

CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

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CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

This Manual is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. Nothing herein creates a solicitor-client relationship. All information in this Manual

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I. INTRODUCTION

The purpose of the adult guardianship and substitute decision-making legislation in British Columbia is to create a scheme by which adults (people over the age of 19) can plan for their future in the event that they may need assistance with decision making, and to provide a means to assist adults who may be vulnerable to abuse and neglect.

The legislation is informed by the guiding principle that all adults have a right to self-determination and autonomy and that any incursion into this right must be governed by the presumption that they are capable of making their own decisions and that any support provided to them is the least intrusive available.

There are six statutes governing adult guardianship and substitute decision-making:

- *Power of Attorney Act*
- *Representation Agreement Act*
- *Health Care (Consent) and Care Facility (Admission) Act*
- *Public Guardian and Trustee Act*
- *Adult Guardianship Act*
- *Patients Property Act*

This chapter will begin with a discussion of the concept of “capacity” or “capability” (which will be used interchangeably), followed by a discussion of the planning mechanisms available to appoint a substitute decision maker and finally to the concept of adult guardianship and how assistance can be provided to vulnerable adults.

II. GOVERNING LEGISLATION

A. *List of Acronyms*

- **AD** – Advance Directive
- **AGA** - *Adult Guardianship Act*
- **AGR** - *Adult Guardianship (Abuse & Neglect) Regulation*
- **DAR** – *Designated Agencies Regulation*
- **EPOA** – Enduring Power of Attorney
- **FIA** – *Financial Institutions Act*
- **HCCFA** – *Health Care (Consent) & Care Facility (Admission) Act*
- **HCCR** – *Health Care Consent Regulation*
- **HPA** – *Health Professions Act*
- **LA** – *Limitations Act*
- **LTA** – *Land Title Act*
- **PAA** – *Power of Attorney Act*
- **PAR** – *Power of Attorney Regulations*
- **PGT** – Public Guardian and Trustee
- **PGTA** – *Public Guardianship and Trustee Act*
- **PLA** – *Property Law Act*
- **POA** – Power of Attorney
- **PPA** – *Patients Property Act*
- **PPAR** – *Patients Property Act Rules*
- **RA** – Representation Agreement
- **RAA** – *Representation Agreement Act*
- **RAR** – *Representation Agreement Regulation*
- **RPP** – Registered Pension Plan
- **RRIF** – Registered Retirement Income Fund
- **RRSP** – Registered Retirement Savings Plan
- **SCCR** - Supreme Court Civil Rules
- **SPGR** – *Statutory Property Guardianship Regulation*
- **TA** – *Trustee Act*
- **TSDM** – Temporary Substitute Decision Maker
- **WESA** – *Wills Estates and Succession Act*

B. *Governing Legislation*

- [Adult Guardianship Act](#), RSBC 1996, c 6 [AGA].
- [Adult Guardianship \(Abuse and Neglect\) Regulation](#), BC Reg 13/2011 [AGR].
- [Designated Agencies Regulation](#), BC Reg 38/2007 [DAR].
- [Family Law Act](#), SBC 2011, c 25 [FLA].
- [Financial Institutions Act](#), RSBC 1996, c 141 [FIA].
- [Health Care \(Consent\) and Care Facility \(Admission\) Act](#), RSBC 1996, c 181 [HCCFA].
- [Health Care Consent Regulations](#), BC Reg 17/2011 [HCCR]
- [Land Title Act](#), RSBC 1996, c 250, ss 45, 51–57, 283(2) [LTA].
- [Limitation Act](#), SBC 2012, c 13, ss 1, 11, 19–21, 24–26 [LA].
- [Patients Property Act](#), RSBC 1996, c 349 [PPA].
- [Power of Attorney Act](#), RSBC 1996, c 370 [PAA].
- [Power of Attorney Regulations](#), BC Reg 111/2011 [PAR].
- [Property Law Act](#), RSBC 1996, c 377, ss 16, 26–7 [PLA].

- [*Public Guardian and Trustee Act*](#), RSBC 1996, c 383 [PGTA].
- [*Representation Agreement Act*](#), RSBC 1996, c 405 [RAA].
- [*Representation Agreement Regulations*](#), BC Reg 162/2011 [RAR].
- [*Statutory Property Guardianship Regulation*](#), BC Reg 152/2018/2014 [SPGR].
- [*Trustee Act*](#), RSBC 1996, c 464 [TA].
- [*Wills, Estates, and Succession Act*](#), SBC 2009, c 13 [WESA].

III. MENTAL CAPACITY

The fact that a person has a mental illness, disability or impairment is not conclusive of their mental capabilities. Capacity to make a legally binding decision depends upon the type of decision at hand. The legal capacity standards for carrying out transactions, entering into relationships, or managing a person's affairs are set out both in common law and statute.

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 (https://www.bcli.org/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf), which covers capacity to do the following:

- Make a will
- Make an *inter vivos* gift
- Make a beneficiary designation
- Nominate a committee
- Enter a contract
- Retain legal counsel
- Marry
- Form the intention to live separate and apart from a spouse
- Enter an unmarried spousal relationship

The planning statutes set out the specific test for capacity that is required for an adult to sign a valid planning document, and it is important to note that the tests differ depending on the nature of the decision being made. Just because someone lacks capacity in one regard does not mean that they necessarily lack capacity in another context.

A. **Capacity to Make a Will**

The capacity to make a will is commonly referred to as “testamentary capacity,” and the testator of the will must have this capacity at the time that they make the will. There are two main ways in which a testator may be found to lack testamentary capacity. First, if a testator is found to have a “general unsoundness of mind.” This assessment considers factors including the testator's ability to appreciate: the nature of a will and the consequences of making one, the property that might be affected by a will, the people who are to receive property under the will, and the way that property is to be distributed under the will. The second way that a testator may be found to lack testamentary capacity is if they are under “specific delusions.” Generally, under this assessment, the law will only take those delusions that have a direct bearing on the will itself into account.

Because creating a will involves many complex cognitive steps and evaluations (including assessing one's own interests and positions as well as the interests and positions of others in relation to one's property) the test for testamentary capacity is generally viewed as being particularly stringent compared to the tests for capacity in other types of decision-making—a comparatively high level of capacity is needed. However, the stringency of the test may be able to be adapted depending on how complicated a particular will is, or if there are particularly compelling policy reasons to adjust the test.

Additionally, due to the unique nature of a will, there are other important issues that may arise surrounding the issue of testamentary capacity. For instance: since wills must follow formal requirements, suspicious circumstances may have bearing on the presumption of capacity, and undue influence may have bearing on the validity of a will. If a person is found

to lack testamentary capacity, British Columbia legislation mandates that there is no way for this person to create a valid will.

B. Capacity to Make an Inter Vivos Gift

The term “gift” takes on a particular meaning in a legal context, and the law may vary depending on the nature or type of the gift, and the circumstances in which a gift is given. The test for assessing the capacity to make a gift borrows largely from the tests for capacity in making a will, and from tests for capacity to enter into a contract. The test for testamentary capacity requires that the person making the gift does not have a general unsoundness of mind and that they are not under specific delusions.

The test for capacity to enter into a contract, when applied to a gift situation, would require that the person making the gift must be able to understand the terms upon which the gift is given and be capable of forming a rational judgment regarding the effect of giving the gift. It also requires that the intended recipient not have knowledge of “incompetency” on the part of the person giving the gift. In the past, courts have used different elements of these two tests to different degrees to assess capacity for making a gift, and there is debate over the degree to which the test for gift-giving capacity should be based on the test for testamentary capacity versus the test for contractual capacity.

A gift is voidable if the person giving it lacked the mental capacity necessary to do so. Voidable in this situation means that the person who gave the gift can legally take it back as long as it remains with the original recipient. However, if the recipient could not reasonably have known that the person giving it lacked capacity, the gift may not be voidable. This is also true if the recipient gave consideration for the gift.

C. Capacity to Make a Beneficiary Designation

Beneficiary designations are commonly used when someone wants funds from an insurance or savings plan to go directly to someone else (the beneficiary) should they die. The test for assessing whether the designator had the requisite capacity to make this designation depends on the nature of what is being designated. In recent years, courts in British Columbia have primarily applied a test that is similar to the test for testamentary capacity.

D. Capacity to Nominate a Committee

A “committee” is somebody appointed by the court to make decisions on that person’s behalf, should they be incapable of making their own legal and financial or personal care decisions. The appointment of a “committee of estate” entitles the committee to make legal and financial decisions for the adult. The appointment of a “committee of person” allows the committee to make personal and health care decisions for the adult. The governing legislation with respect to court-appointed committees is the *Patients Property Act* (PPA). This legislation allows for a person to nominate a committee in writing in the event they become incapable and require the appointment of a committee (s. 9).

There is not much case law that addresses the test to be used when assessing whether a person has the capacity to nominate a committee, but the case law that does exist seems to indicate that the test for capacity to nominate a committee has two components: the nominator must have the capacity to understand the nature of nominating a committee, and they must have the capacity to understand the effect that this nomination has on their interests. This case law also suggests that the capacity required for nominating a committee

is lower than the capacity that would be required for a person to be considered a “patient” under the PPA.

E. Capacity to Enter a Contract

Capacity issues surrounding the formation of a contract also engage the area of contract law, and thus the test to assess someone’s capacity to enter into a contract is informed by unique considerations. Basically, the test for this type of capacity has three components: the person must be able to understand the terms of the contract, they must be able to form a “rational judgement of its effects upon [their] interests,” and the other party to the contract must not know that the person is incompetent. There may be other factors of relevance for assessing capacity in a contract situation as well. For instance, the fairness of the contract and delusions held by a party may play a role. The test for capacity in this area is quite flexible and the test varies in stringency depending on context.

Due to the entanglement of this type of capacity with the area of contract law, the test for capacity in these circumstances must include consideration of the interests of the person in question as well as any other interests that are relevant in contract law (such as the interests of the other party to a contract, or the interests of society in general). If a person is found to lack the capacity to enter into a contract, that contract will not be void (as is the case in other situations of capacity, such as wills), but rather the contract will be voidable. Thus, the contract could be affirmed by the person who lacks capacity if they had a period of lucidity, or by a representative.

F. Capacity to Retain Legal Counsel

The capacity to retain legal counsel is unique because while other capacities are considered as isolated in time (for instance, whether a person had capacity at the time they entered a contract), capacity in situations regarding retaining legal counsel can be ongoing—this is referred to as ‘instructing’ legal counsel. While retaining and instructing legal counsel are separate situations, the line between them often gets blurred.

