



» Ken M. Kramer, Q.C., TEP

Personal Planning for the Future: Representation Agreements & More

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Pathways to Independence



Ken M. Kramer, Q.C., TEP

- Founder and principal of KMK Law, a boutique law firm in downtown Vancouver, BC, providing specialized legal services in the areas of Estates, Trusts, Administration, Elder Law, Estate Litigation and Mediation for the past 25 years.
- Unique understanding of the disability community combined with expertise in the area of estates and trusts law to serve families with disabilities.
- Led community negotiations and collaborations with the Province of British Columbia for over 15 years. These discussions have led to significant improvements in the Choices for Support In Independent Living program (“CSIL”) program including, two significant rate increases.
- Recognized for his service to the community with the distinguished honour of receiving the Queen’s Diamond Jubilee Medal in 2012 & Queen’s Counsel designation in 2014.



Learning Outcomes

- » Differentiating between **Representation Agreements** vs. **Powers Of Attorney**
- » Differentiating between a **Section 7** vs. **Section 9** Representation Agreements
- » Understanding the relevance and importance of **capacity** to develop the personal planning documents
- » What is a **Private Committeeship** and what does it involve
- » Learning steps that we can all take to **avoid** the need for Private Committeeship

Personal Planning, Not Estate Planning!

- » **Personal Planning** = while you're alive → documents "die" with you
 - Representation Agreement
 - Enduring Power of Attorney
 - Advance Directive
 - Other Documents...

- » **Estate Planning** = after death
 - Wills
 - Other estate planning documents

Personal Planning Tools & Supportive Decision-Making

- » **Presumption of capability** to make decisions at age 19.
 - May not always be the case – numerous reasons
 - Capacity is **transaction-specific**, general “nature and effect” test
 - Some individuals may never have been considered “capable” under the law for specific transactions; others will have the ability and lose it over time due to aging, disease, or accident.
 - Many tools to plan for incapacity, end-of-life, or overall support needs.

(Enduring) Power of Attorney – “EPA”

» Utilized while you are alive – Not effective after death

- You can appoint a person or person(s) to be your “attorney” and to make **legal and financial decisions** on your behalf, even if you later lose mental capacity.
- High test for requisite mental capacity - understand nature and consequence.

» Types of Powers of Attorney (“POAs”):

- **General** – can include broad powers to handle financial and legal affairs, ends if donor of power becomes mentally incapable.
- **Specific (e.g. “Bank”)** – limits attorney’s power to specific task, property, time, etc.
- **Enduring** – can include broad powers like General POA, but does not end if donor becomes mentally incapable due to illness, disease, or accident.

Why make an EPA? Who can I appoint?

» Very important if you own real estate.

- **Example:** If two spouses jointly own a home, and one spouse becomes incapable, the other spouse has no ability to sell the house (e.g. to pay for care costs) and manage their partner's finances unless they have an Enduring Power of Attorney. They may need to apply to court to be appointed private committee (more on this later).

» Who can you appoint?

- You can appoint a spouse, child(ren), friend(s), or other relative(s). You may also appoint a trust company, a financial institution, or a professional person such as a lawyer. Professional attorneys will charge fees, usually via an agreement.
- You may provide for a fee for your attorney in your Enduring Power of Attorney document (optional). Attorneys are able to be reimbursed for reasonable out-of-pocket expenses incurred in their role.

Duties of an Attorney

» *Power of Attorney Act* – Section 19

- An attorney must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, act within the authority given under the EPA, and keep prescribed records and produce those records for inspection and copying at the adult's request (e.g. list of property and liabilities, records showing how you have exercised your authority under the EPA, invoices, bank statements and other records and receipts)
- When managing the adult's financial affairs, the attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions set out in the EPA
- The attorney must to the extent reasonable when managing the adult's financial affairs, give priority to meeting the personal and health care needs of the adult, foster the adult's independence and involve the adult in any decision-making that affects them, not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties
- The attorney must keep the adult's property separate from their own property, unless owned as joint tenants
- And more...

Representation Agreements - for Adults, 19 years or older

Section 9 RAs ("RA9")

- » To appoint trusted person(s) or "**representative(s)**" to help you make decisions, or to make decisions on your behalf regarding almost all matters and decisions on:
 - **health care +**
 - **personal care +**
- » You need to be considered **mentally capable** of understanding the nature and effect of the documents you are making

Section 7 Ras ("RA7")

- » To appoint trusted person(s) or "**representative(s)**" to help you make decisions, or to make decisions on your behalf regarding:
 - **personal care**
 - **major and minor health care**
 - **routine financial affairs**
 - **some legal services**
- » You may make an RA7 **even if incapable of**: making a contract; managing their health care, personal care or legal matters; routine management of their financial affairs.

