



## Advance Directives in BC

Instructions for certain health care matters

*“When I could not get my Representation Agreement completed in time for my surgery, I used the Advance Directive to address a worst case scenario. Read the story on p. 4”*

This fact sheet is about Advance Directives in BC and their role in giving instructions to a health care provider about certain health care matters. Some professionals use the term Advance Health Directive, but the legal term in BC is Advance Directive.

There is no ‘d’ on the end of Advance (a common yet serious mistake as it gives a false meaning).

An Advance Directive in BC is governed by legislation that came into effect on September 1, 2011 and was added to the Health Care Consent and Care Facility Admission Act.

The term advance directive may be used in other provinces or countries, but is not always backed up by legislation.

### **What is an Advance Directive under BC law?**

An Advance Directive is a **written instruction** about what health care you do or do not want in the future if you become incapable and a health care decision needs to be made. An Advance Directive is voluntary; you do not have to make one. If you do, consider making a Representation Agreement section 9 and giving your Advance Directive to your representative and alternate to follow.

An Advance Directive does not name a person to act on your behalf. A Representation Agreement is the way in BC to legally choose and authorize a person to help you with health care decisions. When thinking about the difference between these two documents, consider that an Advance Directive is a piece of paper — it cannot be an advocate for you like a person (your representative) can. More comparisons on pages 4-5.

An Advance Directive can only apply to **health care** matters. It cannot apply to personal care matters such as instructions about where you want to live. It does not apply to financial affairs such as using your money to pay for services to enable you to live in your own home.

A Representation Agreement covers health care AND personal care matters. Some types of Representation Agreements can include finances or you might make an Enduring Power of Attorney to cover finances. See page 5 for *More information from Nidus.*

### **Who can make an Advance Directive?**

The requirements for who can make an Advance Directive under BC law are:

- 1. Age** — you must be 19 years or older. In BC, the age of adulthood (age of majority) is 19 years.
- 2. Mental capability** — you must understand the nature and consequences of an Advance Directive, at the time of making it. Nidus calls this the traditional definition of capability.

The law spells out some specifics for being considered mentally capable to make an Advance Directive. (You are not required to state these in the Advance Directive.) You must understand:

- 1) The scope and effect of instructions you put in your Advance Directive about giving or refusing consent to health care; and
- 2) A person will not be selected as a Temporary Substitute Decision Maker to make health care decisions on your behalf except under specific circumstances (see page 3, *What happens if...*).

### **What is a stand-alone Advance Directive?**

Nidus uses the term ‘stand-alone’ to refer to an Advance Directive that is made for a health care provider to act on (rather than your representative):

1. You made an Advance Directive instead of a Representation Agreement section 9 (RA9), or
2. You made both a Representation Agreement section 9 (RA9) and an Advance Directive. You included a statement in the RA9 such as “a health care provider may act on an instruction set out in an Advance Directive without consent of my representative.”

*Note: The wording for the statement above is from the legislation and it says ‘may.’ Even if someone drafts an Advance Directive and uses the term ‘must,’ the legislation takes priority and a health care provider ‘may’ act on the instruction in the Advance Directive.*

*Such wording is not available in the free basic RA9 forms, you could request this from Nidus in a Custom RA9.*

### Can I rely on an Advance Directive?

While it may seem possible and even ‘the responsible thing’ to write instructions about health care you do and do not want in the future — and to expect this to be sufficient — it is NOT likely to cover all health care situations that may arise or to be enough.

Extensive research over many years reveals that even medical doctors find the task of listing clear instructions for all potential circumstances to be impossible.

The Covid-19 pandemic is a case in point. No one predicted the extent of its local or global effects. The health system applied known treatments to tackle this new virus. Public health officials are developing evidence and analysis by taking note of what seems to work or not. Ventilators have become part of standard treatment for the most serious cases. It is clear that the involvement and cooperation of the general public is crucial and to be respected. It is an unpredictable journey. Uncertainty is difficult to accept and adjust to.

