Current Approaches to Substituted Decision Making

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A: Introduction

A substitute decision maker is someone who makes decisions on an individual's behalf if and when that individual becomes incapable of making that decision himself or herself. The requisite capacity for a particular decision is always time and situation specific; an individual may be capable for one purpose while being incapable for another. For example, the capacity to grant a power of attorney differs from the capacity to appoint a personal and health care representative which differs again from the capacity to marry, separate or divorce.

While the boundaries of temporal capacity and incapacity remain elusive, requiring a complex and continuing assessment of medical and legal considerations, there are a number of tools available for (1) an individual to appoint specific substitute decision makers for particular types of decisions while they clearly have capacity to make these appointments and (2) substitute decision-makers to be appointed on behalf of an individual who no longer has capacity.

Much of the legislation providing for substitute decision makers has been amended in the last five or so years and practitioners in this area should be familiar with the *Power of Attorney Act,* the *Representation Act*, the *Health Care (Consent) & Care Facility (Admission) Act*, the *Adult Guardianship Act*, the *Public Guardian and Trustee Act*, the *Patients Property Act*, the *Mental Health Act* and the *Indian Act*.

This paper will briefly review the various substitute decision maker options and consider some of the more recent legislative changes and case law developments in this area.

B: Powers of Attorney

A power of attorney is a written document by which an individual (the "Adult") appoints another person or persons to act as a substitute decision maker on the Adult's behalf in regard to financial affairs, including property matters. The governing legislation is the *Power of Attorney Act*, RSBC 1996, c. 370 (the "POAA"). The POAA recognizes three types of Power of Attorney, a general Power of Attorney (Part 1), an enduring Power of Attorney (Part 2)("EPA"), and a springing enduring Power of Attorney (Part 2 and 4). A general Power of Attorney ceases to be effective when the adult becomes incapable whereas the properly drafted enduring Power of Attorney continues through the Adult's mental incapacity.

The POAA codifies the former common law requirements for the capacity to make the EPA and establishes that "until the contrary is demonstrated" the Adult is presumed to be capable

(section 11). Expressly, section 12 requires that the Adult understand several specific matters concerning his or her property including "knowing its approximate value" and understanding its nature. The Adult must also state in the EPA whether the Attorney may exercise authority during the Adult's capacity and incapacity. If the springing version of the EPA is chosen by the Adult, section 14(b) and 26(1) of the POAA require a description of the requisite triggering events so that a third party will be able to clearly establish when the EPA has been activated. Otherwise, the EPA will become effective upon the latest of (1) its proper execution by the Adult and the Attorney and the "effective date" stated in the EPA.

Section 16 of the POAA sets out the steps required for the proper execution of the EPA by the Adult: the Adult must sign and date the EPA in the presence of two witnesses and both witnesses must be in the presence of the Adult but only one witness is required if that witness is "a lawyer of a member in good standing of the Society of Notaries Public of British Columbia". Section 17 sets out parallel requirements for proper execution by the Attorney.

The term "lawyer" has raised some consternation in regards to Adults or more frequently Attorneys who wish to execute the EPA either out of province or in a different country. "Lawyer" is not defined in the POAA therefore, the definition from section 29 of the *Interpretation Act*, RSBC 1996, c. 238, is applied: "lawyer means a practising lawyer as defined in section 1(1) of the *Legal Profession Act"*. The definition of "practising lawyer" in the *Legal Profession Act*, SBC 1998, c. 9 (the "LPA"), "means a member in good standing who holds or is entitled to hold a practising certificate". In turn, "member" is defined as "a member of the society" and the society is defined as the Law Society of British Columbia. The Law Society Rules, adopted under the authority of the LPA, set out the membership and authority to practise provisions in Part 2, Division 1. Despite the inter-jurisdictional practise provisions of Rule 2-10.1-2-17.1, the category of members of the Society in Rule 2-1 does not incorporate inter-jurisdictional members and therefore for the purposes of the POAA, a lawyer from a different jurisdiction should not act as the sole witness for either an Adult's signature or an Attorney's signature on an EPA. Accordingly, when the EPA is sent out of province for witnessing, two witnesses will be required to be present to witness the signature, regardless of the professional status of the witnesses.

