

BC's Representation Act For Assisted Decision-making: Is It Meeting A Need?

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& Nidus eRegistry**

Centre for Quality of Life Planning

- ◆ Assisted decision-making ◆ Person-centred support
- ◆ Future planning ◆ End-of-life planning
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BC's Representation Agreement Act For Assisted Decision-making: Is It Meeting A Need?

Executive Summary

British Columbia's *Representation Agreement Act* provides a legislative framework for assisted or supported decision-making. Its provisions are a delicate balance for enabling self-determination and providing safeguards. The law allows individuals whose capability is compromised due to illness, injury or developmental disability to make a representation agreement, which gives legal authority to the supporters who help them with decision-making.

The existence of this innovative legislation and its successful practice is credited to the leadership, vision and tenacity of a wide coalition of community organizations including seniors groups. The Representation Agreement Resource Centre, founded by citizens and community organizations provides the public with the technical and practical assistance to implement the legislation.

Representation agreements for assisted decision-making are making guardianship a last resort. One of the stated purposes in Section 2 of the Act is to avoid guardianship. Representation agreements have been used in a variety of situations to deal with financial, health, personal care and legal matters. The duties of representatives as outlined in the Act provides an ethical framework for decision-making and have enabled self-determination and provided safety to adults needing assistance. Since proclamation of the Act in 2000, nearly six years ago, the Public Guardian and Trustee's Office has not received or investigated complaints of abuse of representation agreements for assisted decision-making. While it is true that there are not thousands of such agreements yet in existence, the prediction of rampant abuse has been used by some to discourage implementation of the legislation. In fact the reverse is proving to be the case. The community's vision is being realized and the *Representation Agreement Act* offers a model to other jurisdictions that want to address the challenges created by the aging population and the limitations of guardianship to address quality-of-life issues for the individual.

Introduction

This paper highlights the *Representation Agreement Act*, a model for assisted decision-making, including an overview of the development of this innovative made-in-British Columbia legislation.¹

Decision-making is tied to identity

Decision-making is:

- Something every person does.
- A process, not an outcome.
- The way people look at different things and choose which one they want.
- Different for each person and each person lets others know about it in different ways.
- An inter-dependent process.

What is assisted decision-making?

Assisted decision-making is sometimes referred to as supported or **interdependent** decision-making. The concept recognizes that independent decision-making is a myth and that everyone makes decisions interdependently. And, some people need more support than others, to express their preferences and choices, and support in more decision-making areas than others.²

In the context of this discussion, some BC adults (19 or older) need assistance now because their capacity is compromised due to a developmental disability, mental illness, stroke, dementia or other illness or condition. They cannot make traditional legal documents such as a power of attorney because they do not have the capacity to meet the standard legal test of understanding the nature and effect of the authority they are giving someone else to act on their behalf. In these situations, someone can apply to court to be appointed committee (guardian) but that first requires declaring the adult incapable. The effect of this judgement is usually irrevocable and leads to a loss of civil and human rights.

The Need For Assisted Decision-making

In the late 1980's, the BC Association for Community Living (BCACL) began a process to understand the experiences of British Columbians who had encountered the adult guardianship legislation. Meetings were held with disability and seniors advocates.

¹ The *Representation Agreement Act* also allows for designating a substitute decision-maker. This paper however, deals with the notion of assisting someone with decision-making on a “daily living” basis.

² See The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making, Robert M. Gordon, International Journal of Law and Psychiatry, Vol. 23, No. 1, pp. 61-77, 2000.

...At a meeting, Jack Collins, a former Chair of BCACL spoke about his adult daughter. She enjoyed a fulfilling adult life, but there were still some decisions for which she relied on his support. He realized that as he and other parents of children with disabilities grew older, became ill or died, their adult children would still need support and guidance. However, the legal system offered no tools to provide a supportive decision-making structure.

...Seniors advocates talked about how a spouse with dementia is supported in decision-making by the care-giving spouse. Even as the person with dementia needed more assistance, capability was not “all or nothing” and caregivers strived to access the abilities that remained and that re-emerged during those “windows” of absolute clarity. The idea of taking away the person’s rights or personhood through guardianship was seen as harsh, costly and unnecessary – after all the supportive decision-maker (the caregiver) was available if they only had legal status.