### Does a health care provider have to follow the instruction in my stand-alone Advance Directive?

A health care provider must follow a few steps before they can even consider an instruction in an Advance Directive. They must determine:

1. You need health care;
2. You do not have a court-appointed committee of person (if you do, it means you have been declared mentally incompetent by a judge and the health care provider will get consent from the committee of person for any health care you need, and the committee of person decides based on what they think is best for you);
3. You are incapable of informed consent for the health care that is being offered;
4. There is no representative named in a Representation Agreement you made that covers the health care being offered. OR, there is a Representation Agreement that covers the decision and it has a statement that the Advance Directive may stand-alone for consent - see page 1 under *What is a stand-alone Advance Directive* (#2); and
5. You made an Advance Directive that is related to the health care being offered.

The law sets out other requirements or conditions (some might call these safeguards) for an Advance Directive:

- You were 19 years of age or older when you made the Advance Directive;

- You made the Advance Directive when you were capable of informed consent to the health care being offered (no one can make an Advance Directive on your behalf);
- The Advance Directive is made according to the requirements of the law (see heading about format);
- There is no reason to believe that, while capable, your wishes, values or beliefs about health care decisions significantly changed and these changes are not reflected in the instructions in your Advance Directive;
- Your instruction is not against the law (for example, euthanasia — you cannot use an Advance Directive to request medical assistance in dying or authorize its administration);
- Your instruction does not omit something required by law. For example, you cannot use an Advance Directive to instruct a health care provider to exclude getting consent from other authorities as required by law, if the health care provider cannot follow your Advance Directive for consent when you are incapable. See heading, *What happens if...*
- Your instruction is for a type of health care that can be addressed by an Advance Directive (you cannot include instructions about experimental health care, psychosurgery, transplantation, aversive therapy, or unapproved research. Other conditions must be met for instructions about electro-convulsive therapy or abortion);
- There are no significant changes in medical knowledge, practice, or technology since you made the Advance Directive - or you included a statement in the Advance Directive that your instructions still stand even if such changes occur; and
- Your instruction to give consent and/or to refuse consent is clear and applies to the circumstance at hand (no interpretation is needed).

After confirming the requirements listed above, the law says a health care provider:

- **May** follow an instruction that gives consent to the specific health care; and
- **Must** follow an instruction that refuses consent to the specific health care.

The law also says that if health care has been started before the health care provider locates your stand-alone Advance Directive, and it includes an instruction to refuse consent to the specific health care being offered, the health care provider must stop or withdraw the health care. (Note: A representative named in your Representation Agreement has authority to stop (cancel) health care — they may do this because they see the health care is not helping you.)

### **What happens if my stand-alone Advance Directive is not followed?**

If the health care provider has followed the four steps outlined on page 2 under *Does a health care provider have to follow the instruction...* but they cannot find or follow the instruction in your Advance Directive, the health care provider must get consent from:

- Your representative if you made a Representation Agreement that covers the decision; or, if none,
- A Temporary Substitute Decision-Maker (TSDM), selected by the health care provider from a ranked list in the law. Read [Role and Scope of Authority of a TSDM](#) or see page 5 *More Information from Nidus*.

In this situation, your representative or TSDM decide according to what they think is best for you. They bypass their duty to comply with wishes or instructions you expressed when capable (such as in your Advance Directive).

### **What format is required for an Advance Directive?**

There is no required form that must be used to make an Advance Directive, but the legislation sets out requirements about the format:

- Must be in writing. It must be signed and dated in the presence of witness(es).

*If you cannot physically sign your Advance Directive, another adult can sign on your behalf. You have to be present and you have to direct them to sign on your behalf. They will sign their name and their signature must be witnessed as if it was your signature. A witness cannot sign on your behalf. Someone who is not qualified to be a witness cannot sign on your behalf.*

*In law, your signature is the mark you make in front of the witness(es). Due to physical disabilities you might have to hold the pen in your mouth or maybe the pen is adapted. Your signature might look like a dot or line or squiggle — any mark you make voluntarily is okay. There is something important about signing for yourself.*

- You must include statements in the Advance Directive indicating you know that:
  1. A health care provider may not provide any health care for which you refused consent in the Advance Directive, and
  2. A person may not be chosen to make decisions on your behalf in respect of any health care for which you have given or refused consent in the Advance Directive.
- If you do not want your instructions to be set aside because of changes in medical knowledge, practice, or technology that relate to or may affect your instructions, the law says you can include a specific

statement about this in your Advance Directive. This is the only condition the law says you can 'draft out' of.