If the Adult intends that the Attorney will have the authority to deal with real property, section 16(5) of the POAA requires compliance with the requirements of the *Land Title Act*, RSBC 1996, c. 250 ("LTA"), including Part 5 and Part 6. Subsection 51(2) of the LTA specifically require that the execution of a Power of Attorney must be witnessed or proved in the manner required for instruments by Part 5 (s. 42-50) which, in turn, mandates in section 42 that an instrument must be witnessed by "an officer" who is not a party to the instrument. "Officer" is defined as a person before whom an affidavit may be sworn under the *Evidence Act* (but does not include a

registrar). Section 60 of the *Evidence Act*, RSBC 1996, c. 124, supplies the requirements for commissioners for taking affidavits in British Columbia, which include practising lawyers as defined in the LPA and "notaries public". Section 63 list individuals who may take affidavits outside British Columbia which are "valid and effectual" for use in British Columbia. Commissioners of oaths in that province or country and also notary publics "acting in the territorial limits of the notary's authority, certified under the notary's hand and official seal" can act as "officers" for the purposes of the LTA. Therefore, when an EPA is sent out of province or country for completion and the Attorney will have authority to deal with real property, the best practise if for the executing Adult or Attorney to attend before a lawyer or notary (or other commissioner for taking oaths in that jurisdiction) who will act as one of two requisite witnesses. Furthermore, the Land Title Office has published a Practice Bulletin (https://ltsa.ca/sites/default/files/Practice-Bulletin-02-11.pdf) with suggested form of affidavits of witnesses when the EPA is made outside of British Columbia and best practise is to include these in all out-of-province EPAs.

Any authority for the Attorney to delegate his or her authority must be set out by the Adult in the EPA. There is an exception for investment authority. Unless the Adult provides express instructions regarding the investment authority of the Attorney, the default provisions of the POAA provide that investments should be made in accordance with the investment powers contained in the *Trustee Act*, RSBC 1996, c. 464. While the scope of investment under section 15.1 of the *Trustee Act* has broadened since its earlier form, this authority is still more conservative than many Adult's would wish and drafters need to discuss this provision with the Adult and determine what kind of scope the Attorney will need to manage the particular assets in the best interests of the Adult.

Also, if the Adult intends that the Attorney will receive compensation for performing the role, a rate or amount must be specified in the EPA, though reasonable reimbursement expenses are permitted without express authorization.

The POAA restricts certain categories of persons from being selected as the Attorney. Individuals who provide personal care or health care to the adult for compensation (excluding certain family members) cannot be appointed. These restrictions are in keeping with provisions of the *Hospital Act*, RSBC 1996, c. 200, section 4.1, and the *Community Care and Assisted Living Act*, SBC 2002, c. 75, section 18, which both prohibit certain givers from acting as representatives of patients. However, the amendments provide the flexibility for the Adult to name a minor as the Attorney (section 18(3)) to have authority once the minor becomes an adult. It should be noted that section 51(3) of the LTA requires that any attorney tendering an instrument for registration must be nineteen years or older. The only corporate entity that is entitled to be appointed as Attorney is a "financial institution authorized to carry on trust

business under *the Financial Institutions Act*". The *Financial Institutions Act*, RSBC 1996, c. 141, define "financial institution" as a "credit union, trust company or insurance company".

The Attorney assumes his or her responsibilities under a new EPA when it is properly executed by Adult and Attorney as described in the previous section of this article. Section 42 of POAA deems that a valid EPA made before September 1, 2011, is "deemed" valid, even though it may not comply with the POAA format. Although, there is some question as to whether the Attorney must "sign" the document before the new duties of the POAA apply. It should be noted that where an appointed attorney is an US citizen, once the Attorney has signed the EPA and accepted the duties, he or she may be required to file a report with the Internal Revenue Service in the United States in regards to his or her signing authority for the Adult's bank accounts (a FBAR filing). In such circumstances, a springing EPA may be preferable or an unsigned EPA until such time as the Attorney is ready to act on behalf of the Adult.

The Attorney is required to act in the Adult's best interests and must wherever possible take into account the Adult's "current wishes, known beliefs and values" and "foster the independence" of the Adult. The Attorney is charged in section 19(3)(d) not to dispose of property that is subject to a testamentary gift except if that disposition is necessary to comply with the attorney's duties. The *Wills, Estates and Succession Act*, SBC 2009, c. 13, has a complementary provision at section 48, which provides that if a nominee (including an attorney) has disposed of a property that is the subject of a specific gift under a will, the beneficiary is entitled to receive from the will-maker's estate an amount equivalent to the proceeds of the disposition. Section 20(7) of the POAA provides that a person may only withhold the Adult's will from the Attorney if the Adult has given instructions to a lawyer or notary who holds the will or has provided instructions in the will that prohibit the delivery of the document to the Attorney.