Simultaneously, other forces were driving the need for legislation for assisted decision-making, including:

- An aging population.
- Increasing emphasis on self-determination in the disability movement and the general population.
- Issues of consent/liability for third parties spurred in part by privacy legislation.
- The lack of legislation in BC for health care consent and substitute decision-making.
- Research by Professor Donald J. MacDougall of UBC who conducted a survey in the 1980’s on Legal Issues and Aging, identifying these laws as needing reform.
- Discussion of reforms to the *Power of Attorney Act* by The Canadian Bar Association of BC, Wills and Estates subsection.

The key driving force is the aging population

The aging population indicates the scope of potential need:

- As of 2002, there were 551,800 British Columbians age 65 and over. This is 13.3% of the population.³
 - ◇ 74 percent of seniors are 65 to 79 years old;
 - ◇ 26 percent of seniors are over 80;
 - ◇ 4 percent of seniors are over 90 years.
 - ◇ Between 2004 and 2007, the number of seniors is expected to increase by 41,554.
 - ◇ 22 percent of BC seniors age 45 to 64 have moderate or severe health problems, compared to 49 percent of seniors aged 75 years and over.

³ Children’s, Women’s and Seniors’ Health Population Health and Wellness Ministry of Health Services, 2004.

- ◇ Slightly more than half of women age 75 and over have three to six chronic conditions, compared to 39 percent of women age 65 to 74, and 20 percent of women under the age of 65.
- The Ministry of Health reports that 90% of British Columbians will die as the result of a chronic illness or condition.⁴
- Approximately 61,000 people in BC currently live with dementia (67% are women). It is estimated that over the course of a year, an additional 13,000 people will develop dementia.⁵

Older people are not alone in needing assistance with decision-making

Other groups of people are vulnerable to guardianship, in particular:

- Individuals with an acquired brain injury as a result of an accident, stroke, etc. - one source estimates that the incidence rate could be 7,800 to 14,000 people per year in BC (no differentiation made between children, adults or seniors);⁶ and
- Individuals with a developmental disability, many of whom have aging parents and are themselves aging – 8,600 adults receive government services as reported in 2001/02.⁷

Responding To The Need – The Background

Under the leadership of the BC Association for Community Living and the Alzheimer Society of BC, citizens and community groups began the process of law reform.⁸ The Law Foundation of BC provided three year funding to the Project to Review Adult Guardianship (PRAG) in 1989.

PRAG embarked on a consensus-based approach to law reform. Discussion groups were formed around various topics and over 3,000 individuals, community groups and professionals took part in identifying problems with the existing system and visioning solutions for change.

In 1991, PRAG signed a formal partnership with government to work on legislation, and a Joint Working Committee was set up, producing a draft report in May 1992, which was widely circulated for feedback. In September 1992, the final report of *How Can We Help?* set out recommendations for reform.

⁴ Discussion Paper on a Provincial Strategy For End-Of-Life Care in British Columbia Ministry of Health Services, October 2002.

⁵ Alzheimer Society of BC, www.alzheimerbc.org, 2005.

⁶ Guidelines for Planning Brain Injury Services and Supports in British Columbia, Ministry of Health Services and Ministry of Health Planning, January 2002.

⁷ Ministry of Children and Family Development, 2001/02 Annual Report *A New Era Update*, page 12.

⁸ Leaders of this initiative were Marguerite Ford, then Executive Director of the Alzheimer Society now retired, Al Etmanski, then Executive Director of BCACL and now President of Planned Lifetime Advocacy Network, and Wendy Baker then president of BCACL and a lawyer with Davis and Company and now Madam Justice Baker of the Supreme Court of BC.

How Can We Help? outlined five fundamental principles underlying proposed reforms. In brief they are:

1. All adults have the right to autonomy and self-determination and the right to enjoy the fundamental rights and freedoms prescribed in the *Canadian Charter of Rights and Freedoms*.
2. All adults are entitled to receive the most effective but the least restrictive, least intrusive, and least stigmatizing form of assistance.
3. All adults are entitled to the legal presumption that they are capable of making decisions, and where necessary, to support and assistance in order to understand and make informed decisions on their own behalf.
4. The use of court procedures and court orders appointing decision-makers or guardians for adults should occur only as an absolute last resort.
5. All procedures, protocols and other processes associated with the provision of support, assistance, or protection shall be accessible to all adults.