- You do not have to go to a legal professional to make an Advance Directive. A legal professional may be able to provide information related to the format of an Advance Directive, but likely does not have the necessary knowledge to advise on the wording of instructions. See next heading, *Where do I find...*
- An Advance Directive must be witnessed as required.

*A witness must:*

- › *Be 19 years or older.*
- › *Understand your type of communication or have received interpretive assistance to understand.*
- › *Be present when you sign.*
- › *Sign in the presence of you and any other witness.*

*A witness can NOT:*

- › *Be someone who is compensated for providing health care, personal care, or financial services to you, unless they are a BC lawyer or member in good standing of the Society of Notaries Public of BC.*
- › *Be the spouse, parent, child, employee or agent of someone who is compensated for providing health care, personal care, or financial services to you, unless they are the spouse, parent, child, employee or agent of a BC lawyer or member in good standing of the Society of Notaries Public of BC.*

*Only one witness is required if it is a BC lawyer or member in good standing of the Society of Notaries Public of BC; otherwise two witnesses are required.*

### **Where do I find wording for the instructions?**

Although recommended by Nidus, the legislation does not provide wording to use in an Advance Directive for writing instructions to give consent and/or to refuse consent.

Medical staff working in different departments or specialties have different interpretations of various terms and wording. This adds to the difficulty of making an effective and reliable Advance Directive.

Cynthia's example on the next page illustrates the difficulty and limitations of a stand-alone Advance Directive.

If you made a document with health care instructions before September 1, 2011 it is only recognized as an Advance Directive if it meets the legal requirements as set out in law on September 1, 2011. The law does not recognize Advance Directives made outside BC.

**EXAMPLE:** Cynthia was in the process of making a Representation Agreement section 9 (RA9) for health care and personal care matters. She was going to name her friend Jasmine as her representative and ask her sister to be the alternate. However, before she was able to complete her Agreement, she learned that she needed surgery to remove a benign tumour.

Cynthia did not have time to get all her affairs in order before the scheduled surgery. In discussion with her surgeon, Cynthia became concerned about the possible risks, in particular the remote possibility she could end up in a coma.

Cynthia asked her family doctor for help but he said that it was best to consult the surgeon as he did not know enough about the specifics.

The surgeon agreed to help Cynthia write a clear instruction that she could include in an Advance Directive. Together they arrived at wording the surgeon felt able to follow if Cynthia developed a problem that might result in her becoming comatose. The surgeon told Cynthia she should go over the instruction with the anesthesiologist who might have a role to play if the worst case scenario should occur. The surgeon also stressed that there were many other possibilities, some that he could not predict, and it is easier and better to be prepared by making a Representation Agreement.

Cynthia recovered fully from her surgery and revoked (cancelled) her stand-alone Advance Directive. Cynthia made a Representation Agreement section 9 (RA9) and discussed wishes and values with her representative and alternate — people she knows and trusts.

If Cynthia decides to make another Advance Directive, she will discuss it with and give it to her representative and alternate to apply. Cynthia has come to learn how her representative has more ability than a health care provider to interpret her wishes and to act on them.

With a Representation Agreement, health care providers have a person (your representative) to talk with and your representative can exercise authority based on their knowledge of you and their discussions with you.

### **When would an Advance Directive be useful?**

An instruction such as “I refuse blood transfusions in any and all circumstances” would appear to be clear and specific. Yet, even though people of the Jehovah Witness faith, through various court cases, have won the right to make this decision, some still worry that a health care provider might be convinced by someone else that the adult who wrote the instruction has changed their values and beliefs. In such a case, a health care provider cannot follow the instruction.

The other thing to note is that there are many more health care decisions that might come up and which have nothing to do with blood transfusions.

A comprehensive approach for someone of the Jehovah Witness faith is to make a Representation Agreement section 9 and an Advance Directive with the instruction about no blood transfusions. Give the Advance Directive to the representative and alternate as a representative must carry out your wishes, instructions, values and beliefs.

#### Predicting the hypothetical? Is it realistic?

We are constantly reminded of how unpredictable the weather is, and there has never been a push to write advance instructions for how our money should be managed (given the stability of the economy...).