The Attorney has the formal requirement to keep records as an attorney as established in subsection 19(1)(d) and further described in section 2 of the Regulation. The Attorney should, at a bare minimum, understand the record keeping requirements when they take on the role. Also, these duties apply to attorneys who are acting under existing EPAs existing when the amended POAA came into force in 2011 and those existing Attorneys should be advised to collect and assemble statements and information from prior to September 1, 2011, so that an opening balance can be created for the records.

The POAA provides some authority for the Attorney (1) to make certain gifts or loans and (2) a limited ability to maintain beneficiaries in a non-testamentary document when transitioning these instruments to other plans on behalf of the Adult in section 20. Subsections 20(1), (2) and (3) provide the default power to make gifts or loans, including charitable gifts, from Adult's property provide that the amount of the gift of loan does not exceed a prescribed amount and

certain conditions are met. If the Adult had a pattern of giving while capable, the Attorney may continue this practice as long as there is enough money left to the meet the Adult's personal and health care needs and those of their dependents, if they have them. Such gifting could include the creation of trusts where the powers in the EPA are broad enough or the amounts otherwise fit within the limits. The EPA can also be drafted to expand the gifting and loaning authority if the Adult so instructs. If the Adult wants to clearly provide the Attorney with the ability to engage in trust planning for the benefit of the Adult, then this should be expressly provided for on the face of the EPA; however, the Attorney may not make testamentary provisions for the Adult or change the Adult's will so great care must be taken when exercising this power.

The POAA provides for specific, enumerated duties in conjunction with the overarching fiduciary duty and provides a liability mechanism if the Attorney fails to satisfy the duties. Section 22 of the POAA provides that the Attorney who does not comply with the duties set out in the POAA may be liable for damage or loss to the Adult's financial affairs. Part 3 of the POAA, Reports and Remedies, provides some policing mechanism of the Attorney's actions taken on behalf of the Adult. Pursuant to section 34, any person may make a report to the Public Guardian and Trustee if they have concern that the Attorney is failing to comply with his or her duties and the Public Guardian and Trustee may conduct an investigation. Furthermore, section 331 of the *Criminal Code*, RSC 1985, c. C-46, provides that it is a chargeable theft offence for the Attorney to deal fraudulently with the Adult's property.

C: Representation Agreements

The *Representation Agreement Act* (the "RAA") permits the Adult to appoint a person or persons to make health care decisions and personal care decisions on their behalf. There are two options available under the RAA with different levels of decision making responsibility: a Section 9 agreement which can be made by a fully capacitated Adult and may give the representative the ability to refuse life support and a section 7 agreement which has a lower capacity requirement and provides the representative with lesser authority. Pursuant to section 3 of the RAA, an individual is presumed capable until the contrary is demonstrated.

An Adult may be able to make a Section 7 agreement in situations where he or she is considered incapable for making a Power of Attorney or a will. Section 8(2) of the RAA specifically sets out examples of capacity factors required to determine whether an adult is capable to make a Section 7 agreement, these include whether the adult can communicate a desire to have a representative and can demonstrate choices and preferences and express feelings of approval and disapproval. New regulations where introduced with the changes to the legislation in 2011 to safeguard adults using Section 7 agreements from abuse. For example, a monitor is required if there are financial powers in the Section 7 agreement (unless

the representative is a spouse, child or parent of the Adult or there are two representatives who **must** act together). Furthermore, in order for a Section 7 agreement to be effective, there are a number of prescribed certificates that must be completed, as applicable to the particular circumstances. The certificates are found in the *Representation Agreement Regulation*.

Standard forms for both a Representation Agreement (Section 9) and a Representation Agreement (Section 7) have been published by the Ministry of Justice and can be downloaded at http://www2.gov.bc.ca/gov/content/health/managing-your-health/incapacity-planning. A guide on Advance Care Planning is available at http://www.health.gov.bc.ca/library/publications/year/2013/MyVoice-AdvanceCarePlanningGuide.pdf.

Section 5 of the RAA sets out that an individual must be 19 years or older to be named as a representative and similarly to the POAA also prohibits employees of a facility where the adult resides or receives care and health care and personal care providers from being named as an adult's representative.

Section 13 sets out the formal execution requirements for a Representation Agreement to be valid. The agreement must be signed by the Adult and witnessed by two witnesses each of whom must be present with the Adult and each other except where the Adult's execution is witnessed by a lawyer of notary of BC in which case one witness (the lawyer or notary) is sufficient.