The test for capacity in these situations is largely built upon the test for capacity to enter a contract, as the relationship between a person and their legal counsel is a contractual one. However, due to the unclear boundaries between the isolated retention of legal counsel and the ongoing instruction of legal counsel, it has been argued that there is need to incorporate aspects from other areas of law as well—in particular, the law of agency. The test for the capacity to retain legal counsel is on the stringent side of the capacity spectrum due to its ties to the test for contractual capacity and the complex thought processes and decisions that one must be able to engage in to retain legal counsel.

Lawyers must not allow themselves to be retained by prospective clients who lack capacity, although there are exceptions to ensure that people are not left without any way of getting legal help because they lack capacity. Additionally, if a client who had capacity during the retention of legal counsel loses it afterwards, lawyers have an obligation to ensure that the client’s interests are still properly represented.

G. Capacity to Marry

Although marriage is a contract, there are special considerations surrounding marriage due to its unique subject matter that take the test for the capacity to marry outside of purely the test to enter a contract. Historically, the test for the capacity to marry has fallen into the less stringent side of the spectrum. Essentially, the test for the capacity to marry involves an

assessment of whether the person in question has been able to appreciate what marriage is as a contract, what it means socially and personally, and what the obligations and expectations are for someone who is legally married.

Of course, the idea of “marriage” has changed over time and courts have occasionally tried to alter the test for the capacity to marry—today, the law is somewhat murky about what exactly is and is not required. Some of the attempted changes to the test include requiring that the person be able to manage their own finances and requiring that the person be able to appreciate the effects of the marriage on their previous marriages and their children.

If a party to a marriage is found to have lacked capacity when they entered the marriage, the marriage is void. This can be argued not only by a party to the marriage but also by anyone else who has a financial interest at stake because of the marriage. Additionally, the test for capacity has also been adapted to apply to situations where one of the parties to the marriage was intoxicated.

H. Capacity to Form the Intention to Live Separate and Apart from a Spouse

It is important to keep in mind that the capacity to form the intention to live separate and apart from a spouse is intertwined with family law considerations and family law legislation. However, the main test used to determine this capacity is referred to as the “test of capacity to separate,” and it has its origins in case law. The test in these instances centres on whether the person had the capacity to appreciate the implications and ramifications of ending that marriage.

It is important to keep in mind that the capacity to form the intention to live separate and apart from a spouse is intertwined with family law considerations and family law legislation. However, the main test used to determine this capacity is referred to as the “test of capacity to separate,” and it has its origins in case law. The test in these instances centres on whether the person had the capacity to appreciate the implications and ramifications of ending that marriage. Notably, the presence of delusions is treated differently in this test of capacity than they are in many other types of capacity: just because a person is experiencing delusions that affected their decision to live separate and apart from a spouse does not necessarily mean that they lacked capacity in these situations. The test for capacity to separate has a similarly low stringency as the test for capacity to marry.

If a person is found to lack the capacity to form the intention to live separate and apart from a spouse, then it is unlikely that this act of living apart from their spouse will be enough to end a marriage.

I. Capacity to Enter into an Unmarried Spousal Relationship

No court in British Columbia, or in Canada for that matter, has ever directly engaged with the issue of whether a test for capacity to enter an unmarried spousal relationship is required. This does not mean, however, that capacity is irrelevant in these situations. When courts analyse these unmarried spousal relationships, the importance of intention is often emphasized. Intention necessarily engages the notion of capacity. Ultimately, the test for the capacity to enter an unmarried spousal relationship is undefined—if it even exists at all.

IV. SUBSTITUTE DECISION MAKING

For a brief overview of multiple legal instruments for substitute decision making, please visit Public Guardian and Trustee of British Columbia guide *It's Your Choice: Personal Planning Tools* which can be found at <https://www.trustee.bc.ca/documents/STA/It%27s Your Choice-Personal Planning Tools.pdf>. The guide offers the following table which summarizes key characteristics of each legal instrument for substitute decision making:

Legal tools	Manage your financial affairs	Address your legal affairs	Make personal care decisions on your behalf	Make health care decisions on your behalf	Make a decision to admit you to a care facility
Enduring power of attorney (EPOA)	Yes	Yes	No	No	No
Representation agreement for financial affairs, or personal and health care decisions or all (Financial RA7)	Yes	Yes	Yes	Yes	Yes
Representation agreement for personal and health care decisions only (Personal/Health RA9)	No	No	Yes	Yes	Yes
Advance directive	No	No	No	Yes	No
Nomination of a committee of estate	Yes	Yes	No	No	No
Nomination of a committee of person	No	No	Yes	Yes	Yes

A. **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.

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 their behalf.

The following sections explain what types of POAs can be made; the test for capacity to create a POA and what can be done in the event of incapacity; who is involved in a POA; how a POA can be made, changed, or revoked, and useful information for LSLAP students dealing with POAs.

1. **Overview of Power of Attorney**

a) **Types of Power of Attorney (POA)**

There are two types of POAs. It is important to find out which type of POA would best suit the adult's needs. The first is governed by Part 1 of the *PAA*, and is sometimes called a "General POA." The second is governed by Parts 2 and 3 of the *PAA*, and is sometimes called an "Enduring POA." The key difference between the two is that a POA under Part 1 ends once the adult becomes incapable, while a POA under Parts 2 and 3 continues even when the adult becomes incapable. 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 to be used for a limited time only?
- Does the adult want the POA to be in effect immediately or only when they become incapable?
- How will incapacity be decided?
- Do the adult's powers terminate if and when the adult becomes incapable?

The two types of POA are as follows:

1. **General:** General POAs are governed by Part 1 of the *PAA*, and by common law for agency relationships. They are effective immediately, or as specified on the document, and ongoing until loss of capacity, revocation, or death. The test for capacity for making general POAs can be found in the BCLI's Report on Common Law Test of Capacity (https://www.bcli.org/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf). 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).
2. **Enduring:** Enduring POAs (EPOAs) are governed by Parts 2 and 3 of the *PAA*. Enduring POAs continue in the event that the adult loses capacity, and only ends upon revocation or death. These are the most common type of POA, they allow the attorney to act while the adult is capable and **continue** when/if the adult becomes incapable.

EPOAs can be effective immediately, or "springing." A "springing" EPOA stays dormant until a future date or event (i.e. the loss of capacity) and ends only upon death. 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. A springing EPOA is not active until the adult loses capacity.

See [Goodrich v British Columbia \(Registrar of Land Titles\), 2004 BCCA 100](#). (The BCCA decided that even though the *PAA* does not explicitly allow for a springing power of attorney, it is nevertheless possible to make one.)

Both general POAs and EPOAs can be limited in relation to assets, duration, or specific types of transactions. For example, an adult could draft a POA for the attorney to manage their bank accounts and pay their bills while they are on vacation, but not give authority to the

attorney over their real estate and investments. A bank's POA will be limited to transactions at that institution for the accounts identified.

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.

Unless otherwise specified, all usage of the term "POA" in the subsequent sections of this chapter refers to an Enduring Power of Attorney as governed by Part 2 of the PAA.

b) Who can Appoint and Revoke an Attorney

The "adult" is any adult who makes a POA to appoint an attorney to make financial decisions on their behalf. The adult must be (PAA s10 and 12):

- An individual who is 19 years of age or older
- Mentally capable of making a POA
- Acting voluntarily, or on their own

The adult must have mental capacity at the time that the POA is signed, and must be able to understand 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
- Change or revoke a POA

c) The Test of Capacity

An adult is presumed to be capable of making decisions about their financial affairs and of understanding the nature and consequences of making, changing, or revoking an enduring POA (section 11 PAA).

Pursuant to section 12 of the PAA, an adult is incapable of understanding the nature and consequences of the proposed enduring power of an attorney if the adult cannot understand all the following:

- (a) the property the adult has and its approximate value;
- (b) the obligations the adult owes to their dependants;
- (c) 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 enduring power of attorney;
- (d) that, unless the attorney manages the adult's business and property prudently, their value may decline;
- (e) that the attorney may misuse the attorney's authority;
- (f) that the adult may, if capable, revoke the enduring power of attorney;
- (g) any other prescribed matter.

If an individual does not complete a POA while they are capable, and later becomes incapable of managing their financial affairs, the adult may be able to create a Representation Agreement, which has a lower test of capacity. Alternatively, a capable, interested person can apply to the court for committeehip in order to manage the incapable adult's affairs.

d) 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 the adult. An attorney is required to sign the POA to signify that they accept the role and the responsibility. If an attorney is not willing to accept this role, then the attorney should not sign the POA. In this context, an "attorney" does not need to be a lawyer, although an adult may wish to appoint their lawyer to act as an attorney. An attorney must be (*PAA* s 18 and s 19):

- An adult (i.e. at least 19 years of age), the PGT or certain financial institutions
- 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
- Acting voluntarily/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,
 - An employee of a facility where the adult resides and where the adult receives personal care or health services.
 - Exception: if the individual 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*, RSBC 1996, c 141 [*FIA*].

More than one person can act as an attorney. An adult who names more than one attorney may assign each a different area of authority, or all or part of the same area of authority (*PAA* s 18(4)). The adult might prefer to define distinct roles for each attorney (i.e. appoint one as the attorney for certain transactions, such as personal banking and a second individual as their attorney over different matters, such as 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.

According to s 18(5) of the *PAA*, where an adult appoints multiple attorneys for all or part of the same area of authority, the attorneys must act unanimously in exercising their authority. The exception to this 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
- Authorizes an attorney to act only as an alternate and sets out:
 - I. The circumstances in which the alternate is authorized to act in place of the attorney, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and
 - II. The limits or conditions if any, on the exercise of authority by the 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.**

Appointing more than one person has potential advantages and disadvantages. The practice can reduce the potential for an attorney to misuse their power by providing built-in scrutiny by a second attorney. However, having multiple attorneys may make the decision-making process complicated and inefficient.

e) *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 PGT to consider acting as an attorney in the event of incapacity. According to s 6(c) and s 23 of the *PGTA*, the PGT may agree to act as attorney for a fee. If an adult must appoint the PGT as attorney, they should contact the PGT to arrange this. It is important to note that the PGT will only act as a representative in matters of finance and will not be able to act as a representative for health care decisions.

Another circumstance where the PGT may become involved is where an attorney is misusing a POA or otherwise failing to fulfill their legal obligations. Any person may notify the PGT 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(s). Any person may also notify the PGT where an attorney is:

- Incapable of acting as attorney
- Abusing or neglecting the adult
- Failing to follow the instructions in the POA
- Otherwise failing to comply with legal duties of an attorney

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

For more information on the role of the PGT in general, please visit BC's PGT website: <https://www.trustee.bc.ca/Pages/default.aspx>.

2. 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 adult want to do?
- Does the adult have capacity to make this POA?
- Does the adult understand the nature of this POA?
- Does the adult understand the potential legal impact of this POA?
- Has the adult 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 adult created other POAs?

