agencies. If the AD is revoked or altered, the adult should advise each of these agencies or provide them with the new or revised AD.

## 1. Do Not Resuscitate Orders (“DNR Orders”)

Do Not Resuscitate Orders are a common form of AD which instruct medical professionals *not* to perform CPR. This means that doctors, nurses, emergency medical personnel, or other healthcare providers will not attempt emergency CPR if a person’s breathing or heartbeat stops. DNR orders may appear in a patient’s advance directive document.

However, DNR orders can also be made in a hospital or personal care home, and noted on that person’s chart, or be made by persons at home. Hospital DNR Orders tell the medical staff not to revive the patient if cardiac arrest occurs. If a patient is in a personal care home or at home, a DNR Order tells the staff and/or medical emergency personnel not to perform emergency resuscitation and not to transfer the patient to a hospital for CPR.

Each hospital will have its own policies regarding the implementation of DNR Orders, but such policies are guided by the Joint Statement on Resuscitative Interventions (1995) which was approved by the Canadian Healthcare Association, the Canadian Medical Association, the Canadian Nurses Association and the Catholic Health Association of Canada and was developed in cooperation with the Canadian Bar Association. The Joint Statement can be located at <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD95-03.pdf>.

Guiding Principles of the Joint Statement include:

- A competent person has the right to refuse, or withdraw consent to, any clinically indicated treatment, including life-saving or life-sustaining treatment (Principle 3). In this situation, the healthcare professional will discuss with the patient whether the patient wishes to be resuscitated and a notation will be made on the person’s chart.
- When a person is incompetent, treatment decisions must be based on his or her wishes, if these are known. The person’s decision may be found in an advance directive or may have been communicated to the physician, other members of the health care team or other relevant people. In some jurisdictions, legislation specifically addresses the issue of decision-making concerning medical treatment for incompetent people; the legislative requirements should be followed (Principle 4).

## E. A PRACTICAL CLINICAL APPROACH TO AN ADVANCE DIRECTIVE FOR LSLAP STUDENTS

When a client approaches LSLAP for assistance with creating an AD, students should ask the following series of questions in order to ascertain whether LSLAP can assist them:

1. Is the client capable of creating an AD? 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 to create an AD?
3. What types of health care provision does the client want to give consent to?
4. What types of health care provision does the client want to refuse consent to?
5. Does the client have a RA in place? What is the relationship between the client and their chosen Representative?

6. Does the client want the Representative to be able to give or refuse consent, notwithstanding the AD?

It is common for practitioners to refer the client to his or her doctor for discussion of the types of health care that the client may want to give or refuse consent to, and to obtain the appropriate wording of an AD from that doctor. Students should discuss this option with the client and consider referring them to their doctor in the first instance.

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the AD. Also note that an adult is not required to have an AD as a condition of receiving health care treatment.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Help & Information Line at 604-437-1940 or 1-866-437-1940).

Students must also remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority. Refer to section **VIII: Abuse and Neglect**.

## VII. GUARDIANSHIP IN B.C.: COMMITTEESHIP

Sometimes an individual who has not executed a POA or RA becomes incapable of managing some of their affairs, and needs a mechanism put in place for substitute decision-making. If that individual is still legally capable, he or she may still be able to create either or both of a POA (which has a medium threshold of capability) or a RA (which has a comparably low threshold of capability under s. 7 and a medium to high threshold under s. 9). However, such a person also might not meet the threshold of mental capability required to execute a legal document such as a POA or RA. If this is the case, a guardian may be put in place.

In B.C., adult guardianship (called Committeeship) is currently governed by the Patient's Property Act, R.S.B.C. 1996 c. 349 [PPA]. A Committee (pronounced caw-mi-tay, with emphasis on the end of the word) is a person appointed by the court or other legal process to make decisions for an individual (the patient) who is incapable of making those decisions for him or herself.

A person may be incapable from birth, or may become incapable at some point later in life. An individual may be rendered incapable due to an accident, illness, or a disability. A Committee is appointed where a person has become incapable and does not have a POA or RA in place, and lacks the capacity to create a s. 7 RA.

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 and/or RA. Even where there are Advance Planning documents in place, family disagreement about the documents often results in a contested committee proceeding. In this case, the court may appoint the former attorney or representative as set out in the advance planning document after a full hearing but will **not** leave the existing planning documents in place.

Part of the formal procedures involve declaring the adult mentally incompetent. There are two processes that can result in Committeeship:

1. someone (usually a family member or friend, or the Public Guardian and Trustee as last resort) can apply to the Supreme Court to be appointed Committee (either or both of Committee of Estate or Committee of Person); or

2. the Public Guardian and Trustee (“PGT”) can become Committee of the adult’s finances and legal affairs (Committee of Estate) where a patient is already in a mental health facility or a psychiatric unit, and a medical Certificate of Incapability is issued under the *Mental Health Act*.

Under the first method, a family member or friend who is legally and practically capable of caring for the patient, or the Public Guardian and Trustee as last resort, **must bring an application in the Supreme Court** in order to be granted the authority to act on behalf of the now incapable patient. For details of this process see the section below on *Becoming a Committee*.

Under the second method, the Public Guardian and Trustee can become Committee of the Estate **without any court hearing**. The requisite Certificate of Incapability signed by the director of a Provincial mental health facility or psychiatric unit is sufficient to automatically appoint the Public Guardian and Trustee. The Public Guardian and Trustee cannot be appointed Committee of the Person through this route—a court application would be necessary to put in place a Committee of the Person.

**NOTE:** The provincial government has approved significant changes to the adult guardianship provisions made in the AGA (referred to as “Bill-29”). These provisions have not yet come into force and it is not clear if and when they will be proclaimed. The effect of these provisions is to repeal the PPA and put in place a new guardianship regime for B.C. The description of the law provided in this chapter is current to July 15, 2013. See the publication, Provincial Strategy Document: Vulnerable Adults and Capacity Issues in BC, for a summary of the potential changes to guardianship law included in Bill-29, available online at [www.bcli.org/ccel/projects/vanguard](http://www.bcli.org/ccel/projects/vanguard).

**IMPORTANT TIP FOR STUDENTS:** A client seeking advice or legal information on Committeeships may be a concerned family member or friend wanting information about the process from the standpoint of acting as Committee to a loved one who has lost capacity. Alternatively, the client may be the individual adult for whom a Committee has been appointed. In either instance, the guardianship process can be emotional, and is often connected to complex family dynamics and longstanding conflicts.

An individual subject to Committeeship, or the threat of Committeeship, may present as extremely upset, angry or confused, especially if there were no court proceedings in which they were involved. In order to assist this client in the best possible way, it is important that the student is aware of the gravity of the situation for the client, and that the student appreciates why the client may be feeling this way. Factors to keep in mind include:

- The effect of a Committeeship is that the adult loses his or her decision-making rights and is considered a non-person under the law;
- The adult will likely have a Committee for the rest of his or her life;
- Committeeship is difficult and costly to reverse;
- The Committee, subject to some limitations, has the power to do almost anything the adult could do for themselves, if he or she were mentally capable. This authority is wide ranging and may include consenting to healthcare, determining where the adult will live, what the adult can purchase, what medications he or she will take, etc. As such, the adult becomes highly dependant on the Committee and is vulnerable to abuse and neglect.
- The test of mental capacity is a legal test, based on the opinion of two doctors. However, the adult may remain able manage independent decision-making in some aspect(s) of his or her life, and the adult may, at first glance, present as capable.

**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.

Clinicians may consult CLAS and the Public Guardian and Trustee for more information on Committeeship. The Public Guardian and Trustee produces a number of helpful publications on Committeeships. The resources can be found at [www.trustee.bc.ca/reports\\_publications/index.html](http://www.trustee.bc.ca/reports_publications/index.html). Clients may be advised to contact an Estate and Guardianship Litigation lawyer, possibly through the Law Society's Lawyer Referral Service (604-687-3221).

## A. TYPES OF COMMITTEESHIP

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

### 1. 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, a Committee of Estate 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.

A Committee of Estate can be appointed by the court (family, friend or Public Guardian and Trustee), or after a medical Certificate of Incapability has been issued (Public Guardian and Trustee only). See above.

### 2. Committee of the Person

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

- medical treatment;
- medication; or
- 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.

## B. THE COMMITTEESHIP PROCESS

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

- a declaration must be made by the court that the patient is incapable of managing his or her own affairs and/or person; and
- the court appoints one or more individuals as Committee of the estate and/or the person.

To seek the declaration and orders, the proceeding is commenced by way of petition. The exception is where the Public Guardian and Trustee is automatically appointed as a Committee of Estate for a person declared incapable under the *Mental Health Act*, R.S.B.C. 1996, c. 288 [MHA]. See point 4 below.