In July 1993, four Acts were presented in the legislature: *Representation Agreement Act*, *Health Care Consent Care Facility Admission Act*, *Adult Guardianship Act* and *Public Guardian and Trustee Act*. In the words of one of the drafters, the *Representation Agreement Act* was the “crown jewel” in the package. The legislation was passed unanimously and the Attorney General, Colin Gabelmann, complimented the community on its vision and efforts and said that it must continue to be involved during implementation of the new legislation.

Community leadership in implementation

In 1993, the Community Coalition for the Implementation of Adult Guardianship Reform was formed and its Representation Agreement Task Group (RATG) became the policy and planning group for the *Representation Agreement Act*. In 1996, the RATG submitted a legislative report to government with recommendations on implementation issues.

In 1995, the **Representation Agreement Resource Centre (RARC)**, a non-profit Society was incorporated, receiving charitable status in 1997. The Centre's mandate is to educate and assist British Columbians with representation agreements. RARC hired its first staff in February 2000.

Proclamation of legislation, amendments, review

In February 2000, selected sections of the four Acts were proclaimed. *The Representation Agreement Act* sections that were not proclaimed were those dealing with a mandatory registry, the repeal of enduring powers of attorney legislation and recognition for legal documents made in other provinces. Repeal of enduring powers of attorney was postponed to September 2000 and this deadline extended to September 2001 and then extended again. Amendments were made in September 2001 to streamline and clarify aspects of the *Representation Agreement Act* and Regulation. These amendments were the result of discussions by a consultation group facilitated by the Public Guardian

and Trustee and included RARC and other community organizations, the Canadian Bar Association and the Canadian Bankers Association.

In July of 2001, Attorney General Geoff Plant commissioned a review of enduring powers of attorney and representation agreements with respect to financial and legal matters. In March 2002, the Attorney General accepted reviewer, Albert J. McClean's, key recommendation. McClean recommended that enduring powers of attorney remain as the main planning tool for financial and real property matters; representation agreements retain Section 7 standard powers which include routine management of financial affairs as defined in Regulation and that references to financial and real property matters in Section 9 (additional powers) of the Act be removed.⁹

Confirming the value of the *Representation Agreement Act*

In March 2004, Attorney General Geoff Plant released his response to the balance of McClean's recommendations. His proposal was to replace the existing scheme with a new 'Personal Planning Act' to be tabled in May. The proposal was a sharp departure from the McClean report and community groups and the Canadian Bar Association were united in requesting the Attorney General to hold off. On May 13th, the Attorney General announced that he had heard that the existing legislation was working and being relied upon and he would not be making his proposed changes.

The Representation Agreement Act – A Legislative Framework

The *Representation Agreement Act* (RAA) embodies the principles and vision of the community-initiated law reform by providing a framework for honouring self-determination and keeping people safe. Representation agreements made under Section 7 and 8 of the RAA are a tool for assisted decision-making for BC adults 19 or older and are intended to be an alternative to guardianship (Section 2 RAA). The following chart shows how the legislation enables this.

Guiding factors	Addressed in legislation
Capability is multi-faceted and depends on numerous variables including the particular decision that needs to be made and whether support is available to the individual.	Capability is viewed broadly and there is no up-front or specific test for agreements made under Section 7 - Sec. 3, 7, 8
People communicate wishes and preferences in a variety of ways including through their behaviour.	All forms of communication are recognized – Sec. 3

⁹ This amendment has not yet been made. The Section 9 powers remain in the Act. However, the legal practice is to use the enduring power of attorney as the planning tool for financial and real property matters.

The Practice Of Assisted Decision-making And Its Successes

Person-centred support

Following are three examples of agreements for assisted decision-making:

...When Lori's grandmother was admitted to hospital in 2002 due to a fall, it became clear that she needed help with her affairs. She was not taking care of herself or her apartment. The hospital social worker referred Lori to the Public Guardian and Trustee's Office, which referred her to the Representation Agreement Resource Centre. RARC helped Lori's grandmother make a representation agreement. The hospital social worker was one of the witnesses. Lori's grandmother was close to Lori but not many other family members. She chose another granddaughter to be the monitor. Lori arranged for storage of her grandmother's personal effects, redirected her mail, arranged for facility care placement, dealt with her private and public pension and helped arrange for her personal needs – grandma likes to have her hair done. Lori kept in close contact with RARC about how she was carrying out her duties. It was not always easy such as when Lori had to advocate with two health authorities to arrange for her grandmother to move from Vancouver to Victoria so grandma could fulfill her wish to be closer to her family and her friend.