Pursuant to section 30 of the RAA, a report can be made to the Public Guardian and Trustee if a person has concerns that a representative is (1) "abusing or neglecting" the Adult, (2) failing to follow in the instructions in the agreement, (3) incapable of action, (4) otherwise failing to comply with the duties of the representative. Pursuant to s. 30(3), the Public Guardian and Trustee will conduct an investigation to determine the validity of the report.

D: Physician Assisted Suicide

The chief justice of the BC Supreme Court released BC's Notice Regarding Applications for Exemption from the prohibition on February 25, 2016, which subject to further extension, will be in place until June 6, 2016, and sets out how applications can be made in British Columbia. The Notice can be located on the court website[1]. This protocol is in response to the Supreme Court of Canada's January 15, 2016 5-4 decision[2], which granted an extraordinary four-month extension (until June 6, 2016) to the federal government for its legislative rewrite of the legislation relating to physician assisted death, by issuing a notice of procedure for BC counsel

[1] http://www.courts.gov.bc.ca/supreme_court/documents/Notice_Regarding_Exemption_Applications-Physician_Assisted_Death.pdf
[2] 2016 SCC 4

who represent clients who are seeking a personal exemption. The Supreme Court's extension judgment follows its unanimous ruling in *Carter v. Canada*, 2015 SCC 5, which struck down as invalid the ban on physician assisted death in the *Criminal Code*, sections 241 and 14. The effect of the *Carter* judgment was delayed by twelve months to provide the legislatures with appropriate time to develop legislation and policies. The majority in the extension judgment granted the extension to the legislature but confirmed that meanwhile exemptions to the prohibition can be sought from the various provincial courts and furthermore allowed an exemption for Quebec which has already brought an assisted dying law into force in December 2015.

An application for exemption in BC must be commenced by a petition which is supported by affidavits and a draft order seeking the relief sought. The required supporting materials include: (1) an affidavit about the petitioner which includes, among other things, clear information about the petitioner's illness, pain and distress, details on capacity and information on the plan for proposed assistance; (2) affidavits from two medical physicians, the petitioner's attending physician and a second physician, both of whom attest to the petitioner's condition, pain and suffering, and mental capacity; and (3) an affidavit of the physician who will assist the petitioner to die which sets out the manner, means and timeframe proposed for the death.

Counsel bringing the exemption application must also file a Request to Appear before the Chief Justice (or another judge designated by the Chief Justice) to set a time for the hearing of the application and for further directions as necessary. The Chief Justice will review the Request to Appear and the petition and supporting materials and convene a pre-hearing conference or provide written instructions for the process to be followed and the date of the hearing. The Chief Justice may give directions in relation to notice, services, filing of responses and related matters and keeping the materials private and confidential.

Unless specific service directions are made by the Chief Justice in the pre-hearing conference, the petitioner must serve the petition, the supporting affidavits and draft order on the following persons: (1) the Attorney General of British Columbia, (2) the petitioner's spouse if the spouse and the petitioner are co-habiting at the time the petition is made, and (3) any person named as the petitioner's attorney, if that power of attorney is effective at the time the petition is made.

The BC procedure is similar to the practice advisory adopted by the Ontario Superior Court of Justice on January 29, 2016[3] which at the time of writing this article has already resulted in the first case in that province, an 81-year old Toronto man with terminal lymphoma, being granted

[3] http://www.ontariocourts.ca/scj/practice/application-judicial-authorization-carter/

the right to doctor-assisted death.[4] The Ontario Superior Court Chief Justice Paul Perell granted the exemption after a 30-minute hearing and the applicant's counsel spoke to the media.[5] However, Chief Justice Perell also made an anonymity order protecting the applicant, his family and the health-care professional involved from exposure and to permit the applicant to proceed privately and to protect the professionals involved.

The first Alberta decision, *HS (Re),* 2016 ABQB 121, had a similar emphasis on the privacy, dignity and autonomy of the application and the privacy of the health-care providers. The hearing in that case was held *in camera* and a publication ban was issued. The Alberta Court of Queen's Bench Justice Shellah Martin granted a written legal exemption and the applicant chose to end her life in Vancouver on March 1, 2016 with the help of two BC physicians. Notice of that application was given to the Attorneys General of Canada, Alberta and British Columbia but in the particular circumstances, the court ordered that no notice was required for the applicant's family.

Manitoba has also had its first decision: *Patient v. Attorney General of Canada et al.*, 2016 MBQB 63 ("*Patient*").