Section 9 vs. Section 7 Representation Agreement – What can they authorize?

Section 9 RAs (“RA9”) - Examples

- » **Broadest** personal planning document to appoint someone to help you manage your **health care & personal care** affairs.
- » When used together with the Enduring Power of Attorney, can cover broadest range of planning.
- » In addition to RA7 powers, may authorize representative for **additional matters**: e.g. to refuse care for life-saving treatment/care, some specialized medical procedures, and arrangements for temporary care and education of your minor children.

Section 7 RAs (“RA7”) - Examples

- » **Financial affairs**: paying the adult’s bills, opening bank accounts in the adult's name, setting an RDSP up for an adult;
- » **Legal affairs**: instructing a lawyer to begin a proceeding (not including divorce), or to defend a legal proceeding
- » **Health Care**: Arranging for dental care or physiotherapy, decisions about medications, tests, and surgeries.
- » **Personal Care**: deciding on living arrangements – e.g. home share, hiring and supervising staff for CSIL

Section 9 vs. Section 7 Representation Agreement - Limitations

Section 9 RAs (“RA9”)

- » **Cannot** be used for authorizing **MAiD**.
- » **Not** for **financial** or **legal** affairs (to be used in conjunction with an Enduring Power of Attorney)

Section 7 RAs (“RA7”)

- » **Does not authorize major financial decisions**, such as purchasing or disposing of real property.
- » **Does not authorize specified types of health care or personal care decisions** (e.g. give or refuse consent to life-supporting care, abortion, psychosurgery, experimental health care involving a foreseeable risk that is not outweighed by the expected therapeutic benefit)

Duties of a Representative

» *Representation Agreement Act* – Section 16

- A representative must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, and act within the authority given in the RA.
- The representative must consult (to a reasonable extent) with you to determine your current wishes, and comply with those wishes if it is reasonable to do so – or, depending on the situation, comply with those instructions or wishes you expressed while capable.
- If these specific instructions or wishes are not known, the representative must act on the basis of your known beliefs and values, or if unknown, your best interests.
- Representatives are required to keep accounts and records regarding the exercise of their authority, which may be requested by you, your monitor, and the PGT.

Making a Representation Agreement

» *Representation Agreement Act* – Section 13

- The adult, the representative (at least one, if there are multiple that may act independently), and the monitor (if one is provided for – usually only for RA7s) must all sign the agreement.
- The adult must sign in the presence of two witnesses, unless one of the witnesses is a lawyer or a member of the Society of Notaries Public of British Columbia.
- Options for another person signing on behalf of the adult if they are physically incapable and is physically present but directs the agreement be signed.
- Certain restrictions on who may act as a witness (e.g. no minors, no one named as a representative, or their spouse, child or parent.)

Other Planning Options

- » **Advance Directive** – a written document where you may give or refuse consent to specific health care matters. Quite limited in its use as your instructions must clearly articulate and apply to the specific health care situation that arises at the time consent is sought. (*Health Care Consent and Care Facility Admission Act, Part 2.1*)
 - A representation agreement supersedes the advance directive (if the adult has made both), although the RA may state that a health care provider may act in accordance with an instruction in the advance directive without the consent of the representative.
- » **Organ or Body Donation** – donation for research or education purposes. A consent is required for body donation while you are capable of understanding, and must register your wishes with **BC Transplant's Organ Donor Registry**
- » **Medical Assistance in Dying** - As of June 17, 2016, Canada now has legislation that allows someone 18 years or older to request medical assistance in dying. You must meet the eligibility criteria for your request to be considered and assistance provided.

Committeeship

- » **What is a committee?** A court appointed personal or property guardian with the power to make personal, financial and/or legal decisions for an incapable adult.
- » Governing legislation is the *Patients Property Act* and this model of guardianship has not changed in half a century.
- » Public Guardian and Trustee of BC (PGT) may also be committee of estate by Certificate of Incapability issued under the *Adult Guardianship Act* (**Statutory Guardianship**)
- » Committeeship is considered a last resort measure when other options are unavailable.

Who can be a committee?

- » **A private committee** – a family member, friend, trust company can apply to the court.
 - Private committee legal costs begin at \$7,500, and can be much higher, depending on the complexity of the matter.
- » **Where there is no one willing or able to act, the PGT** can apply or be appointed.

What's involved with a committee court application?