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

An adult with capacity is free to choose to sign a POA or not. 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) on the adult. For more information, refer to the discussion of undue influence below in section **VIII: Adult Abuse and Neglect** in this chapter. Also refer to the BCLI guide on Undue Influence, which is helpful for understanding the dynamics surrounding undue influence in relation to other legal documents like POAs. The guide can be found at <https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf>

a) 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 *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) of the *PAA*, 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 PGT 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
- A person who does not understand the type of communication used by the adult (unless interpretive assistance is used)

The *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 BC website: www.bclaws.ca.

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

NOTE: These formalities for a POA to be considered valid may be temporarily altered in extenuating circumstances. On May 19, 2020, the Minister of Public Safety and Solicitor General, under the authority of the Emergency Program Act, temporarily suspended these rigid requirements in a Ministerial Order, in order to accommodate for the public health and safety concerns in the wake of the COVID-19 pandemic. Under this Ministerial Order, “electronic presence” was enough to fulfill the formal requirements for ensuring the validity of a POA or RA during the provincial “state of emergency.” For more information, see Ministerial Order No. 1M62 at https://www.bclaws.gov.bc.ca/civix/document/id/mo/hmo/m0162_2020 . This order is no longer in effect.

b) 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 land transactions, then the POA must be executed and witnessed in accordance with the *Land Title Act*, RSBC 1996, c 250 [*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 (*LTA* s 56).

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 by 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).

c) **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 individuals to complete their institution's POA. This request normally occurs where an adult wishes to grant the attorney access to bank accounts to pay bills, make transfers, etc. The financial institution may request that the adult and attorney fill out their institution's Limited POA. For more information about financial institution's POA requirements and joint accounts refer to the Canadian Bankers Association website: <https://cba.ca/powers-of-attorney-bank-requirements?l=en-us>.

If the adult signs an institution's POA, this can sometimes create a conflict between POAs. These important questions should be asked:

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

The adult should **not** sign a POA form without seeking legal advice. For more information on preparing documents, consult the **Appendix** or organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **II. D: Resource Organizations** of this chapter.

NOTE: It is good practice 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 if applicable.

3. **Other Jurisdictions**

Enduring POAs (EPOAs) that have been made in some jurisdictions outside of BC, including other Canadian provinces and territories, or some other countries (e.g., the United States, United Kingdom, Australia, and New Zealand) may be recognized as legally valid in BC. These provisions are set out in s 38 of the *PAA*, and subject to the *Power of Attorney Regulation*, BC Reg 111/2011 [*PAR*].

Section 4(3) of the *PAR* requires that the EPOA from another jurisdiction be accompanied by a certificate, 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*, an EPOA from outside BC will be deemed a valid EPOA in BC 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 their own affairs
- Was made by a person who was, at the time of its making, residing elsewhere in Canada or in the United States, the United Kingdom, Australia, or New Zealand
- Is in accordance with the laws and continues to have legal effect in the jurisdiction in which it was made

Section 4(4) states that the EPOA is limited by the *PAA* and the jurisdiction in which the deemed enduring power of attorney was made. Section 4(4) also requires that 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.

4. **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 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.

a) 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
- 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 (*PAA* 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 (*PAA* s 19(3)).

Concerning the adult’s personal property and real property, an attorney must keep the adult’s property separate from their own property (*PAA* 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 invest the adult’s property in accordance with the *Trustee Act*, RSBC 1996, c 464 [TA]
- **Not** dispose of property that is subject to a specific testamentary gift in an adult’s will
- 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.

b) 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 below)
- Receive a gift or loan, if the POA permits
- Retain the services of a qualified person to assist the attorney
- Change or make a beneficiary designation, in limited circumstances (see 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

c) 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 (*PAA* s 20):

- The adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's 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 (set out in s 3 of the *PAR*)

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

d) 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*, including:

- A change to a beneficiary designation if the court authorizes the change
- 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
 - 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

e) *Deeds*

Where there exists a POA, 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*, such a deed is binding on the adult as long as it is within the scope of the attorney's authority, and has the same effect as if it were under the seal of the adult.

f) *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 *PGTA* or the *TA*, s 15.5.

An attorney **is** permitted to retain services. According to s 20(4) of the *PAA*, an attorney may retain the services of a qualified person to assist the attorney in doing anything the adult has authorized.

g) *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 the following (*PAA* 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*
- Any other duty that may be imposed by law

To protect innocent persons from liability arising from transactions made after the POA relationship has been terminated, BC's *PAA* modifies the common law regarding the effects of termination. If the attorney or a third party has acted in good faith, the *PAA* 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 their 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 any registration of “instruments” (as defined in the *LTA*) executed by the attorney after the termination of their authority, even though the attorney and a third party may have been ignorant of the termination.

h) Records and Accounts

The adult’s account must be kept up to date (*PAR* s 2). The adult’s assets and accounts must also be kept separate from those of the attorney and any third parties (*PAA* s 19(4)). Per s 2 of the *PAR*, all assets belonging to the adult held by the attorney, and all books, documents, and account records entrusted to the attorney must be available for production to the capable adult at a reasonable time (usually during annual reviews).

i) Expenses and Remuneration

Payment to an individual (as opposed to the PGT) for service as an attorney under a POA is less common. However, s 24 of the *PAA* allows for an attorney to be compensated 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.

5. Changing, Revoking, or Ending a POA

A POA will be suspended or end in the following circumstances (see s 29(2) of the *PAA*):

- Death of the adult or the attorney
- Bankruptcy of the adult
- Court appointment of a committee
- Revocation by the adult, who is still capable
- Resignation of the attorney(s)
- If the attorney is the adult’s spouse and their marriage (or marriage-like relationship) ends
- If the attorney is a corporation and that corporation dissolves
- If the attorney is convicted of a prescribed offence, or an offence where the adult is the victim
- Per s 19.1 of the *PPA*, a POA is suspended if the PGT becomes the statutory property guardian

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

a) *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 (*PAA s 28(4)*).

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
- 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
 - 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 at the Land Title Office (only applies where the POA deals with land transactions)
- Inform Nidus (representation agreement registration service) if the POA was registered with them

b) *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, s 17(1) of the *PAA* outlines that an attorney who does not sign a POA is not obligated or authorized to act as an attorney. It is possible to refuse becoming an attorney by simply choosing not to sign the POA. Section 17(4) also states that an attorney who does not sign is not required to provide any notice of any kind, but ethically the attorney should let the adult know. If a person *does* sign the POA and wishes to resign from acting as attorney, then written notice must be provided to the adult, any other attorneys and, if the adult is incapable, a spouse, near relative or, if known to the attorney, close friend of the adult. 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 PGT.

c) *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.

6. Note on POAs For LSLAP Students

When a client approaches LSLAP for assistance with creating a POA, the following series of questions should be asked to ascertain the kind of POA that would best suit the needs of the client without putting 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 each 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
 - Inability to answer open-ended questionsRefer to BCLI Guide on Undue Influence for a full checklist at:
<https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf>
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, 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 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. Nonetheless, 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.

a) *Misuse and Abuse of a POA*

The misuse or abuse of a POA 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 them with access to appropriate support services (e.g., the Seniors Abuse & 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. If there is concern that the adult is not capable, it may also be appropriate to refer the concern to the PGT. For example, s 17 of the *PGTA* allows the PGT to investigate potential abuse of POA relationships. Similar authority for the PGT to investigate abuse and neglect are provided by s 34 to 36 of the *PAA*.

Power of Attorney abuse is a constant concern and unfortunately a 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, 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:

- BC Centre for Elder Advocacy and Support: www.bcceas.ca
- Canadian Centre for Elder Law: www.bcli.org/ccel
- Public Guardian & Trustee: www.trustee.bc.ca
- Vancouver Coastal Health: Resource: www.vchreact.ca
- Advocacy Centre for the Elderly website: 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.

Representation Agreements (RAs) are governed by the *Representation Agreement Act (RAA)*. A primary goal of the *RAA* is to give legal recognition to substitute decision makers, and status for informal helpers that are family and friends. Another important change has been a shift of focus toward support for capacity rather than assessments of incapacity, as the latter can take away an individual's personal autonomy.

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 BC can plan for future health care substitute decision making. An 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 an RA is lower than the test for creating a POA, a person with limited cognitive capacity may have the capacity to create an RA.

In the BC health care system, health care providers must speak directly to an individual 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 a proposed treatment. If the adult has previously enacted an 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 an 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. Anyone helping another

create an RA should be aware of indicators of abuse and follow guidelines outlined in this chapter that will help them to notice abuse. If necessary, the adult should be met with alone to ensure that the adult truly wishes to create an RA and give powers to the potential representative. 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.

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

B. Representation Agreements

1. 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 they will authorize the representative to act on their behalf. 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.

a) 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
- Living arrangements of the adult

A s 7 RA may also allow the representative to take care of **routine financial affairs** of the adult. “Routine management of financial affairs” is defined in the *RA Act Regulation* s 2(1) as:

- 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, negotiation, 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 the case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;
- i) Making payments on the adult's behalf on a loan, including a mortgage, that
 - i. Exists at the time the representation agreement comes into effect, or
 - ii. Is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;
- j) Taking steps under the *Land Deferment Act*, RSBC 1996, c 249 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 cancelling 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 an 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 investments 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 the 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*, 1996 RSBC, c 215 and the *Income Tax Act (Canada)*, 1985 RSC, c 1 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 and 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

For greater clarity, the Regulations state that the routine management of the adult's financial affairs does **NOT** include the following (s 2(2) RAR):

- 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 a new loan, including a mortgage, on the adult's behalf;
- c) Purchasing or disposing of real property on the adult's behalf;
- d) Guaranteeing a loan, positing security, or indemnifying a third party on the adult's behalf;
- 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; and
- 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.

A s 7 RA 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 against the adult's objections.

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.

b) 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. Under this section, representatives can do anything that the representative considers necessary in relation to the personal care or the health care of the adult, 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
- 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

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
- Interfere with the adult's religious practices

Section 34(2)(f) of the *HCCFA* pertains to refusing substitute consent to health care necessary to preserve life (*HCCFA* s 18). In a s 9 RA, if a representative is provided with 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 (*RAA* s 9(3)). Some other health decisions are also excluded from potential powers, e.g., "sterilization for non-therapeutic purposes" (*RAA* s 11(2)).

The creation of a s 9 RA no longer requires the services of a lawyer. However, careful attention should be paid to the requirements and powers given under s 7 and s 9 RAs to determine which one best suits the needs of the adult.

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 an enduring POA, and the representative must follow the requirements under the *PAA* to use these powers (s 44. 2 Transitional Provision of the *PAA*).

2. **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 child, parent, or spouse of the adult, 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 PGT can also be named as a representative.

According to s 5(1)(c) of the *RAA*, 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.

RAA s 5(4) requires that all representatives for RAs made under s 7 complete a certificate in the prescribed form.

