

Representation Agreement Resource Centre Response to Ministry of Attorney General Issues for Discussion Personal Planning Legislation: Government's Response to McClean Report

Background

The Representation Agreement Resource Centre was founded by the organizations and individuals who took part in the Community Coalition for the Implementation of Adult Guardianship legislation and the Project to Review Adult Guardianship. The Resource Centre is devoted to public education and information on Representation Agreements and related legislation that enables personal planning and supported or substitute decision-making. The Resource Centre has also established the Nidus eRegistry as a secure, private, centralized, on-line registry for legal planning tools.

Overview

The *Representation Agreement Act* modernizes British Columbia's personal planning legislation by:

- Making planning accessible to every BC adult;
- Recognizing supported decision-making as a way to preserve and enhance autonomy when someone needs assistance with decision-making; and
- Protecting citizenship rights by enabling guardianship to be a last resort.

The *Representation Agreement Act* has seen many challenges. Some of these challenges have been of the kinds that are to be expected with any change. Legal and financial institutions are conservative by nature and are slow to adapt to new legal tools. Some challenges have arisen because various Ministries of government have dragged their feet in implementing the policy changes and communication strategies that would promote the use of Representation Agreements. Others have arisen because of the climate of uncertainty that has enshrouded the adult guardianship statutes by numerous reviews and hesitation from government.

However despite all of these barriers Representation Agreements are catching on and firing the desire of the public to do something that they usually avoid - planning for their future. Even more important is the fact that Representation Agreements are allowing many people who might in the past have been subjected to guardianship, to have the dignity of a legal supported decision-making tool.

At a recent meeting Christina Pederson, Policy and Issues Analyst, Ministry of the Attorney General and Robert Gordon, technical advisor to the Ministry, gave the Board of Directors of the Representation Agreement Resource Centre a briefing and a policy document entitled ***Government's Response to McClean Report***.

Ms. Pederson affirmed that this high level policy document, which essentially summarizes the major points of the McClean review and introduces some new Ministry intentions, was the only written document currently available and that its generality was designed to ensure that the public consultation process could be a meaningful one. Ms. Pederson promised that no legislation had been drafted and that the public consultation process would shape any eventual legislation.

During this meeting, the members of the Representation Agreement Resource Centre Board focussed on several key issues that went beyond the recommendations of the McClean Review and as such need to be opened up to as much public scrutiny as possible. It appears that these issues represent the views of Ministry staff because Ms. Pederson stated that the Attorney General has not signed off on anything.

Response to Specific Issues

#1 Omnibus Act or Amendments to Existing Power of Attorney Act and Representation Agreement Act.

- The *Representation Agreement Act* modernizes the framework for personal planning and alternatives to guardianship and is more sophisticated than anything else that could be offered or imagined. Its substance and language is significant: a representative's role is to 'represent' the values and beliefs of the individual not to substitute decisions on their behalf.
- Professor McClean's recommendations for simplifying and streamlining the execution procedures will make the Representation Agreement as straightforward and inexpensive as it is reasonably possible to do.
- If the government is currently considering one statute, it should be the *Representation Agreement Act*.
- Introducing a new framework under a new statute – the Personal Planning Act – is unnecessary and will:
 - Turn the clock back on the principles and intent of the reform;
 - Cause confusion and frustration for British Columbians with respect to the making of documents and the status of existing documents;

- Set back the public awareness and the momentum for personal planning which has been building since 1993 under the language and framework of the *Representation Agreement Act*;
- Contradict the policy goal of simplifying personal planning processes because it appears that this one Act will roll out up to 5 legal planning tools.

#4 Capability and Incapability

- The Ministry's current proposal to rely on the common law definition of capability for all forms of planning instruments means there will be NO modernization of personal planning legislation in British Columbia. This would be an enormous step backward. It would deny the decade of community consensus building that led to the 1993 passage of the legislation and the 1999 amendments that brought it into effect – and which received the unanimous support of all parties in the legislature.
- Such a proposal ignores the problems and needs that brought community groups and professionals together beginning in 1989 to create the *Representation Agreement Act*. The need for supported decision-making has in fact increased due in part to the aging of the population and the development of innovative service options, like individualized funding, in the community living sector.
- The proposal also ignores the evidence gathered over the last 15 years regarding the multi-faceted nature of capability. And while some may argue that the common law definition is the default in the absence of a capability test, this is a matter of interpretation not of fact.
- The intent of the law reform from its inception and reaffirmed in ***How Can We Help*** (p. 18) was to refocus the common law emphasis on independent mental capability to a consideration of all of the factors that contribute to capability, including the ability to discriminate and the existence of a trusting, committed relationship. This is the essence of Sections 7 and 8 of the *Representation Agreement Act*, which along with other provisions such as the presumption of capability, communication having no bearing on capability, and duties of representatives, puts supported decision-making into law.

