

REPRESENTATION AGREEMENTS

Roger E. Holland, Jordan A. Copeland and Melissa Nagelbach

Another aspect of estate planning deals with providing for the event that you become incapable of making your own decisions in the future. The instrument which can be used to appoint a substitute decision maker in matters of health and personal care is a representation agreement.

1. Purpose

Representation agreements are governed by the *Representation Agreement Act* (the “RA Act”). One of the stated purposes of the *RA Act* is to allow adults to arrange in advance how, when and by whom, decisions about their health care, personal care or financial affairs will be made if they become incapable of making decisions independently. In short, the *RA Act* provides a legally enforceable way for persons to appoint someone to make health care decisions for them. Although the legislation provides the power to use representation agreements in relation to financial matters; these are normally dealt with in powers of attorney, which are discussed in the next section. In representation agreements, the person granting the decision-making power is called the “adult”, while the person receiving the power is called the “representative.”

2. Time of Effectiveness

While created by a capable adult, representation agreements can be drafted so they only come into effect if and when the adult becomes incapable. If this is done, the agreement is never active if the adult does not become incapable before his or her death; however, the agreement can also be drafted to become effective immediately.

3. Representative

A person may appoint another adult or the Public Guardian and Trustee as a representative. In practice, many people appoint a family member or trusted friend. An adult can also appoint an alternate representative to take over if the appointed representative become unable or incapable of acting. Additionally, a co-representative can be appointed to have authority over the same or different types of decisions.

The representative’s power is circumscribed by the type of powers specifically granted to him or her in the agreement. Once a type of decision falls under the agreement, the representative has the

duties to act honestly and in good faith, and to exercise the care, diligence and skill of a reasonably prudent person. In order to provide guidance to the representative, an adult may communicate his or her wishes to his or her representative orally or in writing before he or she becomes incapable. Unless otherwise specified, the representative must also attempt to take the incapable adult's current wishes into account. Because many decisions will fall within the representative's discretion, you should choose someone whom you trust and preferably shares your beliefs and values to be your representative.

4. Types of Decisions

The *RA Act* lists the types of decisions which a person can allow his or her representative to make, and allows a person to choose those which he or she wishes to grant. There are essentially two types of agreements provided for under the *RA Act*.

The first type of agreement allows an adult to give a representative the power to make decisions about:

- personal care, such as where the adult is to live;
- major and minor health care decisions;
- whether the adult should be admitted to a care facility;
- instruction of a lawyer on the adult's behalf; and
- management of the adult's routine financial affairs.

The second type of agreement allows the adult to give the representative additional powers, such as the ability to:

- physically restrain the adult;
- refuse life-supporting treatment;
- give consent to specified types of health care, including abortion and experimental medicine; and
- make temporary arrangements for the adult's children and dependents.

It is important to emphasize that a person wishing to make a representation agreement can consider and choose which sorts of decisions he or she is comfortable giving his or her representative the power to make. However, in order to include anything listed above in the second

type of representation agreement, the adult must consult with a lawyer and have that lawyer fill out a certificate; whereas with respect to the first type of representation agreement, one may appoint a representative without consulting with a lawyer.

5. Monitor

One of the benefits of representation agreements is that the adult making the agreement has the ability to appoint a third party as a monitor of his or her representative. The monitor has the duty to make reasonable efforts to determine if the representative is complying with his or her duties under the *RA Act* and the representation agreement. If the monitor believes that the representative is not acting appropriately, he or she must inform the Public Guardian and Trustee. Thus, the representation agreement provides some safeguards for those who are uncomfortable giving one person complete decision making power in the event of their incapacity. It is important to note that with respect to the first type of representation agreement, a monitor must be appointed, whereas with respect to the second type of agreement, a person granting power under the agreement has the power to waive the appointment of a monitor.

6. Recent Changes

In the Spring of 2007, the BC Legislature introduced the *Adult Guardianship and Planning Statutes Amendment Act, 2007* (Bill 29) which is a revised version of Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act*, which was introduced in 2006 but died at the end of the 2006 Session. Bill 29 passed Third Reading on October 22, 2007, and although not yet proclaimed, it is important to understand some of the changes being introduced with respect to the *RA Act*. It is important to know that many of the amendments to the *RA Act* reflect the BC Legislature's plan to have the *RA Act* co-exist with the *Power of Attorney Act* (which was originally planned to be phased out in favour of the *RA Act*).

Most of the existing *RA Act* has been carried on. However, with respect to the first type of representation agreement referred to above, a restriction has been added that representatives may not make decisions authorizing the use of restraints or to help make or make on the adult's behalf, a decision to refuse health care necessary to preserve life. The power to authorize the use of restraints is still available for the second type of representation agreement. In addition, while not referred to above, the capacity test in order to make the first type of representation agreement has been slightly modified. A person may now make such an agreement even if they are slightly incapable of making a contract, managing their personal care, health care or legal matters or *managing their routine financial affairs*.

With respect to the second type of agreement, the section in the *RA Act* which previously dealt with such agreements has been repealed and replaced with an entirely new section. Once these changes

are proclaimed, a person making the second type of agreement can authorize their representative to do anything the representative considers necessary to the personal care or health of the adult or do one or more things, including any of the following:

- where the adult should live and with whom, including if the adult should live in a care facility;
- if the adult should work;
- educational activities;
- social activities;
- apply for licenses, permits, approval or other authorization required by law for the performance of an activity;
- who the adult should associate with;
- day to day decisions, including diet and dress;
- health care decisions; and
- physically restrain, move and manage the adult and authorize another person to do these things, if necessary to provide personal care or health care to the adult.

In addition, unless expressly provided for in the agreement, the representative must not:

- give or refuse consent on the adult's behalf to any type of health care prescribed under s. 24(2)(f) of the Health Care (Consent) and Care Facility (Admissions Act);
- make arrangements for the temporary care and education of the adult's minor children or any other persons cared for by the adult; or
- interfere with the adult's religious practices.

The power to consent or refuse consent to end of life treatment will continue, however the power to make financial decisions and manage a person's financial and legal affairs outside of routine financial affairs in the second type of agreement will no longer exist. This change will not affect the approach recommended in this paper, which is to confine legal and financial affairs to powers of attorney and matters of health and personal care to representation agreements. However, in order

to ease the transition, if an existing agreement of the second type contains financial support arrangements, the representative may continue to exercise that authority as described in the agreement.

The requirement for certificates of the witnesses are carried on, but other changes to the *RA Act* include:

- a representative may not make or change an adult's will;
- notaries will now be able to witness the second type of agreement;
- a representative will no longer be required to sign a certificate;
- remuneration for representatives must be set out in the agreement and now approved by the court; and
- a document made outside of BC that performs the function of a representation agreement that complies with the as yet unknown regulations, will be deemed to be a representation agreement under the RA Act.

When Bill 29 is proclaimed it will introduce a new planning tool called an “advance directive.” Advance directives will allow adults to specify refusal to specific kinds of health care in a document to be provided to their health care providers when they are incapable. This is intended to be used by those who do not choose to execute representation agreements.