

INCAPACITY PLANNING

Mary Hamilton, Associate Counsel at DLA Piper spoke at the March 9, 2016 General Meeting of the BCRPVPA. Ms Hamilton specializes in wills, estates, and trusts.

Incapacity planning: What happens if you lose the capacity to make decisions (financial, health care, or personal)?

The attendees were provided with an excellent handout of her presentation, and the contents are summarized here for our members.

Ms Hamilton began by explaining that there are a number of Adult Guardianship Laws in British Columbia.

If someone is incapable, someone can go to court and apply to be their Committee (pronounced "comet - tee".)

Power of Attorney – you have permission to act on behalf of someone. However when someone becomes incapable, it is no longer valid.

Representation agreement act – personal health care or finances

INCAPACITY WITHOUT ANY PLANNING DOCUMENTS

- Relatives and friends do NOT have the authority to make any financial or health decision without either a court order under the Patients Property Act or, by being chosen by the hospital or other health care provider or the Public Guardian and Trustee Act to be the temporary substitute decision maker to make specific health care decisions

Every adult has the right to accept or refuse health care and the right to participate in making decisions about their care. If someone is incapable they still have the right, but exercising and protecting that right becomes the responsibility of a substitute decision maker.

In BC, there are three kinds of substitute decision makers for health care decisions:

- committee (someone appointed by the Supreme Court to be a committee of the person under the Patients Property Act.)
- representative – appointed by the adult while they are capable, under the Representation Agreements act, and
- a Temporary Substitute Decision Maker (TSDM) chosen by a health care provider or authorized by the Public Guardian and Trustee (PGT)

Temporary Substitute Decision Maker

If a TSDM is necessary, the health care provider will choose the first of the following who is available and qualified to be a temporary substitute decision maker:

Spouse, adult child, parent, sibling, grandparent, grandchild, other relative, close friend, person related by marriage. If none are available, then an other person authorized by the Public Guardian and Trustee.

Ms Hamilton referred to an online document about Temporary Substitute Decision Makers: <http://www.trustee.bc.ca/documents/STA/Information%20for%20Temporary%20Substitute%20Decision%20Makers%20Authorized%20by%20the%20Public%20Guardian%20and%20Trustee.pdf>

INCAPACITY WITH PLANNING DOCUMENTS

Enduring Power of Attorney: this is only for “financial affairs” – business, property, or conduct of legal affairs. This is enduring, and lasts beyond incapacity. The donor, or person giving permission, must be aware of:

- property and its approximate value
- of obligations owed to dependents
- what the power of attorney allows the attorney to do. The attorney has broad power regarding financial affairs. They are only restricted from making a Will, and as limited in the Power of Attorney
- that a business or property may decline if the Attorney is not prudent
- that a Power of Attorney may be revoked
- one can have two or three people as alternates

TIMING OF EFFECTIVENESS

Power of Attorney can take effect IMMEDIATELY once the document is signed by the Donor and the Attorney or it can be SPRINGING, taking effect upon satisfaction of condition: signature of a doctor or doctors that the donor is incapable of managing their financial affairs due to mental or physical infirmity.

Hamilton suggested that a preference for immediate authority, as it may be difficult to obtain authorization for a springing order when it is needed.

POWER OF ATTORNEY ISSUES

Names are an issue. The person should have all possible variations of his or her names included: example – Jean A. Smith, also known as Jean Amber Smith, also known as J.A. Smith. Hamilton noted that the name must match exactly what is on the land title, if property is involved.

Both the Donor and the Attorney must sign the document for it to become effective. Pre 2011 Powers of Attorney continue to be in effect. Attorney is entitled to information and records of the Donor and must maintain records of the Donor’s property and actions taken. Attorney cannot be paid, unless the document sets the rate or amount.

WHO CAN ACT AS ATTORNEY?

- A person who is not of age cannot act as an attorney. Paid caregivers (health or personal care) unless they are a spouse, child or parent. A Care Facility employee may not act as attorney.
- A person, or Public Guardian or Trustee, or a trust company (not a private company)
- Co-attorneys must be unanimous unless the document states otherwise or has a conflict resolution mechanism in place.
- An alternate attorney can be named, but the document must say how and when the alternate steps in to be the attorney.