The first BC decision involved an anonymous woman suffering from multiple sclerosis who sought first to have her case kept in camera[6] and second sought permission to end "enduring and intolerable pain".[7] Chief Justice Hinkson declined to order that the proceedings should be held *in camera* but granted an order than all documents filed in the registry be sealed with the exception of court's reasons for judgment. Also, all names and facts which would identify the applicant, her family and the physicians, except for Dr. Wiebe, were kept under publication ban. In the second hearing where he determined A.A. right to physician-assisted suicide, Chief Justice Hinkson relied on the analysis of the requisite decision-making capacity set out by Chief Justice Joyal in *Patient*:

> [18] [citing *Patient* at para. 65] The applicant in the present case submits that "competence" refers to decision-making capacity. The applicant is presumed to be competent. The applicant submits that the common law definition of capacity in the context of making healthcare decisions speaks of "being able to understand the nature, the purpose and consequences of proposed treatment." See *Cuthbertson v. Rasouli*, 2013 SCC 53 at para. 19, [2013] S.C.R. 341. "Treatment" is defined as "anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment…" See *The Health Care Directives*

[4] 2016 ONSC 1571
[5] http://www.cbc.ca/news/canada/toronto/physician-assisted-death-1.3497462
[6] *A.A. (Re)*, 2016 BCSC 511
[7] *A.A. (Re),* 2016 BCSC 570

Act, C.C.S.M. c. H27 at s. 1. The Supreme Court acknowledges that administering medication to hasten death clearly constitutes "treatment".

Until June 6, 2016 (or beyond if a further extension is granted) the BC Notice, though lacking legislative force, will provides BC practitioners who are assisting individuals to deal with this difficult issue to seek court approval for an applicant's personal exemption and to craft a sensitive process for the applicant on such issues as notice, confidentiality, the type of evidence, the timing and scheduling of the relief which is appropriate to the applicant's need and privacy.

E: Advance Directives

Changes were also made to the *Health Care (Consent) and Care Facility Admission Act* (the "HCCCFAA") in September 2011. The amendments to the HCCCFAA introduced the concept of advance directives in which, subject to some limitations, the Adult can give or refuse consent to any health care described in his or her advance directive. The purpose of an advance directive is to provide written instructions that a health care provider may rely on.

The Adult must have the capacity to understand the nature and consequences of the proposed advance directive when it is made (*HCCCFAA* section 19.1). Instructions in an advance directive will be treated as the Adult's statement of current wishes and will be binding on any representative or health care provider if the advance directive is made in compliance with sections 19.4, 19.7 and 19.8 of the HCCCFAA. A health care provider may follow an instruction in an Advance Directive giving consent to specific health care; they must follow an instruction that refuses consent to specific health care. Furthermore, if treatment has been started before the health care provider learns of the Advance Directive, and it includes an instruction refusing consent to the specific health care being offered, the health care provider must stop or withdraw the health care (HCCCFAA, section 19.8). If the Adult has an Advance Directive and a Representation Agreement, the Representation Agreement will take priority, therefore it is important that the requisite statutory statement (s. 19.4) is included in the Representation Agreement if the Adult also wants to the representative to adhere to the Advance Directive.

Where an Adult does not name a health care decision maker, the default provision in the HCCCFAA provides that a temporary substitute decision maker can give consent for major or minor health care but not for personal care decisions. Section 16 of the HCCCFAA sets out a priority for temporary decision makers as follows: spouse, child, parent, brother or sister, grandparent, grandchild, anyone else related by birth or adoption, close friend and any person immediately related by marriage. The temporary decision maker must be over the age of 19 years, have been in contact with the Adult during the preceding 12 months, have no dispute with the Adult, be capable and be willing to comply with the duties set out in section 19 of the

HCCCFAA. For individuals who are not satisfied with the default priority list, the Representation Agreement offers the only avenue to select a different order of health care decision makers. The scope of major and minor health care decision is set out in sections 14 and 15 of HCCCFAA.

Nidus has published useful instructions for dealing with Advance Directives: http://www.nidus.ca/PDFs/Nidus_FactSheet_Advance_Directive.pdf.

F: Appointment of Committee

If appropriate incapacity planning has not been made by an Adult while they are capable then an application can be made for an order under the *Patients Property Act*, R.S.B.C. 1996, c. 349 for a declaration of that the Adult is (1) incapable of managing his or her person and/or affairs and (2) under which a committee of person and estate is appointed. A committee can make personal, medical, financial and legal decisions on behalf of the incapable adult. A committee cannot make a will or estate plan for the Adult, vote on their behalf or consent to a marriage for them. A committee has the authority to waive solicitor-client principal over an Adult's legal files.[8]

An applicant seeking to be appointed as committee will have to apply to the British Columbia Supreme Court with supportive affidavits from two medical doctors who set out that the Adult is not capable to manage their affairs and explain why. Unless the doctors will attest that it would be harmful to serve the application on the Adult, then the Adult must be served with the materials and may contest the application. Even when uncontested, this process is more expensive than when the Adult has appointed an attorney and representative under the appropriate planning mechanisms.