Why then, do we feel compelled to write down detailed wishes about health care we might or might not need in the future?

What if we leave something out?

What if an instruction is misinterpreted by someone we did not discuss it with?

### **It's confusing. Do I make an Advance Directive or not? What about a living will?**

As you learned under *What happens if...* a stand-alone Advance Directive could backfire if your instruction is not clear or does not apply to the situation and therefore a health care provider cannot follow it as consent when you are incapable. Instead, they must ask your representative or, if none, select a TSDM to decide. The law says in this case your representative or a TSDM must decide based on what they think is best for you, they do not have to consider or comply with your instructions.

Most wishes depend on the circumstances at hand. These would not be suitable for an Advance Directive.

A faith-based wish is not likely to be affected by different circumstances because it is based on a belief system. In this case, an Advance Directive may be useful but only if you also make a Representation Agreement section 9.

A **Representation Agreement is an essential legal planning document** for health and personal care. It can deal with more things than an Advance Directive covers (like personal care matters) and can respond to the unexpected and allow for a variety of circumstances.

A representative can get information from many sources, including from medical personnel.

Your representative can balance the medical staff's expectations of your recovery (or not) with their knowledge of you and your values. They can talk to other people in your life (such as your family doctor) to help them when making decisions — others may know different aspects of you and what is important to you. You can give your representative and alternate a list of resource people.

If you are incapable, a representative named in an RA9 has authority to refuse health care on your behalf about resuscitation and other health care, like antibiotics, or about personal care matters, like transferring you to hospital for intensive care. For example, maybe you have had pneumonia 5 times in 6 months and each time you recover you are weaker and have lost more abilities.

Your representative considers the long term effects and your values about quality-of-life when deciding to give consent or refuse consent to further treatments. Your representative can give consent for pain control and comfort measures.

If you feel the need to put your wishes in writing, do it on a **separate piece of paper**, sign and date it and give it to your representative and alternate and discuss it with them.

A **living will** is not a legal document in BC. If you have a living will, give it to your representative and alternate and discuss it with them. It will help them to know about your wishes and values.

Use the following resource developed through a cross-Canada seniors project - [Values and Beliefs Discussion Guide](#) (or find it at [www.nidus.ca](http://www.nidus.ca) > Get Help (top menu bar) > Discussion Tools

### More Information from Nidus

For other fact sheets and information related to health care consent, go to [www.nidus.ca](http://www.nidus.ca) > Information (top menu bar) > [Health Care Consent](#)

- Health Care Consent in BC: Your Rights & the Law
- How Health Care Decisions are Made in BC if You are Incapable of Informed Consent — explains various legal authorities.
- Role and Scope of Authority of a TSDM for Health Care Consent in BC
- Duty for Notice When a TSDM is Selected for Major Health Care in BC
- Giving Consent to a Plan for Minor Health Care in BC
- Representation Agreements for Health Care in BC
- Adult Guardianship/Committeeship in BC

For more information on Representation Agreements, go to [www.nidus.ca](http://www.nidus.ca) > Information (top menu bar): > [Representation Agreements](#)

- RA7 Fact Sheet
- RA9 Fact Sheet
- Other resources related to Representation Agreements.

### To view legislation and regulation

Go to [www.bclaws.ca](http://www.bclaws.ca) > Laws of BC > Public Statutes and Regulations > H > Health Care Consent and Care Facility Admission Act (see link for Regulations, click for Health Care Consent Regulation).

### Letting others know about your plans — the Nidus Registry service

The Nidus Registry was established and is supported by the public to enable communication of important information and documents in case of a health crisis. Many people also use the Nidus Registry for emergency preparedness. Learn more in the FAQ section at <https://nidusregistry.ca/>

BC legislation says that a health care provider only has to make a reasonable effort to find out if you made a Representation Agreement, Advance Directive or have any other important information related to health care decisions. Some think health care providers should have a legal duty to search for these items.

Your donation to Nidus can help with ongoing education. Nidus is a charity and can provide a tax receipt. Go to [www.nidus.ca](http://www.nidus.ca) > Donate (top menu bar) for ways to donate.

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