



Who Will Care for Me?

Representation Agreements and how to use them.
barbara findlay

This booklet contains general legal information. It is not legal advice. The information is accurate as of October 2003.

But the law changes frequently. You should consult a lawyer for information about your particular situation.

A Little History: The Bad Old Days

For queer families, the question of who will make decisions for us when we are not able to make them for ourselves has been fraught with uncertainty.

In the U.S., there was the famous Sharon Kowalsky case of a woman whose partner fought for years against Kowalsky's parents before she was finally granted the right to look after Kowalsky, who had serious brain damage. In B.C. Gail Meredith had to go to court to establish her right to be the decision maker for her partner, Judy Patterson, when her partner's degenerative brain disease made her unable to look after herself.

The law has always specified who gets to make those decisions. Until very recently in B.C., the law has said that one's (heterosexual) spouse had first decision rights; then one's parents. Gay and lesbian partners were way down the list, under "other". To remedy that situation, many queer families wrote "health care directive" which they gave their doctors, specifying that they wanted their partner to be their decision-maker.

It was if you did not have such a health care directive that you could run into trouble. If you had not specifically designated your partner as your decision-maker, your homophobic parents could show up at your bedside when you were dying, and say you could no longer even visit. This happened with great frequency, especially during the worst of the AIDS epidemic.

Lesbians, bisexual people and gay men who were not in a relationship had even less chance of having someone other than their parent(s) making health care decisions when they were not able to do so.

Things are Better Now

Two things have changed.

First, the law now specifies that opposite sex *or* same-sex partners are first in line to be the decision maker if a person cannot make a medical decision for himself or herself. Your partner is your "spouse", legally speaking, if you are living together.

Second, the law now permits people to write a "Representation Agreement" spelling out what powers they want their substitute decision-maker to have. Representation Agreements can cover health care decisions, personal care decisions, and financial decisions, or they can be limited to just some of those decisions.

How Do I Know if I Need a Representation Agreement?

Everyone should have a representation agreement, because although same sex partners are named as substitute decision makers in the *Representation Agreement Act*, the procedure to verify your authority takes precious time. A Representation Agreement solves that problem.

What Does A Representation Agreement Deal With?

There is no standard form for a Representation Agreement, though there are specific requirements about how the document must be signed.

You can authorize your “Representative” (or Representatives if you want more than one) to do any or all of the things discussed below. You can name different Representatives for different things, for example if you want someone different to be responsible for your financial affairs than for your medical decisions.

The most general Representation Agreement would say:

I authorize my Representative to help me make decisions, or to make decisions on my behalf, about any or all of the following:

1. my personal care, including, for example, where and with whom I am to live;
2. the routine management of my financial affairs, including,
 - a. Payment of bills
 - b. Receipt and deposit of pension and other income
 - c. Purchases of food, accommodation and other services necessary for personal care; and
 - d. The making of investments
3. major health care and minor health care matters, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*, but not including the kinds of health care prescribed under section 34(2)(f) of that Act;
[The treatments under section 34(2)(f) are types of treatment that someone cannot generally consent to unless you see a lawyer and add the terms in specifically: see below. They include abortion, electroconvulsive therapy, psychosurgery, organ donation, experimental health care, participation in medical research]
4. Obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult’s behalf.

Routine Management of Affairs

The tasks defined as “Routine management of the adult’s affairs” are set out in the Regulations to the Representation Agreement Act. The Regulations may be changed from time to time. Right now the list is as follows:

- a. paying my bills;
- b. receiving my pension and other income;
- c. depositing my pension, income and other money in my accounts;
- d. opening an account in my name at a financial institution;
- e. withdrawing money from, transferring money between, or closing my accounts, but only for my financial need or benefit;
- f. receiving and confirming statements of account, passbooks or notices from a financial institution for the purpose of reconciling my accounts;
- g. signing, endorsing, stopping payment on, negotiating, cashing or otherwise dealing with cheques,