### 1. 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. The first step is to obtain the opinion of two separate doctors on the capability of the proposed patient (the subject). Those opinions must then form the basis of affidavits supporting the petition to the court.
  - 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) In addition to the doctors' affidavits, the petitioner must swear an affidavit of kindred and fortune which, as the name suggests, sets out particulars of the subject's family and financial affairs.
2. 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. This 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.
  - 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.
3. The court may decide whether the subject is incapable based on the affidavit material before it on the application, or it may direct that the issue go to trial. The *Supreme Court Civil Rules* apply to a trial of the issue (see PPA, s. 3). In rare situations, the court may order that one or more medical practitioners examine the subject for the purposes of determining capacity (see PPA, s. 5).

#### NOTE:

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. In this process, the Public Guardian and Trustee automatically becomes the Committee of the patient. This determination ends any pre-existing enduring or springing POA or RAs.

In summary, the court application must include:

- Petition (SCCR 2-1(2));
- Affidavit of Service (unless notice requirement was waived);
- Affidavit of Kindred and Fortune setting out next of kin and financial circumstances of patient (PPA Rules, Rule 2(3));
- Affidavit from two physicians (PPA, s. 3(1));
- Notice of Application to Appoint a Committee (PPA Rules, Rule 2(2)); and
- Chamber Order to Appoint a Committee.

## 2. Resisting a Declaration of Incapability

The subject of the application is usually aware of the court application for a declaration of incapability. If the subject wishes to oppose it, he or she is well advised to have a lawyer for the application hearing. The judge may direct that the incapacity issue 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 BC's College of Physicians and Surgeons.

Section 5(3) of the PPA provides that the judge must 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 unsuccessfully opposes the application, he or she can appeal 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

If a person is declared incapable by the court, that person can apply to the court after one year, for a declaration that he or she is no longer *incapable*. However, such an application cannot be made by the person or anyone else more than once per year, except by leave of a judge. Affidavit evidence of two medical practitioners will be required to support the application (PPA, s. 4). Note, however, that this applies only to committee orders made under the PPA. The *Mental Health Act RSBC c. 288* sets out comprehensive review provisions for adults detained under that Act.

### 3. Appointment of a Committee

Once the subject has been declared incapable, the judge will appoint 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 *Patient Property Act Rules*, BC Reg 311/76 (PPA Rules) and the *Supreme Court Civil Rules*, BC Reg 168/2009 govern the application process.

Although the PPA does not say who else should be served, in practice the proposed Committee should obtain consents to his or her appointment as Committee from next-of-kin, or if they do not consent, serve the next-of-kin with the application and supporting affidavits.

If the Committee was nominated by the patient prior to incapability, then the written nomination should also be included (see **Section VII.B.3.c: Nomination of Committee by Patient**, below). In addition, if the applicant was appointed Attorney, Representative or executor, it would be useful to include proof of this in the application.

#### 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 make recommendations to the court that conditions be imposed on the Committee. 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. Note that there will be amendments to section 9 of the PPA which are expected to come into force March 31, 2014.

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], which are that it must be in writing, signed by the nominator and 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.

E.g.: “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. For a full precedent, see Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2011 (Bogardus/Hamilton).

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, theoretically 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 unreasonable, 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. is a corporate sole, independent of the government. The Public Guardian and Trustee 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 Public Guardian and Trustee 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 that the matter will almost invariably be dealt with more quickly. The disadvantage is that some steps must be taken to begin the proceedings.

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

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

## C. SERVING AS A COMMITTEE

### 1. 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 Public Guardian and Trustee will often recommend that the Committee post a bond to secure the proper performance of these duties, or seek a restriction on accessing the patient's funds. 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 Guardian and 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 21-5 of the rules governing the Act in the *Supreme Court Civil Rules*, BC Reg 168/2009.;
- 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 patient's maintenance, care and treatment costs 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.
- If a person is appointed as Committee for a person under disability, that person must be the litigation guardian of the patient in any proceeding unless the court otherwise orders as per Rule 20-2 of the Supreme Court Civil Rules.

## 2. 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 had legal capacity (PPA, s. 15), such as power to buy and sell property, give gifts, open and close bank accounts, pay accounts etc. These powers 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). For example, if the patient was acting as personal representative to his spouse prior to incapacity, the Committee would now have the responsibility to make decisions for the spouse under the Representation Agreement. However, the court has discretion to place limits on any powers that the Committee could otherwise perform (PPA, s. 16). In such a case, any powers that were limited by the court 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)), which means a Committee must comply with the provisions of this Act when it comes to investing the patient's money. Therefore, a Committee has considerably less freedom to invest the patient's money than an Attorney has to invest a principal's money under a Power of Attorney. For example, the Committee must meet a certain standard of care in making investment decisions and freedom to delegate investment decisions is limited. When advising a client which procedure is preferable, keep this in mind.

If a patient (as opposed to the Committee) transfers his or her property while incapable by, for instance, by selling land or giving a gift, the transfer will be voidable (i.e. deemed to never have occurred at the option of the Committee), unless full and valuable consideration was paid for the property, or a reasonable person would not have known that the adult was incapable. The relevant provision was s. 20 of the PPA, but this has been replaced by s. 60.2 of the AGA, which is a section of the AGA that has been brought into force).

**NOTE:** An Enduring Power of Attorney or representation agreement is *terminated* when a person becomes a 'patient' by being declared incapable of managing his or her affairs by court order (PPA, s. 19). An Enduring Power of Attorney or representation agreement is *suspended* when a person becomes a 'patient' by Certificate of Incapability until that person ceases to be a patient (PPA, s. 19.1). Therefore, the authority of a Committee will never conflict with that conferred by a Power of Attorney.

### **3. Remuneration**

Under s. 14 of the PPA, a person is allowed “reasonable” compensation from the patient’s estate 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. See Public Guardian and Trustee Fees Regulation, B.C. Reg. 312/2000 for up-to-date fee schedule. As of June 30, 2012, the Public Guardian and Trustee will charge a commission of 5 percent of the gross value of the estate, 5 percent of income earned, and 3% of the gross sale price of real property sold 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 (PGT Fees Regulation, s. 2).

A Committee has a first lien upon the estate of the patient or the person who has ceased to be a patient (PPA, s. 14(4)).

**NOTE:** The Public Guardian and Trustee has helpful information at: [www.trustee.bc.ca](http://www.trustee.bc.ca).

## **D. DISCHARGE OF A COMMITTEE**

### **1. Rescission of a Committee**

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)). The rescission is subject to the Committee (other than the Public Guardian and Trustee) complying with the requirement to pass accounts set out in s. 13. This application may be filed along with an application for a new Committee. This process cancels the Committee’s authority to act for the patient.

### **2. Discharge of a Committee**

If a person regains his or her mental capability and ceases to be a “patient,” that person, or the Committee (other than the Public Guardian and Trustee), 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. Once the Committee is discharged, the Committee has no further powers or duties with respect to the estate of the person who has ceased to be a patient (PPA, s. 13(4)(a)).

### **3. Release from Liability**

A discharged Committee, whether it be a private Committee or the Public Guardian and Trustee, 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 Committee as to how the estate should have been handled is not by itself a reason to support a Committee's discharge.

Where the Public Guardian and Trustee is acting as 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.

## VIII. ADULT ABUSE AND NEGLECT

### A. WHAT IS ADULT ABUSE AND NEGLECT?

An adult might be experiencing, or be vulnerable to experiencing, abuse, neglect or self-neglect. In situations where an adult is in need of support or assistance in order to prevent abuse or neglect, the following legislation applies: Part 3 of the AGA; sections 34 and 35 of the PAA; section 31 of the RAA; and the PGTA.

The law defines abuse, neglect and self-neglect to include acts and a failure to act. Refer to the Practical Guide to Abuse and Neglect Law in Canada for a summary of the law and practical guidelines on how to identify and respond to situations of abuse or neglect. This guide is produced by the Canadian Centre for Elder Law (CCEL) and available online at: [www.bcli.org/ccel/projects/practical-guide-elder-abuse-and-neglect-law-canada](http://www.bcli.org/ccel/projects/practical-guide-elder-abuse-and-neglect-law-canada).

Section 1 of the AGA defines the terms abuse and neglect broadly as follows:

- "abuse" means the deliberate mistreatment of an adult that causes the adult
  - (a) physical, mental or emotional harm, or
  - (b) damage or loss in respect of the adult's financial affairs,and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors;
- "neglect" means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs, and includes self neglect

### B. RESPONDING TO ADULT ABUSE AND NEGLECT

Sometimes the most appropriate and helpful response to abuse or neglect is not a legal response. Although in some instances it may be appropriate to contact a designated agency, or the Public Guardian and Trustee, as discussed below, the key response is generally to listen to the older adult's description of his or her experience, and help the person get support and assistance, often through identifying an appropriate referral agency. You will want to consider whether there is an urgency to the circumstances that suggests a need for immediate action. For example:

- Is the person in immediate danger of harm?

- Will money be stolen or spent?
- Will property be taken away?
- Does the person appear to lack mental capacity?

The CCEL has published the following guiding principles for responding to concerns about abuse, neglect or self-neglect:

**1. Talk to the older adult**

Ask questions. Talk to the older person about his or her experience. Help the person to identify resources that could be helpful.

