CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

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CHAPTER FIFTEEN: ADULT GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING

I. INTRODUCTION

A. THE SCOPE OF GUARDIANSHIP AND SUBSTITUTE DECISION-MAKING LAW IN BC

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

1. Mental Capacity: The law presumes that an adult is capable of making decisions and provides statutory tests for determining incapability in different contexts.

2. Advance Planning Documents:

   The law allows a capable adult to appoint a substitute decision-maker for financial or health care decisions in two types of legal documents: Enduring Power of Attorney (for financial decisions only); and Representation Agreement (for health care consent, personal care decisions, and routine financial decision-making). The law also allows a capable adult to provide instructions giving or refusing consent to specific health care in an Advance Directive.

3. Guardianship: Where an adult is incapable and does not have Advance Planning Documents in place, the court may appoint a guardian (called a Committee of Estate or Committee of Person) to act on behalf of an incapable adult. Under the AGA the Public Guardian and Trustee may also be appointed Committee of Estate by a statutory process. This non-court process requires a health authority designate to issue a certificate of incapacity).

   NOTE: Effective December 1, 2014 Part 2. 1 of the AGA replaced the PPA rules governing the process for issuing and terminating a certificate of incapacity. Under the new rules, when a certificate is issued the Public Guardian and Trustee becomes a “statutory property guardian”. However, the PPA (effective December 1, 2014) defines a “committee” to include a statutory property guardian under the AGA and the PPA applies except for the rules governing reassessment and ending the authority. Note also that if a certificate was issued before Dec 1, 2014 under the PPA, the AGA applies for purposes of the new rules for reassessments and termination.

4. Abuse, Neglect and Self-Neglect: The law establishes a legal framework for Designated Agencies to receive reports and respond when adults experience abuse, neglect or self-neglect and need support and assistance to protect themselves from further harm. The law also authorizes the Public Guardian and Trustee of BC to investigate concerns about financial abuse, neglect and self-neglect when it has reason to believe the adult is not capable, and to take steps to protect assets in urgent situations.

Under each of these areas of the law, it is crucial that substitute decision-makers, court-appointed guardians, legal and financial advisors, social workers and health care providers consult with the adult to determine how to act in accordance with the person’s wishes, values and beliefs. Substitute decision-maker(s) and guardian(s) are legally obligated to act according to the wishes, values and beliefs of the adult who appoints them or is need of a guardian. The guiding principle behind BC’s adult guardianship legislation is that the adult is presumed to be capable, and should receive support to make decisions.
The key is to foster the independence of the adult through support, meaning involving the adult to the greatest degree possible when making decisions on their behalf.

B. MENTAL CAPACITY

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

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

1. an adult who meets the appropriate test for mental capacity can name the substitute decision-maker(s) in an Advance Planning Document (e.g. an Enduring Power of Attorney or a Representation Agreement); or

2. an adult who is no longer capable of making financial or health care decisions may have a guardian (called a Committee of Estate or Committee of the Person) appointed by the courts to make decisions. The Public Guardian and Trustee may also become a Statutory Property Guardian if a certificate of incapability is issued by a “health authority designate” stating the adult is incapable of managing his or her financial affairs.

Note that pursuant to s 9 of the PPA an adult may nominate a committee and the nomination document may be one of an adult’s Advance Planning Documents.

3. An adult may also make an advance directive that consents to, or refuses, specified health care.

An adult who has made a Power of Attorney, Representation Agreement or Advance Directive, maintains the right to make decisions about legal, financial and health care matters, even after these legal documents are made. Once the adult is incapable, the substitute decision-maker has a legal duty to act in accordance with the adult’s instructions, values, wishes and beliefs, regardless of capacity. (s 19(2), PAA; s 16, RAA; s 19, HCCFA). The substitute decision maker also has a duty, to the extent reasonable, to foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult.

The appropriate test for capability to make an Advance Planning document is set out in the relevant legislation. The statutory tests for incapability in each statute are summarized below. In many cases, Advance Planning Documents will specify what is required to determine incapability in order to bypass a court process.

1. Power of Attorney (POA)

As mentioned above, an adult is presumed to have capacity, unless proven otherwise. According to s 11 of the Power of Attorney Act, RSBC 1996, c 370 [PAA], an adult is presumed capable of making decisions about financial affairs and understanding the nature and consequences of making, changing, or revoking an Enduring Power of Attorney (EPOA).

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

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

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

NOTE: This is a complex and rapidly changing area of the law. This above statutory test for incapacity in s 12(2) of the PAA came into effect on September 1, 2011. This test is significantly broad in scope and appears to only apply to an EPOA. However, it remains to be seen how this test will be interpreted by the courts. As of July 06, 2017, there has been no judicial interpretation of this test.

2. Health Care Consent

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

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

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

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

Difficulties or barriers in communicating are not adequate grounds for deciding that an adult is incapable. For example, in Bentley (Litigation guardian of) v. Maplewood Seniors Care Society, [2014] BCJ No 181 at paragraph 55 Justice Greyell stated that the legislature “precluded the possibility that a challenge to an adult’s capability could be premised on her method of communicating”. Instead, incapacity is determined in accordance with s 7 of the HCCFA, which requires a health care provider to decide whether or not the adult understands the information given by the health care provider and that the information applies to the situation of the adult in need of health care.
3. **Temporary Substitute Decision Makers**

If a health care provider determines that an adult is not capable of consenting to health care that is being proposed, the health care provider will need to obtain consent from another adult, who is able to give or refuse consent on behalf of the incapable adult. The health care provider can get consent from a substitute decision-maker named in a Representation Agreement. An individual may also document consent or refuse consent in advance through an Advance Directive. With the exception of the provision of emergency health care (s 12(1), HCCFA), the health care provider will need to get consent from a Temporary Substitute Decision-maker (TSDM), if neither a Representation Agreement nor an Advance Direction are in place (or the AD does not address the medical issue for which consent is needed), and there is no appointed guardian (called a Committee of Person).

The HCCFA provides a hierarchical, default list of TSDMs, as follows (s 16):

- spouse/partner (only if married or in a marriage-like relationship)
- adult child (over 19 years old)
- parent
- sibling
- grandparent
- grandchild
- other relatives by birth or adoption (not in-laws or step-children)
- close friend
- person immediately related by marriage (includes in-laws or step-children)

A TSDM has authority to decide whether to give or refuse consent, in accordance with the adult patient’s wishes, values and beliefs. The authority of a TSDM to give or refuse consent is generally valid for 21 days, but this time period may be extended upon written confirmation by the health care provider (ss 17 and 19, HCCFA). If the health care provider has reasonable grounds to believe that the adult patient may be capable during this time period, the health care provider must again determine the adult’s capability in accordance with s 7 of the HCCFA. If an adult patient is deemed to be capable again, consent must be given or refused by the adult patient. For more information, refer to section V. H. 1: **Temporary Substitute Decision-makers (TSDM)** in this chapter below.

4. **Representation Agreement (RA)**

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

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

- making, changing or revoking a s 7 or s 9 RA;
- making decisions about personal care, health care and legal matters; and
- conducting the routine management of their own financial affairs.
An adult who has diminished capacity may still be allowed to make, change or revoke a s 7 RA, even when the adult is incapable of: (s 8(1), RAA)

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

The statutory test to determine incapacity for a standard s 7 RA is set out in s 8(2) of the RAA. In determining whether an adult is incapable of making a s 7 RA, all relevant factors must be considered. The legislation provides four examples of factors that may be relevant. In any given situation, there may be other factors that will need to be considered. The examples are:

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

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

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

5. **Advance Directive (AD)**

A capable adult may also choose to make an Advance Directive (AD), which is a legally-binding document that provides instructions with respect to giving or refusing consent to health care treatment or procedures. According to s 19.1 of the *HCCA*, an adult is presumed to have capacity to make an AD, unless there is evidence that he or she is incapable of understanding the nature and consequences of the AD.