Furthermore, the application must be served on the Public Guardian and Trustee and frequently a bond will be required to ensure that the Adult's property is securely protected. If the Adult, when capable, completes a Nomination of Committee the court will appoint that person unless there is a compelling reason not to do so and frequently will waive the requirement for a bond. The requirements for making a nomination of committee are set out in section 9 of the *Patients Property Act* and require that the nomination must be made in writing while the Adult is capable and should be executed in accordance with the formal requirements for making a will under the *Wills, Estates and Succession Act*.

Pursuant to section 19 of the *Patients Property Act*, unless the court orders otherwise when a committee order is made every power of attorney and every representation agreement made by the Adult are terminated.

[8] *Re: Elsie Jones*, 2009 BCSC 1306 at paras. 12-14.

Once appointed, it is important for the committee to keep records and invoices of the Adult's income and expenses. The committee is responsible to pass his or her accounts to before the Public Guardian and Trustee every year and again when the committeeship ends. The committeeship ends either when a application if made to declare the Adult is capable, the committee is removed or the Adult dies. The committee's authority continues until probate or administration has been granted by the Court.

G: Certificate of Incapacity under Part 2.1 of the *Adult Guardianship Act*, RSBC 1996, c 6

The Public Guardian and Trustee may be appointed as the committee of the estate of a person by way of a certificate of incapacity. An updated process for issuing a certificate of incapacity came into effect on December 1, 2014 and only pertains to the area of financial decision making. Through this certificate process, the Public Guardian and Trustee may be appointed as a statutory property guardian/estate committee of an incapable Adult.

Under Part 3 of the Adult Guardianship Act ("AGA") and the *Public Guardian and Trustee Act*, the health authorities, Community Living BC and the Public Guardian and Trustee may investigate concerns involving at risk adults. If necessary a certificate of incapacity may be issued. When a certificate of incapability is issued, the Public Guardian and Trustee has authority to manage the Adult's financial affairs unless the adult is an aboriginal person living on reserve. When a registered aboriginal adult who is ordinarily a resident on reserve is found to be incapable of managing their financial affairs by a health authority, the Department of Aboriginal Affairs and Northern Development Canada becomes responsible for ensuring that the adult's property is managed for their benefit.[9]

Investigations are typically commenced after a report or concern made to a designated agency or the Public Guardian and Trustee from family members, friends, members of the public, health and social service providers, care facilities or financial institutions.

Once it is apparent that a certificate may be required then it is necessary for a coordinated assessment to occur. Assessments under Part 2.1 of the AGA are required to have two components – a medical component and a functional component. The medical component must (1) be conducted by a physician within six months before the assessment report is completed and (2) consist of one or more examinations and all resulting diagnoses and prognoses relevant to the adult's incapability to manage that adult's financial affairs. The Adult must be informed what the assessment is for and the best practice is for the adult to receive written advance notice. Section 9 of the *Statutory Property Guardianship Regulation*, BC Reg. 115/2014, sets down that an adult is incapable of managing the adult's financial affairs if the qualified health care provider determines that any of a number of criteria apply.

[9] *Indian Act*, s. 51

H: Practical Applications of the Planning Tools

RECENT CASES: Powers of Attorney

Easingwood v. Cockcroft (decided under the former *Power of Attorney Act*, RSBC 1996, c. 370), 2013 BCCA 182

Facts: Attorneys, *inter alia*, settled Adult's assets into an *inter vivos* trust that mimicked the terms of his Will (1) since the EPA required the attorneys to act jointly and one of the attorneys had cancer and they were concerned that if he died there would be no legal representative for the Adult and (2) to protect the assets from probate fees upon the death of the Adult. The widow challenged the creation of the trust as a fraudulent conveyance.

Held: Attorneys acting under a Power of Attorney that is unlimited on its face are authorized to create an *inter vivos* trust in the best interests of the Adult because it was in the Adult's power to do so, provided that the trust does not otherwise step into territory prohibited by other general principles of law or statutory prohibitions, and is in the best interests of the Adult (see paragraphs 44 and 55). Since the trust was immediately effective, it was not considered testamentary and the Attorneys were not in breach of their fiduciary duty because the trust provisions conformed to the arrangements that the Adult had made during his capacity.

