

MEMO

To: Community partners and contacts
From: Representation Agreement Resource Centre (RARC)
Re: Overview of RARC's initial response to the Ministry of Attorney General's proposal on changes to legislation and new legislation.

NEW ADVANCE DIRECTIVE LEGISLATION

We are very concerned about the proposal for new advance directive legislation.

British Columbia already has advance care planning legislation – the *Representation Agreement Act*.

The *Representation Agreement Act* already provides for appointing, in advance, a substitute decision-maker for health and personal care. The representative must make decisions according to the person's wishes and instructions.

We believe the proposed new legislation on advance directives is a step backward:

- Research shows this old approach is ineffective.
- There is no check and balance when those who are responsible for providing care services (Ministry of Health and Health Authorities) are also promoting and interpreting the directives.
- Directives do not protect a person's wishes. They are often presented at a time when people are at their most vulnerable. There is great risk that patients will feel pressured to sign advance directive forms because they want access to care; not because it reflects their autonomous wishes.
- Advance directives cannot be used to give or refuse consent for treatment at a future time when the health condition may have changed or new treatment options become available.

When they created the Representation Agreement Act in 1993, citizens rejected the advance directive approach in favour of representation agreements to ensure advance care planning is safe, ethical and based on best practices.

Please see the attached BC Association for Community Living policy on advance directives, which highlights the dangers of this approach. "The issue of advanced health care directives should ring alarm bells for all British Columbians..."

We support keeping the Representation Agreement Act as British Columbia's ONLY legal tool for advance health and personal care planning.

We do not support new advance directive legislation.

CHANGES TO REPRESENTATION AGREEMENT ACT

We understand that there will be no changes to provisions with respect to capability/incapability for Section 7 powers. This is consistent with the community's effort to create an alternative to guardianship and to provide for assisted decision-making. This is good news for all adults in BC.

We are, however, very concerned that all of the current powers under Section 7 be retained. It appears that the authority to "obtain legal services and instruct counsel..." under Section 7 will be eliminated. This is an important provision and must be preserved for the following reasons:

- It is a separate and different authority from "legal matters."
- It protects people's rights and assets.
- It allows access to justice for many who may not otherwise have this opportunity (e.g. a representative went to Small Claims Court on behalf of his mother because the assisted living residence refused to return her damage deposit when she had to move to a care facility. Others have settled modest compensation settlements with insurance companies and other parties.)
- It avoids guardianship.
- It is being used and it is working.
- There is no evidence that there are problems.

We understand there will be no changes to Section 9 health and personal care powers. But we are concerned about the proposal to eliminate the authority in Section 9 that allows a representative to make arrangements for the temporary care and education of minor children and other minor or adult dependents. We believe this authority is necessary because:

- The enduring power of attorney (EPA) covers making arrangements for temporary financial support and for paying bills related to care but not consenting to care or arranging care;
- The authority to arrange 'temporary' care or education for minor children or other dependents is not sufficiently provided for elsewhere;
- It is being used effectively. In one example, a representative (of an adult with a minor child) was able to arrange education matters for the minor child when the parent's health situation temporarily required the representative to act.

With respect to changes to the Representation Agreement Act, we support:

- **Retaining, in Section 7, the authority for "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";**
- **Retaining, in Section 9, the authority to "make arrangements for the temporary care and education of the adult's minor children and any other persons cared for or supported by the adult."**

CHANGES TO GUARDIANSHIP LEGISLATION

The following points reinforce and build on recommendations made by the Public Guardian and Trustee (PGT) in *Modernizing the Legal Framework*, 2005.

In keeping with the principles of BC's community-initiated law reform of adult guardianship, **guardianship must be the last resort.**

To ensure this, we support:

- **Requiring the court and the statutory guardianship process to consider alternatives to meet the adult's needs, before a guardian is appointed;**
A guardian should not be appointed if there is an existing and valid enduring power of attorney and or representation agreement under Section 7 or 9 (providing it covers all powers needed at the time and the attorney/representative is complying with their duties). In the case of statutory guardianship, this matter should be dealt with before an assessment, as recommended by the PGT. In the case of alternatives that may be put in place instead of guardianship, a representation agreement under Section 7 is one option.
- **Requiring both the court and statutory guardianship to determine that there is a need for a guardian;**
For example: "no Certificate of Incapability be issued unless an assessment has been performed that indicates that the adult is not capable of managing his or her property and there are reasonably foreseeable decisions that need to be made by a guardian and alternatives have been explored." See the PGT recommendation with respect to the court (discussion paper, p. 14).
- **Providing for broad criteria to allow the termination of statutory guardianship even in respect of an adult who has not been assessed as capable.**
For example someone may be under statutory guardianship because they do not have a support network. Once a support network has been developed, there is an opportunity to make a representation agreement. This is particularly important for adults in the community living sector where there is new emphasis on facilitating the development of personal support networks.

RELATED FEEDBACK

In his discussion paper, the Public Guardian and Trustee recommended an education initiative to increase awareness of adult guardianship legislation. We believe that in the case of representation agreements, this is long overdue.

We strongly urge the Ministry of Attorney General to implement an education initiative, led by the community and directed to the public and professionals on:

1. **Alternatives to guardianship, in particular, representation agreements, and**
2. **Representation agreements and advance care planning.**