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

- the scope and effect of the health care instructions set out in the AD; and
- that a temporary substitute decision-maker (TSDM) will not be chosen by the health care provider to make decisions on behalf of the adult about the health care described in the AD except in circumstances set out in s 19. 8 of the *HCCA*.

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

**NOTE:** Health care consent is a complex and rapidly changing area of the law. Care should be taken in assessing capacity to make an RA or AD and assessing the legal validity of these documents.
6. **Designated Agencies – Support and Assistance**

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

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

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

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

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

C. **ADVANCE PLANNING DOCUMENTS**

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

- **Power of Attorney (POA):** an adult (called the ‘adult’ in the legislation) with capacity may choose to appoint another person (called the Attorney) to act on his or her behalf, only in matters concerning financial affairs (e.g. property, finance, banking, business, etc).

- **Representation Agreement (RA):** an adult with the requisite mental capacity may choose to appoint another person (called a Representative) to assist them in making decisions or make decisions on their behalf. The two main categories of RAs are s 7 and s 9 RAs (For differences between s 7 and s 9 RAs see Section V. A: Types of Representation Agreements).

- **Advance Directive (AD):** an adult with capacity may choose to give or refuse consent to health care or give health care instructions in an AD, which will only come into effect when the adult is incapable and in need of health care.

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

II. GOVERNING LEGISLATION AND RESOURCES

A. GOVERNING LEGISLATION

*Adult Guardianship Act*, RSBC 1996, c 6 [AGA].

*Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2011 [AGR].

*Business Corporations Act*, SBC 2002, c 57, ss 386–396 [BCA].

*Designated Agencies Regulation*, BC Reg 38/2007 [DAR].

*Evidence Act*, RSBC 1996, c 124 [E.A].


*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].

*Mental Health Act*, RSBC 1996, c 288 [MHA].

*Patients Property Act*, RSBC 1996, c 349 [PPA].

*Power of Attorney Act*, RSBC 1996, c 370 [PAA].


*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 203/2014 [SPGR].

*Wills, Estates, and Succession Act*, SBC 2009, c 13 [WESA].

B. SECONDARY SOURCES OF LAW AND PRACTICE


This chapter is a good reference for examples of specific clauses one could include in a Power of Attorney document.


Adult Guardianship and Elder Law Issues, Continuing Legal Education Society of British Columbia, 2002. [Note that there are a number of useful publications by searching “Elder Law” on the CLEBC website]

Take Charge-It’s Your Life! (Make a Representation Agreement), The Representation Agreement Resource Centre & The People’s Law School, Vancouver, July 2002, online at http://www. nidus. ca/PDFs/Tk_Chrg. pdf.


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


Decision Tree: Assisting an Adult Who is Abused, Neglected or Self Neglecting, Public Guardian and Trustee of BC, May 2015, online at http://www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf. See also the accompanying videos.

Protecting Vulnerable Adults: Recent Legislative Reform, Continuing Legal Education Society of British Columbia, 2014.

C. RESOURSE 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: bcli@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 – Re:Act Adult Protection Program (VCH ReAct)
Corporate Office
11th Floor, 601 West Broadway
Vancouver, BC V5Z 4C2
Toll Free: 1-877-REACT-99
Telephone: (604) 904-6173
Fax: (604) 904-6179
Website: www.vchreact.ca
E-mail: react@vch.ca

Vancouver Coastal Health is a Designated Agency under the Adult Guardianship Act, RSBC 1996, c 6 [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)
  http://www.fraserhealth.ca/your_care/adult_abuse_and_neglect/getting_help/getting_help
- **Interior Health:** For direct community numbers visit www.interiorhealth.ca/report.aspx
- **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**
1440 West 12th Avenue
Vancouver BC V6H 1M8
Telephone: (604) 408-7414
Toll Free: 1-877-267-5552
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 Public Guardian and Trustee can conduct investigations where there are concerns of financial abuse, neglect or self-neglect. The Public Guardian and Trustee acts as a committee, when required, and may agree to act as an Attorney. The Public Guardian and Trustee may also make health care decisions as a Temporary Substitute Decision Maker. The Public Guardian and Trustee remains bound by statutory law, and is established under the Public Guardian and Trustee Act, RSBC 1996, c 383 [PGTA].
D. **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 [RAA], 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](http://www.communitylivingbc.ca/)

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

**Fraser Health Authority**
Phone: (604) 587-4600
Toll Free: 1-877-935-5669
Website: [http://www.fraserhealth.ca](http://www.fraserhealth.ca)

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

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

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

**Providence Health Care Society**
St. Paul's Hospital—Phone: (604) 806-8739
Mount St. Joseph's Hospital—Phone: (604) 877-8377
Holy Family Hospital—Phone: (604) 322-2311
Website: [http://www.providencehealthcare.org](http://www.providencehealthcare.org)
III. OVERVIEW OF INCAPACITY

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

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

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

A. GUARDIANSHIP AND COMMITTEESHIP

When an individual is mentally incapable of managing his or her affairs, it is possible for someone else to be legally enabled to manage the individual’s affairs or to make decisions about his or her personal care. This can be done through a court order (outlined in the PPA).

A court may appoint a person or the Public Guardian and Trustee of BC to be a “Committee (pronounced caw-mi-TAY, with emphasis on the end of the word.). Consult *Re Matthews*, 2013 BCSC 1045, for an example of where the court had to choose between two people as to who to appoint as committee. See section VII: Guardianship and Committeeship.

The Public Guardian and Trustee of BC can also be appointed as “statutory property guardian” to manage that individual's financial affairs (outlined in the AGA).

B. MARRIAGE AND GUARDIANSHIP OF CHILDREN

1. Marriage

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

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

3. **Children**

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

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

C. **CAPACITY TO MAKE A CONTRACT**

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

D. **DRAFTING A WILL**

Section 36(1) of the *Wills, Estates and Succession Act* [WESA] provides that “[a] person who is 16 years of age or older and who is mentally capable of doing so may make a will.” However, the capacity necessary to draft a will is not set out in the Act, but has been developed through common law.

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

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

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

There is no statutory authority specifically declaring that a person with a developmental disability or cognitive impairment cannot draft a will. However, it is advised that in these circumstances, steps should
be taken to document the person’s capacity to make the will by the person assisting with making the will. The appointment of a committee prior to the testator having made the will in question does not in itself demonstrate incapacity to make a will, though there is a much heavier burden on the person making the will to prove testamentary capacity under such circumstances.

IV. POWER OF ATTORNEY

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

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

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

Anyone aiding another to create a POA should ensure that the adult understands and appreciates the nature and consequences of a POA.

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

A. TYPES OF POA

There are two types of POAs. It is important to find out what type of POA would best suit the Adult’s needs. The first is governed by Part 1 of the Power of Attorney Act, and is sometimes called a General POA. The second is governed by Parts 2 and 3 of the Power of Attorney Act, 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 continue 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 he or she becomes incapable?
- How will incapacity be decided?
- Does 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 *Power of Attorney Act*, and by common law for agency relationships. These are effective immediately, or as specific on the document, and ongoing until the loss of capacity, revocation or death. The test for capacity for making general

2. **Enduring**: Enduring POAs (EPOAs) are governed by Parts 2 and 3 of the *Power of Attorney Act*. These can be effective immediately, or springing. (See note below for details on springing EPOAs.) Enduring POAs continue in the event that the Adult lose capacity, and only ends upon revocation or death.

