



Representation agreements

Recorded on May 12, 2022

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Representation Agreements and Temporary Substitute Decision-Makers

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CAPACITY FOR THE LAWYER

- Capacity for the lawyer is different than capacity for the medical team
- Our concern is does the client understand and appreciate the contents and effect of the decision they are making
- Sliding scale for required capacity:



Test of incapability for standard provisions

8 (1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

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

(2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:

- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- (c) 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;

(d) whether the adult has a relationship with the representative that is characterized by trust.

REPRESENTATION AGREEMENTS

- Section 7 Representation Agreements
 - Less Capacity
 - Day-to-day financial
 - Personal Care
 - Stop gap measure
 - Monitor (unless Representative a spouse or two or more Representatives acting unanimously)
- Section 9 Representation Agreements
 - More Capacity
 - No financial ability
 - Personal Care

Section 7

- Created as a stop gap measure for those Adults unable to grant a POA or Section 9 Representation Agreement
- Allows the Representative to make:
 - day-to-day financial decisions;
 - Major or minor health care decisions;*
 - Personal care decisions; and
 - Obtaining legal counsel.
- *It is possible to have the Adult placed in a care facility but is restricted under the *Representation Agreement Act*
- A Representative cannot refuse treatment to preserve an Adult's life nor can they choose to have the Adult restrained, moved, etc.
- Capacity is determined under Section 8 (See Handout)

Monitors

12 (1) An adult who makes a representation agreement containing a provision authorized by section 7 (1) (b) must name as monitor in that agreement an individual who meets the requirements of subsection (4) unless

(a) the representative named by the adult is the adult's spouse, the Public Guardian and Trustee, a trust company or a credit union, or

(b)the adult has assigned authority under section 7 (1) (b) to 2 or more representatives and they are required to act unanimously in exercising all authority assigned under that section.

(c)[Repealed 2007-34-51.]

(2)Failure to name a monitor in a representation agreement for which a monitor is required under subsection (1) makes a provision authorized by section 7 (1) (b) invalid.

(3)An adult who is not required under subsection (1) to name a monitor may choose to name as a monitor in a representation agreement an individual who meets the requirements of subsection (4).

(4)To be named in a representation agreement as a monitor, an individual must be at least 19 years of age and must be willing and able to perform the duties and to exercise the powers of a monitor.

Section 9

- This level requires greater mental capacity
- Much greater detail as to the care and lifestyle of the Adult
- There is no allowance for day-to-day financials
 - If able to do a Section 9 Representation Agreement, the Adult can do a POA which provides broader legal and financial authority
- IF GRANTED, the Representative can approve or refuse life preservation care for the Adult
 - They may be able to “interfere with the Adult’s religious beliefs”, or
 - Make temporary arrangements for care of those that the Adult cared for (such as children or other incapacitated adults)



Differences Between S7 and S9 Representation Agreements

- Capacity
- Types of Decision Making
- Ability to refuse care
- Financial Abilities

- Section 7 of the *RAA* allows, subject to any restrictions made by the adult while capable, a Representative to decide:
 - Personal care
 - Routine management of financial affairs (day-to-day, nothing major like selling a house)
 - Major and minor health care EXCEPT decisions on care necessary to preserve life
 - Obtaining legal services, except for divorce proceedings
 - The S 7 Rep MAY have authority to accept care facility proposals only if the facility is a family care home, group for mentally handicapped, or a mental health boarding home
 - The S 7 Rep CANNOT refuse care to preserve life and cannot physically restrain, move, or manage the adult, or authorize anyone else to do this.
- Section 9 of the *RAA* allows a Rep to:
 - Anything considered necessary related to the personal or health care of the adult
 - Make any number of decisions for personal or health care, such as:
 - Who or where they live (ie. A care facility);
 - If and where an adult should work;
 - Whether the adult should participate in schooling, training, social activities;

- Who the adult should have contact with;
- Any licensing, permits, approvals, etc to participate in an activity;
- Day-to-day decisions, diet, dress;
- Give or refuse consent to health care
- Physically restrain, move, or manage adult or authorize another to do IF
NECESSARY FOR PERSONAL OR HEALTH CARE
- If EXPRESSLY PROVIDED FOR the S 9 Rep can
 - Give or refuse consent care necessary to preserve life;
 - Make arrangements for temporary care/education for anyone dependant upon the adult;
 - Interfere with the adult's religious practices
- If the S 9 Rep is granted power to refuse or consent to health care, this includes the care necessary to preserve life. Again, EXPRESSLY permitted.