**2. Respect personal values**

Respect the personal values, priorities, goals and lifestyle choices of an older adult. Identify support networks and solutions that suit the older adult's individuality.

**3. Recognize the right to make decisions**

Mentally capable older adults have the right to make decisions, including choices others might consider risky or unwise.

**4. Seek consent or permission**

In most situations, you should get consent from an older adult before taking action.

**5. Respect confidentiality and privacy rights**

Get consent before sharing another person's private information, including confidential personal or health information.

**6. Avoid ageism**

Prevent ageist assumptions or discriminatory thinking based on age from affecting your judgment. Avoid stereotypes about older people and show respect for the inherent dignity of all human beings, regardless of age.

**7. Recognize the value of independence and autonomy**

Where this is consistent with the adult's wishes, assist the adult to identify the least intrusive way to access support or assistance.

**8. Know that abuse and neglect can happen anywhere and by anyone**

Abuse and neglect of older adults can occur in a variety of circumstances from home care to family violence.

**9. Respect rights**

An appropriate response to abuse, neglect, or risk of abuse or neglect should respect the legal rights of the older adult, while addressing the need for support, assistance, or protection in practical ways.

**10. Get informed**

Ignorance of the law is not an excuse for inaction when someone's safety is at stake. If you work with older adults you need to educate yourself about elder abuse.

Taken from The Practical Guide to Elder Abuse and Neglect Law in Canada (2011).

**1. Designated Agencies**

There is no duty for the general public to report abuse, neglect or risk in B.C. However, if an older adult is experiencing, or particularly vulnerable to, abuse, neglect or self-neglect and is

unable to access the necessary support or assistance on her own, anyone may notify a Designated Agency (DA). A Representative of the DA will then meet with the adult to decide on what steps can be taken. The DAs are legally required under the AGA to respond to reports of abuse, neglect and self-neglect. The DA process includes involving the adult in decisions about how to seek support and assistance, providing the necessary support and assistance to prevent abuse or neglect, and respecting the right for an adult with capacity to refuse support or assistance.

The DAs are set out in the AGA, Designated Agencies Regulation. They include BC Community Living, Providence Health Care Society, and each of the provincial Health Authorities (i.e. Vancouver Coastal Health, Interior Health, Fraser Health, Vancouver Health Authority and Northern Health Authority). For contact information, refer to section **I.C.1: Designated Agencies** in this chapter.

Where an adult is found to be in need of support or assistance, a DA may take any of the following courses of action:

- investigate whether abuse or neglect is happening;
- provide assistance to obtain care, social support, or legal guidance;
- assist in obtaining an appropriate Representative or guardian;
- inform the Public Guardian and Trustee;
- prepare and implement a support and assistance plan with the adult; and /or
- apply to the court for an order authorizing the provision of services.

Designated Agencies are legally required to:

- involve the adult in decisions about how to seek support and assistance;
- provide the necessary support and assistance to prevent abuse or neglect; and
- respect the right for an adult with capacity to refuse support or assistance.

Legal professionals need to remember their responsibility to maintain professional conduct and client confidentiality with respect to their clients. There is not a mandatory requirement to report abuse, neglect or self-neglect in B.C. However, a report to a DA can be made anonymously.

Students should refer to the Supervising Lawyer and assess the situation with the client. Make sure that the adult has access to all available resources. If the situation is an emergency, **call 9-1-1**. If the situation is not an emergency, but the older adult is in need of support and assistance to protect themselves, then you may need to contact a DA. Refer to sections **I.C: Resource Organizations** and **I.C.1: Designated Agencies** in this chapter for further relevant information, as well as the CCEL tool “Elder Abuse and Neglect: What Volunteers Need to Know”, found at: [www.bcli.org/ccel/projects/elder-abuse-and-neglect-what-volunteers-need-know](http://www.bcli.org/ccel/projects/elder-abuse-and-neglect-what-volunteers-need-know).

## 2. Public Guardian and Trustee

Although not a designated agency under the AGA, the Public Guardian and Trustee (PGT) has the statutory authority to investigate situations where there appears to be financial abuse or neglect—particularly where the abuse or neglect is due to decisions made by Attorneys or Representatives. A designated agency discussed above may refer an investigation of abuse to the Public Guardian and Trustee.

The statutory powers, set out in s. 17 of the PGTA, allow the Public Guardian and Trustee to investigate and audit the affairs, dealings and accounts of:

- a trust;
- an adult who does not have a guardian;
- an attorney under a POA or EPOA, a representative, or a guardian where the Public Guardian and Trustee has reason to believe assets are at risk or person is not fulfilling their duties.

The statutory powers also allow the Public Guardian and Trustee to:

- protect a person's financial affairs and freeze assets in urgent situations for up to seven days and can extend the freeze period (s. 19, PGTA);
- 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 (s. 18(4));
- act as Representative, associate or substitute decision-maker or guardian for an adult where there is no one available to make necessary decisions; and
- require trustee, attorney, representative, guardian to provide accounts necessary for an audit.

Any person may notify the Public Guardian and Trustee where a Representative or Attorney is:

- abusing or neglecting the person for whom the Representative or Attorney is acting;
- failing to follow the instructions in the RA;
- incapable of acting as Representative or Attorney;
- failing to fulfill the duties of a Representative or Attorney; or
- otherwise failing to comply with the RA (s. 30(1)(h) RAA), or an EPOA (s. 34(2)(c) PAA).

Any person can also make an objection to the Public Guardian and Trustee if there is a reason to believe that fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke a financial or legal document (s. 34(1)(b) PAA, or Representation Agreement (s. 30(1)(b) RAA).

On receiving an objection concerning Representation Agreements, the Public Guardian and Trustee must promptly review the situation and may do one or more of the following (s. 30(3), RAA):

- conduct an investigation;
- apply to the court for an order confirming a change or revocation of the RA or cancelling part of a RA;
- apply to the court for an order that the RA is not invalid;
- recommend that someone else make a court application;
- make a report to a designated agency, requesting support and assistance in accordance with s. 46 of the AGA;
- appoint a monitor;
- authorize remuneration for a monitor;
- take any other action considered necessary.



On receiving an objection concerning Power of Attorneys, the Public Guardian and Trustee must promptly review the situation and may do one or more of the following (s. 34(3), PAA):

- conduct an investigation;
- apply to the court for an order described in s. 36 (PAA);
- advise the person who made the report to apply to the court for an order described in s. 36 (PAA);
- make a report under s. 46 of AGA;
- take steps under the PPA to become a committee;
- take no action, or take any action that the Public Guardian and Trustee considers necessary.

The PGTA requires that the Public Guardian and Trustee regularly represent 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. Students can find contact information for the Public Guardian and Trustee in section **I.C.: Resources** in this chapter.

### **3. Additional Resources for Older People Experiencing Abuse or Neglect**

Refer to section **I.C: Resource Organizations** in this chapter, for contact information for the BC Centre for Elder Advocacy and Support and the Public and Guardian Trustee of British Columbia.

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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: \_\_\_\_\_  
Adult's Name

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

- I met with the proposed Adult separate and apart from the proposed Attorney.
- I explained to the proposed Adult the risks and benefits of granting this Power of Attorney.
- In my opinion, the proposed Adult 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: ENDURING POWER OF ATTORNEY***

**Important note to students regarding this precedent:** If students use this precedent (produced by the Ministry of the Attorney-General of B.C.) students should ensure that the automatic revocation of prior POAs (para. 2) should not be included in the POA without very clear instructions from client that the client WANTS all prior POAs revoked (e.g. this would include prior bank POAs).

In addition, students should be aware that the “effective date” (para. 9) works if there is only one attorney appointed. If more than one attorney is appointed, the POA cannot be used and will not be effective unless all attorneys have signed.

Note that this POA precedent does not include custom clauses e.g. delegation, gifts, loans etc. If the client wishes to include custom clauses, the student should refer to Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2011 (Bogardus/Hamilton) for precedent clauses.

**ENDURING POWER OF ATTORNEY**

Made under Part 2 of the *Power of Attorney Act*.

The use of this form is voluntary. Be advised that this form may not be appropriate for use by all persons, as it provides only one option of how an Enduring Power of Attorney may be made. In addition, it does not constitute legal advice. For further information, please consult the *Power of Attorney Act* and *Power of Attorney Regulation* or obtain legal advice.

This form reflects the law at the date of publication. Laws can change over time. Before using this form, you should review the relevant legislation to ensure that there have not been any changes to the legislation or section numbers.

The notes referenced in this Enduring Power of Attorney are found at the end of this document and are provided for information only.

**1. THIS ENDURING POWER OF ATTORNEY IS MADE BY ME, THE ADULT:**

Full Legal Name of the Adult	Date (YYYY / MM / DD)
Full Address of the Adult	

**2. REVOCATION OF PREVIOUS INSTRUMENTS**

(See Note 1 – actions that must be taken to revoke previous instruments)

(See Note 2 – effect of revocation on previous instruments)

I revoke all of the following made by me:

- all previous Enduring Powers of Attorney;
- all previous Representation Agreements granting authority under either section 7 (1) (b) or section 7 (1) (d) of the *Representation Agreement Act*, or both.