- bank drafts and other negotiable instruments;
- h. renewing a loan or refinancing, including a mortgage, if the principal does not exceed the amount outstanding on the loan at the time of renewal and if no new registration is made in the land title office regarding the renewal or refinancing;
- i. making payments on a loan, including a mortgage, existing at the time this Agreement comes into effect, or is a renewal or refinancing of a loan referred to in the paragraph above;
- j. taking steps under the *Land Tax Deferral Act* for deferral of property taxes on my home;
- k. taking steps to obtain benefits or entitlements for me, including financial benefits or entitlements;
- l. purchasing household, motor vehicle or other insurance for me, other than a new life insurance policy;
- m. purchasing goods and services for me that are consistent with my means and lifestyle;
- n. obtaining accommodation for me other than by the purchase of real property;
- o. selling any of my personal and household effects, including motor vehicles;
- p. establishing an RRSP for me;
- q. making contributions to my RRSP and RPP;
- r. converting my RRSP to a RRIF or annuity and creating a beneficiary designation for the RRIF or annuity that is consistent with my beneficiary designation for the RRSP;
- s. making, in the manner provided in the *Trustee Act*, any investments that a trustee is authorized to make under that Act;
- t. disposing of my investments;
- u. exercising any voting rights, share options or other options relating to shares that I may have;
- v. making donations to registered charities, but only if:
 - v. this is consistent with my financial needs and past practices while capable, and
 - vi. the total amount donated in any year does not exceed 3% of my taxable income for that year;
- w. in relation to income tax,
 - v. completing and submitting my income tax returns,
 - vi. Dealing on my behalf with assessments, reassessments, additional assessments and all related matters,
 - vii. Subject to the *Income Tax Act* and the *Income Tax Act (Canada)*, signing on my behalf, all documents, including consents, concerning anything relating to my income tax returns or assessments;
- x. safekeeping my documents and property;
- y. leasing and entering a safety deposit box for me, entering my safety deposit box, emptying its contents and surrendering the box;
- z. redirecting my mail;
- aa. doing anything that is
 - xxv. a consequence of or incidental to performing an activity listed above, and
 - xxvi. necessary or advisable to protect my interests and enforce my rights in relation to any matter arising out of the performance of that activity.

OPTIONAL POWERS

In the Representation Agreement, you may give your Representative additional powers. There is a catch, though. If you add these additional powers you must consult with a lawyer before you sign, or else the powers are not valid. You may choose to include any or all of the following powers:



- a. physically restrain, move or manage the adult, or have the adult physically restrained, moved or managed, when necessary and despite the objections of the adult;

- b. give consent, in the circumstances specified in the agreement, to specified kinds of health care, even though I am refusing to give consent at the time the health care is provided [Eg. Treatment for psychiatric or mental illness] [CPR, surgery, fibrillation, gastrointestinal feeding, intravenous feeding, life support machinery];
- c. refuse consent on my behalf to specified kinds of health care, including life-supporting care or treatment [you may list types of care here];
- d. give consent on my behalf to specified kinds of health care, including one or more of the kinds of health care prescribed under section 34 (2) (f) of the *Health Care (Consent) and Care Facility (Admission) Act*; [These are types of treatment that someone cannot generally consent to unless a Representation Agreement has been signed or other specific conditions have been met. They include abortion, electroconvulsive therapy, psychosurgery, organ donation, experimental health care, participation in medical research]
- e. accept a facility care proposal under the *Health Care (Consent) and Care Facility (Admission) Act* for my admission to any kind of care facility;
- f. make arrangements for the temporary care, education and financial support of my minor children, and any other persons who are cared for or supported by me;
- g. do, on my behalf, any thing that can be done by an attorney acting under a power of attorney and that is not mentioned in paragraphs a. to f. or at stated in the “routine management of affairs” listed above.




In order to make sure that the wishes expressed are really those of the person making the Representation Agreement, and not the wishes of some person taking advantage, the law requires that the Representation Agreement be witnessed in a particular way.

First, the Representation Agreement must be witnessed by *two* people, who must witness you signing the Representation Agreement *and* witness each other signing. In other words, all three of you have to be present at the same time. Alternatively, you only need one witness if that person was the lawyer whom you consulted in preparing the Representation Agreement, and who then also signs a consultation agreement.

Some people are not allowed to be witnesses, because of the chance of undue influence. These people include

-  any person you have named in the Representation Agreement as a Representative or Alternate Representative
-  any person who is a child, spouse, or parent of your Representative

or Alternate Representative

-  an employee or agent of anyone you have appointed as a Representative
-  anyone under 19 years old
-  anyone who does not understand the type of communication you used

The witnesses have to complete a certificate of witness.

