

## Representation Agreement Section 9 (RA9) Forms Sharing Best Practices with Legal Professionals

These tips are for legal professionals and their staff. They are not for the public to draft their own RA9 documents as drafting legal documents requires knowledge of legal conventions as well as requirements related to specific legislation.

Nidus is happy to share our Nidus RA9 templates with legal professionals who are active as Registration Agents for the Personal Planning Registry. See more on page 6. You can email Joanne Taylor, Executive Director and Registrar at [info@nidus.ca](mailto:info@nidus.ca)

### Nidus' expertise

The Nidus Personal Planning Resource Centre is a non-profit, charitable organization established in 1995, to be a resource on Representation Agreements and the vision/intent of the law reform – shifting from 'best interests' to 'self-determination.'

Members and staff of Nidus were involved in the drafting and practice of the Representation Agreement Act from 1992 to present.

Our experience and knowledge of Representation Agreements and other personal planning documents also comes from partnering with practicing lawyers (2003 to 2008) to offer legal clinics for the public. The purpose was to enable people to make a Representation Agreement under section 9 (consultation with a lawyer was required at that time) and give them the option to also make an Enduring Power of Attorney.

### Examples of RA9 forms – by CLEBC and the Government

No specific form is required for a Representation Agreement. Since there has been no education in any sector, it is best to use language from the legislation and stick to the key elements of a valid document. This avoids problems, particularly when it has to be used in health care and residential care systems. Staff in these systems have had no training either.

☒ **CLEBC forms are long, complex and impractical.** Health care providers are not trained to deal with legal documents and when it comes to health care – time is of the essence!

Nidus is extremely concerned that the Continuing Legal Education Society of BC may be promoting lengthy precedents for Representation Agreements. This completely contradicts the goal of accessibility, one of the fundamental principles of the law reform. Perhaps there is confusion about drafting practices for other documents or unfamiliarity with this field.

☒ **The Ministry of Attorney General forms are not accessible,** especially for health care matters.

The staff of the Ministry who were involved and experienced with the legislation and the amendments had left the Ministry before the forms were drafted. The remaining staff did not consult Nidus or practicing lawyers. The forms produced for September 1, 2011 have serious drawbacks – although they do demonstrate that a legally valid Representation Agreement can be succinct and clear in many fewer pages (3) compared to the CLEBC examples.

## RA9 Drafting Tips

Following are tips for drafting RA9 forms.

**NOTE:** Changes are coming with respect to consent to care facility admission. We understand amendments come into effect October 1, 2018. Nidus will be doing some education. We have gone over issues with Ministry of Health staff – they plan to address some issues in Regulation but we don't know details yet.

- Title the document – Representation Agreement Section 9.** The term 'enhanced' Agreement is no longer relevant since amendments came into effect on Sept. 1, 2011.
- Use the term adult – not donor** to refer to the person the Agreement belongs to. This also applies to the EPA. In BC, the age of adulthood is 19 years.
- Use headings** to make the form easier for the adult to understand as well as the representative/alternate and third parties such as health care providers.
- Do not include a boiler plate Revocation clause** as it is likely not sufficient as a legal revocation.

Nidus recommends NOT including a revocation clause in the new RA9. Instead, use the legal procedures and attach the revocation notice to the new document. It is also recommended to register these so there is a centralized record.

Using a revocation clause in the new RA9 could inadvertently revoke other documents or a Representation Agreement under Section 7 that the adult made for routine financial and legal affairs. The Representation Agreement Act sets out specific procedures for revocation. Nidus has information and a sample form people can use.

Revocation Notice – [www.nidus.ca](http://www.nidus.ca) > Information > Representation Agreement > [More Resources](#).

- Do NOT include financial authority in an RA9 – there are none!**

As of Sept. 1, 2011, financial authorities were removed from the RA9.

\*\* If you include wording that allows a representative to make temporary arrangements for minor children or other dependants – check your wording. Finances is no longer included in that RA9 authority. You need to use an EPA for the financial support of others. The RA9 covers care and education needs of dependants.

Financial authority needs to be dealt with in a separate document – an Enduring Power of Attorney. Some adults might be able to use the Representation Agreement section 7 for routine financial and legal authorities (RA7 F+L).

**Do NOT try to combine RA7 F+L authorities in an RA9.** Sections 7 and 9 have a number of differences that make it complex and problematic. It was also legal professionals who argued against combining financial authorities in the same document as health care!

- ❑ **Use the RA9 wording for plenary authority in section 9(1)(a).** Wording in section 9(1)(b) is for a different purpose, see below.

Since September 1, 2011, there is **no such thing as separate** ‘standard powers’ and ‘additional powers.’ They are both covered in the RA9 plenary wording – see the *Representation Agreement Act* section 9 (1)(a), which includes subsection (3). There are three additional powers that can be expressly mentioned – see section 9(2).

This streamlined wording is a result of input from the public as well as feedback from legal professionals and health care providers.

\*\* The authorities in section 9(1)(b) are meant for clients who want to make Agreements that are limited to specific authorities. This would be unusual and risky.