...Rudi's dying wish was that his friend Ann takes care of his wife, Mari, who has mild dementia and lives in a care facility. Rudi and Mari have no family. As their friend, Ann wanted to help; but she had no legal standing. The Representation Agreement Resource Centre helped Ann to make a representation agreement with Mari who knows Ann as her friend and who is able to communicate her wishes and preferences in a variety of ways including through her behaviour. Ann is the representative and another long-time friend is the monitor. They work together. When helping Mari with her finances, Ann discovered that Mari was not getting all the benefits from Veterans Affairs that she should. Ann filled out the forms and now, thanks to an increase in her monthly benefit, Mari has a better quality of life – she can afford some extras such as new clothes and a new bedspread. Ann helps her get the things that make a difference to her and Mari loves shopping!

...Seniors John and Alice came to the Representation Agreement Resource Centre in 2003 for help. John had a number of health problems and had been in hospital recently. The doctor had given him a Do Not Resuscitate Order (DNR) to sign, which upset John but he felt compelled to sign it. John knew his health was failing but he wanted to be sure he got the appropriate care he needed. He wanted his friend Alice to be his representative so he could feel assured that she would be there to help him speak up for his wishes. Alice recently checked in with the RARC to say that John has died. Alice recounted times when John was in hospital and the staff came to her asking what John would want done. Alice took great pleasure in saying – “well let's go to his room and ask him!” She made sure John was in charge of his life until the very end.

How are representation agreements being used in BC?

RARC is not the only organization helping individuals on a regular basis. Community groups in Abbotsford and Kamloops as well as Planned Lifetime

Advocacy Network help individuals with developmental disabilities to make agreements with Section 7 powers. RARC keeps these groups informed of any practice issues and is a resource for challenges they encounter.

There are also some lawyers involved in the disability community who draft agreements for assisted decision-making; other lawyers refer individuals and families to RARC. We expect that some notaries public draft representation agreements under Section 7 for future planning purposes; RARC has received referrals from notaries for assisted decision-making agreements.

Some social workers have been very helpful with the process of making representation agreements by: informing individuals and families about the option of representation agreements and about RARC; helping the individual express their choices; noting the ways the individual communicates and involving other team members such as speech therapists in this activity; and by being a witness for agreements.

The following breakdowns are based on agreements made with RARC's help over the last two years:

- Stated purpose for making a representation agreement under Section 7:
 - ◇ For assisted decision-making 66%
 - ◇ For future planning¹⁰ 34%
- Agreements that include ALL Section 7 powers:
 - ◇ For assisted decision-making 92%
 - ◇ For future planning 74%
- Agreements for health and personal care only:
 - ◇ For assisted decision-making 8%
 - ◇ For future planning 24%
- As of the third quarter of 2005, there are 1.5 times more seniors making and registering representation agreements for Section 7 powers with RARC's help than in 2004. This is likely due to the publicity in March about Terri Schiavo, of Florida and the removal of her feeding tube which was a life support measure.
- By far the majority of people name a monitor rather than representatives acting jointly for agreements that include the authority for finances. Although the Act requires naming a monitor only with respect to financial matters, in most agreements the monitor role covers all powers.
- Certainly most people are naming family members in their agreements. Although we are not yet able to report on specific numbers, agreements *are* being made between friends either because there is no family, the family is too distant or family is not wanted. For some, the process of making a

¹⁰ A number of seniors who either already have an enduring power of attorney or who do not own real estate, are making representation agreements under Section 7 – not because they need assistance now to manage their affairs; but to plan for the future if they should become incapable. They express that the powers under Section 7 meet their needs and they do not feel the need to include Section 9 health and personal care powers, which require consultation with a lawyer.

representation agreement has facilitated the development of a personal network for those who are isolated or only had paid staff in their life.

The monitor has a unique role to play

The community envisioned the monitor role to be an important and useful one.¹¹ The monitor role was seen as problem solver and supporter of the adult's wishes, and some people have spelled that out in specific ways. Agreements may say "the monitor will review the agreement yearly with the adult." This provides opportunity to identify issues to be discussed with the representative(s) or a need for changes or a need to revoke the agreement. Some agreements outline a process for handling disagreements including accessing mediation services and authorize the monitor to facilitate this process.

RARC is aware that third parties have called on monitors to assist with communication between the third party and the representative where difficulties have arisen. Third parties have also contacted monitors to clarify the adult's wishes. Monitors have attended meetings such as care conferences.