**3. ATTORNEY**

(See Note 3: who may be named as Attorney)

I name the following person to be my Attorney in accordance with Part 2 of the *Power of Attorney Act*:

Full Legal Name of Attorney
Full Address of Attorney

**4. ALTERNATE ATTORNEY (OPTIONAL)**

(See Note 3: who may be named as Attorney)

*(Strike out this provision if you do not want to appoint an Alternate Attorney.)*

I name the following person to be my Attorney in accordance with Part 2 of the *Power of Attorney Act*, and authorize that person to act in place of my Attorney as my Alternate Attorney if my Attorney resigns in accordance with section 25 of the *Power of Attorney Act*, or the authority of my Attorney ends under section 29 (2) (d) of the *Power of Attorney Act*:

Full Legal Name of Alternate Attorney
Full Address of Alternate Attorney

If so acting, my Alternate Attorney has all the authority granted to my Attorney in this Enduring Power of Attorney.

**5. EVIDENCE OF AUTHORITY OF ALTERNATE ATTORNEY**

(See Note 4 – statutory declaration for evidence of authority of Alternate Attorney)

*(Strike out this provision if you are not appointing an Alternate Attorney.)*

A statutory declaration made by me, my Attorney, or my Alternate Attorney (if one is named), declaring that one of the circumstances referenced in section 4 of this Enduring Power of Attorney has occurred, and specifying that circumstance, is sufficient evidence of the authority of my Alternate Attorney to act as my Attorney.

**6. AUTHORITY OF ATTORNEY**

I authorize my Attorney to make decisions on my behalf in relation to my financial affairs and do anything on my behalf that I may lawfully do by an agent in relation to my financial affairs.

**7. CONTINUED AUTHORITY**

My Attorney may exercise the authority granted by this Enduring Power of Attorney while I am capable of making decisions about my financial affairs, and this authority continues despite my incapability to make those types of decisions.

**8. COMPENSATION**

(See Note 5 – Attorneys may be reimbursed for reasonable expenses)  
(Strike out the provision that does not apply.)

- i. My Attorney is not to be compensated for acting as my Attorney.
- ii. My Attorney may be compensated for acting as my Attorney as follows (set out the amount or rate of compensation):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**9. EFFECTIVE DATE**

This Enduring Power of Attorney is effective on the date it has been signed by me and my Attorney.

**10. CERTIFICATION FOR LAND TITLE PURPOSES**

For this Enduring Power of Attorney to be effective for the purposes of the *Land Title Act*, it must be executed and witnessed in accordance with that Act. If the attorney will be required to deal with an interest in land, this section must be completed by a lawyer, notary public or other person before whom an affidavit may be sworn under the *Evidence Act*.

OFFICER SIGNATURE(S)

EXECUTION DATE

ADULT'S SIGNATURE

\_\_\_\_\_  
Signature of officer

\_\_\_\_\_  
Name of officer

\_\_\_\_\_  
Complete address

\_\_\_\_\_  
Professional capacity

Y	M	D

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

\_\_\_\_\_  
Name of adult

**Officer Certification:**

Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, R.S.B.C., 1996, c. 124, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* as they pertain to the execution of this instrument.

**11. SIGNATURES**

**ADULT**

• The Adult must sign and date in the presence of both Witnesses.

Signature of Adult	Date Signed (YYYY / MM / DD)
Print Name	

**WITNESSES TO ADULT'S SIGNATURE**

(See Note 6 – Information for witnesses)

**WITNESS NO. 1**

• Witness No. 1 must sign in the presence of the Adult and Witness No. 2.

Signature of Witness No. 1	Date Signed (YYYY / MM / DD)
Print Name	
Address	
If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below:	
<input type="checkbox"/> lawyer <input type="checkbox"/> member of the Society of Notaries Public of British Columbia	

**WITNESS NO. 2**

• Not required if Witness No. 1 is a lawyer or member in good standing of the Society of Notaries Public of British Columbia.  
 • Witness No. 2 must sign in the presence of the Adult and Witness No. 1.

Signature of Witness No. 2	Date Signed (YYYY / MM / DD)
Print Name	
Address	

**ATTORNEY**

Signature of Attorney	Date Signed (YYYY / MM / DD)
Print Name	

**WITNESSES TO ATTORNEY'S SIGNATURE**

(See Note 6 – Information for witnesses)

**WITNESS NO. 1**

• Witness No. 1 must sign in the presence of the Attorney and Witness No. 2.

Signature of Witness No. 1	Date Signed (YYYY / MM / DD)
Print Name	
Address	
If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below:	
<input type="checkbox"/> lawyer <input type="checkbox"/> member of the Society of Notaries Public of British Columbia	

**WITNESS NO. 2**

• Not required if Witness No. 1 is a lawyer or member in good standing of the Society of Notaries Public of British Columbia.  
 • Witness No. 2 must sign in the presence of the Attorney and Witness No. 1.

Signature of Witness No. 2	Date Signed (YYYY / MM / DD)
Print Name	
Address	

<b>ALTERNATE ATTORNEY</b>	
<i>(Strike out if an Alternate Attorney is not appointed)</i>	
Signature of Alternate Attorney	Date Signed (YYYY / MM / DD)
Print Name	
<b>WITNESSES TO ALTERNATE ATTORNEY'S SIGNATURE</b>	
<i>(See Note 6 – information for witnesses)</i>	
<b>WITNESS NO. 1</b>	<b>WITNESS NO. 2</b>
• Witness No. 1 must sign in the presence of the Alternate Attorney and Witness No. 2.	• Not required if Witness No. 1 is a lawyer or member in good standing of the Society of Notaries Public of British Columbia.
• Witness No. 2 must sign in the presence of the Alternate Attorney and Witness No. 1.	
Signature of Witness No. 1	Date Signed (YYYY / MM / DD)
Print Name	
Address	
If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below:	
<input type="checkbox"/> lawyer	
<input type="checkbox"/> member of the Society of Notaries Public of British Columbia	
Signature of Witness No. 2	Date Signed (YYYY / MM / DD)
Print Name	
Address	

*(See Note 7 - when an Attorney may exercise authority under this Enduring Power of Attorney)*



**NOTES RESPECTING THIS ENDURING POWER OF ATTORNEY**

The notes provided below are for the purpose of providing information only, and do not constitute legal advice.

These notes are prepared for the purposes of this enduring power of attorney form. They should not be considered a complete description of matters to be taken into account in making an enduring power of attorney. A person making an enduring power of attorney, or acting as an attorney, should consult the *Power of Attorney Act* and the *Power of Attorney Regulation* to ensure that they understand their rights and duties.

**NOTE 1: Actions that must be taken to revoke previous instruments**

To revoke a previous enduring power of attorney, you must also give written notice of the revocation to each attorney named in that enduring power of attorney. Revocation is effective when this notice is given, or on a later date stated in the notice.

To revoke a previous representation agreement, you must also give written notice of the revocation to each representative, each alternate representative, and any monitor named in that representation agreement. Revocation is effective when this notice is given, or on a later date stated in the notice.

**NOTE 2: Effect of revocation on previous instruments**

The revocation provision in this enduring power of attorney will do all of the following:

- if you have previously made an enduring power of attorney that is still effective, it will be revoked;
- if you have previously made a representation agreement granting authority under either section 7 (1) (b) or section 7 (1) (d) of the *Representation Agreement Act*, or both, that is still effective, the entire representation agreement will be revoked;
- if you have previously made a section 9 representation agreement that authorizes the representative to exercise the powers of an attorney and that part is deemed under section 44.3 of the *Representation Agreement Act* to be an enduring power of attorney, that is still effective, that part of the representation agreement will be revoked.

If you do not want to revoke all of the above (for example, you may have an enduring power of attorney made for a specific purpose), you should not use this form and should consider obtaining legal advice.

**NOTE 3: Who may be named as Attorney**

This form provides for the naming of one attorney, and one attorney to act as an alternate attorney. If you wish to name more than one attorney to act at the same time, do not use this form.

The *Power of Attorney Act* sets out who may be named as an attorney. If an individual is appointed, that individual must not be an individual who provides personal care or health care services to the adult for compensation, or who is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services, unless the individual is a child, parent or spouse of the adult.

If an individual who is not an adult is named as an attorney, the individual must not act as attorney until that individual is an adult (19 years of age or older).

The information in this note also applies in respect of an alternate attorney.

**NOTE 4: Statutory declaration for evidence of authority of Alternate Attorney**

A statutory declaration that may be used is included with this form.

Additional evidence establishing the authority of the alternate attorney to act as attorney will be required for land title purposes, and may be required for other purposes.

**NOTE 5: Attorneys may be reimbursed for reasonable expenses**

Even if you state that your attorney is not to be compensated for acting as your attorney, an attorney may still be reimbursed from your property for reasonable expenses properly incurred in acting as your attorney.