   **NOTE:** 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 institutions 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. The most common POA is the Enduring Power of Attorney (EPOA), which allows the Attorney to act while the Adult is capable and continues when/if the Adult becomes incapable. General POAs are rarely used in incapacity planning, as they become **no longer in effect** when an adult becomes incapable (which is often when a POA is most needed).

   **NOTE:** 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 *Power of Attorney Act*.

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

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

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

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

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

- an individual who is 19 years of age or older;
- mentally capable of making a POA; and
- acting voluntarily, or on their own.

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

- determine the type, scope or purpose of the POA;
- define the roles and authority of the appointed Attorney(s);
- provide instructions to the Attorney(s);
- express wishes, values and beliefs; and
- change or revoke a POA.

2. **Attorney(s)**

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

- an adult (i.e. at least 19 years of age), the Public Guardian and Trustee or 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; and
- acting voluntarily, or on their own.

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

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

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

More than one person can act as an Attorney. An adult who names more than one attorney may assign to each of them a different area of authority, or all or part of the same area of authority (s 18(4), PAA). The Adult might prefer to define distinct roles for each Attorney (i.e. appoint one adult as the Attorney for certain transactions (e.g. personal banking) and a
second individual as their attorney over different matters (e.g. property). The POA should be clear about the roles and responsibilities of each Attorney and whether or not unanimous consent is necessary in each type of transaction.

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 unanimous decision-making rule is where the Adult specifically does the following in the POA:

- describes circumstances where the Attorneys do not have to act unanimously;
- sets out how a conflict between Attorneys is to be resolved; or
- authorizes an Attorney to act only as an alternate and sets out: (i) the circumstances in which the alternate is authorized to act in place of the attorney, including, 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 his or her power, providing in a sense for built-in scrutiny by a second Attorney. But, having multiple Attorneys may make the decision-making process complicated and inefficient.

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

3. The Public Guardian and Trustee (PGT)

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

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

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

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

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

- What does the 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 that the Adult consults a lawyer or notary prior to finalizing a POA. Independent legal advice will help ensure that the POA only grants an Attorney the powers and authority that the Adult wants to give.

An Adult with capacity must be free to choose—or not to choose—to sign a POA. It is important to be aware of situations where a person may be putting undue pressure (including physical, financial or emotional threats, manipulation or coercion). For more information, refer to the discussion of undue influence below in section **VIII: Abuse and Neglect** in this chapter. Also refer to the BCLI guide on Undue Influence, which, though created to assist wills practitioners, is helpful for understanding the social dynamics surrounding undue influence in relation to other legal documents like POAs. The Guide can be found at [http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf](http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf). The Appendix to the Guide contains a short, useful Reference Aid.

1. **Formalities**

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

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

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

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

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

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

The Power of Attorney Act [PAA] provides a standard form that can be used to create a POA. The most up-to-date version of this form is generally also posted on the government of 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.

2. **Land Transactions**

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

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

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

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

Financial institutions and agents (e.g. banks, credit unions, investment advisors, customer service Representatives, estate planners, etc.) may ask individuals to complete their institution’s POA. This request normally occurs where, for example, an Adult wishes to grant the Attorney access to bank accounts for the purpose of paying bills, making transfers, etc. The financial institution may request that the Adult and Attorney to fill out their institution’s Limited POA. For more information about financial institution’s POA requirements and joint accounts refer to the Canadian Bankers Association website. They have created a PDF accessible at http://www.cba.ca/en/consumer-information/92-protecting-yourself-from-financial-abuse/694-powers-of-attorney-what-consumers-need-to-know.
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. C: 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.

D. OTHER JURISDICTIONS

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

Extra-jurisdictional EPOAs must be certified. Section 4(3) of the PAR currently requires that the EPOA from another jurisdiction must be accompanied by a certificate, which is from a solicitor who is permitted to practice in the jurisdiction where the EPOA was made. The certificate must indicate that the EPOA meets the requirements set out in s 2(a) to (c) of the PAR.

According to s 4(2)(a) to (c) of the PAR, a 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 his or her own affairs;
- was made by a person who was, at the time of its making, ordinarily resides elsewhere in Canada or in the United States, the United Kingdom, Australia or New Zealand; and
- is in accordance with the laws and continues to have legal effect in the jurisdiction in which it was made.

Furthermore, s 4(3) requires a certificate from a solicitor permitted to practise in the jurisdiction in which the deemed enduring power of attorney was made indicating that the deemed enduring power of attorney meets the requirements set out in subsection (2) (a) to (c). 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.

E. ACTING AS AN ATTORNEY

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

1. **Duties**

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

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

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

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

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

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

2. **Powers**

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

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

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

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

- the Adult will have sufficient property remaining to meet the personal care and health care needs of 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. (See s 3, P:AR for prescribed value.)

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

4. **Creating a Will and Designating Beneficiaries**

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

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

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

5. **Deeds**

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, as long as it is within the scope of the Attorney’s authority, such a deed is binding on the Adult and is of the same effect as if it were under the seal of the Adult.

6. **Delegating and Retaining Services**

An Attorney is not allowed to delegate their authority to another person. According to s 23 of the PAA an Attorney must not delegate powers and authorities to others, unless expressly empowered to do so in the POA. An Attorney may delegate financial decisions concerning investment matters to a qualified investment specialist (e.g. mutual fund manager) in accordance with the Public Guardian and Trustee Act, RSBC 1996, c 383 [PAA] or the Trustee Act, RSBC 1996, c 464 [TA], s 15. 5.
Despite the inability to delegate authority, an Attorney is permitted to retain services. According to s 20(4) of the PAA, an Attorney may retain the services of a qualified person to assist the Attorney in doing anything the Adult has authorized.

7. **Liability**

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

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

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

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

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

8. **Records and Accounts**

The Adult’s account must be kept up to date (s 2, PAR), and the Adult’s assets and accounts must be kept separate from those of the Attorney and any third parties (s 19(4), PAA). Per s 2 of the PAR, all assets belonging to the adult which are 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).

9. **Expenses and Remuneration**

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

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

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

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

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, he or she can revoke a POA. Details of how this is done appear below.

1. **Revocation by an Adult**

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

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

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

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

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

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

2. **Resignation of the Attorney(s)**

An Attorney can also formally resign at any time. An Attorney must give written notice to the Adult and any other Attorney(s). The resignation of an Attorney is effective when written notice is given, or on a later date specified in the notice.
An Attorney who loses the capacity to fulfill legal duties should resign. Likewise, if an Attorney is unable or unwilling to act on behalf of the Adult, according to the Adult’s instructions, wishes and values, then the Attorney should resign.

As of September 1, 2011, s 17(1) 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 Public Guardian and Trustee. Refer to section VIII. B. 2: Responding to Adult Abuse and Neglect—Public Guardian and Trustee.

3. **Duties after Termination**

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

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

G. **NO CAPACITY AND NO POA**

If an individual does not complete an enduring or springing POA while they are capable, and later becomes incapable of managing their financial affairs and making decisions related to those affairs, the adult may be able to create an RA, which has a lower test of capacity. Alternatively, a capable, interested person can apply to the court for Committeeship, in order to manage the incapable adult’s affairs. If the Adult owns land or operates a business, a Committeeship will be required.

The Public Guardian and Trustee may take steps to become Committee of Estate if:
- there is no valid enduring power of attorney;
- 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; and
- there are no other less intrusive options.