Representation agreements work!

Representation agreements (Sec. 7) have been used in numerous situations. RARC has heard from representatives who are assisting an adult that the agreement has been accepted by the following third parties:

- Banks/Credit Unions – paying bills, change branches, open/close account, dispose of investment, dealing with corporate Trustees, etc.
- Canada Post – to hold and redirect the mail.
- Care facilities – consent for admission.
- Community living service providing agencies – get financial information, advocate for services, consent to participating in activities.
- Credit card companies – cancel credit cards.
- Dentists – consent for dental work.
- Federal Government – Canada Pension and Old Age Pension, Customs and Revenue Agency, Veterans Affairs, Passport Office.
- Insurance Corporation of BC – to sell a vehicle, renew insurance, settle an accident claim.
- Lawyers – instruction to take action or respond to action.
- Physicians, surgeons – consent for medications, surgery, tests, etc.
- Police – for dealing with abuse by others.
- Private insurance companies – to access long term disability benefit or insurance claim.

¹¹ This is supported by the Honourable Mr. Justice Boyle's comments in *Richardson vs Richardson*, 2000 BCSC 1269, a contentious (disputing family) Committeeship application in which the judge found the adult competent and cited among the points he considered, that the adult had appointed his daughter as his personal representative and that "the monitor under the representation agreement appears to be a reliable and conscientious neighbour."

- Provincial government – Ministry of Human Resources, Ministry for Children & Family Development, PharmaCare, Residential Tenancy Branch (arbitration), Jericho Hill School for the Deaf compensation program.
- Small Claim Court – to bring an action.

Third parties have embraced representation agreements

A number of corporations have incorporate Representation Agreements in their forms and policies. Such as:

- BC College of Physicians and Surgeons – public complaint form
- City of Vancouver – property tax form – signing for homeowner grant
- Care facilities – on form when person is admitted
- Ministry of Health – on form for signing up with PharmaCare

The Nidus eRegistry™

The *Representation Agreement Act* contains provision for a mandatory registry of agreements. Government decided not to implement the registry. While the community had concerns with the type of registry proposed by government, the idea of a notice registry for communication purposes continued to resonate with the public.

RARC established the Nidus eRegistry™ in partnership with the Law Society of BC's Juricert Program and Gateway File Systems Inc., a private company based in Victoria. Nidus (Latin for nest) is a centralized electronic registry for personal planning documents so information is available when needed. Its initial focus in BC is on representation agreements and enduring powers of attorney. See the Nidus information sheet, Appendix B.

The Challenges

Issues with third parties

By far the greatest challenge when dealing with third parties is their lack of awareness and education about this BC law, especially when agreements are used for assisted decision-making. There is also considerable confusion and misinformation leftover from the uncertainty of whether government would repeal the enduring power of attorney. RARC receives numerous calls from professionals and staff of various institutions seeking information and clarification.

The lack of knowledge and understanding puts the onus on the representative to educate the institution. This is an extra burden especially for senior caregivers who are simply trying to ensure the adult is treated with dignity and respect.

RARC is pro-active and educates representatives about what to expect when dealing with financial institutions. Because front-line staff have probably not been

trained, we recommend speaking to the branch manager who should take a true copy of the agreement, and send it to the legal department.

Unfortunately it is common to hear that the first reaction at most financial institutions is still “just sign our Power of Attorney form” or “open a joint account.” Neither of these has any built-in safeguards (no monitor required) and mistakenly leaves people with the impression that doing either of those things precludes the need for any broader authority, such as dealing with income tax or insurance matters.

We have also run into the problem that the signature on the representation agreement does not match the signature on file at the bank. This is understandable when the client has subsequently lost their vision and is bedridden as a result of a fall and cannot go to the bank to sign a new card. In this case RARC has worked with health care professionals to provide information about the health matter to the financial institution.

On the other hand, some branch managers have taken initiative to help clients if the legal department rejected their document because it is invalid (no monitor appointed where required) or there are mistakes in execution. Branch managers have made the effort to find out about RARC and referred clients for help.

The health sector has generally been slow to promote representation agreements. Physicians appear better informed than some other health care providers. In 2003, the BC Medical Association issued a press release encouraging the public to make and register representation agreements.