**NOTE 6: Information for witnesses (other than "officers" witnessing the execution of an Enduring Power of Attorney for land title purposes)**

- (a) The following persons may not be a witness:
  - i. A person named in the enduring power of attorney as an attorney;
  - ii. A spouse, child or parent of a person named in the enduring power of attorney as an attorney;
  - iii. An employee or agent of a person named in the enduring power of attorney as an attorney, unless the person named as an attorney is a lawyer, a member in good standing of the Society of Notaries Public of British Columbia, the Public Guardian and Trustee of British Columbia, or a financial institution authorized to carry on trust business under the *Financial Institutions Act*;
  - iv. A person who is under 19 years of age;
  - v. A person who does not understand the type of communication used by the adult unless the person receives interpretive assistance to understand that type of communication.
- (b) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.
- (c) You should not witness the Enduring Power of Attorney, and you may report your concerns to the Public Guardian and Trustee of British Columbia, if you have reason to believe that
  - i. the adult is incapable of making, changing or revoking an enduring power of attorney, or
  - ii. fraud, undue pressure or some other form of abuse or neglect was used to induce the adult to make the enduring power of attorney, or to change or revoke a previous enduring power of attorney.

**NOTE 7: When an Attorney may exercise authority under this Enduring Power of Attorney**

Before a person may exercise the authority of an attorney under an enduring power of attorney, that person must sign the enduring power of attorney in the presence of two witnesses (or one witness, if that witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia).

**APPENDIX C: STATUTORY DECLARATION OF ATTORNEY FOR LAND TITLES**

BRITISH COLUMBIA

**STATUTORY DECLARATION OF ATTORNEY FOR LAND TITLES**

This statutory declaration must be completed by the attorney before the attorney may file a document with the Land Title Office. It need not be completed at the time that the enduring power of attorney is made or signed.

CANADA  
PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF the *Land Title Act* re: an Enduring Power of Attorney made by

\_\_\_\_\_ naming \_\_\_\_\_ as Attorney  
name of Adult name of Attorney

TO WIT:

I, \_\_\_\_\_,  
Name  
of \_\_\_\_\_, British Columbia,  
Full Address

SOLEMNLY DECLARE THAT:

1. I am the attorney named by the foregoing Enduring Power of Attorney.
2. I am the full age of 19 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.

DECLARED BEFORE ME AT

\_\_\_\_\_ location \_\_\_\_\_ Declarant's Signature  
on \_\_\_\_\_ date

\_\_\_\_\_  
Signature of Commissioner for taking Affidavits  
for British Columbia

\_\_\_\_\_  
Commissioner for taking Affidavits for British Columbia  
(Apply stamp, or type or legibly print name of commissioner)

**APPENDIX D: STATUTORY DECLARATION FOR EVIDENCE OF AUTHORITY OF ALTERNATE ATTORNEY**

**Note to students:** This precedent is not needed if POAs done sequentially instead of appointing alternate POAs in one document.

BRITISH COLUMBIA

**STATUTORY DECLARATION FOR EVIDENCE OF AUTHORITY OF ALTERNATE ATTORNEY**

This statutory declaration may be completed by the adult, the attorney, or the alternate attorney, as evidence of the authority of the alternate attorney to act as attorney. This statutory declaration would be completed if the attorney resigns, or the authority of the attorney ends, to establish the authority of the alternate attorney.

CANADA  
PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF the *Power of Attorney Act* re: an Enduring Power of Attorney made by

\_\_\_\_\_ naming \_\_\_\_\_ as Attorney  
name of Adult name of Attorney

TO WIT:

I, \_\_\_\_\_,  
Name of adult, attorney or alternate attorney  
of \_\_\_\_\_, British Columbia,  
Full Address of adult, attorney or alternate attorney

SOLEMNLY DECLARE THAT:

1. I am the *(strike out the descriptions that do not apply):*  
adult who granted the enduring power of attorney  
attorney named under the enduring power of attorney  
alternate attorney named under the enduring power of attorney.
2. The attorney has resigned in accordance with section 25 of the *Power of Attorney Act*, or the authority of the attorney has ended under section 29 (2) (d) of the *Power of Attorney Act*, specifically *(describe the specific circumstance resulting in the alternate attorney having authority to act):*  
\_\_\_\_\_  
\_\_\_\_\_

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.

DECLARED BEFORE ME AT

\_\_\_\_\_ location \_\_\_\_\_ Declarant's Signature  
on \_\_\_\_\_ date

\_\_\_\_\_  
Signature of Commissioner for taking Affidavits  
for British Columbia

\_\_\_\_\_  
Commissioner for taking Affidavits for British Columbia  
*(Apply stamp, or type or legibly print name of commissioner)*

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

Based on legislation of the Province of British Columbia

**NOTICE OF REVOCATION OF ENDURING POWER OF ATTORNEY**  
*In accordance with Section 28 of  
the Power of Attorney Act, R.S.B.C. 1996, c. 370 as amended,*

**I hereby revoke the Enduring Power of Attorney**

that I made on \_\_\_\_\_  
*(SELECT/PRINT the date the EPA was signed by adult)*

that appointed the following people: *(Cross out any extra lines not needed for listing.)*

\_\_\_\_\_ as \_\_\_\_\_  
*(TYPE/PRINT name as it appears on the EPA) (SELECT/PRINT role)*

\_\_\_\_\_ as \_\_\_\_\_  
*(TYPE/PRINT name as it appears on the EPA) (SELECT/PRINT role)*

\_\_\_\_\_ as \_\_\_\_\_  
*(TYPE/PRINT name as it appears on the EPA) (SELECT/PRINT role)*

**This notice is signed below by me (the adult) on** \_\_\_\_\_  
*(SELECT/PRINT the current date)*

\_\_\_\_\_  
*(Signature of adult)*

\_\_\_\_\_  
*(TYPE/PRINT name of adult)*

March 2012

## APPENDIX F: S. 7 & S. 9 REPRESENTATION AGREEMENT SAMPLES

BRITISH COLUMBIA

### REPRESENTATION AGREEMENT (SECTION 7)

Made under Section 7 of the *Representation Agreement Act*.

The use of this form is voluntary. Be advised that this form may not be appropriate for use by all persons, as it provides only one option of how a Representation Agreement may be made. In addition, it does not constitute legal advice. For further information, please consult the *Representation Agreement Act* and Representation Agreement Regulation or obtain legal advice.

This form reflects the law at the date of publication. Laws can change over time. Before using this form, you should review the relevant legislation to ensure that there have not been any changes to the legislation or section numbers.

The notes referenced in this Representation Agreement are found at the end of this Agreement and are provided for information only.

#### 1. THIS REPRESENTATION AGREEMENT IS MADE BY ME, THE ADULT:

Full Legal Name of the Adult	Date (YYYY / MM / DD)
Full Address of the Adult	

#### 2. REVOCATION OF PREVIOUS REPRESENTATION AGREEMENTS

I revoke all previous Representation Agreements granting authority under section 7 of the *Representation Agreement Act* made by me.

(See Note 1 – actions that must be taken to revoke a previous Representation Agreement)

(See Note 2 – effect of revocation on a previous section 7 Representation Agreement)

#### 3. REPRESENTATIVE

(See Note 3 – naming a Representative)

I name the following person to be my Representative:

Full Legal Name of Representative
Full Address of Representative

#### 4. ALTERNATE REPRESENTATIVE (OPTIONAL)

(See Note 3 – naming a Representative)

*(Strike out this provision if you do not want to appoint an Alternate Representative.)*

If my Representative

- dies,
- resigns in accordance with the *Representation Agreement Act*,
- is my spouse, as defined in the *Representation Agreement Act*, at the time that I make this Representation Agreement, and our marriage or marriage-like relationship subsequently terminates as set out in the *Representation Agreement Act*, or
- becomes incapable,

then I name the following person to be my Alternate Representative:

Full Legal Name of Alternate Representative
Full Address of Alternate Representative

**5. EVIDENCE OF AUTHORITY OF ALTERNATE REPRESENTATIVE**

(See Note 4 – statutory declaration for evidence of authority of Alternate Representative)  
(Strike out this provision if you are not appointing an Alternate Representative.)

A statutory declaration made by my Representative, my Alternate Representative (if one is named), or the Monitor (if one is named), declaring that one of the circumstances referenced in section 4 of this Representation Agreement has occurred, and specifying that circumstance, is sufficient evidence of the authority of my Alternate Representative to act in place of my Representative.

**6. AUTHORITY OF REPRESENTATIVE**

(See Note 5 - what a Representative may and may not be authorized to do under a section 7 Representation Agreement)

Pursuant to section 7 of the *Representation Agreement Act*, I authorize my Representative to:

*(If you want your Representative to have both types of authority, do not strike out either of the following provisions. If you want your Representative to have authority over only one of the following matters, strike out the provision over which you do not want your Representative to have authority. You may not strike out both types of authority.)*

- a. help me make decisions
- b. make decisions on my behalf

about the following:

*(Strike out any of the following matters for which you do not want your Representative to have authority.)*

- a. my personal care;
- b. the routine management of my financial affairs, as set out in the Representation Agreement Regulation;
- c. major health care and minor health care, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*;
- d. obtaining legal services for me and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on my behalf.