- ❑ **Include wording that relieves the representative from onerous record-keeping requirements in the Representation Agreement Regulation.**

See the Representation Agreement Regulation section 3.1(3).

- ❑ **Include wording that the representative has the same right to information and documents** to which the adult is entitled and that relate to the representative’s authority or the adult’s incapability.

Since there has been no education in any sector about Representation Agreements, such a statement is helpful to a representative when trying to access information from a third party such as hospital records.

- ❑ **Ensure the alternate can move up if the representative is temporarily unavailable.**

A representative could be on vacation or respite (as we encourage for caregivers) or simply out-of-cellphone range. Make sure the wording is flexible for an alternate to move up as a temporary replacement. Nidus consulted an expert lawyer when the law came into effect and his advice was to provide general wording that allows for ‘other circumstances.’

- ❑ **Don’t use a Statutory Declaration** as evidence that the alternate may act. This does not make RA9s accessible in urgent situations. It also adds cost and bureaucracy.

This is not required by legislation. Nidus consulted an expert lawyer when the law came into effect and his advice was to simply say that replacement of a representative by an alternate will be **confirmed in writing** – by the representative or the alternate.

- ❑ **Do NOT add a trigger event** (springing clause) – an RA9 needs to be in effect immediately (upon execution). State it comes into effect immediately. Under the *Health Care Consent and Care Facility Admission Act*, the health care provider must go to the adult first for consent.

It is **redundant and impractical** if you draft an RA to say that the representative cannot act unless two doctors sign that the adult is incapable. It is also likely to **delay treatment**.

\*\* The delay caused by a trigger event may force a health care provider to get consent from someone on the default list (TSDM) – who does not have as much authority as a representative and may be someone the adult does not want.

Remember, health care includes dental work, physiotherapy, chiropractor, etc. and a trigger event would apply to these treatments also. It simply isn't practical or helpful.

There are **some unique circumstances** when a trigger event may be used such as in a section that deals with the adult's episodic mental illness (to avoid use of the *Mental Health Act*, which would override the RA). It requires careful wording.

*Trigger events or springing clauses are generally not helpful in EPAs either.*

#### Record wishes about care in a separate document.

Wishes need to be personal. Don't use 'canned' wishes. In fact, extreme caution must be used with written wishes or instructions. **Be careful what you put in writing – it can backfire.** Nidus will be creating a video about this as we are seeing written wishes and instructions backfire on the adult and create significant problems for the representative.

This story was told to Nidus recently by a palliative care physician:

*John had cancer. He filled out a checklist about treatments he did not want. He ticked 'No Intravenous treatment (IV).'*

*When he became very ill and confused, the doctor proposed treatment for severe diarrhea as a comfort measure. In John's condition, he needed it through an IV.... BUT he put in writing that he refused IV.*

Health authorities emphasize written wishes, but this gives more control to health care providers to interpret them. There is lots of evidence that people change their minds about specifics as their condition progresses. Discussion of wishes needs to be ongoing!

Any written wishes need to be kept separate so they can be kept current. They should also be kept with the representative and alternate. Otherwise they will be interpreted by health care providers who were not part of the ongoing discussions and do not know the adult/client's values or intent.

For clients who are focused on wishes, direct them to the **Discussion Guide for Values and Beliefs** available from Nidus (see box below). This was produced by the Old Age Pensioners Association from cross-Canada discussions with seniors. Your clients can use it to host their own 'Death Café' with family and friends.

Values & Beliefs Discussion Guide; Tips for Expressing Wishes - [www.nidus.ca](http://www.nidus.ca) > Get Help > [Discussion Tools](#)

#### Are there any specific wishes to include in an RA9?

There are certain wishes or instructions you might include in an RA9, for example:

- A statement that the adult does not want a specific person (or any family members) to be involved in care decisions. (May also need to include 'no access to communication.')

- An instruction that is **based on a belief system**. This type of instruction is not likely to change and not dependent on the circumstances. See example below.
  - I am a Jehovah’s Witness (since XXXX) and I instruct my representative to refuse blood transfusions in any and all circumstances. (*Example only, not suggested wording*).

- ❑ **No Certificates for RA9** (unless a monitor is named). Be careful you are not obligating your client and those they appointed by using Certificates designed for Section 7 – as noted at the top of the Certificates.

New wording in the Representation Agreement Act (sec. 5, 13) clarifies that Certificates are only required for Agreements under section 7. This streamlining is a result of input from the public as well as feedback from legal professionals and health care providers.

There may be **unintended negative consequences** of using Certificates that are designed for use with an RA7 with RA9’s.

- ❑ **Additional wording – did you think about these options?**

Nidus can share wording for the following options – based on our partnership with practicing lawyers at our legal clinics.

- Statement to permit the spouse’s authority as representative to continue even if the relationship breaks down or ends.
- Statement to say the adult’s representative will be the one to determine the adult’s current wishes and if they are reasonable; statement that the representative may bypass their legal duty to follow the adult’s current wishes or instructions if they are different from those expressed while capable.
- Statement to refer to written wishes I expressed in a separate document such as a living will or advance care plan.