Two health authorities have decided to focus resources on advance instructional directives. This old approach does not provide a person with the strongest and safest tool available. RARC has proposed that it is necessary to work together since the legislative scheme in BC requires a proxy.¹² Working together avoids public confusion, ensures the proxy is of the adult's choosing, avoids ethical concerns raised when the authority promoting the directives also controls the resources, and ensures a safeguard for the adult when their wishes or instructions are applied in a context they may not have anticipated or in cases where treatments have changed due to advances in technology or research. It is important to note that advance directives do not have a place in assisted decision-making. Only adults who are capable of the standard legal test can make an advance directive. However, the fact that some health authorities are creating a parallel system presents a challenge for public legal education on representation agreements in general.

¹² In an emergency, if the patient is incapable, the health care provider will treat unless they have reason to believe that when capable and 19 years or older, the patient expressly refused the proposed treatment for the circumstance at hand and has not changed her/his mind. In other situations, the health care provider must get consent from a proxy - representative if the adult made a representation agreement.

Some health and personal care settings still refer to enduring power of attorney as if it covered consent to health and personal care.

Government services have also been slow to implement representation agreements. There has been no standard training program for staff. Many forms and policies still only refer to enduring power of attorney in cases where the individual cannot sign.

Legal community

Representation agreements under Section 7 do not require legal consultation or notarization. However, the attitude of legal practitioners has an effect on both the public and third parties.

The lobby by the Canadian Bar Association to government not to repeal the enduring power of attorney cast confusion and doubt about representation agreements. Following the decision to retain the enduring power of attorney, members of the CBA have promoted representation agreements for health and personal care planning. However, the positive news never travels as fast as the negative. A sub-committee of the Wills and Trusts section continues to express concern about the lack of a specific test of capacity for representation agreements under Section 7 and concerns of abuse with respect to financial authority. As discussed under the next heading, this is no evidence of such abuse unlike with powers of attorney.

Notaries public were not named as consultants for representation agreements with additional powers (Section 9). In 2001, the community lobbied and got an amendment to enable this, but the government made it conditional on the development of an approved training program, which has not been finalized. This has made it more difficult for notaries public to fully promote representation agreements. At least one notary public has established a partnership with a local lawyer in order to address her client's interests.

Public access to information, forms, support

As will be noted later, RARC has few resources to put into promotion. When the public reaches RARC they are very excited to find personal help but frustrated that it was not easier to reach. They wonder why there is not greater awareness on the part of third parties and why government is not putting resources into public education.

In 2000, RARC published a step-to-step guide on representation agreements. Take Charge It's Your Life included an example of an agreement for Section 7 powers and a set of Certificates. Over the course of time it became clear that people needed more one-to-one assistance in order to comply with the legal requirements and implement their roles. RARC now provides a shorter information package with a worksheet so people can start the process of deciding what they want and need and communicating it to others. Then they are

encouraged to contact RARC to get more specific help. RARC offers a Self-Help Kit for representation agreements with Section 7 powers. However, unlike other types of self-help kits, people are not left on their own with a form that may not fit. RARC works individually with people to answer questions, provide details on the duties and authorities of representatives and monitors and help them with a form that fits their situation.

In helping people to register their agreements with Nidus, RARC has seen documents that people have done on their own and there are often errors. Knowing when a monitor is required and correctly completing the execution procedures including certificates are among of the most difficult aspects of the process. RARC alerts people to these issues and offers assistance to correct the problems.

Problems with users

Over the past 5 ½ years since proclamation, the PGTO reports that it has not investigated any cases of abuse by representatives acting under a representation agreement for assisted decision-making.

Both the PGTO and RARC have had a few calls from those involved in the representation agreement (representative(s), monitor) who are having problems communicating with each other, generally due to pre-existing conflict, usually among family members. (Note: all those who contacted RARC were named in agreements with Section 9 powers, made in consultation with a lawyer.)

Conflict results in a breakdown in communication among representatives and between the representative and the monitor. While representatives can seek advice and help from the Public Guardian and Trustee's Office, the PGTO does not offer formal mediation.¹³ In some cases, RARC has suggested incorporating a customized decision-making process (who calls whom, when) in the agreement to minimize communication breakdown. Potentially the conflict can escalate to the point where one party or more makes application for Committeeship (court-appointed guardian), which would supersede an agreement under Section 7. The PGTO has not seen a trend in this regard.

The other situation of pre-existing conflict that RARC has seen is divorced parents of an adult child with a developmental disability. Generally, divorced or separated parents and other family members have found ways to work with each other and the agreement.