Issues from the Legal Perspective

- Capacity
- Use of the S7 Representation Agreement
- Is there land that needs to be dealt with?
- Confusion between a Power of Attorney and a Representation Agreement
- How does the Representation Agreement fit with the Advanced directive?

- Capacity is always at issue and requires an assessment
- Acceptance at the Banks: Not often accepted in lieu of the Power of Attorney
 - Also, there is vagueness as to routine financial matters. How far will you be allowed to go?
- A Representative cannot sign Land Title documents for someone else, only a Power of Attorney.
- Power of Attorney is for the “stuff” – ie legal and financial decisions – and not the “person” – ie personal hygiene, medical care.

- If both advance directive and representation agreement

19.3 (1) Subject to subsection (2), if an adult makes both an advance directive and a representation agreement, regardless of when, in relation to each other, the advance directive and representation agreement are made,

(a) section 19.7 of this Act does not apply in respect of any instruction in the advance directive that relates to a matter over which the adult's representative has decision-making authority, and

(b) for the purposes of section 16 of the [Representation Agreement Act](#), the instruction referred to in paragraph (a) of this subsection is to be treated as the wishes of the adult, expressed while capable.

(2) An adult may, in the adult's representation agreement, state that a health care

provider may act in accordance with a health care instruction set out in the adult's advance directive without consent of the adult's representative, in which case section 19.7 applies in respect of that instruction.



The Patient, the Family Member, or the Representative?

- The Patient: Anyone who has reached 19 years of age
 - Is the patient able to participate in the decision-making process?
 - Presumption is yes but has there been anything suggest otherwise?
 - Communicating not always indicative of capacity
 - Examples?
 - If not, who, or what, do we look to?
 - Advanced Directive? Part 2.1, S 19.1
 - Representative?
 - Temporary Substitute Decision Maker?

- Capacity will be determined on a case by case basis;
- Section 7 and Section 8 dictate how capacity is determined and how this is communicated:
 - 7** When deciding whether an adult is incapable of giving, refusing or revoking consent to health care, a health care provider must base the decision on whether or not the adult demonstrates that he or she understands
 - (a) the information given by the health care provider under section 6 (e), and
 - (b) that the information applies to the situation of the adult for whom the health care is proposed.
 - 8** When seeking an adult's consent to health care or deciding whether an adult is incapable of giving, refusing or revoking consent, a health care provider
 - (a) must communicate with the adult in a manner appropriate to the adult's skills and abilities, and
 - (b) may allow the adult's **spouse**, or any **near relatives** or **close friends**, who accompany the adult and offer their assistance, to help the adult to understand or to demonstrate an understanding of the matters mentioned in section 7.



The Patient, the Family Member, or the Representative?

- The REPRESENTATIVE:
 - Common misconception that a Power of Attorney and Representative are interchangeable
 - Power of Attorney – Legal and Financial "THE STUFF"
 - Representative – Personal and Health Care "THE PERSON"
 - Looking for the Representation Agreement – dependant upon circumstances
 - What kind of Agreement are you looking at?
 - Section 7 or Section 9?
 - What if there is a Representative AND an Advanced Directive?

- Section 7 of the RAA allows, subject to any restrictions made by the adult while capable, a Representative to decide:
 - Personal care
 - Routine management of financial affairs (day-to-day, nothing major like selling a house)
 - Major and minor health care EXCEPT decisions on care necessary to preserve life
 - Obtaining legal services, except for divorce proceedings
 - The S 7 Rep MAY have authority to accept care facility proposals only if the facility is a family care home, group for mentally handicapped, or a mental health boarding home
 - The S 7 Rep CANNOT refuse care to preserve life and cannot physically restrain, move, or manage the adult, or authorize anyone else to do this.
- Section 9 of the RAA allows a Rep to:
 - Anything considered necessary related to the personal or health care of the adult
 - Make any number of decisions for personal or health care, such as:
 - Who or where they live (ie. A care facility);
 - If and where an adult should work;
 - Whether the adult should participate in schooling, training, social activities;
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- Any licensing, permits, approvals, etc to participate in an activity;
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If both advance directive and representation agreement

19.3 (1) Subject to subsection (2), if an adult makes both an advance directive and a representation agreement, regardless of when, in relation to each other, the advance directive and representation agreement are made,

(a) section 19.7 of this Act does not apply in respect of any instruction in the advance directive that relates to a matter over which the adult's representative has decision-making authority, and

(b) for the purposes of section 16 of the [Representation Agreement Act](#), the instruction referred to in paragraph (a) of this subsection is to be treated as the wishes of the adult, expressed while capable.