**7. MONITOR**

(See Note 6 - what a Monitor is and whether one is required)

*(Strike out this provision if a Monitor is not required and you do not want to name a Monitor.)*

I name the following person as Monitor of this Representation Agreement:

Full Legal Name of Monitor
Full Address of Monitor

**8. EFFECTIVE DATE**

This Representation Agreement becomes effective on the date it is executed.

**9. SIGNATURES****ADULT AND WITNESS SIGNATURES****ADULT'S SIGNATURE**

- The Adult must sign and date in the presence of both Witnesses.

Signature of Adult	Date Signed (YYYY / MM / DD)
Print Name	

**WITNESSES TO ADULT'S SIGNATURE**

(See Note 7 – information for witnesses)

**WITNESS NO. 1**

- Witness No. 1 must sign in the presence of the Adult and Witness No. 2.

Signature of Witness No. 1	Date Signed (YYYY / MM / DD)
Print Name	
Address	
If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below: <input type="checkbox"/> lawyer <input type="checkbox"/> member of the Society of Notaries Public of British Columbia	

**WITNESS NO. 2**

- Not required if Witness No. 1 is a lawyer or member in good standing of the Society of Notaries Public of British Columbia.
- Witness No. 2 must sign in the presence of the Adult and Witness No. 1.

Signature of Witness No. 2	Date Signed (YYYY / MM / DD)
Print Name	
Address	

**REPRESENTATIVES' SIGNATURES**

(See Note 8 - when a Representative may exercise authority under this Representation Agreement)

<b>REPRESENTATIVE</b>	<b>ALTERNATE REPRESENTATIVE</b> (Strike out if an Alternate Representative is not appointed.)
Signature of Representative	Signature of Alternate Representative
Date Signed (YYYY / MM / DD)	Date Signed (YYYY / MM / DD)
Print Name	Print Name

(See Note 9 - additional forms required for this Representation Agreement to be effective)



## **NOTES RESPECTING THIS REPRESENTATION AGREEMENT MADE UNDER SECTION 7 OF THE REPRESENTATION AGREEMENT ACT**

The notes provided below are for the purpose of providing information only, and do not constitute legal advice.

These notes are prepared for the purposes of this representation agreement form. They should not be considered a complete description of matters to be taken into account in making a representation agreement. A person making a representation agreement, or acting as a representative, alternate representative or monitor, should consult the *Representation Agreement Act* and the Representation Agreement Regulation to ensure that they understand their rights and duties.

### **NOTE 1: Actions that must be taken to revoke a previous Representation Agreement**

To revoke a previous representation agreement, you must also give written notice of the revocation to each representative, each alternate representative, and any monitor named in that representation agreement. Revocation is effective when this notice is given, or on a later date stated in the notice.

### **NOTE 2: Effect of revocation on a previous section 7 Representation Agreement**

If you have previously made a section 7 representation agreement that is still effective, it will be revoked by the revocation provision in this representation agreement.

### **NOTE 3: Naming a Representative**

(a) This form provides for the naming of one representative and one alternate representative. If you wish to name more than one representative to act at the same time, do not use this form.

(b) The *Representation Agreement Act* sets out who may be named as a representative. If an individual is appointed, that individual must be 19 years of age or older, and must not be an individual who provides personal care or health care services to the adult for compensation, or who is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services, unless the individual is a child, parent or spouse of the adult.

(c) A representative must complete the Certificate of Representative or Alternate Representative in Form 1 under the Representation Agreement Regulation.

The information in this note also applies in respect of an alternate representative.

### **NOTE 4: Statutory declaration for evidence of authority of Alternate Representative**

A statutory declaration that may be used is included with this form.

Additional evidence establishing the authority of the alternate representative to act in place of the representative may be required for some purposes.

### **NOTE 5: What a Representative may and may not be authorized to do under a section 7 Representation Agreement**

Under a section 7 representation agreement, a representative may be authorized to help the adult make decisions, or to make decisions on behalf of the adult, about all of the following things:

- the routine management of the adult's financial affairs, as described in the Representation Agreement Regulation;
- obtaining legal services for the adult and instructing counsel to commence proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf;
- the adult's personal care, and major health care and minor health care, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*.

Under a section 7 representation agreement, a representative may not be authorized to do any of the following:

- to help the adult make decisions, or to make decisions on behalf of the adult, about the adult's financial affairs, other than the routine management of the adult's financial affairs as described in the Representation Agreement Regulation;
- to commence divorce proceedings on the adult's behalf;
- to help make, or to make on the adult's behalf, a decision to refuse health care necessary to preserve life;
- to help the adult make decisions, or to make decisions on behalf of the adult, about the kinds of health care prescribed under section 34 (2) (f) of the *Health Care (Consent) and Care Facility (Admission) Act*;
- despite the objection of the adult, to physically restrain, move or manage the adult, or authorize another person to do these things;

- to refuse consent to those matters in relation to the *Mental Health Act* set out in section 11 of the *Representation Agreement Act*.

(Please note that this list may not be complete.)

In addition, a representative must not do either of the following:

- consent to the provision of professional services, care or treatment to the adult for the purposes of sterilization for non-therapeutic purposes;
- make or change a will for the adult.

(Please note that this list may not be complete.)

**NOTE 6: What a Monitor is and whether one is required**

- (a) A monitor is a person responsible for making reasonable efforts to determine whether a representative is complying with the representative's duties under the *Representation Agreement Act*.
- (b) A monitor is required for this representation agreement if the representation agreement authorizes a representative to make, or help make, decisions concerning routine management of the adult's financial affairs, unless the representative is the adult's spouse, the Public Guardian and Trustee, a trust company or a credit union.
- (c) A monitor must complete the Certificate of Monitor in Form 2 under the Representation Agreement Regulation.

**NOTE 7: Information for witnesses**

- (a) The following persons may not be a witness:
  - i. A person named in the representation agreement as a representative or alternate representative;
  - ii. A spouse, child or parent of a person named in the representation agreement as a representative or alternate representative;
  - iii. An employee or agent of a person named in the representation agreement as a representative or alternate representative, unless the person named as a representative or an alternate representative is a lawyer, a member in good standing of the Society of Notaries Public of British Columbia, the Public Guardian and Trustee of British Columbia, or a financial institution authorized to carry on trust business under the *Financial Institutions Act*;
  - iv. A person who is under 19 years of age;
  - v. A person who does not understand the type of communication used by the adult unless the person receives interpretive assistance to understand that type of communication.
- (b) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.
- (c) A witness must complete the Certificate of Witnesses in Form 4 under the Representation Agreement Regulation.
- (d) Section 30 of the *Representation Agreement Act* provides for a number of reasons to object to the making and use of a representation agreement. If you believe that you have grounds to make an objection at this time, you must not witness the representation agreement or execute the Certificate of Witnesses, and you may report your objection to the Public Guardian and Trustee of British Columbia.

**NOTE 8: When a Representative may exercise authority under this Representation Agreement**

Before a person may exercise the authority of a representative under a representation agreement, that person must sign the representation agreement.

**NOTE 9: Additional forms required for this Representation Agreement to be effective**

The following certificates must be completed, if applicable:

- Form 1 (Certificate of Representative or Alternate Representative);
- Form 2 (Certificate of Monitor), if the Representation Agreement names a Monitor;
- Form 3 (Certificate of Person Signing for the Adult), if a person is signing the Representation Agreement on behalf of the Adult;
- Form 4 (Certificate of Witnesses).

These certificates can be found in the Representation Agreement Regulation.

**REPRESENTATION AGREEMENT (SECTION 9)**

Made under Section 9 of the *Representation Agreement Act*.

The use of this form is voluntary. Be advised that this form may not be appropriate for use by all persons, as it provides only one option of how a Representation Agreement may be made. In addition, it does not constitute legal advice. For further information, please consult the *Representation Agreement Act* and Representation Agreement Regulation or obtain legal advice.

This form reflects the law at the date of publication. Laws can change over time. Before using this form, you should review the relevant legislation to ensure that there have not been any changes to the legislation or section numbers.

The notes referenced in this Representation Agreement are found at the end of this Agreement and are provided for information only.

**1. THIS REPRESENTATION AGREEMENT IS MADE BY ME, THE ADULT:**

Full Legal Name of the Adult	Date (YYYY / MM / DD)
Full Address of the Adult	

**2. REVOCATION OF PREVIOUS INSTRUMENTS**

(See Note 1 – actions that must be taken to revoke a previous Representation Agreement)

(See Note 2 – effect of revocation on previous Representation Agreements)

I revoke all of the following made by me.

- all previous Representation Agreements granting authority under section 7 of the *Representation Agreement Act*;
- all previous Representation Agreements granting authority under section 9 of the *Representation Agreement Act*.