¹³ The PGTO finds that in most cases, a representative or monitor calls not for advice but because they want the PGTO to solve the problem they are having with the other representative or monitor. It frequently turns out that the caller has not tried to speak to that person directly; they want someone else to do it. While such calls are very intense, their number remains very small.

Challenges for community

The greatest challenge for the community and particularly the Representation Agreement Resource Centre is the lack of resources. RARC's leadership and expertise in public legal education and with the process of making and using representation agreements for assisted decision-making is invaluable.

The success of representation agreements is due to the commitment and effort of RARC and its community partners. RARC has juggled public legal education, one-to-one assistance, professional education and training, troubleshooting and problem solving with third parties, information and referral service and community development – all with no core funding.

Another important challenge for the community is meeting the needs of seniors who have no family members or friends to name as representative. As these seniors become less able to function on their own, landlords and others call the health authority to solve the problem. But the health system doesn't have good solutions for this social problem. They may try to introduce home care support if the person qualifies and or can pay. Often such arranged help is resisted. The health care provider checks to see if the person can be deemed "incapable" in which case maybe the Public Guardian and Trustee can take over the finances. But often the person is not at that stage and it becomes a waiting game – until they become incapable or they have a serious injury or illness, which sends them to hospital. Over the years, RARC has worked with individuals where the process of making a representation agreement has facilitated help and hope for these situations. RARC needs resources to undertake the community development work to address this growing need.

Outstanding Issues

There are some obvious outstanding issues:

- Education of the public and third parties is crucial.
- The *Representation Agreement Act* has not yet been tested in court. There are any number of areas that are "open to interpretation."
- Community development is needed to ensure that those who are alone have the opportunity to form a personal network and make a representation agreement as a tool to protect their capability and their wishes.
- There is a need for research on the practice of making and using representation agreements for assisted decision-making as a tool to preserve the identity/personhood and quality-of-life of those who are vulnerable to guardianship.

Conclusion

Clearly representation agreements are meeting the need of individuals for assistance with decision-making. They are being relied upon and most important they are honouring and enhancing self-determination.

Safeguards For Representation Agreements With Standard Powers

- Standard powers are prescribed in Section 7 of the *Representation Agreement Act* and **are limited** to routine management of financial affairs (excludes dealing with real property); minor and major health care, personal care and obtaining legal services and instructing counsel.
- If authority to manage finances is included in the agreement, a **monitor must be named OR at least two representatives** must be named to act jointly for finances unless the representative is the adult's spouse.
- Financial powers are **prescribed in Regulation**, which lists what can and cannot be done.
- **Each representative and alternate representative must sign** the representation agreement AND complete a declaration – a **Certificate of Representative/ Alternate** (prescribed Form 1) which certifies they accept and are accountable for their duties.
- The **monitor signs a Certificate of Monitor** (prescribed Form 3). The monitor can request to see the representative's records and if they find the representative has abused their duties, they must contact the Public Guardian and Trustee.
- Consistent with the experience that what really keeps people safe is having more than one personal, caring relationship in their lives, representation agreements facilitate the building and **strengthening of support networks** by involving people in various roles. You can appoint more than one representative, alternate representatives plus there is the monitor.
- **Two witnesses are required** and they watch the adult and each other sign the agreement. **Witnesses must also complete a Certificate of Witnesses** (prescribed Form 5), which certifies that they understand the type of communication used by the adult.
- There are **restrictions on who can be a witness**. Witnesses cannot be immediately related to a representative or alternate representative. For example, a parent, spouse or child of a representative cannot be a witness.
- The Representation Agreement **Act prescribes the duties** of a representative. The Act outlines an **ethical decision-making process** whereby the representative must first consult the adult's current wishes. If these cannot be determined or are not reasonable, the representative acts according to the adult's pre-expressed wishes. If these are unknown, the representative acts according to the adult's values and beliefs.

- Representatives must keep records of decisions and actions they take on behalf of the adult.
- The Representation Agreement Act and the Public Guardian and Trustee Act give the Public Guardian and Trustee **new and stronger powers to investigate concerns of abuse** by a representative and to suspend financial transactions while an investigation takes place. Anyone may make a complaint and is protected for doing so.
- The **Nidus eRegistry** operated by the Representation Agreement Resource Centre in partnership with the Law Society of BC's Juricert Program and Gateway File Systems of Victoria is a centralized registry for representation agreements and powers of attorney. Nidus stores important information about the legal document as well as an exact image showing signatures and details of any instructions or restrictions. Revocations can also be registered. Communication is a key issue in abuse prevention and effective response.