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

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

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

1. Is the client (mentally) capable, in the view of the clinician, of granting a POA? The presumption is that all adults are capable. The general test is the ability to understand and appreciate the meaning
of what they are trying to do in this particular case. Warning signs of temporary or ongoing incapacity can include the following—bear in mind the list below is not comprehensive and the indicators below do not necessarily indicate incapacity:

- sudden confusion, short term memory problems, disorientation;
- signs of depression;
- appears worried, distressed, overwhelmed;
- signs of substance abuse; and
- inability to answer open ended questions.

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

2. Why does the client want a POA?

3. For what purpose does the client require someone else to manage their financial affairs?

4. Does the client need to authorize broad powers, or can powers be narrowly defined and still meet the needs of the client?

5. What tasks does the Attorney need to be authorized to do to meet the client’s needs?

6. When does the POA need to start?

7. Is it appropriate for the POA to have a built-in expiration date?

8. Has the client thought about who they wish to appoint as Attorney(s)?

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

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

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

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

If a student or client has concerns that a person may be abused or neglected, or is at risk of being abused or neglected, then in most instances the student should discuss these concerns with the client and provide him or her with access to appropriate support services (e. g., the Seniors 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 Public Guardian and Trustee. For example, section 17 of the Public Guardian and Trustee Act allows the PGT to investigate potential abuse of POA relationships. Similar authority for the PGT to investigate abuse and neglect are provided by sections 34-36 of the Power of Attorney Act.

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

- Senior’s First BC (Formerly known as BC Centre for Elder Advocacy and Support) http://seniorsfirstbc.ca
- Canadian Centre for Elder Law: [www.bcli.org/ccel](http://www.bcli.org/ccel)
- Public Guardian & Trustee: [www.trustee.bc.ca](http://www.trustee.bc.ca)
- Vancouver Coastal Health: Resource: [www.vchreact.ca](http://www.vchreact.ca)
- Advocacy Centre for the Elderly website: [www.acelaw.ca](http://www.acelaw.ca)

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

V. **REPRESENTATION AGREEMENTS**

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

Refer to Representation Agreements and Supported Decision Making, (www.wcmhn.org/position_papers_files/Representation%20Agreements%20and%20Supported%20Decision.pdf)
Representation Agreements (RA) are governed by the RAA. RAs are an instrument by which an individual can proactively plan for the possibility of future incapacity, by appointing another person to make decisions on their behalf. RAs are the primary method by which adults in 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.

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

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

### A. TYPES OF REPRESENTATION AGREEMENTS

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

#### 1. Section 7 Representation Agreements

Section 7 RAs designate a substitute or supportive decision-maker to make or assist in making personal care decisions, major and minor health care decisions for the adult, and routine legal and financial decisions.

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

- personal care, including where and with whom the adult is to reside;
- consent to treatment;
• medication;
• minor OR major surgery;
• diagnostics and tests;
• palliative care; and
• living arrangements of the adult.

As a 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 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, negotiating, cashing or otherwise dealing with cheques, bank drafts and other negotiable instruments on the adult's behalf;
(h) renewing or refinancing, on the adult's behalf, with the same or another lender, a loan, including a mortgage, if
(i) the principal does not exceed the amount outstanding on the loan at the time of the renewal or refinancing, and
(ii) in the case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;
(j) making payment on the adult's behalf on a loan, including a mortgage, that
(i) exists at the time the representation agreement comes into effect, or
(ii) is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;
(k) taking steps under the Land Tax Deferral Act for deferral of property taxes on the adult's home;
(l) taking steps to obtain benefits or entitlements for the adult, including financial benefits or entitlements;
(m) 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;
(n) purchasing goods and services for the adult that are consistent with the adult's means and lifestyle;
(o) obtaining accommodation for the adult other than by the purchase of real property;
(p) selling any of the adult's personal or household effects, including a motor vehicle;
(p) establishing an RRSP for the adult;

(q) making contributions to the adult's RRSP and RPP;

(r) converting the adult's RRSP to a RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;

(s) making, in the manner provided in the Trustee Act, any 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 shares held by the adult;

(v) making donations on the adult's behalf to registered charities, but only if

(i) this is consistent with the adult's financial means at the time of the donation and with the adult's past practices, and

(ii) the total amount donated in any year does not exceed 3% of the adult's taxable income for that year;

(w) in relation to income tax,

(i) completing and submitting the adult's returns,

(ii) dealing, on the adult's behalf, with assessments, reassessments, additional assessments and all related matters, and

(iii) subject to the Income Tax Act and the Income Tax Act (Canada), signing, on the adult's behalf, all documents, including consents, concerning anything referred to in subparagraphs (i) and (ii);

(x) safekeeping the adult's documents and property;

(y) leasing a safety deposit box for the adult, entering the adult's safety deposit box, removing its contents and surrendering the box;

(z) redirecting the adult's mail;

(aa) doing anything that is:

(i) consequential or incidental to performing an activity described in paragraphs (a) to (aa), and

(ii) necessary or advisable to protect the interests and enforce the rights of the adult in relation to any matter arising out of the performance of that activity.

For greater clarity, the RA Act Regulations state that the routine management of the adult’s financial affairs do NOT include the following:

(a) using or renewing the adult's credit card or line of credit or obtaining a credit card or line of credit for the adult;
(b) subject to subsection (1) (h), instituting on the adult's behalf a new loan, including a mortgage;

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

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

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

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

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

The creation of a s 7 RA does not require the services of a lawyer. However, a s 7 RA for the Adult does not permit a Representative to make health care and personal decisions that involve decisions to refuse health care necessary to preserve life, or to physically restrain, move or manage the adult 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.

2. **Section 9 Representation Agreements**

Section 9 RAs designate a substitute decision-maker for significant and sometimes very personal or more controversial health or personal care decisions. 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; and
- physically restraining, moving and managing the adult and authorizing another person to do these things, if necessary to provide personal care or health care to the adult

A representative under s 9 RA must not do the following, unless expressly provided for in the RA:

- give or refuse treatment in accordance with s 34(2)(f) of the HCCFA.
- make arrangements for the temporary care and education of the adult’s minor children, or any other person who is cared for or supported by the adult; or
- interfere with the adult’s religious practices.
S 34(2)(f) pertains to refusing substitute consent to health care necessary to preserve life (s 18, HCCA). In a s 9 RA, if a Representative is provided the power to give or refuse consent to health care for the adult, then the Representative may give or refuse consent to health care necessary to preserve life (s 9(3), RAA). Some other health decisions are also excluded from potential powers, e.g., "sterilization for non-therapeutic purposes" (s 11(2), RAA).

The creation of a s 9 RA no longer requires the services of a lawyer. 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).

3. **Note on Medical Assistance in Dying**

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 or nurse practitioner may, at the 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 given through substitute decision makers, such as Representatives under the RA Act, and Advanced Directives are **NOT** sufficient for medical practitioners to provide MAiD. MAiD can only be provided to patients who are able to give consent as of July 15th, 2016.

This is because the College of Physicians and Surgeons of British Columbia’s “Professional Standards and Guidelines” regarding MAiD clearly prohibit consent given through ADs and RAs. The Professional Standards and Guidelines have weight in law pursuant to section 5(2) of the Medical Practitioners Regulation under the Health Professions Act.


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

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

- providing personal care or health care services to the adult for compensation, unless the caregiver is a 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 Public Guardian and Trustee can also be named as a Representative. According to s 5(1)(c), a credit union or trust company can only have authority to make (limited) financial decisions listed in a s 7 RA. A credit union or trust company cannot make decisions regarding health care or personal care.