**3. REPRESENTATIVE**

(See Note 3 – who may be named as Representative)

I name the following person to be my Representative:

Full Legal Name of Representative
Full Address of Representative

**4. ALTERNATE REPRESENTATIVE (OPTIONAL)**

(See Note 3 – who may be named as Representative)

*(Strike out this provision if you do not want to appoint an Alternate Representative.)*

If my Representative

- dies,
- resigns in accordance with the *Representation Agreement Act*,
- is my spouse, as defined in the *Representation Agreement Act*, at the time that I make this Representation Agreement, and our marriage or marriage-like relationship subsequently terminates as set out in the *Representation Agreement Act*, or
- becomes incapable,

then I name the following person to be my Alternate Representative:

Full Legal Name of Alternate Representative
Full Address of Alternate Representative



**9. SIGNATURES**

**ADULT AND WITNESS SIGNATURES**

**ADULT'S SIGNATURE**

- The Adult must sign and date in the presence of both Witnesses.

Signature of Adult	Date Signed (YYYY / MM / DD)
Print Name	

**WITNESSES TO ADULT'S SIGNATURE**

(See Note 7 – information for witnesses)

**WITNESS NO. 1**

- Witness No. 1 must sign in the presence of the Adult and Witness No. 2.

Signature of Witness No. 1	Date Signed (YYYY / MM / DD)
Print Name	
Address	
If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below: <input type="checkbox"/> lawyer <input type="checkbox"/> member of the Society of Notaries Public of British Columbia	

**WITNESS NO. 2**

- Not required if Witness No. 1 is a lawyer or member in good standing of the Society of Notaries Public of British Columbia.
- Witness No. 2 must sign in the presence of the Adult and Witness No. 1.

Signature of Witness No. 2	Date Signed (YYYY / MM / DD)
Print Name	
Address	

**REPRESENTATIVES' SIGNATURES**

(See Note 8 - when a Representative may exercise authority under this Representation Agreement)

**REPRESENTATIVE**

Signature of Representative	Date Signed (YYYY / MM / DD)
Print Name	

**ALTERNATE REPRESENTATIVE**

*(Strike out if an Alternate Representative is not appointed.)*

Signature of Alternate Representative	Date Signed (YYYY / MM / DD)
Print Name	

**NOTES RESPECTING THIS REPRESENTATION AGREEMENT MADE UNDER SECTION 9  
OF THE REPRESENTATION AGREEMENT ACT**

The notes provided below are for the purpose of providing information only, and do not constitute legal advice.

These notes are prepared for the purposes of this representation agreement form. They should not be considered a complete description of matters to be taken into account in making a representation agreement. A person making a representation agreement, or acting as a representative or alternate representative, should consult the *Representation Agreement Act* and the Representation Agreement Regulation to ensure that they understand their rights and duties.

**NOTE 1: Actions that must be taken to revoke a previous Representation Agreement**

To revoke a previous representation agreement, you must also give written notice of the revocation to each representative, each alternate representative, and any monitor named in that representation agreement. Revocation is effective when this notice is given, or on a later date stated in the notice.

**NOTE 2: Effect of revocation on previous Representation Agreements**

The revocation provision in this representation agreement will do all of the following:

- if you have previously made a section 7 representation agreement that is still effective, it will be revoked;
- if you have previously made a section 9 representation agreement that is still effective, it will be revoked.

**NOTE 3: Who may be named as Representative**

(a) This form provides for the naming of one representative and one alternate representative. If you wish to name more than one representative to act at the same time, do not use this form.

(b) The *Representation Agreement Act* sets out who may be named as a representative. If an individual is appointed, that individual must be 19 years of age or older, and must not be an individual who provides personal care or health care services to the adult for compensation, or who is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services, unless the individual is a child, parent or spouse of the adult.

The information in this note also applies in respect of an alternate representative.

**NOTE 4: Statutory declaration for evidence of authority of Alternate Representative**

A statutory declaration that may be used is included with this form.

Additional evidence establishing the authority of the alternate representative to act in place of the representative may be required for some purposes.

**NOTE 5: What a Representative may and may not do**

The authority of a representative appointed under this representation agreement includes the power to give or refuse consent to health care necessary to preserve life.

A representative appointed under this representation agreement must not do any of the following:

- give or refuse consent on the adult's behalf to any type of health care prescribed under section 34 (2) (f) of the *Health Care (Consent) and Care Facility (Admission) Act*;
- make arrangements for the temporary care and education of the adult's minor children, or any other persons who are cared for or supported by the adult;
- interfere with the adult's religious practices.

(Please note this list may not be complete.)

If you want your representative to be authorized to do the things on the above list, you should obtain legal advice.

In addition, under the *Representation Agreement Act*, a representative:

- may not be authorized to refuse consent to those matters in relation to the *Mental Health Act* set out in section 11 of the *Representation Agreement Act*;
- must not consent to the provision of professional services, care or treatment to the adult for the purposes of sterilization for non-therapeutic purposes;
- must not make or change a will for the adult.

(Please note that this list may not be complete.)

**NOTE 6: Consultation with a health care provider**

If you choose to include instructions or wishes in your representation agreement about your health care, you may wish to discuss with a health care provider the options and the possible implications of your choices.

**NOTE 7: Information for witnesses**

(a) The following persons may not be a witness:

- i. A person named in the representation agreement as a representative or alternate representative;
- ii. A spouse, child or parent of a person named in the representation agreement as a representative or alternate representative;
- iii. An employee or agent of a person named in the representation agreement as a representative or alternate representative, unless the person named as a representative or alternate representative is a lawyer, a member in good standing of the Society of Notaries Public of British Columbia, or the Public Guardian and Trustee of British Columbia;
- iv. A person who is under 19 years of age;
- v. A person who does not understand the type of communication used by the adult unless the person receives interpretive assistance to understand that type of communication.

(b) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.

(c) Section 30 of the *Representation Agreement Act* provides for a number of reasons to object to the making and use of a representation agreement. If you believe that you have grounds to make an objection at this time, you should not witness the representation agreement and you may report your objection to the Public Guardian and Trustee of British Columbia.

**NOTE 8: When a Representative may exercise authority under this Representation Agreement**

Before a person may exercise the authority of a representative under a representation agreement, that person must sign the representation agreement.

**APPENDIX F: STATUTORY DECLARATION FOR EVIDENCE OF AUTHORITY OF ALTERNATE REPRESENTATIVE (s. 7 OR s 9 RA)**

BRITISH COLUMBIA

**STATUTORY DECLARATION FOR EVIDENCE OF AUTHORITY OF ALTERNATE REPRESENTATIVE**

This statutory declaration may be completed by the representative, the alternate representative, or the monitor, as evidence of the authority of the alternate representative to act in place of the representative. This statutory declaration would be completed if one of the circumstances in which the alternate representative is authorized to act in place of the representative occurs to establish the authority of the alternate representative.

CANADA  
PROVINCE OF BRITISH COLUMBIA

IN THE MATTER OF the *Representation Agreement Act* re: a Representation Agreement made by

\_\_\_\_\_ naming \_\_\_\_\_ as Representative  
name of Adult name of Representative

TO WIT:

I, \_\_\_\_\_  
Name  
of \_\_\_\_\_  
Full Address

SOLEMNLY DECLARE THAT:

- a. I am the *(strike out the descriptions that do not apply)*:
  - representative named under the representation agreement
  - alternate representative named under the representation agreement
  - monitor named under the representation agreement.
- b. One of the circumstances referenced in the Representation Agreement in which the alternate representative is authorized to act in place of the representative has occurred, specifically *(describe the specific circumstance resulting in the alternate representative having authority to act)*:  
\_\_\_\_\_  
\_\_\_\_\_

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.

DECLARED BEFORE ME AT

\_\_\_\_\_ location \_\_\_\_\_ Declarant's Signature  
on \_\_\_\_\_ date

\_\_\_\_\_  
Signature of Commissioner for taking Affidavits  
for British Columbia

\_\_\_\_\_  
Commissioner for taking Affidavits for British Columbia  
*(Apply stamp, or type or legibly print name of commissioner)*



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

*from the Representation Agreement Regulation - September 9, 2011*

(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 Representative 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 Representative Agreement Act Regulations, September 2001

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

For s. 7 Representation Agreements

**Schedule**

[en. B.C. Reg. 21/2011, s. 5; am. B.C. Regs. 111/2011, App; 162/2011.]

**Form 1**

**Certificate of Representative or Alternate Representative**

*(sections 5 (4) and 6 (2) of the Representation Agreement Act)*

*[to be completed by each representative and alternate representative named in a representation agreement made under section 7 of the Representation Agreement Act]*

**Part 1 – Identification of representative or alternate representative**

1 This certificate applies to the representation agreement made ..... [date] by ..... [name of adult].

2 I am named in the representation agreement as representative or alternate representative.

3 My contact information is as follows:

..... [name]  
..... [telephone number], of  
..... [address],  
..... [city, province, postal code],  
..... [date of birth, if not a trust company or credit union].