- » **Two medical affidavits** – two physicians must swear an affidavit sharing their opinion that the patient is capable of managing their person and/or estate. Physicians may charge fees for this service ranging anywhere from \$300 to upwards of \$2,000.
- » **Affidavit of Kindred and Fortune** – the applicant(s) must swear an affidavit providing personal information about the patient such as their age, living arrangements, income, assets, expenses, liabilities, and their qualifications to act as committee. May also need to provide an outline of a care plan for the patient.
- » **PGT** reviews the application for a statutory fee, \$525 inclusive of GST.
- » Certain individuals (e.g. next of kin, appointed attorneys or representatives) will be **notified** of the application and may submit competing applications.
- » Process can take **3-4 months** or longer, depending on the circumstances of the case.

Duties and Responsibilities of a Committee

- » ***Patients Property Act*** gives very little direction on the duties and responsibilities of a committee.
 - Section 15 - a Committee has all the rights, privileges and powers the person/adult would have if he or she had capacity.
 - Section 18 – Powers must be for the benefit of the person/adult and his or her family, having regard to the nature and value of the person’s property and their circumstances and needs and those of his or her family.
 - Section 18(2) – A committee must, to the extent reasonable, foster the independence of the patient and encourage the patient’s involvement in any decision making.
- » The Court has discretion to place limits on any rights, privileges and powers that the Committee could otherwise exercise, including requiring the written consent of the PGT prior to the committee’s exercise of any right, privilege or power.

Effect of Committeeship on Planning Documents

- » **A Court appointment of a committee** terminates all power of attorney and representation agreement documents (unless the court otherwise orders, for a representation agreement - s. 19(b), *Patients Property Act*).

Pros of Committeeship

- » Full protection of the adult– useful if there are real concerns for the safety and financial security of the adult.
- » Assists people who cannot avail themselves of other planning tools.
- » Oversight of the PGT

Cons of Committeeship

- » Adult's autonomy is removed
- » Expensive
- » Takes time
- » Lack of privacy
- » Not easily reversed; will likely always require a committee
- » Oversight of the PGT

Is a Committee Necessary?

- » **Test under the *Adult Guardianship Act* for the appointment of the PGT:**
 - Adult needs to make decisions about their financial affairs;
 - Adult is incapable of making those decisions;
 - Adult would benefit from the assistance and protection of a statutory property guardian;
 - The needs of the adult would not be sufficiently met by alternative means of assistance; and
 - Adult has not granted power over all the adult's financial affairs to an attorney in an EPA, OR they have but the attorney not complying with duties.

- » **Not required for** receipt of PWD, federal pensions, CSIL, CLBC funding, or to make health care decisions.

Health Care Decision Hierarchy in BC

1. You (while capable)
2. **Committee (of Person)** – already determined to be incapable by Court

If health care provider finds you incapable of informed consent:

3. **Representative** appointed in your **Representation Agreement**
4. **Advance Directive** – if it applies to the specific situation at hand
5. **Temporary Substitute Decision Maker (TSDM)** – temporary and determined by statute: Spouse > Adult Child > Parent > Sibling > Grandparent... etc.
 - Must be an adult, have been in contact within past 12 months, and have no “dispute”
 - No authority for personal care decisions, no authority in emergency situations
 - No general authority to refuse life-supporting health care

How to Avoid Committeeship/TSDMs & Benefits of Planning

- » **If possible**, make a **Section 9** Representation Agreement + **Enduring** Power of Attorney
- » **If capability is in question**, a **Section 7** Representation Agreement may still be available to:
 - Legally and directly empower someone to assist/support you in making health and financial decisions;
 - Identify the specific decisions your representative can or cannot make;
 - Provide comfort of knowing your representative must follow your known wishes and beliefs;
 - Provide ability to override the statutory scheme of consent to health care by substitute decision-makers;
 - Avoid court, expense, and intrusiveness of committeeship;
 - Provide ability to give someone authority to help you make decisions rather than only to make them on your behalf.

4 Types of Affairs: Financial, Legal, Health Care, Personal Care



	Financial	Legal	Health Care	Personal Care
Enduring Power of Attorney	✓	✓		
Section 9 Representation Agreement			✓	✓
Section 7 Representation Agreement	✓★	✓★	✓★	✓★
Advance Directive			✓★	
Temporary Substitute Decision Maker			✓★	
Committeeship	✓	✓	✓	✓

★ = Limited

Other Resources

- » KMK Law: www.kmklaw.net
- » Nidus: www.nidus.ca
- » PGT Website: www.trustee.bc.ca - PGT Committee Handbook

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