

## The Out/Law Series of Legal Guides

# Who Will Care For Me?

Representation Agreements

Power of Attorney

Advance Health Directives

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### *Introduction*

What would happen in your life if you you're your decision -making abilities? Suppose you were in an accident that resulted in a long coma. Or you develop dementia. Who pays the mortgage, or decides what medical treatment you should get, if you can't decide for yourself?

The law for some time has permitted you to appoint someone to make decisions about your financial affairs, health care, and personal care if you are unable to make those decision for yourself. Such a person is called a substitute decision maker.

The law also specifies what happens if you lose your mental capacity and have not appointed anyone to make decisions for you.

Finally, the law gives remedies to elders who may be abused.

All of the laws in this area had a major overhaul, effective September 1, 2011.

This booklet explains:

- How to appoint a substitute decision-maker for financial matters, health care, and/or personal matters.
- How to use an Enduring Power of Attorney.
- How to us a Representation Agreement.

- How to specify what health care you want at the end of your life in a way that is binding on doctors, using an advanced directive.
- What happens if you do not appoint a substitute decision-maker?
- Differences between Representation Agreements, Power of Attorney, and Advance Directives.
- Which document(s) you need, depending on what you want to achieve.
- What happens to your property if you don't have a substitute decision-maker?
- What to you do if you, or another elder, is being abused physically or mentally?

In addition to answering these questions, the booklet explains what happens if you have signed a Health Care Directive, Enduring Power of Attorney, or Representation Agreement before September 1, 2011.

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## 1. Enduring Power of Attorney

### *a. What Does the Document Do?*

An “Enduring Power of Attorney” permits you to appoint one or more people to manage your financial affairs if the time comes that you are unable to manage them yourself, temporarily or permanently.

### *b. Why Would I Want an Enduring Power of Attorney?*

If you don't have an enduring power of attorney, and your money is not in joint accounts with anyone, then one of your family or friends would have to make an application to court to be able to manage your financial affairs: that is expensive and burdensome. If at the time there is no one who would make such an application, the duty falls to the Public Guardian and Trustee.

If all of your property (house, car, bank accounts, and investments) are owned jointly with your spouse (common law or married), or someone else, so that your spouse or that other person can already access and manage your finances, you may not need an Enduring Power of Attorney. However, in any transaction requiring both signatures (selling your home, for example) you need to have an Enduring Power of Attorney.

### *c. How Many People Should I Give Enduring Power of Attorney to?*

It is wise to appoint one person and a second person as backup in case the first cannot act for some reason. If you do that you must be clear what triggers a shift of responsibility from the first to the second person.

Or, you can appoint two people separately. Then, each of them has complete power over your affairs. They are required to make decisions together.

You can appoint two or more people jointly, and again they have to agree what decision is made.

If you appoint more than one person at a time to be your attorney, it is good to include a provision saying what will happen if they cannot agree with each other.

*d. Can I Say What My “Attorney” is Allowed to Do?*

Yes you can. You can give powers as broadly or narrowly as you like. The only restrictions are that you cannot confer the power to make or change your will, or do anything illegal.

You might choose to limit the powers your “attorney” has, for example, to make sure that your attorney cannot undercut your intentions in your Will by reorganizing or selling your assets. Or you might limit the powers to the routine management of your financial affairs, such as paying bills, as opposed to dealing with your investments.

*e. What Does an Attorney Have to Do?*

The person you appoint (called an “attorney”) has the legal duty

- to act with honesty and in good faith
- not to mix your property with theirs
- to keep a financial record
- to exercise the care, diligence and skill of a reasonably prudent person
- to give priority to meeting your personal and health care needs
- Unless the Enduring Power of Attorney says otherwise, to invest your property only in accordance with the *Trustee Act*.
- to foster your independence and to encourage your participation in decisions
- to not dispose of property you have given away in your will, unless it is necessary because there are no other funds available.
- To the extent reasonable, keep your personal effects available to you.

*f. Is This the Only Document I Need?*

An Enduring Power of Attorney only deals with financial matters. It does not deal with health care decisions or personal care decisions

(such as where you will live, whether you can drive, etc). For those issues you need a Representation Agreement and possibly an Advance Directive.

*g. Will my Attorney Be Paid for Their Work?*

No, not unless you include a direction to that effect in you Enduring Power of Attorney

*h. Can I Create This Document Myself?*

Because the laws have changed so significantly, it is best to get legal advice before creating a Power of Attorney. Our office sends a questionnaire to you before your interview, to help you decide what you want to put in your Enduring Power of Attorney.

## **2. Representation Agreements**

*a. What does the Document Do?*

You can make a Representation Agreement to appoint someone to make decisions about your health care and your personal care, if you are unable to make those decisions for yourself.

“Health care” can include anything from ordinary doctor visits to major surgery, from having a tooth out to having an abortion. You can specify what health care decisions you want a Representative to be able to make if you cannot make the decision yourself

*b. Why Would I want a Representation Agreement?*

If you want to have control over who makes important end-of-life decisions for you, or who decides if you have to go into a care facility, and if so, which one, or similar deeply personal and important decisions, then you need a Representation Agreement.