- As stated by Robert Gordon in ***The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making, (2000)***: “The concept of assisted decision-making – sometimes referred to as supported or **interdependent** (as opposed to **independent**) decision-making – is gradually appearing in the ...legislation of many Canadian jurisdictions....[it] appears to be acquiring status as a viable alternative to court-ordered guardianship and substitute decision-making.” (pages 62-63 and page 75)
- Gordon also notes: “One of the points often made in support of assisted decision-making – and it is a compelling point – is that the concept simply recognizes the way in which most adults function in their everyday lives. It is argued that independent decision-making is a myth...Some people require more in the way of support and assistance than others, and with respect to more areas of decision-making than others; it is a matter of degree, rather than a case of absolutes.” (p. 65)
- Gordon further adds: “The emergence of assisted decision-making marks a significant break from both the common law presumption of (absolute) capacity and the doctrine of free will that are embedded in the theory of independent decision-making: ...It is a product of a new philosophy...that rejects benign paternalism and embraces principles such as the right to autonomy and self-determination, the right to the least restrictive alternative, and the use of stigmatizing court-ordered interventions only as an absolute last resort.” (p. 71)
- The Attorney General, recognizes the importance of these principles and their significance in the daily life of BC citizens as recorded in Hansard during the Debate of Bill 92 (on the selective proclamation of the Adult Guardianship statutes) in the legislature in 1999:

This particular bill and the implementation process will actually have more of an impact on the day-to-day lives of British Columbians than most of the rest of what we do here, with the exception perhaps of giving the government permission to tax and spend money. It seems to me that the introduction of representation agreements as a new planning tool is going to effect a very significant change on the way aging adults and other persons of limited capacity are able to plan, to maintain and to assign authority over decision-making in their lives. Representation agreements are bound to become a widely used planning tool, perhaps as familiar to British Columbians as, if not more so than, a will.¹

¹ British Columbia. Debates of the Legislative Assembly (Hansard), July 12, 1999, 14267, Geoff Plant, MLA for Richmond-Steveston.

- Our experience, which is the most extensive of any group in the Province, has shown us that Agreements made under Sections 7 and 8 (supported decision-making) work in practice and serve to decrease the vulnerability of adults by enabling a recognized circle of support.
- The community is maturing in its understanding of supported decision-making. Systems and institutions will likely take longer as their structures are oriented to “black and white” definitions that can be standardized and easily perpetuated.

9 Advance Care Directives

- There has been a long history, dating back to 1993, of the Ministry of Health staff wanting to develop a law to enshrine Advance Care Directives. Each Minister of Health since 1993 has considered the advice from Ministry staff to develop such an Act and has rejected it because of their understanding that the *Representation Agreement Act* is British Columbia's Advance Care Directive Act. The fact that Representation Agreements and Advance Directives are one and the same appears to be evident to everyone except Ministry of Health staff.
- Advance directives without the designation of a proxy (representative) are effectively useless. As stand-alone documents they do not allow people to change their mind or take into consideration treatment options that were not available when the Advance Directive was drawn up. Health professionals do not rely on written directives because of their concerns about the staleness of documents and the real intent of the individual.
- There is a serious ethical conflict when the Ministry behind the promotion of Advance Directives (Ministry of Health and Health Authorities) is also responsible for providing health services. There must be several arms lengths between the service provider and Advance Directives or it will be seen to be a method of rationing health care.
- Advance Directives are effective inside a Representation Agreement. The advantage of the Representation Agreement is that it provides an “arms-length” process for these decisions. The process of making an Agreement provides opportunity for the individual to clarify their wishes and prepares families and friends for these decisions. Such preparation avoids confusion, conflict and guesswork.

- In his paper, ***Advance Health Care Directives and the New Adult Guardianship Legislation: An Overview*** (1998), Robert Gordon states: "The decision in 1993 [when the Adult Guardianship Legislation was passed with all party support], was to favour the use of safeguards. This also seemed to be the preference of health care providers who, apparently, would always prefer to use a substitute decision-maker, rather than rely upon a piece of paper and the assumption that it reflected their patient's current wishes."
- In his paper, summary attached, Gordon also notes, "the benefits associated with instruction directives (simplicity and convenience) are outweighed by a number of serious flaws."
- There is no evidence that the problems identified with Advance Directives have disappeared. If anything, there is growing consensus among health care professionals, especially those in Palliative Care that best practice requires a representative who is chosen in advance by the patient.
- The Representation Agreement Resource Centre has put a lot of effort into its design of the Nidus eRegistry to ensure that health care providers can access information about Representation Agreements and representatives quickly and at no cost. This is the kind of communication that people asked for when the *Representation Agreement Act* was developed and it will mean that people can feel confident that Hospitals will know who to contact and what to do when the need arises.

Summary

- The *Representation Agreement Act* epitomizes British Columbia's uniqueness. It is a modern and sophisticated expression of the people's will to have legislation which recognizes the way they really live and behave.
- Every question, concern or idea under the sun was carefully debated over the last decade and no better consensus has ever emerged than the *Representation Agreement Act*. Imposing a new Act denies the people's will and exerts instead an authoritarian and paternalistic government will.
- Enshrining the idea of supported decision-making in the *Representation Agreement Act* has done what the current Attorney General Geoff Plant predicted in 1999 that it would. It has enabled "*aging adults and other persons of limited capacity... to plan, to maintain and to assign authority over decision-making in their lives*".

- The need for the supported decision-making provisions of the *Representation Agreement Act* is increasing as the population ages and the government employs new service delivery mechanisms like individualized funding.
- The *Representation Agreement Act* is British Columbia's Advance Directives Act because it incorporates within it allowance for both written instructions and proxy decision-making. It also contains all of the safeguards that the community deemed to be essential for ensuring that advance directives reflected the will of the individual making them.
- The Ministry of Health needs to endorse the Representation Agreement as the best kind of advance directive and acknowledge the fact that health care providers need to be at arms length from end of life decision-making so that there is no public perception of health care rationing.