DUTIES OF ATTORNEY

The attorney must act honestly and in good faith. They must have the care, diligence and skill of a reasonably prudent person. They must act within the authority given to them, and work in the best interests and follow the adult’s known wishes, beliefs, and values. They must follow the directions in the Power of Attorney. Priority must be given to the personal health care needs of the donor, fostering the adult’s independence and investment in decisions. They are NOT to dispose of any items specifically gifted in the donor’s will. However, a Catch-22 is that the attorney cannot see the will. They must keep the donor’s property separate from their own, unless the property is jointly owned.

POWERS OF ATTORNEY

- make Gifts, Loans, Charitable gifts (if document permits) OR if there is sufficient property AND track record AND total annually \$5000 or 10% of taxable income (whichever is less)
- gifts or loans to attorney only if document permits
- May change beneficiary designations with a Court order
- May retain assistance but cannot delegate unless document permits or falls within s. 15.5 Trustee Act (investment advice)
- May renew, replace, or convert plans or policies and name the same beneficiary as on other plan or policy
- May designate estate on new investments
- Cannot make a will for adult
- Cannot get access to Will if adult prohibited delivery to the attorney (or the Will says so)

RECORD KEEPING OF ATTORNEY

From when the attorney first “exercises authority on adult’s behalf,” attorney must determine and maintain a list of adult’s property and liabilities including estimate of value. The attorney must keep accounts with current list of property and liabilities. Must maintain records regarding any actions taken or other exercise of authority. Must keep all invoices, statements, and records for all receipts and disbursements of capital and income.

SIGNING WITHIN BC

Ms Hamilton cautioned that Powers of Attorney must NOT be signed outside of BC.

REMUNERATION

Attorneys may be reimbursed for expenses. Remuneration takes place only if the power of attorney states the amount OR the rate. Query how specific one needs to be. Pre- September 1, 2011 Power of Attorney is grandfathered if compensation is authorized in the POA or in a separate document signed by adult and ancillary to the POA even if no rate or amount is set. Questions to consider: what is appropriate? Hourly rate? Percentage of Income? Assets?

ENDURANCE AND TERMINATION

Power of Attorney is not terminated by loss of capacity or expiration of time under the Land Title Act. It is suspended by terms provided in the Power of Attorney or when the person is assigned a Committee as per the Persons Property Act, or when there is an appointment of Committee (private action). It can also be terminated by the death of adult or attorney. The Power of Attorney is terminated if the attorney is the spouse and the marriage or marriage-like relationship ends, or if the Attorney is incapable, bankrupt, corporate dissolution or commits crime against the adult. An attorney may resign if they give written notice to the adult AND to any other attorneys named. If the adult is incapable, then the attorney MUST give written notice to a spouse, or near relative: an adult child, grandparent, brother/sister or related by birth or adoption, or close friend that has a long term close relationship, who has had frequent personal contact and is not a paid caregiver.

CAUTIONS

Ms Hamilton cautioned against using a standard form for a Power of Attorney. Errors are easy to make. If you pay someone to draft a Power of Attorney, you can sue if errors are made. She also noted the danger if both the adult and the Power of Attorney have private shares. There are tax implications as when the document is signed you are now related.

US REPORTING IMPLICATIONS

If the attorney is a citizen or resident of the US the Attorney must report to the United States on any bank or investment accounts of the Donor, if the Power of Attorney grants the Attorney signing authority of such accounts. Failure to report by June 30 of the year following can be \$10,000 per unreported account.