Individuals who make Agreements with the assistance of the Representation Agreement Resource Centre (RARC) receive plain language information regarding the legal duties of representatives and monitors. RARC also prints referenced sections of the Act on the reverse side of the Certificates, which must be signed by each representative/alternate, monitor and witnesses.

NIDUS INFORMATION SHEET

What is Nidus?

The Nidus eRegistry™ is an on-line registry for planning documents. The registry serves as a communication tool to make sure the document is available when needed. Nidus also provides a safeguard. (Nidus is Latin for nest.)

Who is Nidus?

Nidus is operated by the Representation Agreement Resource Centre (a non-profit charity) in partnership with the Law Society of British Columbia and Gateway File Systems Inc. (a private company in Victoria with experience in electronic registries).

What can be registered and accessed on Nidus?

Currently, Representation Agreements and Enduring Powers of Attorney can be registered. Two types of information are recorded:

1. Descriptive and identifying basic information about the document being registered.
2. An image of the document.

Nidus records **basic information** about the person who made the legal document, when the document was signed, where the original is stored and the names and contact information for attorneys and representatives.

Nidus can also store an **exact image** of your legal documents. These are scanned into the computer using a fax. The advantage of this is that a hospital or other third party can easily and quickly see if you expressed specific wishes for health care in the Representation Agreement or if you restricted your attorney's powers in the Enduring Power of Attorney. This additional information speeds up communication and is a safeguard for your wishes.

Who can access Nidus?

You can access Nidus and review your record at any time using your Nidus Registration Number and the password you choose when you register. You can also change contact information (addresses, phone numbers, etc.) so your information is always current.

Designated individuals of pre-authorized organizations can also look up a record in Nidus. This includes hospitals, banks and government services. When you register, you decide which organizations you authorize.

What does it cost?

The regular fee for registration is \$25. for the initial set-up and first registration and \$10. for additional registrations for the same person. These fees are not annual fees – they are for the life of the specific document.

How do I register my documents?

After your legal documents are completed, signed and witnessed, register them through your legal professional, or by yourself using your credit card, internet access and fax, or with the help of the Representation Agreement Resource Centre 604-408-7414.

RESOURCES ON REPRESENTATION AGREEMENTS

Information, resource people, access to legislation

Representation Agreement Resource Centre (RARC) and Nidus eRegistry™

Non-profit, charitable society, provides information and assistance

411 Dunsmuir Street, Vancouver, BC V6B 1X4

Tel: 604-408-7414

Fax: 604-801-5506

E-mail: info@rarc.ca

Web sites: www.rarc.ca, www.nidus.ca

Hugh McLellan, LLB

Expert lecturer, author and practitioner for adult guardianship matters in BC

Past Chair of CBA National Elder Law Section, Founding Chair of CBA BC Elder Law Subsection

McLellan Herbert

Suite 310 - 800 West Pender Street

Vancouver, British Columbia V6C 2V6

Tel: 604-683-5254

Fax: 604-683-5212

E-Mail: lawyers@mclellanherbert.com

Web site: www.mclellanherbert.com

Public Guardian and Trustee of BC

700-808 West Hastings Street

Vancouver, British Columbia V6C 3L3

Tel: 604-660-4444

Fax: 604-660-0374

E-mail: mail@trustee.bc.ca

Web site: www.trustee.bc.ca

Publications

The 2005 Annotated British Columbia Representation Agreement Act

Robert M. Gordon, Carswell, 2005.

The Continuing Legal Education Society of British Columbia

300—845 Cambie Street,

Vancouver, BC, Canada V6B 5T2

Tel: 604-669-3544

Toll-free: 800-663-0437 (in Canada)

Fax: 604-669-9260

Web site: www.cle.bc.ca

- Elder Law, November 5, 2004, 201 pp.
- Adult Guardianship and Elder Law Issues, November 8, 2002, 80 pp.

Other

Planned Lifetime Advocacy Network (PLAN)

260 – 3665 Kingsway, Burnaby, BC V5R 5W2

Tel: 604-439-9566

Fax: 604-439-7001

E-mail: inquires@plan.ca

Web site: www.plan.ca

PLAN is a family directed organization created to assist families to answer the question, "What happens to our family members with disabilities when we die?"