Re Sangha, 2013 BCSC 1965

Facts: Father granted daughter and his two friends a Power of Attorney, with instructions to act by majority. The daughter subsequently petitioned the court for a declaration of incapacity of the Adult and seeking to be appointed as his committee of estate and person when he revoked a Representation Agreement in her favour and also made a nomination of committee not in her favour. The daughter authorized the payment of legal fees for her application by utilizing her authority as an attorney. The father expressed that he wanted his children to cooperate and not proceed to litigation.

Held: The court made an incapacity declaration but appointed the Adult's other two children as his committee instead of the daughter because the court found that she was not acting in the Adult's best interests but was responding to the revocation of the documents. Furthermore, the unilateral payment of the legal fees without the consent of one of the other acting attorneys was a breach of fiduciary duty and the daughter failed to take the father's wishes into account. An authorization to pay incidental expenses in this case did not amount to an authority to pay for the costs of a committee application (paragraph 104).

***Sommerville v. Sommerville*, 2014 BCSC 1848**

Facts: Prior to his incapacity, the Adult appointed his current wife and daughter from his first marriage severally as his attorneys. Throughout the marriage, the Adult and his current wife held a joint bank account into which various monies were deposited, including the Adult's pension. The daughter used her authority as attorney to request that the Adult's pension monies be moved from the joint account to an account in the Adult's sole name so that the assets of the Adult and his current wife were not co-mingled; she also liquefied certain investments. The wife sought to have the pension funds returned to the joint account and argued that the Adult had intended to continue to benefit from the pensions and his other investments since this was consistent with his wishes, beliefs and values.

Held: Although s. 19(4) of the POAA requires the donor's property to be kept separately from the attorney's, this does not apply to property owned as joint tenants. Although the wife as acting attorney must give priority to the Adult's monthly expenses, she was entitled to use excess pension funds for her own personal expenses. This decision was based on the intention of the Adult being to benefit his spouse with these funds.

***Klonarakis Estate (Re)*, 2014 BCSC 1735**

Facts: Son, who was acting as the attorney for his mother, sought to use his authority under the Power of Attorney to charge his sister rent for a period of years when she had been living free in the mother's house. As the executor of the mother's estate, he claimed the occupation rent was owned to the estate.

Held: The Power of Attorney did not give the attorney the authority to (1) terminate an existing agreement that the Adult had made with his sister and (2) impose a rental obligation that had not previously existed simply because the attorney felt that it would be a fair thing to do.

***Browne v. Brown Estate*, 2015 BCSC 28**

Facts: Daughter, who was the attorney-in-fact, used the authority of the Power of Attorney to sell the home of the Adult one year after the Adult had died and conveyed the property to herself, contrary to the terms of the Adult's Will.

***Robillard v. Bandick*, 2015 BCSC 1417**

Facts: Mother granted son a Power of Attorney. He removed $35,000 from her bank account to renovate her condo and paid himself as the general contractor for the renovation. He did not inform the bank when she passed away but continued to utilize her accounts and then refused to provide an accounting of his actions as attorney to the estate beneficiaries. Furthermore, he

sought to vary the will to compensate him for time spent attending to his mother in her final years.

Held: The son breached his duties as an attorney in at least four different ways: (1) he failed to keep records and documents; (2) he paid himself contrary to section 24 of POAA; (3) he continued to use the Power of Attorney after the Adult's death contrary to s. 30(4)(b) of POAA and he took cash which appear to have been for his own benefit. Court ordered the return of the cash and further noted that the obligation of the attorney to account is not mitigated by a failure to be advised of the obligations by the person who prepared the Power of Attorney.

***Zeligs Estate v. Janes*, 2015 BCSC 525**

Facts: Mother granted daughter a Power of Attorney. Daughter held property in joint tenancy with mother and took out a mortgage on the property for the benefit of herself and husband. When mother was incapable, daughter entered into a purchase and sale agreement and instructed the notary to pay off the mortgage from the proceeds of the house and then paid the remaining funds into a joint bank account.

Held: an attorney's fiduciary obligation become more elevated once the Adult becomes incapable. An attorney who is also a joint tenant cannot fulfill those obligations in a transaction that benefits her as a joint tenant. There may be a role for the Public Guardian and Trustee to represent the Adult where such a conflict exists.