3. **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.

a) *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
- 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 their current wishes, and comply with the wishes if reasonable (*RAA* 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 (*RAA* s 16(3)). A representative cannot make decisions based on their own opinion when it conflicts with the intent of the adult. They must accurately represent the adult’s own wishes to health care providers and others, even if they personally disagree with those wishes. 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 their beliefs and values are not known (*RAA* 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 (RAA s16(5)).

Adults should communicate their instructions and wishes to the named representative(s). This should be done in writing (including by e-mail or recorded transmission), but it can also be done orally. The communication of instructions and wishes can continue, for as long as the adult has capacity. It is best that the representative(s) know exactly what the adult would want.

b) *Delegation of Authority*

A representative is not permitted to delegate authority to another person (RAA 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 (RAA 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.

c) *Accounts and Records*

A representative must also keep accounts and records concerning the exercise of authority (RAA s 16(8)). These accounts and records must be produced upon request from the adult, the appointed monitor, or the PGT. A representative who has been appointed to make financial decisions must keep the adult's assets separate from their own (RAA 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.

d) *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 (RAA s 18).

A representative also has a duty to keep information confidential. A representative must not disclose information or records to anyone, except where it is necessary to perform the duties owed to the adult, to cooperate with an investigation by the PGT, or to make an application to or comply with an order of the court (RAA s 22).

e) *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 their representative has no force or effect (RAA s 19.01).

f) *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 (*RAA s 26(1)*). In addition, an RA cannot authorize a representative to be paid for making any decision under Part 2 of the *HCCFA (RAA s 26(1.1))*.

A representative, alternative representative, or monitor is 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.

4. **Monitors**

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

a) *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 (*RAA 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:

- a) The representative is the adult's spouse, the PGT, a trust company or a credit union, or
- b) The adult has appointed two representatives who must act unanimously (*RAA 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 (*RAA 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 (*RAA s 12(4)*). An individual named in a representation agreement as a monitor must complete a Monitor's Certificate (*RAA s 12(5)*).

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 (*RAA s 12(6)*). See s 12 of the *RAA* for general provisions regarding the appointment and resignation of a monitor.

b) *Duties and Powers*

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

- Make reasonable efforts to ensure that the representative is fulfilling their duties (these duties are set out in s 16 of the *RAA*)
- 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 their 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 (*RAA* s 20(4)). The monitor has a right to visit and speak with the adult at any reasonable time (*RAA* s 20(2)) and any person with custody or control of the adult is prohibited from hindering the monitor's access to the adult (*RAA* 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 PGT to make a complaint (*RAA* s 20(5)).

c) *Payment and Expenses*

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

d) *Replacement Monitor*

The PGT 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 (*RAA* s 21(1)).

5. *Creating a Representation Agreement*

The adult who executes the Representation Agreement must have the mental capacity to do so, as set out in the *RAA*.

The RA must also be in writing, signed and witnessed (*RAA* s 13). The adult and each of the representative(s) must sign the RA (*RAA* s 13(2)). Two adults must witness the signatures. However, only one witness is necessary if that witness is a lawyer and member in good standing with the Law Society of BC or is a member in good standing of the Society of Notaries Public.

Witnesses cannot be (*RAA* 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
- 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 in the prescribed form (*RAA* s 13(1.1) and s 13(6)). Please consult the Nidus Personal Planning Resource Centre for more information about prescribed forms.

An 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 an RA, registration may be done through the Nidus e-Registry. When a person registers, they can decide which organizations can access their record. For more information contact Nidus Personal Planning Resource Centre.

For more information on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry.

NOTE: These formalities for a RA to be considered valid may be temporarily altered in extenuating circumstances. On May 19, 2020, the Minister of Public Safety and Solicitor General, under the authority of the Emergency Program Act, temporarily suspended these rigid requirements in a Ministerial Order, in order to accommodate for the public health and safety concerns in the wake of the COVID-19 pandemic. Under this Ministerial Order, “electronic presence” may be enough to fulfill the formal requirements for ensuring the validity of a POA or RA when British Columbia is declared to be in a “state of emergency.” For more information, see Ministerial Order No. 1M62: https://www.bclaws.ca/civix/document/id/mo/mo/2020_m162.

6. Changing, Revoking or Ending a Representation Agreement

An RA can be changed or revoked by the adult at any time (so long as the adult has mental capacity) (*RAA* s 27(1)). 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 (*RAA* s 27(3.1))

An RA ends 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
- As provided for under s 19 of the *PPA*

Where the adult who made the agreement and the representatives are spouses, then an 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.

7. Other Jurisdictions

As of September 1, 2011, agreements from other jurisdictions that perform the same function as an RA in British Columbia may be deemed to be a representation agreement under the RAA. Subject to any further limitations or conditions set out in the regulations, the criteria for accepting an extra-jurisdictional RA are that it must (RAA s 41):

- Perform the function of an RA
- Be made in a jurisdiction outside BC
- Comply with any prescribed requirements

The certificate in the prescribed form must be completed by an extra-jurisdictional solicitor. Please consult the Nidus Personal Planning Resource Centre for more information about prescribed forms.

These recognition rules only apply to s 9 RAs for personal and health care decisions (see s 9 of the *Representation Agreement Regulations*).

8. Note on RAs for LSLAP Students

When a client approaches LSLAP for assistance with creating an RA, students should ask the following questions 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 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 Abuse & 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 **II. D: Resource Organizations** and **VIII: Adult Abuse and Neglect** in this chapter.

9. **The Bentley (Litigation Guardian) v Maplewood Seniors Care Society Case**

An important case for both Representation Agreements and Advance Directives is [*Bentley \(Litigation Guardian\) v Maplewood Seniors Care Society, 2014 BCSC 165*](#). The case highlights issues of consent, the ability of an adult to change their consent from written instructions, and the meaning of health care versus personal care. A discussion of the case is available by case brief through CLE online: <http://canliiconnects.org/en/summaries/33208>.

C. 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 they become incapable of giving health care instructions. The legal provisions for ADs are set out in Part 2.1 of 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.

1. 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 AD 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 AD 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
- 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 an RA and an AD, then the health care provider must seek consent from the representative. According to s 19.3 of the *HCCFA*, 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.

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
- 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
- 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 care facility and instructed to “fill out these forms” prior to treatment, the adult does not have to fill out the AD.

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*.

2. 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
- 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 on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry.

3. Changing, Revoking, or Ending an Advance Directive

An adult with capacity may 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.

4. 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
- Blood transfusions

Note that it is not likely that simple refusals like “I refuse CPR” are going to be sufficient for health care providers. It is important to describe the circumstances to the best degree possible under which consent will be refused, such as only refusing CPR if cardiac arrest occurs, rather than stating only to refuse CPR. The adult may use the phrase “under any circumstances” to make it clear to health care professionals that consent is not given in any case.

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.

a) 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

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1488016/>

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 their 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).

5. Note on ADs 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: 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.

1. Why does the client want to create an AD?
2. What types of health care provider does the client want to give consent to?
3. What types of health care provider does the client want to refuse consent to?

4. Does the client have an RA in place? What is the relationship between the client and their chosen representative?
5. 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 their 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 Abuse & 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.

D. Temporary Substitute Decision-Makers (TSDM)

The statutory framework of the *HCCFA* allows for the appointment of a temporary substitute decision-maker (TSDM) in some situations where there is no representative previously appointed and an adult no longer has capacity. For instance, in BC, 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 expressly or by inference either orally or in writing. However, when an adult is not capable of making this election (i.e. due to illness, loss of consciousness, or injury), health care providers are required to get consent from a substitute decision-maker in order to commence treatment. There are, however, exceptions for this requirement when urgent or emergency health care is required (*HCCFA* s 12). Planning tools, such as RAs and ADs may be helpful in obtaining this consent. If the patient has an RA in place, then instructions for consent will need to be obtained from the representative (*HCCFA* s19). If the patient has an AD in place, then the instructions for consent will need to be obtained from the representative (*HCCFA* s19).

However, if there is no representative and no committee in place, then the health care provider will need to find a TSDM to give or refuse consent (*HCCFA* s19.8). The *HCCFA* outlines the specific procedures that health care providers must follow to obtain legally valid consent. Section 16(1) 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. To obtain substitute consent to provide major or minor health care to an adult, a health care provider must choose the first, in the listed order, of the following who is available and qualifies under s 16 of the *HCCFA*:

- The adult's spouse or partner
- The adult's child who is over 19
- The adult's parent
- The adult's sibling

- 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 under s 16(2) of the *HCCFA*:

- 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
- 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.

E. Admission to Care Facilities

Part 3 of the *Health Care (Consent) and Care Facility (Admissions) Act (HCCFA)* describes consent requirements for admission of adults into care facilities. If an adult is incapable of providing consent for admission into a care facility, a manager of the facility may admit an adult to the facility if consent is provided by a committee of person. For more information on committees, please refer to **Section V: ADULT GUARDIANSHIP** in this chapter.

If an adult does not have a committee of person, a substitute will be chosen from the following list, in this order, to give or refuse consent:

- The adult's representative, if they have authority to give consent to admission
- The adult's spouse
- The adult's child who is over 19
- The adult's parent
- The adult's sibling
- The adult's grandparent
- Anybody related by birth
- A close friend
- A person immediately related to the family by marriage

If no person meets these requirements, or if there is a dispute over who is chosen, the manager of the facility must notify the PGT. The PGT can authorize a person to give or refuse consent, including one of their staff.

In providing consent, the substitute decision maker must consider:

- The adult’s current wishes
- The adult’s previously expressed wishes and known beliefs and values
- Whether the adult would benefit from admission
- What other options may be available and appropriate or less restrictive to support the adult’s care

F. Limits on Substitute Decision-Makers

1. Health Care Consent Regulation

The *HCCFA’s Act’s Health Care Consent Regulation* outlines scenarios in which a temporary substitute decision maker cannot provide consent on behalf of someone (s 5).

Situations where the temporary substitute decision maker may not be able to provide this consent include:

- abortion
- electroconvulsive therapy
- psychosurgery
- removal of tissue from a living human body for implantation in another human body or for education or research
- experimental health care, participation in a program that has not been approved by the appropriate committee
- any treatment that involves using “aversive stimuli” to cause a behavioural change

2. Medical Assistance in Dying (MAiD)

The Criminal Code of Canada was amended on June 17th, 2016, to permit the Medical Assistance in Dying (MAiD) under certain conditions. This means that a medical doctor or nurse practitioner may, at a person’s request, administer a substance to cause their death, or prescribe a substance so that the person can self-administer a substance that causes their death.

Consent for MAiD can only be given by patients who are able to consent, and substitute decision-makers cannot give consent on a patient’s behalf. This is because the College of Physicians and Surgeons of British Columbia’s “Professional Standards and Guidelines” clearly prohibits consent for MAiD to be given via an RA or AD. The “Professional Standards and Guidelines” have weight in law pursuant to s 5(2) of the Medical Practitioners Regulation under the *Health Professions Act*.

