

PLANNING MATTERS

Third Quarter 2010

Representation Agreements: Planning for Health and Personal Care

Adults can only be given health care with their consent. Specifically, under the *Health Care (Consent) and Care Facility (Admission) Act of BC*, health care professionals must obtain informed consent before treating a patient. However, if the patient is incapable of making an informed decision, a substitute decision-maker is needed. A substitute decision-maker includes a Committee of Person or Representative appointed under a representation agreement. In the absence of a Committee of Person or a Representative, the law allows for a “temporary substitute decision maker” which is the adults’ nearest relative, namely, the adult’s spouse, adult child, parent, sibling or other relative who qualifies to make the health care decision.

Representation agreements are relatively new in British Columbia and are made possible by the *Representation Agreement Act*, which came into effect on February 28, 2000. A representation agreement is an important legal planning document that enables you to choose the person to make important health care decisions for you in the future. It gives you an opportunity to make critical choices in advance about who will make health care decisions for you and how they will be made in the event that you could not communicate those wishes yourself. You can designate another adult or the Public Trustee to represent you in health care matters. Of note, financial institutions and trust companies are only permitted to represent an adult in financial and legal matters.

A representative is in a fiduciary relationship with the adult. Thus, the representative must act in good faith, exercise the care and skill of a reasonably prudent person and cannot act outside the scope of authority given to him or her under the agreement.

There are two kinds of Representation Agreements:

1. Standard Representation Agreements

Standard representation agreements (section 7 agreements) can be entered into by someone who may be incapable of making a contract or managing her affairs, provided that:

- It is the adult’s desire to have a representative decision maker;
- The adult can make choices and express feelings of approval or disapproval of others;
- The adult can comprehend the effect of a representative agreement and its terms; and
- If the adult and the representative have a relationship based on trust.

A standard representation agreement can cover the following health care issues:

- Major surgery, any treatment involving a general anaesthetic, major diagnostic or investigative procedures, radiation therapy, intravenous chemotherapy, kidney dialysis, electroconvulsive therapy, laser surgery, routine tests to determine if health care is necessary, routine dental treatment that prevents or treats a condition or injury caused by disease or trauma, cavity fillings and extractions done with or without a local anaesthetic; and oral hygiene inspections.

A monitor is required unless the representative is the adult’s spouse, is the Public Guardian and Trustee, or more than one representative is appointed.

The representative in a standard agreement is not allowed to make the following decisions:

- Abortion unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;
- Electroconvulsive therapy unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed;

Contributing Writer:
Nicole Garton-Jones
Lawyer & Mediator



Heritage Law®

www.bcheritagelaw.com

Editor:

Jonathon Palfrey, CFA
Senior Vice President,
Portfolio Manager

Leith Wheeler Investment
Counsel Ltd.
Suite 1500
400 Burrard Street
Vancouver, B.C.
V6C 3A6

Tel 604.683.3391
Fax 604.683.0323
info@leithwheeler.com
www.leithwheeler.com

Views expressed are the views of the contributing writer and do not represent the views necessarily of Leith Wheeler, and do not in any event constitute legal or other advice. Leith Wheeler has certain referral arrangements with the contributing writer and with the company with which the contributing writer is employed.

- Psychosurgery;
- Removal of tissue from a living human body for implantation in another human body or for medical education or research;
- Experimental health care (health care that deviates from standard professional practice) involving a foreseeable risk to the adult for whom the health care is proposed that is not outweighed by the expected therapeutic benefit;
- Participation in a health care or medical research program that has not been approved by a committee;
- Any treatment, procedure or therapy that involves using aversive stimuli to induce a change in behaviour.

In addition, the representative in a standard agreement is not authorized to make a decision to refuse life-supporting care or treatment.

2. *Enhanced Representation Agreements*

An enhanced representation agreement (section 9 agreement) goes beyond the limited provisions of a standard agreement but requires the adult to have full mental capacity when it is signed. It can be as broad or detailed as the adult wishes it to be.

A representative appointed in an enhanced representation agreement has the same powers as one appointed in a standard agreement in addition to the authority to do the following:

- Physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult;
- Give consent, in the circumstances specified in the agreement, to specified kinds of health care, even though the adult is refusing to give consent at the time the health care is provided;
- Refuse consent to specified kinds of health care, including life-supporting care or treatment.
- Give consent to specified kinds of health care, including one or more of the following:
 - * Abortion unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed, electroconvulsive therapy unless recommended in writing by the treating physician and at least one other medical practitioner who has examined the adult for whom it is proposed, psychosurgery, removal of tissue from a living human body for implantation in another human body or for medical education or research, experimental health care (health care that deviates from standard professional practice) involving a foreseeable risk to the adult for whom the health care is proposed that is not outweighed by the expected therapeutic benefit, participation in a health care or medical research program that has not been approved by a committee, any treatment, procedure or therapy that involves using aversive stimuli to induce a change in behaviour.
- Accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for the adult's admission to any kind of care facility;
- Make arrangements for the temporary care, education and financial support of
 - * The adult's minor children, and
 - * Any other persons who are cared for or supported by the adult; and
- Do, on the adult's behalf, any thing that can be done by an attorney acting under a power of attorney.

Currently, only practicing lawyers can consult with clients entering into enhanced representation agreements.

The Future

In November 2008 the provincial government passed the *Adult Guardianship and Planning Statutes Amendment Act* and the *Health Statutes Amendment Act* (Bill 29) that, once proclaimed, will strengthen and clarify the law relating to the use of representation agreements. In addition, Bill 29 will amend the *Health Care (Consent) and Care Facility (Admission) Act* to include advance directives for health care. It is unknown at this time when Bill 29 will come into effect.

Due to the complexities, ongoing changes, and differences among jurisdictions, guidance from your estate advisor is needed to incorporate representation agreements into your estate plans.