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Incapacity Planning and Representation Agreements What They Are and What They Do

by
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Everyone, during his or her lifetime, will be required to make any number of health care decisions. With our increasing life spans, decisions about major health treatment issues in our advanced years are becoming more prevalent. In British Columbia, as well as other common law provinces in Canada, it is a fundamental law that as long as any adult is mentally capable, he or she has the right to make his or her own health care decisions.

In the context of medical treatment, before anyone gives another person any health care treatment, that person must agree to receive the treatment, or, in other words, give his or her consent to have that type of level of health care administered.

Having the right to make your own health care decisions means:

- You can choose to refuse any health care treatment, for any reason, including religious/moral reasons. You have this right even if this puts your health or life in danger.
- You can change your mind and stop any treatment, for any reason. Again, you gave this right even if your decision puts your life or health in danger.
- Your decision must be respected.
- You have the right to be involved in plans and decisions about your health care.
- You have a right to health care information in a way you can understand it so you can make informed decisions.

What happens when a person's mental and or physical health declines to such an extent that he or she can no longer provide this consent? Who will decide for that person about becoming an organ donor or authorize any given medical treatment or make end-of-life decisions?

The need for this kind of incapacity planning is often brought into focus when a person examines the present "default" legislative mechanism in British Columbia, where a responsible adult can apply to the British Columbia Supreme Court to have him or her appointed to make health care (and financial) decisions for a legally incapable adult. This "default" mechanism (known as "Committeeship") is found in *Patient's Property Act*. This legislative "default" mechanism exists to fill the vacuum in the situation where the now mentally incapable adult has not entrusted another to make health care (or financial) decisions in accordance with his or her expressed wishes made known when he or she was of sound mind. Often, the decision of the Court will be at odds with the adult's wishes. This is due to the fact that the Committeeship process is inflexible, costly and often results in the appointment of a person or persons who do not always have the best interest of the adult at heart, or do not possess a knowledge and understanding of the adult person's wishes

Incapacity planning will create peace of mind because it gives a person the ability to delegate health care (and financial) decisions to another trusted person. He or she can rest assured that those health care (and financial) decisions will be made in the way the person would do for him or herself if he or she were mentally capable.

There are two primary, legislatively authorized, legal documents by which a person in British Columbia, can, in advance, plan for the possibility he or she will become incapable of making decisions for himself or herself. Both of these documents enable an adult to appoint another person or persons who he or she trusts to make future decisions, either immediately, or if certain events come to pass. Both must be executed when the person giving the authority is mentally capable.

The first legal instrument is called a Power of Attorney (“POA”). This grants another person (the “attorney”) the authority to act on behalf of another person (the “Donor”) ONLY in matters of finance, property, banking and business. Powers of Attorney have no application to health care decision-making.

The second legal instrument is a Representation Agreement (the “RA”). Until fairly recently, it was not possible for a person to delegate health and personal care decisions, as was possible with financial matters by way of an enduring POA. That changed in British Columbia with the coming into force, in 1993, of the *Representation Agreement Act*. The balance of this article will discuss the operation of RAs.

A Representation Agreement gives another person (the “Representative”) the authority to make, PRIMARILY, health care decisions for himself or herself. At present, the *Representation Agreement Act* does permit a Representative to manage routing financial affairs but legislation is forthcoming which will permit a person’s financial affairs to be administered only by an attorney under a POA.

TWO KINDS OF REPRESENTATION AGREEMENTS

Under the *Representation Agreement Act*, a person can execute one of two kinds of RAs while he or she is still mentally capable, the two kinds of RAs being named after the section in the *Representation Agreement Act*, which creates them.

Section 7 RA

- Designates substitute decision maker in the event of the Donor’s incapacity.
- Representative can make minor and major health care decisions for the Donor.
- Health care decisions covered:
 - consent to medical treatment;

- medication;
 - minor or major surgery (as these terms are defined by the *Representation Agreement Act*; and
 - living arrangements for the Donor.
- does not require a lawyer to prepare.

Section 9 RA

- Designates substitute decision maker (the “Representative”) for significant (often controversial) health care decisions including:
 - end of life decisions;
 - admittance to care facility;
 - refusal of life saving or life supporting treatment; and
 - to have the Donor confined or physically restrained against his or her will.
- Representative must exercise decisions in accordance with the Donor’s values, beliefs and wishes, made known while mentally capable.
- RA must be executed in the presence of a lawyer.

The Representative

Who may act as a Representative is set out in Section 5 of the *Representation Agreement Act*. A Donor may appoint:

- another adult; or
- the Public Guardian and Trustee.

All Representatives must complete a certificate in a prescribed form stating that he or she will comply with the duties and responsibilities of a Representative described in Section 16 of the *Representative Agreement Act*.

Duties of a Representative

A Representative, when making health care decisions for a Donor, cannot make decisions based upon his or her own values and wishes. He or she, like an attorney under a POA, owes a

fiduciary duty to the Donor. A Donor should give the Representative a detailed, written statement of his or her wishes for health care. These wishes can be incorporated into the RA. The Donor should make such wishes as extensive as possible in order that the Representative can accurately represent the adult in the event of incapacity.

The Representation Agreement (the “RA”)

The *Representation Agreement Act* requires that a RA must be:

- in writing;
- signed by the Donor, Representative and Alternate Representative; and
- witnessed by two witnesses, unless it is witnessed by a lawyer or notary public who must complete a consultation certificate, which forms part of the RA.

A RA is, at present, a cumbersome document to execute but changes are contemplated to simplify the execution requirements in the hope that a RA will be more easily understood and, therefore, more widely used.

Changing your RA

RAs can be revoked or changed at any time as long as the adult is capable of making his or her own decisions. As part of your estate plan, we recommend that you review your RA at least every five years, or more often as you grow older or if your health changes, to ensure that your RA continues to reflect your wishes and health conditions. If you change the content of your RA, you should destroy all copies of the RA you have changed.

Checklist for an RA

1. Decide if you want to entrust your health care to another trusted individual(s) if you cannot make such decisions.
2. Gather information for decision making:
 - discuss your health care thoughts with your doctor and lawyer;
 - your doctor will likely be one of your future health care providers, so he or she will be more likely to honour the requests that you have communicated directly;
 - your doctor and lawyer can help you phrase your requests in a way that makes sense to physicians;
 - your doctor can point out inconsistent aspects of your requests so the RA is coherent;

- your doctor will inform you of aspects of your requests that he or she cannot honour because of professional, personal or moral constraints
3. Speak with your family:
- your actual medical condition may not equate with your directives,
 - speaking with family members will likely help them to make decisions based upon your ideas for health care, which you communicated to them while you were still capable, even though your RA does not specifically address your actual health care directives - your wishes will more likely be honoured; and
 - more likely to avoid unpleasant family disputes where one family member who feels he or she has the moral, if not legal, authority to make health care decisions and disagrees with the health care steps proposed to be taken.
4. Discuss the draft RA with your doctor, relatives and your chosen Representative(s).
5. After execution of the RA:
- give executed copies to your Representative(s), doctor and close relatives; and
 - ensure the original RA is stored in a secure location that is known to your Representative and to which your Representative has access in the event he or she is called upon to use it.

Useful Internet Links

1. Planned Lifetime Advocacy Network of Canada (www.plan.ca).
2. Representation Agreement Resource Centre for British Columbia, Vancouver, B.C. (www.rarc.ca).
3. Canadian Bar Association (www.cba.org/BC/public_media/wills).
4. Public Guardian and Trustee of British Columbia (www.trustee.bc.ca).

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