- ❑ **Do NOT include a representative’s duties** and other information details within the body of the Representation Agreement. It makes the document longer and hard to follow. It is **also risky** in case there are changes to legislation that affect content included in the witnessed Agreement.

Nidus has wrestled with this issue, particularly due to the lack of education. We have decided to include more details under the ‘Information’ section of our RA9 forms. Please contact us if you would like this wording (we are happy to share with active Registration Agents).

Does BC legislation recognize planning documents made in other jurisdictions? Yes, from SOME jurisdictions. Read more at [Using Documents](#)

## Personal Planning Registry

### Why register?

*Family and friends don't have to rummage through drawers and bookcases hoping to find the legal documents they need!*

*If there is a Registry for Wills, which is used after my death, surely there is a Registry for information and planning documents if I am ill or injured and need assistance?*

### Registry Security and Privacy

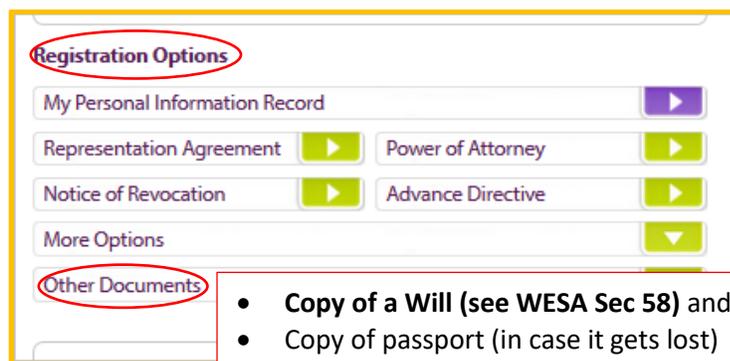
- Registry database is located in Canada.
- David Flaherty, former Information and Privacy Commissioner of BC.
- Click to read more – [http://www.nidus.ca/PDFs/registry/Nidus\\_Registry\\_SecurityFactSheet.pdf](http://www.nidus.ca/PDFs/registry/Nidus_Registry_SecurityFactSheet.pdf)

### Registry details

- Access the Online Registry at [www.nidus.ca/registry](http://www.nidus.ca/registry)
- The Registry provides secure storage with 24 hr access.
- You can register information and store a copy of the completed document(s) – in PDF format – so it is available when needed.
- Lawyers can register on behalf of clients as **Registration Agents**.
- The regular fee is \$25.00 to set up a Registry Account and register the first document; \$10.00 for additional documents. Clients can register their own documents.
- Registration Agents** (lawyers and notaries public) are charged 20% less than the regular fees listed above.
- To apply, click on Registration Agent, click [Request Agent Account](#)



### Register Personal Planning Documents and More



## Nidus Education Resources

See the section for [legal professionals](#) – [www.nidus.ca](http://www.nidus.ca) > Get Help > Teaching & Training.

Subscribe to the **Nidus Newsletter to stay informed** – [www.nidus.ca](http://www.nidus.ca) > Subscribe – at top of right sidebar.

Nidus provides **information on a variety of topics** including:

- Representation Agreements
- Enduring Powers of Attorney
- Advance Directives
- Medical Assistance in Dying (MAiD)
- Organ/Body Donation
- End-of-Life Planning
- Expressing Wishes and more...

Go to [www.nidus.ca](http://www.nidus.ca) > Information

Nidus also provides information on **ALL aspects of the planning process** including ‘Changes to Documents’ and ‘Using Documents.’ Go to [www.nidus.ca](http://www.nidus.ca) > My Documents

## Make Effective Referrals to Nidus

Nidus receives **referrals from lawyers and notaries public**. These legal professionals often tell clients to get informed through Nidus webinars and resources. They also refer clients to the Nidus Representation Agreement forms. Clients appreciate this and their legal professional! Nidus refers the public to legal professionals for the Enduring Power of Attorney and their Will

Nidus provides **personal help at information appointments**. We can share tips and experiences with those who are making documents as well those who are now using them.

Nidus’ leadership is particularly with the Representation Agreement section 7 (RA7) for those whose **mental capability is in question**.

- The RA7 was created as a **legal alternative to adult guardianship** (Committeeship by court-order or the Public Guardian and Trustee as statutory property guardian.)
- It is likely best for the family member or friend to book an appointment to discuss the situation. They need to book online – [www.nidus.ca](http://www.nidus.ca) – click BOOK NOW in the right sidebar.

### Nidus is...

- A BC non-profit, charitable organization (1995).
- The first organization in Canada that is devoted to personal planning.
- The hub for expertise on Representation Agreements.
- Provides education, facilitation and training with personal planning documents (RAs, EPAs, ADs) and related legislation such as health care consent and MAiD.
- Operates a Registry for personal planning documents.

*Nidus is a Latin term for nest: a symbol of support and safety.*