**Part 2 – Certifications made by representative or alternate representative**

1 I certify that

- (a) I am an adult [does not apply to a trust company or credit union],
- (b) I do not provide, for compensation, personal care or health care services to the adult who made the representation agreement, or I do provide the services described in this paragraph, but I am a child, parent or spouse of the adult,
- (c) I am not an employee of a facility in which the adult who made the representation agreement resides and through which he or she receives personal care or health care services, or I am an employee described in this paragraph, but I am a child, parent or spouse of the adult,
- (d) I am not a witness to the representation agreement,
- (e) I have read and understand, and agree to accept, the duties and responsibilities of a representative as set out in section 16 of the *Representation Agreement Act*, and
- (f) I have read and understand section 30 of the *Representation Agreement Act* and have no reason to make an objection as described in that section.

..... [date].

*[signature of representative, alternate representative or authorized signatory of a trust company or credit union]*

**APPENDIX I: CERTIFICATE OF MONITOR**

**Schedule**

[en. B.C. Reg. 21/2011, s. 5; am. B.C. Regs. 111/2011, App; 162/2011.]

**Form 2**

Certificate of Monitor

*(section 12 (5) of the Representation Agreement Act)*

*[to be completed by the person named as monitor]*

**Part 1 – Identification of monitor**

1 This certificate applies to the representation agreement made ..... [date] by  
..... [name of adult].

2 I am named in the representation agreement as monitor.

3 My contact information is as follows:

..... [name]

..... [telephone number], of

..... [address],

..... [city, province, postal code].

**Part 2 – Certifications made by monitor**

1 I certify that

(a) I am an adult,

(b) I have read and understand, and agree to accept, the duties and responsibilities of a monitor as set out in section 20 of the *Representation Agreement Act*, and

(c) I have read and understand section 30 of the *Representation Agreement Act* and have no reason to make an objection as described in that section.

....., ..... [date].

*[signature of monitor]*

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

**Schedule**

[en. B.C. Reg. 21/2011, s. 5; am. B.C. Regs. 111/2011, App; 162/2011.]

**Form 3**

**Certificate of Person Signing for the Adult**

*(section 13 (4) (d) of the Representation Agreement Act)*

*[to be completed by the person who signs a representation agreement made under section 7 of the Representation Agreement Act for the adult making the agreement, if the adult is physically incapable of signing]*

**Part 1 — Identification of the person signing on behalf of the adult**

1 This certificate applies to the representation agreement made..... *[date]* by  
..... *[name of adult]*.

2 I signed the representation agreement on behalf of the adult.

3 My contact information is as follows:

..... *[name]*  
..... *[telephone number]*, of  
..... *[address]*,  
..... *[city, province, postal code]*.

**Part 2 – Certifications made by the person signing on behalf of the adult**

1 I certify that

- (a) I am an adult *[does not apply to a trust company or credit union]*,
- (b) the adult who made the representation agreement was present when I signed the representation agreement on his or her behalf, and directed me to sign because he or she was physically incapable of signing,
- (c) I understand the type of communication used by the adult who made the representation agreement when he or she directed me to sign the agreement,
- (d) I am not named in the representation agreement as a representative or an alternate representative, and
- (e) I am not a witness to the representation agreement.

....., ..... *[date]*.

*[signature of person signing for the adult]*

**APPENDIX K: CERTIFICATE OF WITNESS**

**Schedule**

[en. B.C. Reg. 21/2011, s. 5; am. B.C. Regs. 111/2011, App; 162/2011.]

**Form 4**

**Certificate of Witnesses**

*(section 13 of the Representation Agreement Act)*

*[to be completed by each person witnessing the signing of a representation agreement made under section 7 of the Representation Agreement Act]*

**Part 1 — Identification of, and certifications made by, first witness**

1 This certificate applies to the representation agreement made ..... [date] by  
..... [name of adult].

2 I witnessed the signing of the representation agreement by, or on behalf of, the adult.

3 My contact information is as follows:

..... [name]  
..... [telephone number], of  
..... [address],  
..... [city, province, postal code].

4 I certify that

- (a) I am an adult [does not apply to a trust company or credit union],
- (b) the adult who made the representation agreement was present when I witnessed the representation agreement,
- (c) I understand the type of communication used by the adult who made the representation agreement, or had interpretive assistance to understand that type of communication,
- (d) I am not named in the representation agreement as a representative or an alternate representative,
- (e) I am not a spouse, child, parent, employee or agent of a person named in the representation agreement as a representative or an alternate representative [does not apply to an employee or agent of the Public Guardian and Trustee, or a trust company or credit union], and
- (f) I have read and understand section 30 of the *Representation Agreement Act* and have no reason to make an objection as described in that section.

....., ..... [date].  
*[signature of witness]*

**To Make an Objection**

If you believe that you have grounds to make an objection at this time, you

- (a) must not witness the representation agreement,



- (b) must not execute this certificate, and
- (c) may report your objection to the Public Guardian and Trustee.

**Part 2 — Identification of, and certifications made by, second witness**

*[to be completed only if the first witness is not a lawyer or a member in good standing of the Society of Notaries Public of British Columbia]*

1 This certificate applies to the representation agreement made ..... *[date]* by  
..... *[name of adult]*.

2 I witnessed the signing of the representation agreement by, or on behalf of, the adult.

3 My contact information is as follows:

..... *[name]*  
..... *[telephone number]*, of  
..... *[address]*,  
..... *[city, province, postal code]*.

4 I certify that

- (a) I am an adult *[does not apply to a trust company or credit union]*,
- (b) the adult who made the representation agreement was present when I witnessed the representation agreement,
- (c) the first witness and I were in the presence of each other when each of us witnessed the representation agreement,
- (d) I understand the type of communication used by the adult who made the representation agreement, or had interpretive assistance to understand that type of communication,
- (e) I am not named in the representation agreement as a representative or an alternate representative,
- (f) I am not a spouse, child, parent, employee or agent of a person named in the representation agreement as a representative or an alternate representative *[does not apply to an employee or agent of the Public Guardian and Trustee, or a trust company or credit union]*, and
- (g) I have read and understand section 30 of the *Representation Agreement Act* and have no reason to make an objection as described in that section.

....., ..... *[date]*.

*[signature of witness]*

**To Make an Objection**

If you believe that you have grounds to make an objection at this time, you

- (a) must not witness the representation agreement,
- (b) must not execute this certificate, and
- (c) may report your objection to the Public Guardian and Trustee.

## ***APPENDIX L: ENHANCED REPRESENTATION AGREEMENT FOR HEALTH CARE***

Students may also refer to the s. 9 Representation Agreement Precedent produced by the Ministry of the Attorney-General at Appendix J and Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2011 (Bogardus/Hamilton) for further precedents.

### **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 Representatives] I assign each one of them authority to make health care decisions for me.

appoint (b) If [Representative Name] should at any time be unable or unwilling to act or continue to act, I appoint [Alt Representative 1] instead.

act (c) [Representative Name] and [Alt Representative 1] should at any time be unable or unwilling to act to or continue to act, I appoint [Alt Representative 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 anaesthetic; 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 Representative 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 **[Include this paragraph only if representatives are the same in the power of attorney – if 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 *Representative Agreement Act* I declare that this Representative 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, [Representative Name]. In the event [Representative Name] 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 Representative 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, [Representative Name], and [Alt Representative 1/2] In the event either [Representative Name] or [Alt Representative 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 Representative 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 M: CERTIFICATE OF EXTRAJURISDICTIONAL SOLICITOR**

**Schedule**

[en. B.C. Reg. 21/2011, s. 5; am. B.C. Regs. 111/2011, App; 162/2011.]

**Form 5**

**Certificate of Extrajurisdictional Solicitor**

*(made under section 9 (4) of the Representation Agreement Regulation)*

*[to be completed by a solicitor in the jurisdiction in which an extrajurisdictional representation agreement was made]*

**Part 1 — Identification of solicitor**

1 This certificate applies to the instrument made ..... [date] by  
..... [name of adult], authorizing  
.....  
..... [name of person or persons] to do the following:  
.....  
.....  
.....  
.....  
.....  
.....

*[summary of the powers the person, or each person, is granted].*

2 I am lawfully entitled to practise law in ..... [province or state, if applicable,  
and country].

3 My contact information is as follows:

..... [name]  
..... [telephone number]  
..... [address]  
..... [city, province or state]  
..... [postal code or zip code]  
..... [e-mail (optional)].

4 The regulatory body that governs the practice of law in my jurisdiction is

..... [name]  
..... [telephone number]  
..... [address]  
..... [city, province or state]

..... [postal code or zip code].

**Part 2 – Certifications made by solicitor**

1 I certify that

(a) the instrument described in Part 1 of this certificate authorizes a person to assist the maker of the instrument to make decisions, or to make decisions on behalf of the maker of the instrument, respecting personal care or health care,

(b) at the time of making the instrument, the adult who made it was to the best of my knowledge ordinarily a resident of ..... [province or state, if applicable, and country], and that jurisdiction is

(i) outside British Columbia but within Canada, or

(ii) within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand, and

(c) the instrument was validly made according to the laws of the jurisdiction in which

(i) the adult who made the instrument was ordinarily resident, and

(ii) the instrument was made.

....., ..... [date].

[signature of solicitor]

**Note:** this regulation replaces B.C. Reg. 459/99.