WHO MAKES HEALTH CARE DECISIONS

The adult if they are capable. Otherwise, a Substitute Decision-Maker, which can be a Committee of Person that is appointed by the Court, a Representative (named in a Representation Agreement), a Health Care Provider, if consent has been given in an Advance Directive, or a Temporary Substitute Decision-Maker

REASONS TO HAVE A REPRESENTATION AGREEMENT

Decide in advance how, when and who should make decisions about health care and personal care. You may not want a committee or a Temporary Substitute Decision-Maker. A Representation Agreement empowers a person to consent to serious types of health care, or make decisions about personal care. With a Representation Agreement, you have an advocate in the health care system or social service system if you lose capacity. You want a person who will advocate for you to have access to all medical records.

WHO CAN BE A REPRESENTATIVE?

An individual aged 19+ (but not a paid caregiver or employee of a care facility unless the caregiver or employee is the child, parent, or spouse of the adult). A Public Guardian and Trustee may be a representative. You may have multiple representatives that may act concurrently or alternately. Consider when drawing up an agreement if you have multiple representatives, are decisions to be unanimous? Must there be a majority agreement, or may each act separately. If you set up an alternate representative, when does the alternate step in?

REMUNERATION

Representatives may be reimbursed for expenses, but there is no remuneration for any health care decisions or actions. Remuneration occurs otherwise only if authorized in the Representation Agreement and the amount or rate is set, and the Court authorizes payment. This is not required if the Public Guardian Trustee is the representative and remuneration is in line with regulations.

SECTION 9 REPRESENTATION AGREEMENT FOR PERSONAL AND HEALTH CARE

Section 9 representatives can be authorized to do anything they consider necessary in relation to personal or health care, or one can specify decisions within the rep's authority, including:

- Personal: shelter, employment, education, social activity, contacts, approvals, diet, dress, etc.
- Health: consent to specific health care, withhold life support, restrain, or move adult over his or her objections, etc.

SECTION 9 TASKS REQUIRING SPECIFIC AUTHORITY

The adult needs to specifically authorize representation to:

- Consent to serious health care in regulations (e.g. abortion, electroconvulsive therapy, psychosurgery, etc.)
- Make arrangements for the temporary care and education of minor children, or any other persons who are cared for or supported by the adult
- Interfere with the adult's religious practices
- Certain end of life decisions.
 - o The Carter case was cited where the Supreme Court of Canada concluded that individuals who meet rigorous criteria should be able to avail themselves of assistance in dying. An adult would need to:
 - Be a competent adult
 - Clearly consult to the hastening of death
 - Have a grievous and irremediable medical condition (including an illness, disease or disability), and
 - Be suffering intolerably

The court affirmed the trial judge's conclusion that the evidence from permissive jurisdictions established that physician assisted dying could be regulated in a safe manner.

- The Bentley V. Maplewood Seniors Care Society ruling
 - The BC Justice Greuell held that offering food on a spoon is an aspect of personal care and not health care.
 - The BC Court of Appeal agreed and dismissed the appeal by the family
 - The Care Home is obliged to offer food and liquids to Mrs. Bentley and as long as she continues to consume them.

ADVANCE DIRECTIVES

- Gives or refuses consent to any particular health care in the future
- Are binding on health care provider, representative and substitute decision-maker
- Health care provider can treat you without choosing temporary decision-maker
- Are not valid if instructions are:
 - To do something contrary to law
 - To omit to do anything contrary to law
 - Can include end of life provisions but not any of the health care consent regulations listed in section 5.1 of the Health Care Consent Regulations (abortion, electroconvulsive therapy, psychosurgery, etc.)

Do not apply if Advance Directive

- does not address particular health care decision
- is unclear so you cannot tell whether the adult has given or refused consent
- Adult's wishes, values or beliefs have significantly changed since making Advance Directive
- Medical knowledge, practice, or technology has changed,
AND...
 - changes might substantially benefit the adult:
 - Advance Directive did not expressly state Advance Directive was to apply even if changes in medical knowledge, practice or technology occur.

ADVANCE DIRECTIVES V. REPRESENTATION AGREEMENTS

If a representation agreement exists – health care professional cannot act without consent of the representative unless the Representation Agreement provides that a health care provider may act in accordance with an advance directive.

Consider: Do you really want decisions made without consulting your representative?