For more information on the Standards and Guidelines of the College of Physicians, please see their document on MAiD at <https://www.cpsbc.ca/files/pdf/PSG-Medical-Assistance-in-Dying.pdf>.

V. ADULT GUARDIANSHIP

In BC, a person or the Public Guardian and Trustee (the “PGT”) may be appointed to manage the legal, financial and/or personal and health care decisions for another person.

The *Patients Property Act (PPA)* allows a judge to appoint a committee (pronounced caw-mi-TEE, with an emphasis on the end of the word). A court appointed committee steps into the shoes of the adult and is authorized to make legal and financial decisions (committee of estate) and/or personal and health care decisions (committee of person) on behalf of an adult who has been declared incapable of making those decisions by the Court.

Part 2.1 of the *Adult Guardianship Act (AGA)* contains a statutory process by which the PGT becomes statutory property guardian. As statutory property guardian, the PGT has the same authority as a committee of estate and will make legal and financial decisions on behalf of the adult.

Adults may consult CLAS and the Public Guardian and Trustee for more information on committeeeship. The Public Guardian and Trustee produces a number of helpful publications on committeeeships. The resources can be found at <http://www.trustee.bc.ca/reports-and-publications/Pages/default.aspx>. It is also advisable to contact an Estate and Guardianship Litigation Lawyer, possibly through the Law Society’s Lawyer Referral Service (604-687-3221).

A. *Patients Property Act: Court-Ordered Committeeeship*

A court may declare a person incapable of managing their affairs, their person, or both. Upon making the declaration, the appointment of a committee of estate and/or person is required to allow decisions to be made on behalf of the person. A court-ordered committee and its application is a Supreme Court procedure: provincial courts do not have jurisdiction in this regard.

Section 1 of the *PPA* provides the following definitions:

- A “**patient**” is a person who is in incapable of managing their affairs or themselves, due to mental infirmity, disease, age etc.
- A “**committee**” can be an appointed individual, the PGT, or a statutory property guardian.

1. **Types of Committees**

a) ***Committee of the Estate***

A committee of the estate has the authority to make financial and legal decisions on the patient’s behalf. This routinely includes:

- Controlling the patient’s income
- Conducting banking
- Paying expenses
- Selling real property

b) ***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 care facility.

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. It may be that the same individual is appointed to a committee comprising both estate and person, or it may be that separate individuals are appointed to each committee.

2. The Court Ordered Committee

There are two steps involved in appointing a committee for an individual who is incapable:

- An order must be made by the Supreme Court declaring that the patient is incapable of managing their own affairs and/or person.
- The court appoints one or more individuals as Committee of the estate and/or the person.

a) ***Declaration of Patient Incapability***

An individual must be declared incapable of managing their affairs before a committee of estate can be appointed. Similarly, a person must be declared incapable of managing themselves before a committee of person is appointed.

1. Section 2 of the *PPA* provides that the Attorney General, a near relative or the subject, or any other person may file an application to the court for an order declaring incapability. Supreme Court Civil Rules (*Rules*) R. 2-1(2)(e) states that, unless R. 17-1 applies, guardianship proceedings must be commenced by way of petition.
2. The court will then consider the affidavits of two medical practitioners who provide their opinion on the incapacity of the subject. The medical practitioners must be members of the BC College of Physicians and Surgeons.
3. In addition to the medical practitioners' affidavits, the applicant must swear an "affidavit of kindred and fortune," which as the name suggests, set out particulars of the patient's family and financial affairs. The affidavit of kindred and fortune must be in a prescribed form (Form 3), as set out in the *Patients Property Act Rules*.
4. The court then may decide whether the subject is incapable based on the affidavit material before it on the application, or it may proceed:
 - a) By converting the petition into an action. The test for determining whether a petition is to be tried was recently reviewed and amended in [Cepuran v. Carlton, 2022 BCCA 76](#). The court clarified that "a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4)" (para 160). There are no determinative factors for referring a matter to trial; rather, the courts have discretion on a

- case-by-base basis to determine whether a proceeding is suitable for trial.
- b) By order, to require the person to undergo an additional examination with either:
- i) One or more medical practitioners other than those whose affidavits were before the court, or
 - ii) A board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court.
5. 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(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 the interests of the subject.
- In order for a waiver of notice to be granted, there must be a medical affidavit advising the court that it would be injurious to the health of the adult to be served with notice of the application. The affidavit must demonstrate this clearly and provide evidence, it is not sufficient to simply restate the language of the statute. A discussion on this can be found in [T.H.N et al v Q.V.L. 2000 BCSC 24](#).

In summary, the court application must include:

- Petition (*Supreme Court Civil Rules*, BC Reg 168/2009 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))
- Chamber Order to Appoint a Draft Order

While it is not required to include consent of the next of kin, it is recommended. See below.

b) *Resisting a Declaration of Incapability*

If the subject of the application wishes to oppose it, they are entitled to be represented at the hearing, either in person or through counsel.

c) *Challenging Affidavits*

The medical affidavits provided should not be older than 6 months, and should clearly lay out the diagnosis, clinical findings, and prognosis of the patient. 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 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. However, the person does not need to wait for the courts order to present other evidence of their capability or their own independent medical affidavit evidence.

d) *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 they are 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).

e) *Appointment of a Committee*

Once the patient has been declared incapable, the judge will appoint a committee. This appointment is governed by the *PPA*. If the court does not appoint a committee, the role defaults to the PGT (*PPA* s 6).

f) *Private Committee*

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

The *PPA*, *Patient Property Act Rules*, BC Reg 31 1/76 (*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 their 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 below). In addition, if the applicant were appointed attorney, representative, or executor, it would be useful to include proof of this in the application. If they were appointed as attorney, representative or executor, they will likely be exempted from the requirement to post security.

g) *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 not less than **10 days prior** to the hearing of the application and, if applicable, to a committee already appointed. The PGT can review the application and oppose the appointment if the applicant is considered unsuitable. The PGT may also impose terms on the committee or make recommendations to the court that conditions be imposed on the committee. The PGT will file a Response, setting out the position of the PGT on the appropriateness of the applicant to act as committee and will make recommendations with respect to bonding or restrictions upon the committee's management of the adult's affairs.

h) Nomination of Committee by Patient

Under s 9 of the *PPA*, an individual has the power to nominate a committee of their 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 they were of full age and of sound and disposing mind (i.e. before the court declares them incapable). A person may want to execute a nomination and have a lawyer hold it in reserve to be released if there is an application for the appointment of a committee.

The nomination must be executed in accordance with the requirements for the making of a will under the *Wills, Estates and Succession Act (WESA)*, which are that it must be in writing, signed by the nominator and properly witnessed (*WESA* s 37).

Note that members of military forces are exempt from some of the formal requirements; see the *WESA* s 38.

Other than compliance with the *WESA*, 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 their name on the document. For a full precedent, see *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & 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).

i) 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 their moral obligation. Even though the patient’s estate initially pays costs, the PGT may later review the costs on a passing of accounts to ensure that 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.

The recent case of [Wong \(Re\), 2023 BCSC 22](#) reiterates that the costs of all proceedings are within the discretion of the court. In para 14 of *Wong (Re)*,

the court acknowledged that the default approach is to award special costs to all parties to a committee application whose good faith participation:

- was effected solely in the patient's best interests, and
- was unmotivated by the possibility of personal benefit or other improper ulterior considerations.

However, in para 14, *Wong (Re)* confirms that the Court may depart from this approach due to:

- concerns regarding an applicant's motives,
- how the applicant conducted the proceeding, and
- the estate's ability to bear a costs order.

Another recent case [Horton \(Re\), 2020 BCSC 87](#) is an example of the court deciding not to award costs in favour of either child who submitted competing applications for appointment as committee of the estate and person of their parent. Where committee petition is contested, costs payable from patient's estate are not guaranteed to be granted to the applicants. In particular, competing petitions driven by animosity or power struggle may not be awarded the costs as explained in *Horton (Re)*.

j) *Public Guardian and Trustee (PGT) as Committee*

The PGT is a corporation established under the *Public Guardian and Trustee Act* with a unique statutory role to protect the interests of British Columbians who lack legal capacity to protect their own interests. This may include acting as committee of estate and/or person where a person needs assistance and there is no other family member or friend who can assume this role, or where there is conflict among family members and a neutral party is preferred.

The Public Guardian and Trustee (PGT) may take steps to become committee of estate if:

- There is no valid enduring power of attorney, or the attorney is not fulfilling their role
- The individual is incapable
- There is a need for someone to make financial decisions
- There is no suitable person available and willing to apply to be committee
- There are no other less intrusive options

The PGT charges a fee to provide estate management services in accordance with the *Public Guardian and Trustee Fees Regulation*, BC Reg 312/2000 [PGT Fees Regulation].

The PGT can become committee of estate and/or person in one of two ways:

1. The PGT may become committee of estate and/or person by Court Order. The PGT may bring an application for the appointment or, in a proceeding to appoint a committee, where there is a conflict, one or more of the parties may seek an Order that the PGT be appointed. The PGT will provide a response in the proceedings setting out whether they

are prepared to take on this role. Typically, the PGT will only agree to act as committee of estate. A committee of person is required to make very personal decisions on behalf of the person and a family member or friend is usually more appropriate to act in this role if it is required.

2. As of December 1, 2014, the PGT may also become committee of estate by a legislative process set out in the AGA. See below.

For more information, visit: <https://www.trustee.bc.ca/Pages/default.aspx>.

B. Adult Guardianship Act: Statutory Property Guardian

The PGT may become statutory property guardian through a legislative process outlined in the AGA. A statutory property guardian is the equivalent to a committee of estate and has the duties and responsibilities to the adult as set out in the PPA.

1. The Legislative Committeeship Process

a) Assessment of Incapability

Several steps are required before an adult may be certified as incapable under the AGA:

1. Any individual can notify the PGT to investigate and determine whether intervention is warranted. If an intervention is warranted, the PGT can request an assessment of incapability by a qualified health care provider. A “qualified” health care provider is defined in s 3(2) of the *Statutory Property Guardianship Regulations [SPGR]*. It includes a health care provider as defined in the *Health Professions Act* and the *Social Workers Act*, as well as registrants of the British Columbia College of Social Workers; BC College of Nursing Professionals; College of Occupational Therapists of British Columbia; and registrants of the College of Psychologists of British Columbia
2. The qualified health care provider then assesses the adult according to the prescribed procedures and, if satisfied, prepares a Report of Assessment of Incapability along with a Details of Assessment for review by a health authority designate.
 - a) The procedure for an incapability assessment is outlined in s 5 through 10 of the *SPGR*. These procedures are also required for any subsequent reassessment of the adult’s incapability such as a review requested by the adult or an ordered review.
 - i) The assessment is composed of two parts: a medical component and a functional component.
 - ii) Prior to conducting the assessment, the adult must be given notice of the purpose of the assessment and their rights (see *SPGR* s 6(1)(a-f).
 - iii) Section 10 outlines that an assessment report must be completed by filling out a Form 1 and that details of the assessment must be attached. The qualified health care provider must also inform the adult of the result and the determination and offer the adult a copy of Form 1 and the details attached.
 - iv) The qualified health care provider does not need to inform the adult or offer a copy of the report if they have

reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property. A health authority designate is defined by s 4 of the *SPGR*.