You may also want an Advance Directive to ensure as far as possible that doctors and hospitals follow your wishes.

*c. How Many People Should I Appoint as Representatives?*

Your Representation Agreement may be needed in an emergency - for example if you are in an accident and decisions about your care must be made quickly. So it is wise to appoint one person, and another one or two as backups in case the first person is not available.

You can also appoint two or more people to act jointly - but give some thought to what happens if they don't agree with each other

*d. Can I Specify What My Representative Can and Cannot Do?*

Yes, absolutely. You can spell out in detail the kind of decisions you want. You can also specify what your preferences are. Your Representative is required to carry out your wishes as you have expressed them in the Representation Agreement

Many people include a "living Will" as part of their Representation Agreement so that their health care providers and their representatives will have a general idea of the person's views on end of life care.

Would you want doctors to go the extra mile in trying to keep you alive, even if that meant having experimental treatment? Or would you want to specify that if death was likely, you should be allowed to die in peace?

You can give your Representative the power to access information - including legal and medical information - about you. And you can empower them to decide where you will live, where you will work, and with whom you spend time, if you are unable to make those decisions yourself

*e. What does a Representative Have to Do?*

The duties of a Representative are similar to the duties of an attorney: to act honestly, in good faith, and in your best interests;

to involve you in decisions affecting you as much as possible; and if you are unable to participate in decisions, to make decisions which are consistent with your values and preferences.

In the Representation Agreement, you specify and you can limit the range of health and personal care decisions you want your Representative to make for you. For example, you may want your Representative to decide what medical treatments to consent to, but you never want your Representative to consent to shock treatments, for example, then you would specify that.

You might specify that if you can't decide for yourself, you want your Representative make decisions about

- where you live
- when you should stop driving
- what treatments you should get
- when to refuse to consent to medical treatment

*f. Is this the only Document I Need?*

A Representation Agreement only deals with health and personal care issues. It does not deal with financial issues - for those issues you need an Enduring Power of Attorney.

If you like, you can name the same person(s) to be your attorney under an Enduring Power of Attorney, and your Representative under a Representation Agreement.

*g. Will My Representative Be Paid?*

Not unless you include a term to that effect in your Representation Agreement. Of course if your Representative spends money - for example buying prescription - they are entitled to be reimbursed.

*h. Can I Draft This Document Myself?*

Because of recent legal changes, it is best to get legal advice before creating a Representative Agreement.

### 3. Advanced Directive

#### *a. What does this document do?*

A “committee” is the name given to a person who is appointed by a court to manage your financial and personal affairs. If you name the person you would want to be your committee, assuming that becomes necessary, then a court must appoint the person you choose, unless that person can be shown to be inappropriate for the role of committee

#### *b. Why Would I Want to Create a Nomination of Committee?*

Unless you express a preference in writing for who should be your committee, a court may appoint anyone who applies for the position. Nominating a committee gives you some choice in the matter.

#### *c. How Many People Should I Appoint as Committee?*

It is always worthwhile to appoint one person, with a second as backup in case the first can't do the job.

#### *d. If you have an enduring Power of Attorney and a Representation Agreement, it is unlikely that anyone will have to apply to court for an order giving them the power to manage your affairs because you've already got that covered.*

#### *e. Can I Say What I Want My Committee to Do?*

No. You can say who you would want it to be, but it is a court that decides whether your committee will have authority over your estate, or your person, or both.

Your committee is not required to consult you about decisions they make. Often the Public Guardian and Trustee is appointed to be your committee. However, a good thing is that if your representation agreement has a lawyer's certification at the time it

is made, then a court must let the representative chose have authority over your affairs.

*f. What Does a Committee Have to Do?*

A committee of the estate of a person manages that person's financial affairs. A committee of the person means having decision-making power over the person's health and personal decisions like where they live.

*g. Is This the Only Document I Need?*

No. You need a Representation Agreement and Enduring Power of Attorney so that if anyone applied to have a committee appointed for you, a court would have to appoint the Representative and Attorney you have chosen.

*h. Will My Committee Get Paid?*

Yes, the law permits a committee to charge reasonable fees. But the committee must get the court's approval of the amount before charging any fees.

*i. Can I Draft This Document Myself?*

No, because there are technical requirements about how the document needs to be signed and what it needs to say.

#### **4. Elder Abuse**

*A Massachusetts study found that one senior in eight in BC is abused.*

Abuse means an action or deliberate behaviour by a person in a position of trust, such as an adult, family member, friend, or caregiver that causes physical, emotional or mental harm to the adult, or causes damage to or loss of the adult's assets or property.

Abuse includes:

- Threats
  - Intimidation
  - Humiliation
  - Physical Assault
  - Sexual Assault
  - Over/under Medication
  - Withholding Medication
  - Failure to Provide Necessities of Life
  - Censoring Mail
  - Invasion or Denial of Property
  - Denial of Access to Visitors
  - Taking Adult's Money
  - Missing Documents such as a Power of Attorney
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The information in this booklet is current to September 2011

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