SPECIFIC PROVISIONS

- If you have specific health care wishes that you want followed without question, you should include these provisions:
 - Advance Directive should say it applies even if changes in medical knowledge, practice, or technology occur
 - Representation Agreement should say health care provider may act in accordance with an advance directive and need not consult with representative

SECTION 7 REPRESENTATION AGREEMENT

Section 8 (1) Test for Limited Section 7 Representation Agreement

An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is INCAPABLE of

- (a) making a contract,
- (b) managing his or health care, personal care, or legal matters, or
- (c) the routine management of his or her financial affairs.

Section 8 (2) Considerations for an adult who wishes to make or change or revoke a Section 7 Representation Agreement:

- can the adult communicate a desire to have a representative make, help make or stop making decisions?
- Does the adult demonstrate choices and preferences?
- Can the adult express feelings of approval or disapproval of others?
- Is the adult aware that the representative may make or stop making decision or choices that affect the adult?
- Do the adult and the representative have a relationship that is characterized by trust?

COMMITTEESHIP

Patients Property Act

To be replaced by Adult Guardianship and Planning Statutes Amendment Act, 2007??

- Finances and Person
- Strips Patient of legal capacity
- Replaces Power of Attorney and Representation Agreement
- Requires Court Order once incapable
- Court can appoint
 - o Any person or trust company for finances
 - o Any person of Public Guardian & Trustee for person
- Need 2 medical affidavits
 - o Incapable of managing person, or
 - o Incapable of managing finances, or
 - o Both.

POWERS OF COMMITTEE

- All rights, powers, and privileges of patient as a person
 - o Unless court orders otherwise
 - o Including as trustee, guardian, personal representative
- Must exercise powers for benefit of patient and patient's family (s. 18)
- Continues until grant of probate or letters of administration
- Committee supervised by Public Guardian & Trustee
- Bonding may be required
- Any adult may nominate a Committee
 - o Nomination of Committee
 - o S. 9 Patients Property Act
 - o Signed like a Will
 - o Court will appoint nominee unless good and sufficient reason for refusing the appointment

EXPRESSED WISHES DOCUMENT

Committee, representative or Substitute Decision-maker all MUST make decisions based on:

- current wishes
- Expressed wishes – more recent or in document
- Known beliefs and values
- Best interests
- (in that order)

WISHES EXPRESSED WHILE CAPABLE

- Wishes expressed orally
- Wishes expressed in writing or some other fashion
- Wishes set out in a Representation Agreement
- Wishes set out in an Advance Directive
- Wishes set out in a Living Will

LIVING WILL, PERSONAL DECLARATION , DNR: NO CODE

- Wish for death with dignity; no heroic measures
- Provides comfort to family

SO WHAT SHOULD YOU DO NOW?

- Make sure you and your spouse have up to date WILLS (and other parent of your child)
- Do you have a NOMINATION OF COMMITTEE?
- Think about doing a POWER OF ATTORNEY (maybe name two people to act jointly)
- Consider a REPRESENTATION AGREEMENT
- Do you want a LIVING WILL?
- Do you have strong feelings that should be included in an ADVANCE DIRECTIVE?
- Can your loved one do a Power of Attorney?
- Do you need more advice?
- Does anyone else in the family need Advice?

Attendees were provided with Handouts:

Will Planning Information Booklet

Will Instruction Questionnaire

Some websites

My Voice:

<http://www.health.gov.bc.ca/library/publications/year/2012/MyVoiceAdvanceCarePlanningGuide.pdf>

Cam and Sally's Story and Getting Your Affairs in Order:

<http://www.alzheimer.ca/bc/~media/Files/bc/Advocacy-and-education/Personal-planning/2012-11-15%20Cam%20and%20Sally%20Story.pdf>

It's Your Choice: Personal Planning Tools:

<http://www.trustee.bc.ca/documents/STA/It%27s>Your Choice-Personal Planning Tools.pdf>

NIDUS: Personal Planning Resource Guide and Registry

<http://www.nidus.ca>

Planned Lifetime Advocacy Network:

www.plan.ca

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