3. Upon receiving the Form 1, the health authority designate may issue a Certificate of Incapability if they are satisfied the criteria have been met. The criteria should be set out here. The designate must also have consulted with the PGT and notified the adult and, if possible, any spouse or near relative of the adult, of the intention to issue a Certificate of Incapability.
 - a) The criteria are provided by sections 32(3)(a) to (e) of the *AGA*. It is important to note that the Certificate of Incapability cannot be signed if the adult has granted power over all of the adult's financial affairs to an attorney under an enduring power of attorney unless that attorney is not complying with the attorney's duties under the *Power of Attorney Act* or the enduring power of attorney, as applicable (*AGA* s 32(3)(e)).
 - b) The notice required to the adult and a near relative is outlined in s 11 of the *SPGR*. Section 11(3) states that the adult or near relative be given at least 10 days to respond. Notice is given in writing of the intention to issue a Certificate of Incapability. Notification does not need to be provided to the adult or near relative if the designate has reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property.
 - c) The Certificate of Incapability is Form 2 (*SPGR* s 12).
4. Once the Certificate of Incapability is signed by the health authority designate, the certificate must be forwarded to the PGT. The adult and a spouse or near relative must be informed that the Certificate of Incapability has been issued and provided with a copy.
 - a) The BC Government has created a form called "Health Authority Designate Concluding Letter" for the purpose of providing notice to the adult.
 - b) The PGT becomes statutory property guardian on the date that the certificate was signed by the health authority designate.
 - i) The PGT must inform the adult and, if information is available, a spouse or near relative, that the PGT has the power to manage the adult's financial affairs (*AGA* s 33(2)). The adult, or person acting on their behalf, may request a second assessment and potentially a court review (*AGA* s 33(3)).
 - ii) The adult or someone on behalf of the adult may request a second assessment within 40 days of being notified (*AGA* s 60(2)).

See *A Guide to the Certificate of Incapability Process Under the Adult Guardianship Act* available at <http://www.trustee.bc.ca/reports-and-publications/Documents/A%20Guide%20to%20the%20Certificate%20of%20Incapability%20Process%20under%20the%20Adult%20Guardianship%20Act.pdf>

b) Reassessment of Incapability

Once a Certificate of Incapability has been issued and the time for a second assessment has passed, or the second assessment confirms the assessment of incapability, s 34 of the AGA outlines three different ways that a reassessment can be made of an adult's incapability:

1. If the PGT informs the body that designated the health authority designate who issued the certificate of incapability that a reassessment should occur.
2. If the adult requests a reassessment and has not been reassessed within the preceding 12 months
3. The court orders a reassessment under s 35(3) of the AGA.

c) Court Review of Assessment of Incapability

After a second reassessment has occurred and the adult is still declared incapable, the adult can apply for a court review.

The parties to the court review are:

- The adult
- The body that designated the health authority who issued the certificate of incapability
- If ordered by the court, a person appointed under the *Patients Property Act*, as committee for the adult following a declaration under that Act that the adult is incapable of managing themselves

The court may order another reassessment of the adult's incapability.

During this review, the court may confirm the determination of incapability, or they may reject the determination of incapability and order that the statutory property guardianship is ended.

2. Ending Committeeship (Statutory Property Guardian Authority Under the AGA)

A Statutory Property Guardianship can be ended in one of four ways:

1. The PGT is satisfied that the adult no longer needs a Statutory Property Guardian.
 - a. Notice must be provided to the adult that they no longer have a Statutory Property Guardian.
2. After a second assessment, the health authority designate accepts that the adult is no longer incapable.
 - a. The adult will be provided a form entitled "Health Authority Designate Acceptance of Determination of Capability."
 - b. Notice must be provided to the PGT
3. A court order after a review of an incapability assessment under s 35 of the AGA
4. The court appoints a committee under the *PPA*

3. Serving as a Committee

a) Duties

The committee's general duty is to exercise their 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 their family (*PPA* s 18).

The committee has a fiduciary responsibility to the patient, and is not allowed to use or take any benefit from their position. When the patient has assets, the PGT 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 them 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 PGT, at the times directed by the PGT (*PPA* s 10(d)). This includes, if the PGT 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 PGT 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
- Paying patient's maintenance, care, and treatment costs out of the estate (*PPA* s 23)
- Bringing an action, if necessary, on behalf of the patient as their litigation guardian (*PPA* s 22)
- Exercising the rights, powers, duties, and privileges of the patient after the patient's death, as if they 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 (*PPA* s 24)
- Filing income tax returns and applying for pensions

Upon the patient's death, the committee is no longer required to pass accounts before the PGT, 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)

b) Powers

The committee of the estate has all the same rights, powers, and privileges over the patient's estate as the patient would have if they had legal capacity (*PPA* s 15). This includes the power to buy and sell property, open and/or close bank accounts, pay accounts etc. These powers include 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 their 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 PGT to monitor.

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 (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. For example, the committee must meet a certain standard of care in making investment decisions and their freedom to delegate such investment decisions is limited.

If a patient (as opposed to the committee) transfers their property while incapable, 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 (*AGA s 60(2)*).

NOTE: An Enduring Power of Attorney or representation agreement is *terminated* when a person becomes a “patient” by being declared incapable of managing their affairs by court order (*PPA s 19*). Therefore, the authority of a court order committee will never conflict with that conferred by a power of attorney. Where a committee is appointed under the *AGA* statutory property guardianship rules, any EPOA or s 7 RA for routine financial affairs is suspended (*PPA s 19.1*).

c) *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 PGT.

If the PGT acts as the committee of estate, its fees are charged in accordance with the *Public Guardian and Trustee Fees Regulation*. Fees may be reduced or waived where the PGT is satisfied that hardship or injustice would result from charging the full fee (*PGT Fees Regulation s 3*).

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 for private committees at www.trustee.bc.ca.

4. Discharge of a Committee

a) *Rescission of a Committee*

On application by the Attorney General, the PGT, or any other person, a judge may rescind the appointment of a person (other than the PGT) appointed as committee (*PPA s 6(2)*). The rescission is subject to the committee complying with the requirement to pass accounts set out in s 13 of the *PPA*.

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.

b) Discharge of a Committee

If a person regains their mental capability and ceases to be a "patient," that person, or the committee (other than the PGT), 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 PGT 10 days prior to the application.

The judge who hears the application may, and shall if asked by the PGT, order the committee to pass accounts. The order declaring the person capable may also discharge the committee upon passing accounts or upon receipt of a waiver of that requirement from the adult. There will almost always be outstanding accounts.

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)).

NOTE: At this time there is no section under the *PPA* governing the discharge of the PGT as committee.

c) Release from Liability

A discharged committee is released from liability concerning the management of the estate except in respect of undisclosed acts, neglects, defaults, or accounts, or where the committee was dishonest or unlawful in their conduct (*PPA* s 13(4)(b)). Disagreement between the person who has ceased to be a patient and the committee regarding management of the estate would mitigate against the discharge of the committee. In essence, if a former patient regains capacity, they can hold the committee to account for how they have managed the patient's assets while the patient was incapable. If their concerns are legitimate, the committee may not be discharged from liability for those decisions and actions.

VI. 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*; s 34 and 35 of the *PAA*; s 31 of the *RAA*; and s 17 to 19 of 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 is available online at <https://www.bcli.org/project/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, serious physical, mental or emotional harm or substantial damage to the adult or loss in respect of the adult's financial affairs. This definition 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. In some instances, it may be appropriate to contact a designated agency, or the PGT. However, the key response is generally to listen to the individual's description of their experience, and to 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?

BC's PGT office has prepared a useful “decision tree” to help with deciding where to refer someone who is abused or neglected. The front half is the decision tree itself, which is designed to guide the reader to the appropriate type of referral. The back contains a table setting out the response from the three resources – the police, the designated agency, and the PGT's office. Please see **Appendix B** for the Decision Tree.

The CCEL has published the following guiding principles for responding to concerns about abuse, neglect, or self-neglect: (*A Practical Guide to Elder Abuse and Neglect Law in Canada* (2011)).

1. Talk to the individual

Ask questions. Talk to the person about their 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 the individual. Identify support networks and solutions that suit their individuality.

3. Recognize the right to make decisions

Mentally capable 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 the 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 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 individual, 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 must educate yourself about elder abuse.

Another useful document provided by the Public Guardian and Trustee is called *Decision Tree: Assisting an Adult Who is Abused, Neglected or Self Neglecting* and the related videos (See **Section II. C: Secondary Sources**).

1. Designated Agencies

There is no duty for the general public to report abuse, neglect, or risk in BC. 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 their 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*, and the *DAR*. 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, Island Health Authority and Northern Health Authority). For contact information, refer to section **II. E: Designated Agencies** in this chapter.

A DA must determine whether an adult needs support and assistance if the agency receives a report of abuse or neglect, has reasons to believe that an adult is abused or neglected, or receives a report that the adult's representative, guardian, or monitor has been hindered from visiting or speaking with the adult (*AGA* s 47). Where an adult is found to be in need of support or assistance, a DA may take any of the following courses of action: (See s 47(3) and s 51 of the *AGA*).

- 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
- Apply to the court for an order authorizing the provision of services

Designated Agencies (DAs) must involve the adult, to the greatest extent possible, in decisions about how to seek support and assistance, and in decisions regarding the provision of support and assistance necessary to prevent abuse or neglect in the future (*AGA* s 52). DAs are also legally required to respect the right for an adult with capacity to refuse support or assistance (*AGA* s 2).

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 for legal professionals in BC. However, a report to a DA can be made anonymously.

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 **II D: Resource Organizations** and **II. E: 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: <http://www.bcli.org/project/elder-abuse-and-neglect-what-volunteers-need-know>.

2. Public Guardian and Trustee

The Public Guardian and Trustee (PGT) has the statutory authority to investigate all situations where there appears to be financial abuse, neglect, or self-neglect. A designated agency discussed above may refer an investigation of abuse to the PGT.