If you are giving your Representative certain powers, eg to sell real estate, then one of the witnesses must be a lawyer.

Your Representative(s) must sign the Representation Agreement, but their signatures do not have to be witnessed.

Why So Complicated?

The requirements for Representation Agreements are elaborate, because the potential is present for someone to try to take advantage of you – especially if they have control over you, for example if you have a disability and are living with them. That is why there are such tight specifications about witnessing.

Who Would Want to Take on All This Responsibility? Can I Pay Someone?

If you want you can specify that your Representative should be paid, and the basis of the payment.

When Does the Agreement Become Effective?

The agreement is effective on the day it is signed, unless you specify a later date.

Can I Change the Agreement?

Yes, at any time, provided that you are capable. You must have the changes witnessed in the same way that the original Agreement was witnessed, and you must give your Representative a copy of the changes.

When Does The Agreement End?

A Representation Agreement ends if

- 📄 you die
- 📄 a court ends it
- 📄 your partner or spouse was your Representative, and the relationship or marriage ends
- 📄 your representative becomes unable to make decisions, or dies, and no Alternate Representative is specified
- 📄 you revoke it, signing the revocation in the same way that the original Agreement was signed, and notify your Representative that the Agreement has been revoked

What If Someone Asks Me to Be Their Representative?

Being someone's Representative is a very serious responsibility. Essentially you are given the power to make all or almost all decisions that someone would make about their own life.

This section outlines the things you have to be aware of and the standards you are expected to maintain.

Because the responsibilities are serious and sometimes complicated, there is a resource you can turn to for help. The Public Trustee will help you figure out what your obligation is in any particular circumstance.

You must act honestly and good faith. You must make sure that the decision that you are about to make is one which you are entitled to make under the Representation Agreement.

In every case, you *must* consult with the person who nominated you (we will refer to them as the “Author” of the Representation Agreement) and you *must* do what the Author wants, unless what the Author wants is not “practicable”. This is a high standard. In other words, the fact that you get to make the decision does not mean you get to make any decision you want: you must do what the Author wants – even if it is unreasonable in your mind -- unless it is impracticable.

For example, suppose an Author was a wealthy person who had not much time to live. She says that she preferred to live at home and have 24 hour nursing care, rather than go into a care facility. *Even though* you might think that is a ridiculous waste of money, *even though* you think she would be better off with other people to socialize with, *even though* her doctor recommends that she be in a care facility instead of at home – her choice prevails.

If the Author is unable to say what he wants, you are obliged to do what you think he would have wanted, based on your knowledge of him.

Some kinds of authority carry specific obligations. For example, if you are going to have the Author admitted to a community care facility, you must consider the following:






- When deciding whether it is in the adult's
best
interests to give, refuse or revoke substitute consent, the person chosen under
section 16 must consider
- a. the adult's current wishes,
 - b. whether the adult's condition or well-being is likely to be improved by the proposed health care,
 - c. whether the adult's condition or well-being is likely to improve without the proposed health care,
 - d. whether the benefit the adult is expected to obtain from the proposed health care is greater than the risk of harm, and
 - e. whether a less restrictive or less intrusive form of health care would be as beneficial as the proposed health care.

If your duties include financial responsibilities, you must manage the Author's money prudently, and keep proper books and records.

Powers as a Representative

As a Representative, you have the power to make the kinds of decisions listed in the Representation Agreement. All of your other powers are subject to that Agreement.

You can

-  get any personal information the Author could have got about himself
-  hire someone to help carry out your duties
-  make contracts on behalf of the Author
-  request help from the Public Trustee
-  go to court to seek direction about what to do in a specific circumstance

Provided you carry out your duties responsibly and to the best of your abilities, you will not be held liable if the Author's estate suffers loss.

If I Take This On, Am I Bound Forever?

No, you can always resign as Representative. If there is an Alternate Representative named in the Representation Agreement, turn everything over to him. If not, notify the Author and, if necessary, the Public Trustee.

This pamphlet contains legal information. It is *not* legal advice. Laws change quickly, and individual situations vary. To find out how the law affects your situation, contact me. First interviews are always free of charge.

barbara findlay, Q.C.
604-251-4356 or bjf@barbarafindlay.com

www.barbarafindlay.com