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

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

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

C. **ACTING AS A REPRESENTATIVE**

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

1. **Duties**

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

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

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

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

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

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

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

2. **Delegation of Authority**

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

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

4. **Access to Information**

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

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

5. **Creating a Will**

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

6. **Remuneration and Expenses**

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

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

D. **MONITORS**

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

1. **Appointment and Resignation**

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

If an adult has a s 7 RA which authorizes their representative to make routine financial decisions, the adult MUST appoint a monitor to oversee their chosen representative unless the representative is the adult’s spouse, the Public Guardian and Trustee, a trust company or a credit union OR the adult has appointed two representatives who must act unanimously (s 12(1)). Failure to comply with this requirement will make the provision of the RA authorizing the Representative to make routine financial decisions invalid (s 12(2)).

A monitor must be 19 years or older and must be willing and able to perform the duties and to exercise the powers of a monitor (s 12(4)). An individual named in a representation agreement as a monitor must complete a Monitor’s Certificate.

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

2. **Duties and Powers**

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

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

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

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

3. **Payment and Expenses**

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

4. **Replacement Monitor**

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

E. MAKING A REPRESENTATION AGREEMENT

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

The RA must also be in writing, signed and witnessed (s 13). The adult and each of the Representative(s) must sign the RA (s 13(2)). Two adults must witness the signatures. 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 (s 13(5)):

- one of the Representatives;
- an alternate Representative;
- a spouse, child, or parent of anyone named in the RA as a Representative or alternate Representative;
- an employee or agent of a Representative or alternate Representative;
- anyone under 19 years of age; or
- anyone who does not understand the type of communication used by the adult who wishes to be represented.

Each Representative and each witness for a s 7 RA must also complete a certificate in the prescribed form (s 13(1.1) and s 13(6)). Please consult 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).

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. C: Resource Organizations of this chapter.

Although there is no legal requirement to register an RA, registration may be done through the Nidus Personal Planning Registry. When a person registers, he or she can decide which organizations can access his or her record. For more information contact Nidus Personal Planning Resource Centre.

F. CHANGING, REVOKING OR ENDING A REPRESENTATION AGREEMENT

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

An RA terminates where:

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

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

G. OTHER JURISDICTIONS

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

• perform the function of an RA
• be made in a jurisdiction outside BC; and
• comply with any prescribed requirements.

The certificate in the prescribed form, which requires completion by the extra-jurisdictional solicitor). Please consult Nidus Personal Planning Resource Centre for more information about prescribed forms.

Other Canadian jurisdictions may have other names for documents that govern personal and health care decision making. Two terms that may be encountered are “Personal Directives” and “Power of Attorney for Personal Care”.

NOTE: These recognition rules only apply to RAs for personal and health care decisions. See section 9 of the Representation Agreement Regulations.

H. NO CAPACITY AND NO RA

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

1. Temporary Substitute Decision-makers (TSDM)

In 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.
• Consent to health care may be expressed orally or in writing or be inferred from conduct (s 9(1) HCCFA). Where a patient is incapable (i. e. due to illness, loss of consciousness or injury), health care providers are required to get consent from a substitute decision-maker. However, there is an exception when urgent or emergency health care is required (s 12 HCCFA).
• If the patient has a Representation Agreement (RA) in place, then the instructions for consent will need to be obtained from the Representative (see s 19. 3 HCCFA).
• If the patient has an Advance Directive (AD) in place, then consent may be given in the AD (s 19.7 HCCFA).
• If no Representative and no Committee are in place, then the health care provider will need to find a temporary, substitute decision-maker (TSDM) to give or refuse consent (s 19.8 HCCFA).

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

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

To obtain substitute consent to provide major or minor health care to an adult, a health care provider must choose the first, in listed order, of the following who is available and qualifies under subsection (2) (subsection 1):

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

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

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

If no one listed in subsection (1) is available or qualifies under subsection (2), or if there is a dispute about who is to be chosen, the health care provider must choose a person authorized by the Public Guardian and Trustee (which can include a person employed in the Office of the Public Guardian and Trustee).

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

2. Admission to Care Facilities

In March 2017, the Government of BC announced that Part 3 of the HCCFA will come into force in April 2018. Part 3, which is not in force as of this Manual’s current edition, extends consent requirements to admissions into care facilities. This legislation will require health authority staff and care facility operators to get consent for admission to a facility, including extending protections for adults who may not have the capacity to make such decisions. Under part three, if a person is assessed as incapable of consent, then a personal guardian or substitute
A PRACTICAL APPROACH TO RAs FOR LSLAP STUDENTS

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

1. Is the client capable of creating an RA? The presumption is that all adults are capable. The test for capacity depends on whether it is a s 7 or s 9 agreement at issue.

2. Why does the client want to create an RA?

3. Who is the client considering to be their Representative?

4. What is the relationship between the client and their chosen Representative?

5. Are there signs of abuse, neglect or self-neglect? Does the adult have access to community resources? Is there a need to involve a Designated Agency?

6. Which specific authorities would the client like their Representative to have?

7. Have they spoken to their chosen Representative to see if they are willing to serve?

8. What is the status of the client’s will? Explain that wills do not provide direction or authority if testators become incapable, and POAs/RAs do not function like wills.

9. Would the client like to appoint a substitute or supportive decision-maker?

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

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

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

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 for an adult to change their consent from written instructions, and the meaning of health care verses personal care. A discussion of the case is available by case brief through CLE online: http://online.cle.bc.ca/digests/browse.aspx?cle=55084&sub=5.
VI. ADVANCE DIRECTIVES

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

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

A. SIGNIFICANCE OF AN ADVANCE DIRECTIVE

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

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

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

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

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

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

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

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

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

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

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

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

It is possible for an adult who does not complete an AD to still receive health care. Completion of an AD must not be mandatory prior to providing any good or service (i.e., health care). In other words, an adult has the right to not complete an AD. For example, where an adult is being admitted to a health care facility and instructed to “fill out these forms” prior to treatment, the adult does not have to fill out the AD. Adults are still eligible to receive health care treatment without completing an 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.

B. Note on Medical Assistance in Dying

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 or nurse practitioner may, at the 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 given through substitute decision makers, such as Representatives under the RA Act, and Advanced Directives are NOT sufficient for medical practitioners to provide MAiD. MAiD can only be provided to patients who are able to give consent as of July 15th, 2016.

This is because the College of Physicians and Surgeons of British Columbia’s “Professional Standards and Guidelines” regarding MAiD clearly prohibit consent given through Ads and RAs. The Professional Standards and Guidelines have weight in law pursuant to section 5(2) of the Medical Practitioners Regulation under the Health Professions Act.
C. MAKING AN ADVANCE DIRECTIVE

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

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

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

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. C: Resource Organizations of this chapter.

D. CHANGING, REVOKING OR ENDING AN ADVANCE DIRECTIVE

An adult with capacity is able to revoke or change an AD at any time. According to s 19. 6 of the HCCFA, an adult who has made an AD may change or revoke the AD as long as the adult is capable of understanding the nature and consequences of the change or revocation.

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

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

E. EXAMPLES OF ADVANCE DIRECTIVE PROVISIONS

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

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

Note 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.

1. **Do Not Resuscitate Orders ("DNR Orders")**

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

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

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

Guiding Principles of the Joint Statement include:

- A competent person has the right to refuse, or withdraw consent to, any clinically indicated treatment, including life-saving or life-sustaining treatment (Principle 3). In this situation, the healthcare professional will discuss with the patient whether the patient wishes to be resuscitated and a notation will be made on the person’s chart.