The statutory powers, set out in s 17 of the *PGTA*, allow the PGT to investigate and audit the affairs, dealings, and accounts of:

- A trust, a beneficiary of which is a young person, an adult who has a guardian, or an adult who does not have a guardian but who is apparently abused or neglected, as defined in the *AGA*
- If the PGT has reason to believe that the interest in the trust, or the assets of the young or adult, may be at risk, or that the representative, guardian or attorney has failed their duties
- An adult who does not have a guardian, a representative or an attorney under an *EPOA* but who is apparently abused or neglected, as defined in the *AGA*
- An attorney under a *POA* or *EPOA*, where the PGT has reason to believe assets are at risk or person is not fulfilling their duties
- A representative
- A guardian

The statutory powers also allow the PGT to:

- Require a trustee, attorney, representative, or guardian to provide accounts necessary for an audit (*PGTA* s 18(2))
- Ask the court for an order allowing access to information previously denied when undertaking an audit or investigation (*PGTA* s 18(4))
- Protect a person’s financial affairs and freeze assets in urgent situations for up to 30 days, and renew the instructions up to three times for a total of 120 days (*PGTA* s 19)

Any person may notify the PGT where a representative or attorney is: (*RAA* s 30(1)(h); *PAA* s 34(2)(c))

- 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
- Otherwise failing to comply with an *RA*, or an *EPOA*

Any person can also make an objection to the PGT 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 (*PAA* s 34(2)(b)), or a Representation Agreement (*RAA* s 30(1)(b)).

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

- Conduct an investigation to determine the validity of the objection
- Apply to the court for an order confirming a change to, or the revocation of, the RA or cancelling part of the 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 out of the adult's assets
- Take any other action considered necessary

On receiving a report concerning Power of Attorneys, the PGT must promptly review the situation and may do one or more of the following (*PAA* s 34(3)):

- Conduct an investigation to determine the validity of the report;
- Apply to the court for an order described in s 36 of the *PAA*
- Advise the person who made the report to apply to the court for an order described in s 36 of the *PAA*
- Make a report under s 46 of the *AGA*
- Take steps under the *PPA* to become a committee
- Take no action, or take any action that the PGT considers necessary

See Part 3 of the *PGTA* for the planning and accountability obligations of the PGT.

For more, please visit the PGT website:

<https://www.trustee.bc.ca/Pages/default.aspx>.

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

Refer to section **II. D: 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.

VII. SOURCES AND RESOURCES

- *A Guide to the Certificate of Incapability Process Under the Adult Guardianship Act*, Public Guardian and Trustee of BC, May 1, 2016, online at <https://www.trustee.bc.ca/sites/default/files/2024-03/certificate-incapability-process-guide.pdf>
- *A Practical Guide to Elder Abuse and Neglect Law in Canada*, Canadian Centre for Elder law, July 2011, online at http://www.bcli.org/sites/default/files/Practical_Guide_English_Rev_JULY_2011.pdf.
- *Act on Abuse and Neglect: A Guide to Prevent and Respond*, Vancouver Coastal Health, online at <https://www.vch.ca/sites/default/files/import/documents/ReAct-Manual.pdf>
- *Adult Guardianship Update*, Continuing Legal Education Society of British Columbia, 2007. Online at <https://online.cle.bc.ca/CoursesOnDemand/ContentByCourse/Papers?courseId=4029>.
- *Decision Tree: How to Assist an Adult Who is Abused, Neglected or Self Neglecting*, Public Guardian and Trustee of BC, May 2015, online with accompanying videos at : <https://www.trustee.bc.ca/sites/default/files/2024-05/decision-tree.pdf>
- *Elder and Guardianship Mediation Report*, Canadian Centre for Elder Law, 2012, online at https://eapon.ca/wp-content/uploads/2021/09/Elder-and-Guardianship-mediation-Report_Jan_30_2012.pdf
- *Elder Mediation*, Continuing Legal Education Society of British Columbia, 2012. Note: there are a number of useful publications by searching 'Elder Law' on the CLEBC website: <https://online.cle.bc.ca/CoursesOnDemand/ContentByPracticeArea/Papers?taxonomyId=647>.
- *Enduring Powers of Attorney: Areas for Reform*, Western Canada Law Reform Agencies, 2008, online at https://lawreformcommission.sk.ca/EPA_final.pdf
- *How You Can Help: Option for Helping Adults Who Cannot Manage Financial and Legal Matters on Their Own*, Public Guardian and Trustee of BC, December 2014, online at <https://www.trustee.bc.ca/sites/default/files/2024-07/options-to-consider.pdf>
- *It's Your Choice: Personal Planning Tools*, Public Guardian and Trustee of BC, December 2014, online at <https://www.trustee.bc.ca/adults/personal-planning-tools#personal-planning>
- *Life Matters Too: Incapacity Planning with Powers of Attorney and Representation Agreements*, Continuing Legal Education Society of BC, 2016. Online at: <https://online.cle.bc.ca/CoursesOnDemand/ContentByCourse/Papers?courseId=4615>.
- *O'Brien's Encyclopaedia of Forms*, 11th ed, V., c 34, 1988. This chapter is a good reference for examples of specific clauses one could include in a Power of Attorney document. Copies are available at the Vancouver Public Library.
- *Protecting Adults from Abuse, Neglect and Self Neglect*, Public Guardian and Trustee of BC, December 2014, online at: <https://www.trustee.bc.ca/adults/protecting-vulnerable-adult-abuse-neglect-or-self-neglect>
- *Public Guardianship & Trustee Handbook*, Continuing Legal Education Society of British Columbia, 2015 (Cunningham et al.). Online at: <https://store.cle.bc.ca/products.aspx?search=Public+Guardian+and+Trustee+Handbook>
- *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, BC Law Institute, October 2011, online at https://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf.
- *Review of Representation Agreements and Enduring Powers of Attorney: Undertaken for the Attorney General of the Province of British Columbia*, A J McClean, 2002. Online at <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/351806/mcclean-report.pdf>.
- *Services to Adults Assessment and Investigation Services*, Public Guardian and Trustee of BC, March 2015, online at [Protecting a vulnerable adult from abuse, neglect or self-neglect | Public Guardian and Trustee of British Columbia](https://www.trustee.bc.ca/adults/protecting-a-vulnerable-adult-from-abuse-neglect-or-self-neglect)

- *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton). Online at <https://www.cle.bc.ca/wills-and-personal-planning-precedents-an-annotated-guide/>.

A. **Resource Organizations**

Seniors First BC (Formerly known as the BC Centre for Elder Advocacy and Support)

#150-900 Howe Street
 Vancouver, BC V6Z 2M4
 Telephone: 604-688-1927

Seniors Abuse and Information Line (Confidential)

Toll Free: 1-866-437-1940
 Telephone: (604) 437-1940
 Fax: (604) 437-1929

Website: <http://seniorsfirstbc.ca/>

Email: info@seniorsfirstbc.ca

Seniors First BC 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, Representation Agreements, and consumer fraud. Seniors First BC 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.

Canadian Center for Elder Law (CCEL)

Faculty of Law, University of British Columbia
 1822 East Mall
 Vancouver, BC V6T 1Z1

Telephone: (604) 822-0142

Fax: (604) 822-0144

Website: www.bcli.org/ccel

E-mail: ccels@bcli.org

CCEL is a national non-profit organization 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.

BC Association of Community Response Networks (BC CRNs)

Website: www.bccrns.ca

CRNs are located throughout BC. 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 – ReAct Adult Protection Program (VCH ReAct)

Corporate Office

Toll Free: 1-877-732-2899

11th Floor, 601 West Broadway

Telephone: (604) 904-6173

Vancouver, BC V5Z 4C2

Fax: (604) 904-6179

Website:

www.vchreact.ca

E-mail: react@vch.ca

Vancouver Coastal Health is a Designated Agency under the AGA. VCH React provides educational materials to help health care providers recognize and respond to abuse, neglect and self-neglect of vulnerable adults. Each health authority has a similar program. The following contact and phone numbers are provided by the Public Guardian and Trustee website Assessment and Investigations page <http://www.trustee.bc.ca/services/services-to-adults/Pages/assessment-and-investigation-services.aspx>

- **Fraser Health:** 1-877-REACT-08 (1-877-732-2808); react@fraserhealth.ca
- <https://www.fraserhealth.ca/health-topics-a-to-z/adult-abuse-and-neglect/getting-help-for-adult-abuse-and-neglect#.W9vJ-GhKiUk>
- **Interior Health:** For direct community numbers visit <https://www.interiorhealth.ca/information-for/seniors/adult-abuse-and-neglect>
- **Northern Health:** Prince George Adult Protection Line 250-565-7414
- **Vancouver Island Health Authority:**
 - South Island: 1-888-533-2273
 - Central Island: 1-877-734-4101
 - North Island: 1-866-928-4988

Nidus Personal Planning Resource Centre and Registry

(Mail only) 2391 Crescent Way

Telephone: (604) 408-7414

Abbotsford, BC V2S 3M1

Fax: (604) 801-5506

Website: www.nidus.ca

E-mail: info@nidus.ca

Nidus provides public legal education on personal planning and related matters, specializing in Representation Agreements. They have made available on their website various factsheets and guides on personal planning matters, as well as self-help forms for creating Representation Agreements. Nidus also operates a centralized registry for personal planning documents, which allows for secure, online storage of planning documents and the option to allow third parties like hospitals and financial institutions to search for your record.

Public Guardian and Trustee of BC

700 - 808 West Hastings Street
Vancouver, BC V6C 3L3

Telephone: (604) 660-4444

Fax: (604) 660-0374

Website: www.trustee.bc.ca

E-mail: mail@trustee.bc.ca

The Public Guardian and Trustee produces publications on various aspects of adult guardianship as noted above. The PGT can conduct investigations where there are concerns of financial abuse, neglect, or self-neglect. The PGT acts as a committee, when required, and may agree to act as an attorney. The PGT may also make health care decisions as a Temporary Substitute Decision Maker. The PGT remains bound by statutory law and is established under the *Public Guardian and Trustee Act*, RSBC 1996, c 383 [PGTA].