RECENT CASES: Representation Agreements

Bentley v. Maplewood Seniors Care Society, 2014 BCSC 165, 2015 BCCA 91

The RAA has been featured in the news in 2014 and 2015 through the high profile case, ***Bentley v. Maplewood Seniors Care Society***. In that case, the patient, Margot Bentley, a former nurse, was suffering from advanced dementia and was receiving nutrition by spoon feeding within an institutional setting. She had not had the opportunity to make a representation agreement nor an advance directive but she had left written evidence of her wishes that she did not wish to survive in a long term vegetative state. Her family as the temporary substitute decision makers sought to have the court determine that spoon feeding fell within the definition of health care so that the temporary substitute health care decision maker could make a decision to cease future feedings. At the trial level, Judge Greyall decided in the first instance that by opening her mouth to receive the nutrition by spoon that Mrs. Bentley was giving her consent to be fed and that no substitute decision maker was required. He ordered that the spoon feeding of Mrs. Bentley should be continued. However, the judge went on to determine that spoon feeding falls within the definition of personal care not health care and that in British Columbia only a representative appointed under the RAA can make personal care decisions for the Adult.

However, in *Bentley* on the facts, even if a representative had been properly appointed under the RAA, a failure to provide the nutrition by spoon would have constitute neglect within the meaning of the *Adult Guardianship Act* and was prohibited. On appeal, the family argued that the trial judge had erred in failing to declare that the spoon feeding constituted battery because Mrs. Bentley was not consenting to receiving food but the court of appeal dismissed the argument and upheld the trial judgment.

***Garner v. Garner*, 2015 BCSC 109**

Facts: Mother appointed her daughter under a Representation Agreement while capable and subsequently the daughter sought to restrict her brothers' access to visit the mother who was then 90 years old and suffering from dementia because his visits resulted in physical anxiety symptoms. The brothers applied to the court, in the context of competing application for committees, for interim relief to have a fixed schedule for visitation.

Held: In the context, the decision to reduce visits was a decision that a representative was capable of making pursuant to section 9(1)(a) of the Representation Agreement Act which permitted the representative to make decisions considered necessary to the personal care and health care of the mother.

***Clay (Re)*, 2016 BCSC 261**

Facts: The court appointed the Bank of Nova Scotia Trust Company as committee of the estate of Dr. Clay (the "Patient"). The Patient had made a representation agreement appointing his daughters while he was capable. The daughters continued to act to make healthcare and personal care decisions and the trust company sought court directions to ensure that it was able to take instructions from the daughters. The Patient in this case had counsel and sought to advance the position that he was not incapable as to his person.

Held: The court declined to exercise its *parens patriae* jurisdiction to preserve the representation agreement authority but referred the matter to the committee to pursue in a committee of person application rather than as directions before the court.

Begg (Guardians ad litem of) v. Begg, 2013 BCSC 84

Facts: Representation Agreement was executed by the Adult but was not signed by the three representatives nor were their names typed on the agreement. However, each of the representatives had signed the certificate (a requirement under the pre-2011 legislation).

Held: The court cured the representation agreement finding that the representatives had accepted their duties when they completed the certificates and that the missing signatures was "a defect in execution" within the meaning of s. 13(7) of the Representation Agreement Act (as

it then was) which permitted the court to declare that it was not invalid based solely on the defect.

H: Conclusion

Incapacity planning and appointing substitute decision-makers in anticipation of incapacity continues to be an important part of a good plan, particularly based on the aging demographic of the Canadian population. Currently, one in five Canadians aged 45 or older provides some form of supportive care to seniors living with long-term health problems.[10] Statistics indicate that by 2031, if nothing progresses in the medical prevention of capacity decline that by 2031, 1.4 million Canadians will be victims of dementia.[11] It is also anticipated that the worldwide numbers of dementia suffers at this time will be approximately 75.6 million people.[12]

Practitioners are definitely seeing an increase in activity in this area, whether it is family members beginning to worry about misuse of authority under a Power of Attorney during aging parents' lifetimes, Adults and their children needing assisting to transition to the next stages where the children start acting as attorneys-in-fact and representatives or Adults who have no immediate family available to help in these roles and need to turn to corporate trust companies to assume the roles. Therefore, individuals continue to be encouraged to make systemic plans for appointing substitute decision makers to assist if they are in the future unable to manage their own financial, legal, healthcare and personal care matters when they are engaged in estate planning while they are capable and they are encouraged to continue an open dialogue with their appointed substitute decision-makers are situations evolve.

[10] Eldercare: What We Know Today. (2008). Statistics Canada
[11] A new way of looking at the impact of dementia in Canada. Alzheimer Society, 2012
[12] Dementia Fact Sheet (March 2015), World Health Organization, http://www.who.int/mediacentre/factsheets/fs362/en/