- When a person is incompetent, treatment decisions must be based on his or her wishes, if these are known. The person’s decision may be found in an advance directive or may have been communicated to the physician, other members of the health care team or other relevant people. In some jurisdictions, legislation specifically addresses the issue of decision-making concerning medical treatment for incompetent people; the legislative requirements should be followed (Principle 4).

F. **A PRACTICAL CLINICAL APPROACH TO AN ADVANCE DIRECTIVE FOR LSLAP STUDENTS**

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

1. **Is the client capable of creating an AD?** The presumption is that all adults are capable. The test is the ability to understand and appreciate the meaning of what they are trying to do in this particular case.

2. **Why does the client want to create an AD?**

3. **What types of health care provision does the client want to give consent to?**

4. **What types of health care provision does the client want to refuse consent to?**
5. Does the client have an RA in place? What is the relationship between the client and their chosen Representative?

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

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

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

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

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

VII. GUARDIANSHIP IN BC: COMMITTEESHIP

In BC, adult guardianship (called Committeeship) is currently governed by two acts: the Patient’s Property Act, RSBC 1996 c 349 [PPA] and the Adult Guardianship Act, RSBC 1996 c 6 [AGA]. The PPA allows a judge to declare a person incapable of managing themselves or their affairs and appointing a Committee (pronounced caw-mi-TAY, with emphasis on the end of the word). Section 2.1 of the AGA contains a statutory process by which a person can be declared incapable of managing their financial affairs and the Public Guardian and Trustee becomes their Statutory Property Guardian. All Committees, whether an individual or the Public Guardian and Trustee, are legally authorized to make decisions for the patient, who is incapable of making their decisions for him or herself.

A person may be incapable from birth, or may become incapable at some point later in life. An individual may be rendered incapable due to an accident, illness, or a disability. Being a Committee is the highest form of fiduciary obligation that one person can hold to another.

It is important to keep in mind that the two different processes for creating a Committeeship are quite different from each other and are governed by different pieces of legislation. It is important to identify which type of Committeeship is present or being sought. In the rest of this section a Committeeship created under the PPA is referred to as a court order Committeeship while one created under the AGA is referred to as a statutory process Committeeship. These are not technical or legal phrases but used solely for clarity. Details for the two types are produced below.

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

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

NOTE: A court ordered Committeeship and its application is a Supreme Court procedure. Provincial courts do not have the jurisdiction required.

Adults may consult CLAS and the Public Guardian and Trustee for more information on Committeeship. The Public Guardian and Trustee produces a number of helpful publications on Committeeships. The resources can be found at www.trustee.bc.ca/reports_publications/index.html. 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. **COURT ORDERED COMMITTEESHIP**

A court may appoint a committee to manage a person’s affairs (the estate), their person or both.

1. **Committee of the Estate**

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

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

As circumstances dictate, a Committee of Estate can also include the authority to:

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

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

2. **Committee of the Person**

A Committee of the Person holds the authority to make decisions regarding the patient’s health and well-being, place of residence, and admission to a health care facility. These powers can include such decisions as:
• medical treatment;
• medication; or
• consent to treatment.

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

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

B. THE COURT ORDERED COMMITTEESHIP PROCESS

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

• an order must be made by the Supreme Court that the patient is incapable of managing his or her own affairs and/or person; and
• the court appoints one or more individuals as Committee of the estate and/or the person.

1. Declaration of Patient Incapability

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

1. 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.

2. The court will then consider the affidavits of two medical practitioners who provide their opinion on the incapacity of the subject.

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 subject’s family and financial affairs.

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) to direct the issue to be tried, following the Supreme Court Civil Rules

   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

      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

This additional examination can be requested by the patient and cannot be refused by the court unless the court believes the patient is not mentally competent to form and express the request (PPA, s 5)
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 practitioner advising the court that it would harm the subject to be served with notice of the application.

In summary, the court application must include:

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

2. **Resisting a Declaration of Incapability**

If the subject of the application wishes to oppose it, he or she is well advised to have a lawyer for the application hearing. The judge may direct that the incapacity issue be tried in Supreme Court (PPA).

**a) Challenging Affidavits**

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

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

**b) Appeals**

If the subject unsuccessfully opposes the application, he or she can appeal to the BC Court of Appeal. The PPA does not preclude the power of *habeas corpus* and other prerogative writs.

**c) Subsequent Applications**

If a person is declared incapable by the court, that person can apply to the court after one year, for a declaration that he or she is no longer incapable. However, such an application cannot be made by the person or anyone else more than once per year, except by leave of a judge. Affidavit evidence of two medical practitioners will be required to support the application (PPA, s 4). Note, however, that this applies only
to court ordered Committees made under the PPA. Review of a statutory process Committee under the AGA has its own review process under that Act.

3. **Appointment of a Committee**

Once the subject has been declared incapable, the judge will appoint a Committee. This appointment is governed by the PPA.

a) **Private Committee**

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

The *Patient Property Act Rules, BC Reg 311/76 (PPA Rules)* and the *Supreme Court Civil Rules, BC Reg 168/2009* govern the application process.

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

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

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

Section 7 of the PPA provides that notice in writing of the application must be served on the Public Guardian and Trustee not less than 10 days prior to the hearing of the application and, if applicable, to a Committee already appointed. The Public Guardian and Trustee can review the application and oppose the appointment if the applicant is considered unsuitable. The Public Guardian and Trustee may also impose terms on the Committee, or make recommendations to the court that conditions be imposed on the Committee. If the Public Guardian and Trustee does not oppose the appointment, it will issue a letter to that effect. The applicant must present this letter to the judge at the time of the Committee application.

c) **Nomination of Committee by Patient**

Under s 9 of the PPA, an individual has the power to nominate a Committee of his or her choice. However, the person nominated cannot serve as a Committee until appointed by the court. The nomination must be in writing and signed by the person when he or she was of full age and of sound and disposing mind (i.e. before the court declares him or her incapable). A person may want to execute a nomination and have a lawyer hold it in reserve to be released if there is an application for the appointment of a Committee.

The nomination must be executed in accordance with the requirements for the making of a will under the *Wills, Estates and Succession Act, SBC 2009, c 13 [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 his or her name on the document. For a full precedent, see Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2014 (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).

**d) Costs**

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

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

The Public Guardian and Trustee (the “PGT”) is a corporation sole 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 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 she is 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. Since December 1, 2014 the PGT may also become committee of estate by the legislative process that is provided by the Adult Guardianship Act. This process is described in the next section. It is important to note that the PGT can only become committee of estate through this process. An appointment as committee of person requires a Court Order.

C. LEGISLATIVE PROCESS COMMITTEESHIP (Statutory Property Guardian)

The other process by which a Committee ship can be created is through the legislative process outlined by the Adult Guardianship Act. The major difference over a court order Committee ship is that only the Public Guardian and Trustee can become Committee and only over the adult’s financial affairs. The term used in the legislation is a Statutory Property Guardian [SPG]. However, once the PGT becomes a SPG, the PPA states that the SPG is a committee under the PPA. In short, the process for the Public Guardian and Trustee to become a SPG is through the AGA but then their duties are defined by the PPA.

1. Declaring an Adult Incapable

For an adult to be declared incapable under the AGA a number of steps need to take place.

1. If the concerned person is a health care provider, they can request that a qualified health care provider assess the adult’s incapability. Anyone else can notify the PGT and the PGT can request an assessment of incapability.

   a) A “qualified” health care provider is defined in section 3 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; College of Registered Nurses of British Columbia; College of Registered Psychiatric Nurses of British Columbia; 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 incapability for review by a health authority designate.

   a) The proper procedures of an incapability assessment are outlined in sections 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 a order 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

      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.

b) A health authority designate is defined by section 4 of the SPGR.