B. Designated Agencies

In BC, 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 BC are: (see s 61 of the *Adult Guardianship Act*, RSBC 1996, c 6 [AGA], and the *Designated Agencies Regulation*, BC Reg 38/2007 [DAR])

Community Living BC

Phone: (604) 664-0101

Toll-Free: 1-877-660-2522

Website: www.communitylivingbc.ca

Vancouver Coastal Health Authority

Phone: (604) 736-2033

Toll-Free: 1-866-884-0888

Website: <http://www.vchreact.ca/>

Fraser Health Authority

Phone: (604) 587-4600

Toll-Free: 1-877-935-5669

Website: <http://www.fraserhealth.ca>

Island Health Authority

Phone: (250) 370-8699

Toll-Free: 1-877-370-8699

Website: www.viha.ca

Interior Health Authority

Phone: (250) 469-7070

Toll-Free: 1-844-870-4754

Website: www.interiorhealth.ca/

Northern Health Authority

Phone: (250) 565-2649

Toll Free: 1-866-565-2999

Adult Protection Line: 250-565-7414

Toll Free: 1-844-465-7414

Website: www.northernhealth.ca

Providence Health Care Society

St. Paul's Hospital—Phone: (604) 862-2344

Mount St. Joseph's Hospital—Phone: (604) 874-1141

Holy Family Hospital—Phone: (604) 321-2661

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

VIII. Appendix

Power of Attorney Forms and Precedents

- A. ENDURING POWER OF ATTORNEY
- B. BC PUBLIC GUARDIAN AND TRUSTEE DECISION TREE ON ADULT ABUSE AND NEGLECT

A. *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 BC) students should ensure that the automatic revocation of prior POAs (para 2) should not be included in the POA without very clear instructions from the 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, 2019 (Bogardus, Wetzel & 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	

ALTERNATE ATTORNEY <i>(Strike out if an Alternate Attorney is not appointed)</i>	
Signature of Alternate Attorney	Date Signed (YYYY / MM / DD)
Print Name	
WITNESSES TO ALTERNATE ATTORNEY'S SIGNATURE (See Note 6 – information for witnesses)	
WITNESS NO. 1	
• Witness No. 1 must sign in the presence of the Alternate 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 Alternate Attorney and Witness No. 1.	
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)

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)

**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)

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)

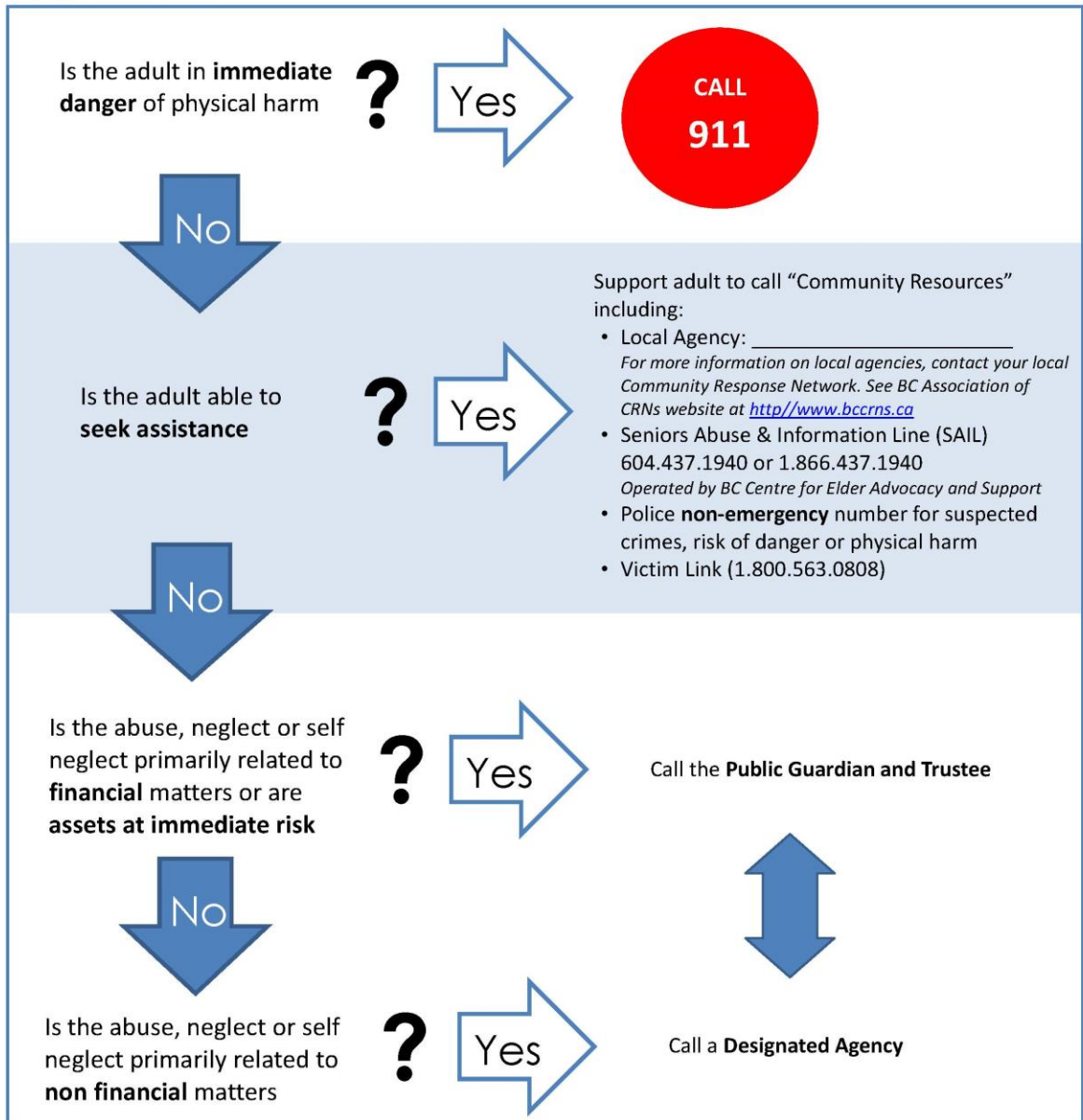
- (a) The following persons may not be a witness:
- i. A person named in the enduring power of attorney as an attorney;
 - ii. A spouse, child or parent of a person named in the enduring power of attorney as an attorney;
 - iii. An employee or agent of a person named in the enduring power of attorney 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).

How to Assist an Adult Who is Abused, Neglected or Self Neglecting: A Decision Tree for Effective Referrals for Adults in BC Who may be Vulnerable and/or Incapable

For an introductory video to the law in BC on responding to abuse and neglect, and for information on how to use this decision tree, visit <http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx> and see page 2 for information about calling the police, Designated Agencies and the Public Guardian and Trustee (PGT). For more information on Designated Agencies, the PGT, and Community Response Networks (CRNs) see the PGT publication *Protecting Adults from Abuse Neglect and Self Neglect* at <http://www.trustee.bc.ca>



B. *BC Public Guardian and Trustee Decision Tree on Adult Abuse and Neglect*

Police	Designated Agency: Regional Health Authorities and Community Living BC (CLBC)	Public Guardian and Trustee (PGT)
For a video on role of the Police, visit http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx	For a video on the role of Designated Agencies, visit http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx	For a video on role of the PGT, visit http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx
Governing Legislation:	Governing Legislation:	Governing Legislation:
<i>Criminal Code</i> RSC 1985 c. C-46	<i>Adult Guardianship Act</i> RSBC 1996 c. 6	<i>Public Guardian and Trustee Act</i> RSBC 1996 c.383
Why would you call?	Why would you call?	Why would you call?
You suspect a crime has occurred, might occur or someone is exhibiting behavior indicating a lack of wellbeing and unpredictability.	You are concerned that an adult is being abused, neglected or is self neglecting and is unable to seek support and assistance on his or her own due to: <ul style="list-style-type: none"> physical restraint, a physical handicap limiting ability to seek help, or an illness, disease, injury or other condition affecting ability to make decisions about the abuse or neglect <p>The adult may live in his or her own home, the home of a relative, a care facility, or any other place except correctional centres.</p>	You have reason to believe that an adult is not capable of managing his or her financial and legal affairs and there is imminent risk to his or her assets. Concerns may include: <ul style="list-style-type: none"> the adult appears to be under duress and going along with decisions he or she does not agree with there may be financial mismanagement of an adult's financial affairs the adult may not be able to look after his or her financial affairs and needs someone to make financial decisions someone with authority to manage the adult's financial affairs may not be fulfilling his or her duties and responsibilities
Where should you call?	Where should you call?	Where should you call?
<ul style="list-style-type: none"> Emergency - Call 911 if you suspect <ul style="list-style-type: none"> Immediate risk to a person's physical safety, or A crime is occurring Local Police non-emergency Tel: _____ 	See www.trustee.bc.ca <i>Assessment and Investigation Services</i> for links to all Designated Agencies, or visit your Health Authority website (search abuse and neglect) <ul style="list-style-type: none"> Local Health Authority Tel: _____ Local Community Living BC (CLBC) Tel: _____ 	See www.trustee.bc.ca <i>Assessment and Investigation Services</i> for PGT referral form. Contact Information: <ul style="list-style-type: none"> Toll free Tel: 1.877.511.4111 Local Tel: 604.660.4507 Toll free Fax: 1.855.660.9479 Local Fax: 604.660.9479 Email: AIS-HCD@trustee.bc.ca
What can you expect?	What can you expect?	What can you expect?
You will be asked to provide information about the nature of your concern, the adult you feel is a victim and any possible suspect(s). You can expect that some basic information about yourself will also be requested.	You will be asked to provide information about the adult and the nature of your concern.	You will be asked to provide information about the nature of your concern, personal information about the adult and any decision maker.
Actions May include:	Actions May include:	Actions May include:
<ul style="list-style-type: none"> Attending the location Dispatching special units where available Visiting adult, gathering information and evidence which may indicate a criminal offence such as: <ul style="list-style-type: none"> assault, sexual assault, failure to provide necessities of life theft, theft by power of attorney fraud, forgery, extortion Liaising with Designated Agency and/or Public Guardian and Trustee as required Assessing for adult's wellbeing Considering peace bonds, no contact orders Referring to community resources Considering/recommending charges 	<ul style="list-style-type: none"> Interviewing adult and others Requesting information Offering support and assistance (includes referral to community resources) Liaising with Public Guardian and Trustee and/or police as required Reporting suspected crimes to police Exercising emergency powers to enter and remove adult to a safe place Obtaining a restraining order Obtaining a court order for support and assistance 	<ul style="list-style-type: none"> Gathering additional information Requesting account information from financial institutions and current decision makers (attorney, representative, trustee, committee) Liaising with Designated Agency, community services, or police, as appropriate If urgent risk to assets, exercising protective powers such as: <ul style="list-style-type: none"> stopping withdrawals or sale of assets redirecting income for the adult's health or safety Looking for an appropriate decision maker. If none, and a decision maker is needed, consider obtaining authority as Committee of Estate, or in exceptional circumstances, Committee of Person.

Developed in partnership by the Public Guardian and Trustee, RCMP BC "E" Division, Crime Prevention Services, and Fraser Health Authority © Public Guardian and Trustee. Licensed under CC BY-NC-ND 3.0 <https://creativecommons.org/licenses/by-nc-nd/3.0/>. It can be used without asking permission, but must not be used for commercial purposes or altered in any way. For inquiries contact the PGT at mail@trustee.bc.ca. Readers are referred to their organization's accompanying training materials and organizational policies for making reports to the police, designated agencies, or the PGT.