(2) An adult may, in the adult's representation agreement, state that a health care provider may act in accordance with a health care instruction set out in the adult's advance directive without consent of the adult's representative, in which case section 19.7 applies in respect of that instruction.



The Patient, the Family Member, or the Representative?

- The Patient cannot consent, there is no advanced directive, and the Representative has not arrived yet, or there isn't one, so you are looking to a Family Member to assist in the decision-making. Who should you talk to?
 - Good thing the legislation tells you!
 - Section 16 of the HCCFA
 - *The Temporary Substitute Decision Maker*
 - The stand-in until the adult regains capacity or the representative or guardian arrives
 - This person has the right to all information or documents that the adult would be in order to make an informed decision
 - There are restrictions on their authority (s 18 – Known wishes will trump, as well as meeting their duties as the

The Hierarchy of Temporary Substitute Decision Makers

Temporary substitute decision makers

16 (1) 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):

- (a) the adult's spouse;
- (b) the adult's child;
- (c) the adult's parent;
- (d) the adult's brother or sister;
- (d.1) the adult's grandparent;
- (d.2) the adult's grandchild;
- (e) anyone else related by birth or adoption to the adult;
- (f) a close friend of the adult;
- (g) a person immediately related to the adult by marriage.

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

- (a) be at least 19 years of age,
- (b) have been in contact with the adult during the preceding 12 months,
- (c) have no dispute with the adult,
- (d) be capable of giving, refusing or revoking substitute consent, and

(e) be willing to comply with the duties in section 19.

(3) 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**, including a person employed in the office of the Public Guardian and Trustee, authorized by the Public Guardian and Trustee.

(4) A health care provider is **not required to do more than make the effort that is reasonable in the circumstances** to comply with this section.

- Section 18(2) on care necessary to preserve life – consensus with health care providers:
 - It is medically appropriate>
 - Was the decision made in accordance with s 19(1)?
 - Consulted with the adult (if possible)
 - Family, close friend, or near relative, if applicable/appointed by the PGT
 - Is it in the instructions/wishes of the adult?
- S 19(2)?
 - No known wishes or instructions?
 - Best Interests!!
 - Current wishes, known beliefs or values?
 - Is there a chance of recovery
 - Benefit outweighs risk
 - Is there a less restrictive/intrusive form of care?




The Patient, the Family Member, or the Representative?

- The Family Member:
 - May not always be a family member who is available
 - The Close Friend
 - "in respect of an adult who needs health care, means another adult who has a long-term, close personal relationship involving frequent personal contact with the adult, but does not include a person who receives compensation for providing personal care or health care to that adult;"
 - The Near Relative
 - "in respect of an adult who needs health care, means an adult child, a parent, a grandparent, an adult brother or sister, any other adult relation by birth or adoption, or a spouse of any of these;"
 - The Spouse
 - a person who
 - (a) is married to another person, and is not living separate and apart, within the meaning of the [Divorce Act](#) (Canada), from the other person, or
 - (b) is living with another person in a marriage-like relationship.



The Who: The Patient, the Family Member, or the Representative?

- To Sum Up:
 - The Patient
 - Advanced Care Directive
 - Capacity
 - The Representative
 - Section 7 or Section 9 Representative?
 - Personal Guardian (Committee)
 - The Temporary Substitute Decision Maker
 - The Patient is incapable
 - The Representative/Guardian is not available



The When: When do we pass over one for the other?

- Does the Patient understand the information given by the health care provider to make an informed decision?
 - Do they understand how it applies to their specific situation?
- If they cannot give oral consent, what about in writing?
 - Is there an advanced directive?
- The Representative is not EXPRESSLY permitted to make that decision
 - Will be looking to whether that Representative applies to be granted that authority by way of Committee appointment
 - May need a Temporary Substitute Decision Maker if urgent
- Seek Guidance from the PGT, or subsequently the Courts

Make an action plan ✓

Wills and planning for your future care

Make a will (5 mins)

Plan for your future care (20 mins)

MyLawBC can help you **make a simple will** that says what you want to happen after you die. If your situation is complicated, you can't make a will with MyLawBC but you can **make an action plan** that gives you information about what you need in your will and where to get help.

You can also plan for a time when you can't decide for yourself. You'll get an action plan about documents you'll need to arrange for future decision-making about financial, legal, and health and personal care matters.

You might not be able to make a will with MyLawBC if your situation is complicated. See [What MyLawBC doesn't cover](#) (PDF).

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