3. Upon receiving Form 1, the health authority designate may issue a report of incapability if they are satisfied of a number of criteria. The designate must also have consulted with the Public Guardian and Trustee and notified the adult and, if possible, any spouse or near relative of the adult, of the intention to issue a certificate.

a) The criteria are provided by sections 3(a) through 3(e) of the AGA. Important to note, the certificate 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 3(e)).

b) The notice required to the adult and a near relative is outlined in section 11 of the SPGR. Section 11(3) states that the adult or near relative be given at least 10 days to respond. The BC Government has created a form called “Health Authority Designate Notice of Intention to Issue a Certificate of Incapability” for the purposes of this notification.

i) 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 Public Guardian and Trustee. The adult and, if contact information is known, a spouse or near relative must be informed of the certificate 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 Public Guardian and Trustee becomes the Committee of the adult on the date that the certificate was signed by the health authority designate.

i) The Public Guardian and Trustee must inform the adult and, if contact information is known, a spouse or near relative that the Public Guardian and Trustee has power to manage the adult's financial affairs and that the adult has the right to request a second assessment and potentially a court review (AGA, s 33).

ii) The adult or someone on behalf of the adult, may request a second assessment within 40 days of being notified.
2. **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 Public Guardian and Trustee 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.

3. **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. This right of review is also applicable to any adults who was declared incapable through a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the Mental Health Act, prior to December 1, 2014:

1. The parties to the court review are the adult, the body that designated the health authority designate who issued the certificate of incapability, and 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 himself or herself.

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

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

4. **Ending Committeeship (Statutory Property Guardian Authority under the AGA)**

A statutory process Committeeship can be ended in one of four ways.

1. The Public Guardian and Trustee 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 BC government has created a form for this purpose called “Health Authority Designate Acceptance of Determination of Capability”.

   b) Notice must be provided to the Public Guardian and Trustee.

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.

5. **Transition to Statutory Property Guardianship under the Adult Guardianship Act**

The new sections of the Adult Guardianship Act came into force on December 1, 2014. Prior to December 1, 2014, the Patients Property Act provided for an adult to be declared incapable through a different process which involved a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the *Mental Health Act*. While this is no longer in force, it is possible that an adult was being assessed before December 1, 2014 but a certificate had not been issued. It is possible that this assessment can qualify for an assessment under the new AGA. The rules surrounding this unlikely situation are outlined in sections 15 and 16 of the *Adult Guardianship Act Statutory Property Guardianship Regulations*.

### D. SERVING AS A COMMITTEE

#### 1. Duties

The Committee’s general duty is to exercise his or her powers for the benefit of the patient, having regard to the nature and value of the patient’s property, and the patient’s circumstances and needs and those of his or her family (PPA, s 18). **The Committee is not allowed to use or take any benefit from his or her position.** When the patient has assets, the Public Guardian and Trustee will often recommend that the Committee post a bond to secure the proper performance of these duties, or seek a restriction on accessing the patient’s funds. The Committee may use professional services to assist him or her in some duties. However, professionals cannot be retained to do actions an ordinary person could perform. The cost of professional services is paid for by the patient’s estate.

Specific duties of the Committee include:

- Passing accounts before the Public Guardian and Trustee, at the times directed by the Public Guardian and Trustee (PPA, s 10(d)), including, if the Public Guardian and Trustee requires it, a true inventory of the whole estate of the patient. The patient’s assets are not the Committee’s, and thus the Committee must account to the Public Guardian and Trustee for all transactions. Provisions regulating this duty are contained in s 10 of the PPA and in Rule 21-5 of the rules governing the Act in the *Supreme Court Civil Rules, BC Reg 168/2009*.
- Upon the patient’s death, the Committee is no longer required to pass accounts before the Public Guardian and Trustee, but must provide the Committee’s accounts to the executor or administrator of the patient’s estate, or, if the Committee and the executor or administrator of the patient’s estate are the same person, to the beneficiaries of the patient’s estate (PPA, s 24);
- Paying patient’s maintenance, care and treatment costs out of the estate (s 23);
- Bringing an action, if necessary, on behalf of the patient as his or her guardian *ad litem* (s 22);
- Exercising the rights, powers, duties, and privileges of the patient after the patient’s death, as if he or she had not died, and serving as executor or administrator until letters probate of the will or letters of administration to the estate of the patient are granted and notice in writing is served upon the Committee (s 24); and
- Filing income tax returns and applying for pensions.
- If a person is appointed as Committee for a person under disability, that person must be the litigation guardian of the patient in any proceeding unless the court otherwise orders as per Rule 20-2 of the *Supreme Court Civil Rules.*
2. **Powers**

The Committee of the Estate has all the rights, powers, and privileges over the patient’s estate as the patient would have if he or she had legal capacity (PPA, s 15), such as power to buy and sell property, give gifts, open and close bank accounts, pay accounts etc. These powers includes those powers that would have been exercisable by the patient as a trustee, guardian of a person, holder of power of appointment or as the personal representative of a person (PPA, s 17). For example, if the patient was acting as personal representative to his spouse prior to incapacity, the Committee would now have the responsibility to make decisions for the spouse under the Representation Agreement. However, the court has discretion to place limits on any powers that the Committee could otherwise perform (PPA, s 16). In such a case, any powers that were limited by the court would fall to the Public Guardian and Trustee.

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

For investing money, a Committee is a trustee within the meaning of the Trustee Act, RSBC 1996, c 464 (PPA, s 15(2)), which means a Committee must comply with the provisions of this Act when it comes to investing the patient’s money. For example, the Committee must meet a certain standard of care in making investment decisions and freedom to delegate investment decisions is limited.

If a patient (as opposed to the Committee) transfers his or her 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 his or her 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)

3. **Remuneration**

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

If the Public Guardian and Trustee acts as the Committee of Estate, its fees are charged in accordance with the Public Guardian and Trustee Fees Regulation, BC Reg 312/2000. Fees may be reduced or waived where the Public Guardian and Trustee is satisfied that hardship or injustice would result from charging the full fee (PGT Fees Regulation, s 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.
E. **DISCHARGE OF A COMMITTEE**

1. **Rescission of a Committee**

   On application by the Attorney General, the Public Guardian and Trustee, or any other person, a judge may rescind the appointment of a person (other than the Public Guardian and Trustee) appointed as Committee (PPA, s 6(2)). The rescission is subject to the Committee (other than the Public Guardian and Trustee) complying with the requirement to pass accounts set out in s 13. This application may be filed along with an application for a new Committee. This process cancels the Committee’s authority to act for the patient.

2. **Discharge of a Committee**

   If a person regains his or her mental capability and ceases to be a “patient,” that person, or the Committee (other than the Public Guardian and Trustee), may apply to the court for the discharge of the Committee (PPA, s 12). Notice in writing of this application must be provided to the Public Guardian and Trustee 10 days prior to the application. The judge who hears the application may, and shall if asked by the Public Guardian and Trustee, order the Committee to pass accounts. There will almost always be outstanding accounts. The fees payable will be rescinded as of the date of the order and discharged on the passing of accounts.

   An order of discharge or a discharge by the passing of accounts before the Public Guardian and Trustee is required before a security bond, if any, can be cancelled. Once the Committee is discharged, the Committee has no further powers or duties with respect to the estate of the person who has ceased to be a patient (PPA, s 13(4)(a)).

3. **Release from Liability**

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

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

VIII. **ADULT ABUSE AND NEGLECT**

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

   An adult might be experiencing, or be vulnerable to experiencing, abuse, neglect or self-neglect. In situations where an adult is in need of support or assistance in order to prevent abuse or neglect, the following legislation applies: Part 3 of the AGA; sections 34 and 35 of the PAA; section 31 of the RAA; and sections 17–19 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: www.bcli.org/cCEL/projects/practical-guide-elder-abuse-and-neglect-law-canada.

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

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

B. RESPONDING TO ADULT ABUSE AND NEGLECT

Sometimes the most appropriate and helpful response to abuse or neglect is not a legal response. In
some instances, it may be appropriate to contact a designated agency, or the Public Guardian and
Trustee, as discussed below. However, the key response is generally to listen to the older adult's
description of his or her 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 Public Guardian and Trustee’s office has prepared a useful “decision tree” to help people
concerned about the potential abuse or neglect of a vulnerable adult. The first page is the decision tree
itself, a flow chart of how to respond to different circumstances of potential abuse or neglect. The
second page contains a table setting out the roles and responsibilities of the police, the designated
agency, and the PGT’s office. Please see the 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 older adult
   Ask questions. Talk to the older person about his or her experience. Help the person to identify
   resources that could be helpful.

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

3. Recognize the right to make decisions
   Mentally capable older adults have the right to make decisions, including choices others might consider
   risky or unwise.
4. **Seek consent or permission**  
In most situations, you should get consent from an older adult before taking action.

5. **Respect confidentiality and privacy rights**  
Get consent before sharing another person’s private information, including confidential personal or health information.

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

7. **Recognize the value of independence and autonomy**  
Where this is consistent with the adult’s wishes, assist the adult to identify the least intrusive way to access support or assistance.

8. **Know that abuse and neglect can happen anywhere and by anyone**  
Abuse and neglect of older adults can occur in a variety of circumstances from home care to family violence.

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

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

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 I. B: Secondary Sources of Law and Practice).

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

The DAs are set out in the AGA, 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, Vancouver Health Authority and Northern Health Authority). For contact information, refer to section I. D. : 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 (§ 47, AGA). 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; and/or
- apply to the court for an order authorizing the provision of services.

Designated Agencies 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 (s 52, AGA). DAs are also legally required to respect the right for an adult with capacity to refuse support or assistance (s 2, AGA).

Legal professionals need to remember their responsibility to maintain professional conduct and client confidentiality with respect to their clients. There is not a mandatory requirement to report abuse, neglect or self-neglect in 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. C: Resource Organizations and II. D.: 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**

Although not a designated agency under the AGA, 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 Public Guardian and Trustee.

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

- a trust, 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 RAA;
- if the Public Guardian and Trustee 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 to his or her 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 RAA;
- an attorney under a POA or EPOA, where the Public Guardian and Trustee has reason to believe assets are at risk or person is not fulfilling their duties;
- a representative; or
- a guardian committee.

The statutory powers also allow the Public Guardian and Trustee to:
• require trustee, attorney, representative, guardian to provide accounts necessary for an audit (s 18(2))
• ask the court for an order allowing access to information previously denied when undertaking an audit or investigation (s 18 (4)); and
• 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 (s 19, PGTA).

Any person may notify the Public Guardian and Trustee where a Representative or Attorney is: (s 30(1)(b), RAA; s 34(2)(c), PAA)

• abusing or neglecting the person for whom the Representative or Attorney is acting;
• failing to follow the instructions in the RA;
• incapable of acting as Representative or Attorney;
• failing to fulfill the duties of a Representative or Attorney; or
• otherwise failing to comply with an RA, or an EPOA.

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

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

• conduct an investigation 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 RAA;
• appoint a monitor;
• authorize remuneration for a monitor out of the adult’s asset;
• take any other action considered necessary.

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

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

See Part 3 of the PGTA for the planning and accountability obligations of the PGT.
3. **Additional Resources for Older People Experiencing Abuse or Neglect**

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

**APPENDIX INDEX**

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 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, 2014 (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 / MMM / 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)
(Skive 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.

<table>
<thead>
<tr>
<th>OFFICER SIGNATURE(S)</th>
<th>EXECUTION DATE</th>
<th>ADULT’S SIGNATURE</th>
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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.

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<th>Signature of Adult</th>
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**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.

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<th>Signature of Witness No. 1</th>
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If witness is a lawyer or member of the Society of Notaries Public of British Columbia, check relevant box below:
- lawyer
- 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.

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<th>Signature of Witness No. 2</th>
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**ATTORNEY**

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**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.

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**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.

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ALTERNATE ATTORNEY
(Strike out if an Alternate Attorney is not appointed)

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:
☐ lawyer
☐ 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)
B. BC PUBLIC GUARDIAN AND TRUSTEE DECISION TREE ON ADULT ABUSE AND NEGLECT

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

Is the adult in immediate danger of physical harm

- Yes: CALL 911
- No: Support adult to call “Community Resources” including:
  - Local Agency: ____________________
  - For more information on local agencies, contact your local Community Response Network. See BC Association of CRNs website at http://www.bcarns.ca
  - Seniors Abuse & Information Line (SAIL)
    604.437.1940 or 1.866.437.1940
    Operated by BC Centre for Elder Advocacy and Support
  - Police non-emergency number for suspected crimes, risk of danger or physical harm
  - Victim Link (1.800.563.0808)

Is the adult able to seek assistance

- Yes: Call the Public Guardian and Trustee
- No: Is the abuse, neglect or self neglect primarily related to financial matters or are assets at immediate risk

- Yes: Call a Designated Agency
- No: Is the abuse, neglect or self neglect primarily related to non financial matters
<table>
<thead>
<tr>
<th>Police</th>
<th>Designated Agency: Regional Health Authorities and Community Living BC (CLBC)</th>
<th>Public Guardian and Trustee (PGT)</th>
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<tr>
<td>For a video on role of the Police, visit <a href="http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx">http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx</a></td>
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### Governing Legislation:

<table>
<thead>
<tr>
<th>Criminal Code</th>
<th>Adult Guardianship Act</th>
<th>Public Guardian and Trustee Act</th>
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<tr>
<td>RSC 1985 c. C-46</td>
<td>RSC 1996 c. 6</td>
<td>RSC 1996 c. 383</td>
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### 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:
  - 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.

  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.

#### Why would you call?

- 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:
  - 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 be not be fulfilling his or her duties and responsibilities.

### Where should you call?

- **Emergency - Call 911 if you suspect**
  - Immediate risk to a person’s physical safety, or
  - Acute is occurring
    - Local Police non-emergency
      - Tel: 

See [www.trustee.bc.ca](http://www.trustee.bc.ca) Assessment and Investigation Services for links to all Designated Agencies, or visit your Health Authority website (search abuse and neglect) (Local Health Authority)
- Tel: 
  - Local Community Living BC (CLBC)
  - Tel: 

See [www.trustee.bc.ca](http://www.trustee.bc.ca) Assessment and Investigation Services for PGT referral form.
- Contact Information:
  - Toll free Tel: 1.877.511.4111
  - Local Tel: 604 660.4607
  - Toll free Fax: 1.855.660.9479
  - Local Fax: 604.660.9479
  - Email: PAC-HCD@trustee.bc.ca

### What can you expect?

- You will be asked to provide information about the nature of your concern, and 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:

- **Attending the location**
- **Dispatching special units where available**
- **Visiting adult, gathering information** and evidence which may indicate a criminal offence such as:
  - 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**

- **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**

- **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:**
  - stoping 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.

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